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LEGAL BRIEFING – Dispute Resolution & Restructuring

by Sotiris Foteas – Partner

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s.foteas@aklawfirm.gr

Special administration: The end of an era?

Pursuant to the New Insolvency Code (already Law 4738/2020, Government Gazette Volume A' 207/27.10.2020, hereinafter the "NIC"), Articles 68 seq. of the Law 4307/2014, which constituted the legal base of the "special administration" procedure, are repealed. Pending procedures will be continued until completion or expiration of their duration and new filings will be available until December 31, 2020. Despite the fact that the new provisions for the "alternative en bloc/per units liquidation" in bankruptcy (art. 158 seq. NIC) present similarities to the special administration, it is an appropriate time to conduct a brief assessment of its contribution to the legal order.

Being part of a fragmented system of insolvency and rehabilitation facilities in the Greek legislation, the mechanism never became an attractive option. The number of placed entities under the regime remained extremely limited, while creditors faced it as a rather technical and cost-ineffective procedure compared to rehabilitation agreements of Articles 99, 106 seq. of the previous Insolvency Code or the traditional means of enforcement over debtor's assets according to the Code of Civil Procedure or other special pieces of legislation (e.g. the Legislative Decree 1923).

This sets a little paradox, to the extent that the system aimed indeed at offering an alternative simplified mechanism of "control over the business" as a precondition for the payment of its debts, without any strict requirements of enforceable title or enhanced qualified majorities of creditors.

Why then didn't it work extensively?

It is true that specific provisions have added to this inflexibility. For example, the prerequisite of a bank or credit institution acting as a filing creditor (necessary to achieve required majorities) finds no legitimate grounds. Especially after succession in the creditor's position pursuant to L. 4354/2015, the subjective criterion was no longer fulfilled for numerous-previously eligible-cases.

However, this short notice will focus on another structural underlying contradiction: Although the special administration mechanism was introduced *rationale* as a mechanism of continuing business, market and legal perspective conceived it as a strict means of liquidation. In our opinion, this is due to its structural articulation as an "asset" rather than a "share deal". The higher bidder in the tenders proclaimed by the Special Administrator would acquire business units and not share capital of the placed entity. Thus, it resulted into a procedure comparable to traditional enforcement means, this time via controlled channel of liquidation focused on creditor's interests rather than directed to the maximum economic and social surplus. On the contrary, a different statutory perception leading alternatively to a share control over the entity (evidently with debt write-off of the entity for the new shareholder) could have been more attractive in terms of investment interest and legal clarity. This approach would have connected more efficiently legal with business continuity through entity's integrity as a system of assets, productive means, know-how, clientele and existing legal relationships. Control over the entity may then have proven more compatible with the existence of a sustainable business.

Although insisting on the "liquidation approach" (Art. 158 seq.), the NIC is not completely unfamiliar with this idea of "return" to the business continuity, even for entities placed under special administration. Of course, the case is not a pure "share deal" amendment but an alternative to the liquidation one-way which goes although far beyond the transitory provisions. The new Article 72A in L. 4307/2014 (as introduced pursuant to Article 264 par.3 of the NIC) sets a legal basis for a rescission (revocation) even of a pending special administration upon concurrent filing of a Rehabilitation Agreement.

Assessment of the necessary majorities leads to the conclusion that this is expected to be a result of a subsequent turning in creditor's intentions or a substitution in creditor's position, compared to the time of the filing/placement.

Apart from problematic practical issues of transitory law-making (e.g. the provision of Article 72A is introduced into a law that is being repealed with the same introductory piece of legislation and has a longer duration than the remaining temporal force of the law which contains it), the rationale behind is welcome and lies upon the superior principle of *proportionality*. More lenient means are preferable when ensuring equivalent results.