

New Extrajudicial Debt Settlement Law: Addressing a regulatory gap (?)

An attempt to address the legislative gap in the existing regulatory framework of debt settlements is made by the Hellenic Republic pursuant to the newly issued Greek Law 4469/2017 on the business debt settlement extrajudicial mechanism (hereinafter “*the Extrajudicial Debt Settlement Law*” or “*the EDS Law*”).

The newly introduced framework on the extrajudicial debt settlement seeks to address matters that remain unresolved under article 99 of Greek Bankruptcy Code (rehabilitation proceedings) and Greek Law 3869/2010 (debt settlement of non-traders natural persons), in the context of a time-barred, lax, flexible and less burdensome alternative.

Key features of the new framework

The EDS Law provides for a proceeding of an extrajudicial settlement of monetary debt obligations to any creditor; such obligations derive either from the exercise of the debtor’s business activity or from any other cause, provided that the parties participating in this proceeding contemplate such debt settlement as necessary for the debtor’s viability.

A broad scope of application

Who can file an application?

Any natural person which may be declared bankrupt (according to the Greek Bankruptcy Law) and any legal entity with an income deriving from its business activities¹, being a Greek tax resident, provided that it meets the (objective) requirements set therein (the **Debtor**).

In addition, any person not falling within the subjective scope of the EDS Law (self-employed individuals such as attorneys, doctors etc. who may not be declared bankrupt), in relation to its debts to the Greek State and the Social Security Funds, may fall under the provisions of art. 15 par. 21 of the said law; according to the EDS Law, the Greek State and the Social Security Funds may propose to such debtors relevant debt settlement solutions similar to the ones contemplated under its provisions. However, further enactments should be expected for the refinement of this option.

¹Both small and large businesses fall within the scope of the EDS Law; according to the said law, “large business” shall mean the business having a turnover exceeding the amount of Euro 2,500,000 or having a debt obligation of an amount exceeding Euro 2,000,000, at the time of the submission of the EDS application, while “small business” shall mean any business not meeting the above criteria.

Requirements

The Debtor may file an application under EDS Law subject to the following conditions:

- a) **overdue debt on 31.12.2016:** Debt obligations must be overdue on 31.12.2016
- b) **nature of the debt:** Such debt obligations may consist of: **i)** debt to financial institutions deriving from loans or credits in excess of ninety (90) days past due (or, in the alternative, debt that has been settled after 01.07.2016); or **ii)** overdue debt obligations to tax authorities or social security funds or public law legal entities (including Local Authorities); or **iii)** debt obligations to third parties (suppliers) provided that they have been a subject of judicial rulings or payment orders, or arise from bounced cheques²
- c) **amount of debt:** The aggregate amount of debt obligation must exceed the amount of Euro 20,000;
- d) **an indication of viability:** Certain eligibility criteria must be met; the business must have either a positive EBITDA or a positive net equity during at least one of the last three fiscal years prior to the filing of an application for submission to the EDS proceeding

The proceeding

Submission and Coordinator's Role

The proceeding is initiated by the Debtor wishing to be submitted to the EDS Law, who may file its online application (including, *inter alia*, its settlement proposal) before the Special Secretariat of Private Debt Management (the **EGDIX**) until 31.12.2018 via a special electronic platform (to be) hosted on the EGDIX's official website. The proceeding may be also initiated by the creditors (Greek state, Social Security Funds, Public Law Legal Entities or financial institutions) by written notice to the Debtor inviting the latter to submit to the EDS Law. If the Debtor fails to comply with such invitation, the Debtor forfeits the right to do so in the future. Following the submission, EGDIX appoints a coordinator by the relevant coordinators' registry (held in EGDIX) (the **Coordinator**) who is in charge of bringing the Debtor in contact with its creditors and of supervising the overall proceeding of the debt restructuring. In particular, once the Coordinator ascertains the completeness of the application, it notifies the latter to the Debtor's creditors.³

Suspension of measures

The Coordinator's notification signifies the suspension of application of the Bank Code of Conduct (established by virtue of Greek Law 4224/2013)⁴. Furthermore, from the date of such Coordinator's notification/invitation of creditors and for a time period of seventy (70) days, any enforcement measures against the Debtor, individual or collective, pending or not, in relation to the claims the

²According to the explanatory report of the EDS Law "...provided that the inability of the businesses to perform at least one of their claims to any of their creditor can be proved".

³It should be noted that while for large businesses an expert's participation is mandatory in the EDS proceedings, this is optional for small businesses.

⁴Bank Code of Conduct sets out an Arrears Resolution Procedure which is applied by Greek credit institutions towards their borrowers aiming to find settlement solutions that take into account the capabilities and particularities of each borrower to hand.

settlement of which is requested, are automatically suspended. Same applies to any interim measure against the Debtor (including the establishment of a prenotation of mortgage). Such suspension may be extended for four (4) months subject to **(a)** the Debtor's application; and **(b)** the consent of the majority of the participating creditors, with any creditor being entitled to apply for the early termination of the suspension if it is probable that such suspension will cause irreparable damage to that creditor.

Negotiations & Agreement

The creditors wishing to participate in the proceedings shall declare their intention within ten (10) days from the date of the invitation's notification by the Coordinator.⁵ Upon lapse of the aforementioned timeframe, once a creditors' quorum representing at least 50% of the total claims against the Debtor is ascertained by the Coordinator, the application may enter into the negotiation stage during which the creditors may proceed with their counter-offers. In order for a debt settlement agreement to be reached (the **Agreement**), the following are required: **(a)** the Debtor's consent; and **(b)** a voting majority of 3/5 of the participating creditors, including a 2/5 of the participating secured creditors⁶. Based on the deadlines provided in the EDS Law, the overall timing of negotiation proceedings may not exceed the 6-7 months.

It should be noted that the Law provides for a bilateral negotiation stage in case the claims of one creditor exceed 85% of the aggregate amount of claims against the debtor. Furthermore, there is a relevant provision in the EDS Law according to which a simplified proceeding may be initiated for individuals whose total debt obligations do not exceed in value the amount of Euro 50,000, with the settlement proposal and the viability assessment following a standardised path.

The Agreement

A contractual content subject to mandatory rules

A. In general

Provided that the Agreement does not contemplate the debt settlement against debts to the Greek State and the Social Security Funds, the parties are free to determine the content of the Agreement (shifting of payment dates, interest rate reduction, payments in installments write-off, capitalisation, grace periods, etc.) subject to three (3) mandatory rules set out below:

- i. **No-creditors- worse-off principle:** The Agreement and the settlement arrangements contained therein must not place the creditor in a worst financial position than the one following the Debtor's assets liquidation under the enforcement procedure of the Greek Code of Civil Procedure. The EDS Law broadens the principle in order to include any amounts (or other consideration) allocated to the

⁵ Such declaration is notified electronically to the Coordinator (by way of an e-mail), shall have the form of a solemn declaration and shall include a confidentiality statement as well as a certification of the creditor's aggregate claim against the Debtor outstanding on the date of the submission of the application.

⁶ Such majorities are calculated on the basis of a percentage of the total claims (concerning the aggregate amount of debt).

creditor following an enforcement procedure (in accordance with the Greek Code of Civil Procedure) against any co-debtors', guarantors' or third persons' encumbered assets, securing the debts. For example, not only the Agreement shall not provide that the creditor receives a lower amount than the one to which he would be entitled according the liquidation and ranking provisions of the Greek Code of Civil Procedure, but also, in case where a co-debtor, guarantor or any third person has granted a security of the relevant debt, the liquidation value of the latter's assets must also be taken into account in the Agreement.

ii. **Satisfaction pari passu:** Any remaining amounts or other considerations following the distribution of amounts and relevant considerations, as per (i) above, are distributed among the creditors on a *pari passu* basis; this concerns the case where it is agreed that the Debtor is able to repay an amount exceeding the liquidation value of his assets and the assets of any co-debtor, guarantor or third person securing the debt. In this case, the amount exceeding the liquidation value amount of such assets (which will distributed in accordance with the no creditors worse off principle) shall be distributed to the creditors on a *pari passu* basis.

iii. **Pre-deduction of claims:** Without prejudice to the principle under (i) above, the amounts and considerations to be distributed are calculated following the **deduction** from the creditors' claims of (a) the total amount of default interest of the private sector creditors; (b) 95% of Greek State's claims arising from fines imposed by the tax administration and 85% of claims of the Greek State and the Social Security Funds arising from surcharges or late payment interests⁷.

B. Participation of Greek State & Social Security Funds

Without prejudice to the mandatory rules outlined above, the Greek State and the Social Security Fund may proceed with the debt settlement including the possibility of a partial write-off, along the following additional mandatory rules:

- the payment of the debt shall not exceed one hundred and twenty (120) installments
- debt payments shall be on a monthly basis (no longer time periods are allowed)
- the value of monthly installments shall be at least Euro 50
- no grace period is provided
- finally, only cash payments are allowed

C. No write-off of employees' contributions

Without prejudice to the mandatory rules outlined above under B., both the Greek State and Social Security Funds may proceed with a debt settlement including the possibility of a partial write-off, except for the write-off of withheld employees' contributions towards Social Security Funds.

⁷Such deducted amounts may be calculated for the distribution only to the extent permitted by the Debtor's payment capacity and may be repaid (in full or in part) subject to the full repayment of the remaining creditors' claims. The deducted amounts not included in the distribution are written off following the full repayment of the remaining creditors, in accordance with the Agreement.

(Optional) Judicial Ratification of the Agreement

The EDS Law provides for the possibility (but not the obligation) of the Agreement's judicial ratification (by means of a court ruling issued by the Multi-member court of First Instance on the basis of *ex parte* proceedings). The judicial ratification is required in order for the Agreement to legally bind the non-contracting creditors.⁸ The court decision ratifying the Agreement constitutes an *ex lege* enforcement title.

Non-Compliance with the Agreement

The EDS Law explicitly sets out the consequences and measures applicable in case of non-compliance with the Agreement. In brief, in the event of non-payment of the Debtor for a time period longer than ninety (90) days, any creditor may file an annulment petition before the court. Upon annulment, all claims revive while the Agreement's annulment constitutes a refutable presumption of the Debtor's cessation of payments. Whereas, an Agreement with the Greek State/Social Security Funds is automatically revoked in case of **(a)** non-payment (or partial payment) of three (3) installments; **(b)** failure to submit the required income tax and VAT statements within three (3) months from the lapse of their submission deadline; and **(c)** failure to pay or settle any subsequent debt obligations born after 31.12.2016 within ninety (90) days from the enactment or the ratification of the Agreement or, in case such debt obligations became due following the enactment or the ratification of the Agreement, within sixty (60) days from the payment time due.

Counting-down for enactment

The EDS Law will enter into force on 3 August 2017 when the electronic platform will start operating in the official website of EGDIX, while certain provisions of the EDS Law which concern preparatory measures (e.g. coordinators registry, supporting documentation, etc.) have already been enacted since 3 May 2017. In the meantime, until the electronic platform starts to operate, the relevant applications shall be submitted in both hard-copy and electronic form before the Development Division of the Prefectures.

Why should anyone opt to be submitted to EDS Law?

- Contrary to the rehabilitation proceedings of art. 99 of the Greek Bankruptcy Code, EDS proceeding is in principle a flexible, time-barred, well-structured extrajudicial procedure with a broader scope of application, less costs and minimal publicity and aiming to an overall long-term settlement of debt. It is also not subject to the conditions of "cessation of payments" or of the general inability to pay the outstanding obligations, or even the projection of such inability, as is

⁸According to art. 12 of the EDS Law "The Debtor or the participating creditor **may** submit [...] for ratification [...]" while the explanatory report of the EDS Law, explicitly states that the judicial ratification is **optional** in order to avoid any court congestion for cases that such ratification does not serve any special purpose (e.g. the Agreement was unanimously approved by the creditors or the non-contracting creditors approved, explicitly or silently, *a posteriori* the Agreement).

the case for bankruptcy and the pre-bankruptcy rehabilitation (Articles 99 *et seq* of the Greek Bankruptcy Code).

- It is a simpler and less time consuming preliminary settlement procedure while the judicial ratification of the Agreement is optional.
- While the primary aim of the EDS Law is to safeguard the viability of the Debtor, it also provides for the protection of small-scale creditors through a provision according to which a number of claims (mainly claims which, per creditor, do not exceed the 1.5% of the aggregate Debtor's debt etc.) are excluded from its scope. Such provision is addressed to employees and suppliers and their protection, and such creditors are not bound by an Agreement entered into between the Debtor and other creditors.
- The Greek State and the Social Security Funds participate in the EDS mechanism aiming to negotiate viable settlement solutions adjusted to the needs of the business of each Debtor. The flexibility of the Greek State as a creditor extends to even a partial write-off of its claims, when this is deemed necessary and subject to the protection of the public interest.
- The EDS Law leaves room for any self - employed individuals who may not be declared bankrupt (lawyers, physicians, notaries etc.) to enter into bilateral settlement arrangements with the Greek State and the Social Security Funds.
- The EDS Law provides for a simplified – standardized proceeding in relation to the debt obligations the aggregate amount of which does not exceed the amount of Euro 50,000.
- The introduction of electronic platform and the whole online application procedure reduces the administrative costs incurred by the Debtor.

However, just keep in mind that...

- Any debt obligations born following the date of 31.12.2016 do not fall within the scope of EDS Law.
- The applicability of art. 15 par. 21 and the bilateral arrangement and its particularities between a debtor not falling within the subjective scope of the EDS Law (self-employed etc.) and the Greek State and/or Social Security Funds is subject to the prior issuance of ministerial decisions. The wording of the provision creates an ambiguity over the application of this provision while no further clarifications are provided on the matter.
- The simplified – standardized proceeding (described above) in relation to the debt obligations the aggregate of which does not exceed the amount of Euro 50,000 is subject to a Joint Ministerial Decision.
- Last but not least, the application of the EDS Law will depend on the prior launching of the required electronic platform by August 2017, when the new framework enters in force.

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