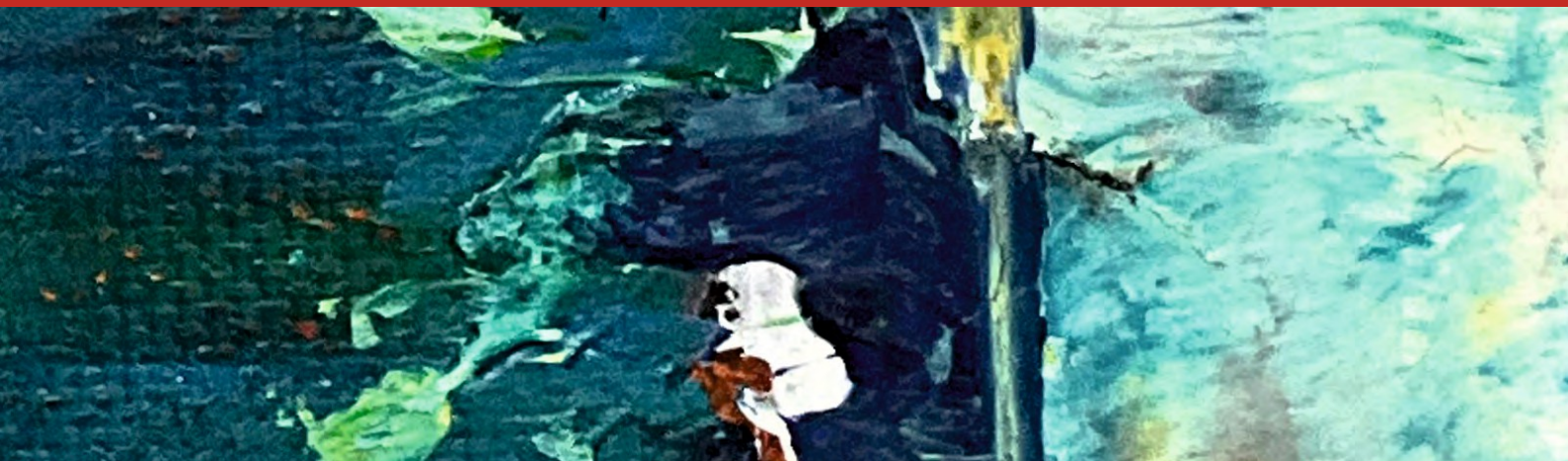


PSARAKIS || KEFALAS  
COMMERCIAL LITIGATION



LEGAL NOTICES – CORPORATE INSOLVENCY LAW





## **PSARAKIS - KEFALAS LAW FIRM**

### **LEGAL NEWSLETTERS – CORPORATE INSOLVENCY LAW**

Among the firm's areas of expertise is the handling of corporate over-indebtedness and insolvency issues. The firm has handled numerous cases involving both the prevention and management of insolvency, utilising all available extrajudicial and judicial tools provided for by law.

The introduction of Law 4738/2020 has substantially reshaped the corporate insolvency framework, providing debtors with tools to prevent and avert insolvency, such as out-of-court mechanisms and restructuring procedures, as well as tools for dealing with it and relieving the bona fide debtor of their debts, in the context of bankruptcy and the discharge procedure. The choice of the appropriate legal route is not self-evident, but depends on a number of parameters and requires a thorough analysis of the factual and legal data of each specific case.

The issues of over-indebtedness and insolvency of legal and natural persons engaged in business activities are approached holistically, examined in combination from the perspective of commercial, accounting, tax and criminal law, as well as enforcement law. The aim is not simply to initiate proceedings, but to draw up a realistic and viable plan for the recovery of the business or, where this is not possible, the legally secure and controlled completion of business activities through bankruptcy and the discharge of the over-indebted debtor. Particular emphasis is also placed on addressing any criminal consequences that often accompany the insolvency of a business, such as prosecutions for offences against public bodies (in particular, non-payment of debts to the State and non-payment of insurance contributions) or third parties (in particular, bankruptcy offences), in the context of the company's parallel specialisation in tax and economic criminal law.

The company's goal is to provide comprehensive and practical solutions, with a view to protecting business continuity, where possible, or ensuring the best possible position for the client in the context of insolvency, with security, strategic planning and a long-term perspective.



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## THE LIQUIDATION OF BANKRUPT PROPERTY THROUGH THE SALE OF ASSETS

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*This article examines the possibility of liquidating bankruptcy assets through the sale of the business as a going concern, in accordance with the articles of the Insolvency Code, with an emphasis on the procedure, conditions and deviations from the usual sale of individual assets.*

### I. Bankrupt Estate

Bankruptcy aims to satisfy creditors collectively by liquidating the debtor's assets. Law 4738/2020 ("K.Af") decoupled bankruptcy from commercial status, so that bankruptcy assets now consist of the bankrupt's movable and immovable property, without necessarily being organised into a business or commercial concept.

Specifically, according to Article 92 § 1 of Law 4738/2020, bankruptcy estate means all of the debtor's property – movable and immovable (and his residence) – belonging to him on the day of the declaration of bankruptcy, i.e. all assets (including rights, intangible goods, trademarks, etc.) whose acquisition was completed before that date, anywhere in the world and wherever they are located.

The bankruptcy estate also includes interest, periodic benefits, ancillary claims and rights that arise after the bankruptcy within the meaning of Article 92(8)(b) but arise from a legal relationship that existed prior to the declaration of bankruptcy. Specifically mentioned assets are excluded, as well as anything that the bankrupt sold before the declaration of bankruptcy, subject to the provisions on bankruptcy revocation, and anything acquired afterwards. The debtor may, of course, use the post-bankruptcy assets to satisfy the creditors of the bankruptcy.

In the bankruptcy of a natural person, as an exception to the above rule, the bankrupt estate also includes the part of his annual income from the bankruptcy until the discharge that exceeds the limits specified in the law. In other words, the law requires the bankrupt person to "give" to the bankruptcy estate the "surplus" of their income, in order to avoid cases where, although there is no significant movable and immovable property, the bankruptcy estate is insufficient to satisfy creditors.

in order to avoid cases where, although there is no significant movable and immovable property, the bankrupt person has a high income.

Upon declaration of bankruptcy, the debtor is deprived of the administration of his property, which is now taken over by the trustee. Bankruptcy expropriation is a measure similar to the special prohibition on the disposal of seized assets provided for in the Code of Civil Procedure (KPoID). In both cases, ownership is retained by the debtor-bankrupt until the sale. The trustee will now take over the administration of the property and, among other things, the liquidation of the bankrupt's property, either as a functional whole or divided into individual assets, assisted by the bankruptcy authorities in order to satisfy the creditors.

### II. The individual sale of the bankrupt's assets

The Code provides for a special procedure for the sale of the bankrupt's individual assets, which in principle is the same for movable and immovable property. This is the only possibility for liquidation when there is no organised business or when there is one, but it is a very small entity under the terms of Article 2 of Law 4308/2014 (i.e. in the case of small-scale bankruptcy).

The relevant provisions cover, indicatively, immovable property, ships and aircraft regardless of value, as well as movable property or groups of movable property whose value exceeds €50,000. Assets whose value, according to the estimate of the trustee

If the value does not exceed the above limit, they are sold as one or more groups of items, following the same procedure as above. Code No. 1001A of the Code of Civil Procedure allows for the sale of real estate on which production units are located, together with its annexes, as well as the joint sale of several properties that form a functional unit. It is clear from the above provisions that the legislator's main objective is to maximise value in order to better satisfy the bankruptcy creditors.

As mentioned above, the administration of the bankrupt's estate is undertaken by the trustee, who is responsible for liquidation. However, priority is given to secured creditors, who, from the declaration of bankruptcy and for the first nine months, may proceed with the sale of the secured property themselves. This possibility constitutes an exception to the suspension of individual prosecutions, which occurs with bankruptcy. If enforcement begins within this period, the sale process may continue after the end of the nine-month period until the auction is completed or the seizure is overturned. The commencement of enforcement is understood to mean the commencement of compulsory sale with the imposition of seizure. If the secured creditors have not commenced the compulsory sale procedure within these nine months, or if the procedure has commenced but is delayed to the detriment of the other creditors, the competence reverts to the trustee. The same priority is given to the pledgee in whose possession the pledged movable property is held.

### **III. The process of private sale compared to the provisions of the Code of Civil Procedure on compulsory auction**

The procedure is largely similar to that of the Code of Civil Procedure, but the role of the executor is assumed by the trustee.

There are, of course, certain differences, so as to better serve the purposes of bankruptcy .

In summary, the most important points, in our opinion, are as follows:

- The first step in compulsory sale is the appointment of the auctioneer, i.e. the notary before whom the auction will be conducted.
- For each item or group of items being sold, the trustee publishes a notice in the Insolvency Register, which includes a brief description of the item, the starting price and the date of the auction. This is equivalent to the Extract from the Seizure Report provided for in the context of enforcement, with the difference that there is no requirement to report encumbrances and serve mortgagees.
- Within five days of publication, the trustee submits the notice to the auctioneer.
- The date of the auction is set by the trustee between 30 and 45 days from the publication of the notice. In contrast, under the Code of Civil Procedure, the auction is held seven (7) months after the completion of the seizure and in any case no later than eight (8) months. This provision reflects both the need for rapid disposal and the reduced protection of the bankrupt person, who has already lost the power to dispose of his property by declaring bankruptcy.
- There is also no deadline for publishing the announcement on the e-auction website.
- The choice of the sale procedure (order, grouping, etc.) and the initial bid price are determined by the trustee, who hires two certified appraisers under Article 1(C) of Law 4152/2013. The price is defined as the average price of the two appraisals. In the compulsory auction under the Code of Civil Procedure, the bailiff responsible for the appraisal is required to hire a certified appraiser at his discretion. Of course, in the event of an incorrect valuation, it is possible to correct it by means of an objection under Article 954(4) of the Code of Civil Procedure, which is not available in the context of bankruptcy.

● With regard to the electronic auction procedure, the provisions of Article 163 of the Bankruptcy Code largely reproduce those of the Code of Civil Procedure, with some variations to adapt them to the specificities of bankruptcy.

● Article 163(14) of the Bankruptcy Code provides for the signing of a contract for the transfer of movable or immovable property between the trustee and the highest bidder. This provision is not found in the Code of Civil Procedure, where the transfer of movable property is completed upon delivery and the transfer of immovable property is completed upon delivery to the highest bidder of the summary of the award report, which is transcribed. The above procedure of the Code of Civil Procedure "returns" to Article 166 of the Code of Civil Procedure, contradicting at first glance the provisions of Article 163(14) of the Code of Civil Procedure. The two provisions must be interpreted systematically in the sense that the contract of Article 163(14) has the status of a final award.

● However, the major difference between the two procedures lies in the case of an unsuccessful auction. In bankruptcy, there is an automatic procedure for reducing the initial bid price. Specifically, the auction is repeated within twenty (20) days of being declared unsuccessful, and the price is set at  $\frac{3}{4}$  of the average valuation price. If a second repeat is required, the price is set at  $\frac{1}{2}$  of the initial price. If this auction also fails, the trustee submits a request to the rapporteur to reduce the initial bid price or to approve terms that will facilitate the sale, including the possibility of free sale at a specific price. After 120 days from the issuance of the rapporteur's order and if the sale has not been achieved, the trustee proceeds with an auction without a first bid price. An "automated" system is thus structured in order to achieve a rapid sale at a price

that reflects the actual market value of the asset being sold and is free from the constraints and legal complications of the Code of Civil Procedure.

● The provisions of the Code of Civil Procedure regarding the manner and procedure for distributing the auction proceeds are maintained in bankruptcy proceedings, with the provision of "super-priority" to cover the costs of any prior consolidation agreement or negotiations to conclude such an agreement.

● Finally, the absence of the possibility of challenging enforcement actions is of particular interest. Moreover, even in the context of a sale as a whole, which is a particularly complex procedure, no such possibility is provided for. If this legislative gap is unintentional, then the best solution seems to be to oppose Article 933 of the Code of Civil Procedure, adapted to the bankruptcy procedure. The Bankruptcy Code only provides for the possibility of challenging the ranking table drawn up by the trustee, in the context of which the reasons against the table of verified claims are also put forward.

#### **IV. In conclusion**

The regulation of the sale of the bankrupt's personal assets, as introduced by Law 4738/2020, attempts to balance the need for rapid liquidation with the protection of creditors' rights. It also reflects the legislator's intention to bring the procedure closer to the enforcement of the Code of Civil Procedure, adapted to the particularities of bankruptcy. Finally, the absence of a specific provision for opposition to acts of disposal creates a gap in legal protection, allowing the procedure to proceed despite any invalidity and/or to the detriment of creditors.

## LIQUIDATION OF ASSETS IN BANKRUPTCY: THE EXCEPTION – SALE OF THE BUSINESS AS A WHOLE OR AS OPERATING UNITS

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*This article examines the process of selling individual assets in the context of bankruptcy, as provided for in Law 4738/2020, with an emphasis on deviations from the Code of Civil Procedure and the legislative aim of accelerating liquidation in favour of creditors.*

### I. The concept of the enterprise as a whole and its functional units.

The liquidation of the bankrupt's assets takes place on the initiative of the trustee through the sale of individual assets. The assets are put up for electronic auction on the e-auction website. The Insolvency Code ("IC") outlines the entire sale process, which largely "mirrors" that of the Code of Civil Procedure, but adapted to the particularities of bankruptcy.

As an exception to the above rule, the Insolvency Code introduced the possibility of a total sale of the business or its operational units. This procedure is preferred when the business retains a unified or separable productive capacity, allowing its value to be transferred as an operating unit, despite the bankruptcy of its owner. This option is only available when a business exists and is not subject to the provisions on small-scale bankruptcy.

Thus, when, upon request by bankruptcy creditors representing at least 30% of the total debts and including at least 20% of secured creditors, the court may be requested to *order the "sale of the entire business or its individual operating units"*. This request is submitted both when the proceedings are initiated by the creditors and as an additional intervention in the context of a request submitted by the debtor. If the request is accepted by the court, the trustee is obliged to proceed with the sale in the manner ordered. It is, of course, possible to order a mixed sale, combining the total sale and the sale of individual assets. In the absence of a relevant provision in the law, the relevant provisions must be applied in combination, which presents practical difficulties. It should be noted that this provision of the decision

constitutes a separate chapter, which may be challenged.

The concept of the business as a whole is largely borrowed by the K.A.F. from the corresponding provisions of Law 4307/2014 on special liquidation, with the difference that under the K.A.F. only the assets are transferred. Thus, a business as a whole is understood to mean all the assets listed in the company's last balance sheet approved by the General Meeting and any other assets and rights not listed in the balance sheet, including claims of any kind, trademarks, patent rights and trade names, clientele, reputation, administrative licences, etc.

Similarly, the concept of individual operating units is identical to that of a branch, i.e. the totality of assets, exclusively in the case of bankruptcy, which constitute an autonomous operation from an organisational point of view. The property complex is transferred free of encumbrances and together with the pending contracts relating to it, unless the trustee chooses to sell a contractual relationship separately. The trustee shall choose which assets of the business, including claims, shall be sold together with a functional whole or separately.

### II. On the procedure

The disposal plan, i.e. both the order of disposal and the specific details of each branch or individual assets, unless determined by the Court, shall be defined by the trustee and approved by the Creditors' Meeting. The sale takes place through a public electronic auction conducted before a notary electronically via e-auction, a provision that constitutes an innovation of the C.A.F. in relation to the previous law. Contrary to the private appraisal procedure

And the auction under the Code of Civil Procedure, no valuation takes place and no initial bid price

and the auction under the Code of Civil Procedure, no valuation takes place and no initial bid price is set.

The bid of the highest bidder is submitted by the trustee within one month of the completion of the auction for approval by the Creditors' Meeting, which may approve it as it stands or on condition that the bid price is increased. If the procedure is completed successfully, the business or the individual operating unit is transferred to the highest bidder, with the signing of a contract between the latter and the trustee and payment of the price in cash. The contract, as expressly stated in Article 160 of the Code of Civil Procedure, has the force of a final award.

Conversely, if the auction is unsuccessful, either because no bids were submitted or because the transaction was rejected by the Assembly, the sale process ends and the trustee proceeds with the sale of the individual assets as described above. Of course, instead of rejecting the bid, the Assembly may decide to hold a new auction within 18 months. The auction may also be partially successful, with the completion of the transfer of only some of the operational units (or with the decision to hold a new auction for them) and failure in respect of others, which will ultimately be sold through the individual sale procedure.

The process ends 18 months after the declaration of bankruptcy and provided that no bidding process is pending or no decision has been taken by the Assembly to extend it. After completion, the trustee proceeds with the sale of the assets by private sale.

In order to ensure the success of the overall sale, the K.A.F. also includes supporting provisions that deviate from those applicable in the context of private sale. In this context, the commitment of secured creditors to suspend individual prosecutions, without any time limits, is considered important. A special regime is also introduced for ongoing contracts, so that the rule of automatic and uncompensated termination does not apply, unless there is a specific provision to that effect in the law. From the combination of the provisions of Articles 107 and 171(5), it also follows that any contractual provision for termination of the contract in the event of bankruptcy is null and void by law, unless it is not detrimental to the bankrupt.

5, it also follows that any contractual provision for termination of the contract in the event of bankruptcy is null and void by law unless it is not detrimental to the bankrupt debtor. Furthermore, the trustee is allowed to enter into contracts for the purpose of servicing the current bankruptcy proceedings, which, of course, may be terminated by the Creditors' Meeting within 30 days. It should be noted that the business is also protected at the administrative level, as it is expressly stated that bankruptcy does not constitute grounds for revoking administrative licences, while the tax relief provided for under the previous Bankruptcy Code and Law 4307/2014 is extended.

Finally, of particular interest is the absence of the possibility of challenging enforcement actions, which concerns both the method of liquidation discussed here and the sale of individual assets. If this legislative gap is unintentional, then the best solution seems to be to oppose Article 933 of the Code of Civil Procedure, adapted to the bankruptcy procedure. The Civil Code only provides for the possibility of challenging the ranking table drawn up by the trustee, in the context of which the reasons against the table of verified claims are also put forward.

### III. In conclusion

The Bankruptcy Code provides for this special procedure of total liquidation so that, from the moment bankruptcy is declared, the trustee is aware of the subsequent course of action. It is not left to the bankruptcy authorities to decide at their discretion whether individual or total liquidation is appropriate in the case in question, as they are bound by the court decision. K. Af. attempts to mitigate the resulting lack of flexibility with provisions regarding the failure of the auction. The rescue of a business without the rescue of its owner is a more complex scheme than the liquidation of individual assets, which must be governed by more specific legislation. Thus, K.A.F. structures the process in such a way as to serve both the necessary speed and the rescue of the company's goodwill, while maintaining the validity of ongoing contracts, administrative licences, etc. in order to achieve the maximum possible auction price.

## CONTENT OF THE RESTRUCTURING AGREEMENT: POSSIBILITIES FOR SETTLEMENT WITH PUBLIC AUTHORITIES

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*The consolidation agreement, together with the out-of-court debt settlement mechanism, constitutes the two collective debt settlement procedures provided for the collective consolidation of viable businesses. Unlike the out-of-court procedure, the consolidation procedure offers the debtor and its consenting creditors considerable flexibility in shaping the terms of the agreement. It is therefore crucial to formulate the terms of the reorganisation agreement in such a way as to achieve the maximum possible benefit for the company. In this article, we focus on the formulation of the terms of the agreement, particularly in relation to public bodies.*

### 1. Introduction

In previous articles, we have already highlighted the advantages that the institutional framework of consolidation offers to the debtor, while we have also presented the two basic principles that govern the process and define the possibilities for settlement, namely the principle of equal treatment of creditors in the same position and the principle of collective satisfaction of creditors in the sense of not worsening their position.

**In this article, we focus in particular on settlement issues with public bodies, namely the Greek State and the Single Electronic Social Security Agency (e-EKFA), highlighting possible forms that the consolidation agreement may take, always based on the case law of our courts.**

It should be noted, however, that in order for a consolidation agreement to be ratified by the court, it must be approved by the majority of creditors specified by law (i.e. either 50% of creditors with collateral and 50% of creditors without collateral, or 60% of all creditors, including 50% of creditors with collateral). Therefore, provided that the necessary majorities exist, the specific terms of the consolidation agreement are crucial, particularly with regard to public entities.

### 2. Long-term settlement of debts to public bodies

**A long-standing demand of debtors to the State and e-**

**EFKA is the provision of the possibility to settle their debts on a long-term basis.** In this context, the old out-of-court settlement (Law 4469/2017) had provided for the possibility of settling debts to public bodies in up to 120 (monthly) instalments, while a similar provision existed in specific legislation that had been enacted (see also the recent revival of the 120-installment arrangement under Law 5036/2023). **The new out-of-court mechanism provides for the possibility of settling debts owed to the State and the e-EFKA in up to 240 instalments.** However, the out-of-court mechanism imposes restrictions on the possibility of writing off basic debt amounts (basic debt amounts from withheld and imposed taxes, as well as insurance contributions, are not written off), while at the same time the arrangement is subject to a 3% interest rate (following the changes made to the out-of-court mechanism by Law 5024/2023).

**On the contrary, in the context of the consolidation procedure, there is no upper limit on the number of instalments for the settlement of debts owed to public bodies (or to other creditors for that matter).**

A typical example in this regard is the ruling of the Syros Multi-Member Court of First Instance in its decision No. 2/2018, which states: "Finally, with regard to the Greek State, it is provided that its claim will be settled as follows: [...] *the regulated surcharges, interest and fees, as well as the amounts certified by the Labour Inspectorate as debts to the Greek State, will be repaid in full, amounting to ... euros, in 280 equal monthly instalments without interest.*

instalments, with the first instalment to be paid within 60 working days of the signing of the protocol for the transfer and receipt of assets between the applicant and the company named [...]. The above number of instalments, although quite large, is considered by the Court not to violate the principle of equal treatment of creditors in the same position, as the same applies to the EFKA, which, according to the first intervener, is in the same position as the State. **Moreover, a large number of instalments has been repeatedly accepted by case law, such as, indicatively: 140 instalments (PPraAth 288-9/2015), 152 instalments (EfPeri 569/2014), 156 instalments (EfThes 2156/2015), 240 instalments (PPraAth 109/2018), 250 instalments (PPraAth 8/2017), 268 instalments (PPraAth 688/2014)".**

Beyond the possibility of long-term settlement, it has been ruled that interest-free settlement of debts owed to the State and e-EFKA may also be agreed, provided that the principle of equal treatment of creditors in the same position is not violated. The Athens Court of Appeal's decision 5177/2017 stated: "*The claim of the mainthat creditors are not treated on the basis of the principle of equal treatment, because the repayment of the applicant's loan obligations to the banks party to the consolidation agreement provides for the payment of interest at a rate of Euribor + 3%, while for themselves, who belong to the category of generally privileged [Greek State and insurance organisations] non-contracting creditors, repayment is provided for in 180 interest-free monthly instalments, while for the company's employees, repayment is provided for in 18 equal monthly instalments, for the debt owed to the Public Power Corporation in 90 equal instalments and for suppliers, depending on whether they are necessary for the continued operation of the company or not, in 42 or 60 equal monthly instalments respectively, is rejected as unfounded. This is because the above categories of creditors are not in the same position, and any deviations from the principle of equal treatment, according to the provision*

*Article 106b(2)(d) of the Bankruptcy Code, for important business or social reasons, for example, the claims of customers of the debtor's business may be given favourable treatment, the non-satisfaction of which substantially damages its reputation or the continuation of the business, as well as labour claims. In this case, the above-mentioned special arrangement for the repayment of bank claims with interest is justified by the fact that these are secured by mortgage deeds on the applicant's hotel complex and that they are expected to continue financing the business with a loan of EUR 600,000 for its further operation..*

### 3. Treatment of debts from any tax audits

It is possible that, in parallel with the consolidation agreement, an audit will also be carried out by a public body, the results of which are not yet known at the time of signing the agreement. It is also possible that, after the consolidation agreement has been ratified, a tax audit will follow for financial years prior to the date of ratification of the agreement. It is reasonable to ask what happens in such cases, as the imposition of penalties following an audit may undermine the consolidation of the business.

**With regard to this issue, the courts have ruled that a term in the restructuring agreement providing for the write-off of debts arising from tax audits is valid in the context of ensuring the viability of the company through restructuring.**

A typical example in this regard is Decision No. 581/2021 of the Patras Multi-Member Court of First Instance, which ruled that: "*With regard to debts that may arise, be charged or certified to the applicant company from past, current or future tax audits until the date of signing of the private agreement for the transfer of the business, shall not be charged and shall not be transferred to the company.*"

by the new company, but will constitute an obligation of the applicant company, which, due to the absence of assets, will be written off at a rate of 100% [...]. **This condition is considered reasonable and necessary in the context of the new company's viability, as in order to draw up its business plan and cover all its needs, it must assume specific and clear obligations, rather than ambiguous ones.**

Along the same lines, decision no. 5756/2020 of the Thessaloniki Multi-Member Court of First Instance ruled that: "Furthermore, the terms of the consolidation agreement under ratification, which stipulate that the applicant's obligations arising from current or future tax audits or audits by social security institutions (provided that the relevant claims have arisen by the date of the decision ratifying the consolidation agreement) **will not be transferred to the new company but will be written off in full (100%), is considered reasonable and necessary in order to ensure the viability of the new company.**

#### 4. The claims of hidden creditors

First of all, hidden creditors are defined as creditors whose claims existed prior to the signing of the consolidation agreement and the discussion of the application for ratification before the court, but did not appear in the company's books or other documents submitted to the court, either by mistake or because the claim was disputed. Corresponding to the concept of an unknown creditor, there is also the concept of an unknown claim by an otherwise known creditor. This concept can also include the above-mentioned debts from any tax audits or audits by insurance agencies.

Indicatively, with regard to undisclosed creditors, the above-mentioned decision No. 581/2021 of the Poly-

The Court of First Instance of Patras ruled that a term of the consolidation agreement was valid, which provided for: "**Claims of any unknown creditors of the applicant company, which had already arisen on 31 March 2020 or were to arise during the interim period but do not appear in its books, shall remain as a liability of the applicant, but, given that no assets will remain with the applicant, they will be written off in full.**"

Similarly, Decision No. 39/2020 of the Edessa Multi-Member Court of First Instance ruled that: "It should also be noted that clause 8.9 of the agreement, according to which any claims to creditors of any kind that do not appear in the balance sheet of 31-12-2019 (unidentified creditors), as well as any debts that may arise, be charged or certified to the applicant by past, current or future tax audits and relate, indicatively and not restrictively, to the assessment of any taxes, fees or contributions in favour of the State or third parties, income tax, withheld or imposed taxes, value added tax, stamp duties, capital or property tax, special contributions, as well as the imposition of fines or penalties for violation of the provisions of the KVS, KFS and the Tax Procedure Code or Law 2523/1997, however they are assessed or collected, as well as any fines, surcharges, interest and other related charges, and which debts relate to any past financial year or any period up to the publication of the court decision, and regardless of the time at which any audit procedure may have commenced, are written off at a rate of 100%. This is considered reasonable and necessary in the context of the new company's viability, as in order to draw up its business plan and cover all its needs, it must undertake specific and clear obligations, rather than ambiguous ones.

Other decisions have ruled, however, that the claims of silent creditors must be treated in the same way (e.g. same percentage write-off, same

repayment period, same interest rate) with the claims of non-preferential creditors with the same historical and legal cause.

However, as provided for in Joint Ministerial Decision No. 26400 EX 2021 on the content of the Expert Report: ***"In the event that the consolidation agreement provides for the limitation or write-off of claims of the State and Public Bodies, which have not been certified at the time of signing the agreement and do not appear in the debtor's books, an explicit and distinct indication must be included in the form of a provision, with an assessment of the possibility of repayment based on the projected cash flows of the company in the relevant chapter of the expert's report."***

In other words, the expert's plan must provide that the company's cash flows during the implementation of the restructuring plan are not sufficient to cover any hidden claims of the State and public bodies.

## 5. Instead of a conclusion

The institution of consolidation can be a useful tool for a company wishing to settle its debts in order to ensure its long-term viability, provided, of course, that it has the necessary majority of its creditors on its side. In this article, we have outlined possible forms that a consolidation agreement may take, particularly with regard to the company's debts to public bodies, in order to achieve the maximum possible benefit for the company and enable it to implement its business plan. The restructuring institution provides much greater flexibility compared to the out-of-court mechanism, not only with regard to the settlement of debts owed to public bodies, but to any creditor, as the only limitation is the principles of not worsening the position of creditors and treating them equally. It is therefore crucial to formulate the terms of the agreement correctly in order to ensure the maximum possible benefit for the company without jeopardising the court's ratification of the agreement.

*Companies belonging to a group of companies have common financial interests, but this does not mean that they do not retain their independence as legal entities. In principle, each member company of a group is liable only for its own debts and obligations. However, under certain conditions, a member company of a group may be called upon to assume responsibility for the debts of another "sister" company that is a member of the same group. In this article, we will examine the conditions under which this may occur, citing some examples where the courts in our country have ruled that such a circumstance exists.*

### 1. Introduction – Principle of legal personality

A basic principle of commercial law is the principle of the autonomy of legal entities, which means that the legal personality of a company is separate from the natural persons who comprise it, with the further practical consequence of separating the property of the legal entity from the property of its members, i.e. the natural persons who own its shares or quotas. **In this way, the liability of the legal entity is separated from the liability of its members, and only its own property is liable to the creditors of the legal entity, not the property of its members, while conversely, its assets are not liable to the individual creditors of its members.** For this reason, many entrepreneurs will choose a capital company to carry out their business activities through it, with the aim of the company acting as a mechanism to absorb any adverse consequences of their business activities. Thus, in principle, entrepreneurs who choose a type of capital company to shield their business activities with the advantages it offers are not acting unlawfully (see MPRTThes 16999/2010).. **The above principle also applies to member companies of a group, which have separate legal personality and each of which is liable only for its own debts and not for the debts of other companies in the group.**

### 2. The removal of the legal entity's autonomy

However, this rule is bent when it is done in accordance with

abuse of the independent existence of a legal entity, i.e. when invoking the separate personality of a company serves to legitimise an outcome that is contrary to the rules of good faith. **This may occur when the acts of the company are in fact acts of its controlling shareholder or partner, which are deliberately presented as acts of the company, or conversely when the acts of the natural person are in fact connected with the company from which they are unlawfully attempting to separate themselves with the company from which they are unlawfully attempting to separate.** This form of abuse of the company institution occurs mainly in cases where the controlling shareholder or partner uses the legal personality of the company to circumvent the law (e.g. to circumvent a prohibition that binds him as a natural person) or to cause damage to a third party with intent, or to avoid fulfilling either corporate or individual obligations. Abusive is also the behaviour of the main shareholder or partner who transacts with the company through an intermediary, when the company has no corporate organisation or has not developed any business activity and it is he (the main shareholder) is in fact trading under the company name for his own benefit (AP ol 2/2013).

### 3. The removal of autonomy to the detriment of another legal entity - a sister company belonging to the same group

The above mechanism for removing autonomy may also apply, according to the case law of our courts, to the detriment of a third legal entity belonging to the same business group. **This is because, just as the independence of the legal entity's assets can be invoked against the assets of its members, so too can the insistence on the independence of the assets of a legal entity that is part of a group be invoked against the assets of another legal entity belonging to the same group.**

**of the individual legal entities that make up the group may be abusive.** A classic case of such abuse is, for example, the use of the legal personality of a member company of a group, e.g. a subsidiary, by another company of the same group, e.g. a parent company or another subsidiary, in order for the latter to avoid fulfilling its obligations. The above issue is particularly important in cases where the second of the above companies in the group is also the only one with sufficient assets against which the creditors of the first company could take action. In this case, the first company will usually be insolvent and will act as a front company, with the second company being the actual contracting party.

**In practice, it is highly likely that groups of companies will promote either the common interests of the group or the overriding business plans of the parent company at the expense of the subsidiary's objectives, resulting in unequal treatment of the latter's creditors.** In this case, liability should be diffused within the group. In this case, the removal of autonomy will take the form of transferring the liability of the insolvent legal entity not only to its members, but also to other legal entities belonging to the same business group. In such cases, the different companies should be treated as a single legal entity, because separating them as independent legal entities is contrary to the sense of justice.

The above liability arises when circumstances exist that make the establishment of multiple legal entities manifestly abusive. Such circumstances, which usually reveal personal action by the parent company through its subsidiary or legal entity, in general through another legal entity, include: **the omission of corporate formalities, the same or almost the same name, the same staff, and, more generally, any behaviour from which it can be inferred that the sole or main reason for the existence of most legal entities is to avoid liability.** Furthermore, such liability of the parent company may also be established in cases where, justifiably,

**the impression of unity between the companies has been given to third parties. This unity may be manifested by the exercise of joint activity by the parent company and the subsidiary or legal entity with another legal entity, the pursuit of common objectives, the existence of common property or common management and organisation. In practice, such unity may be said to exist when two companies have a common registered office, a common (or potentially confusing) name, common facilities, the same offices, the same staff, the same telephone numbers, etc.**

#### **4. Case law examples of the removal of the independence of a legal entity to the detriment of another legal entity belonging to the same group**

Based on all of the above, Greek courts have ruled that the independence of legal personality between two public limited companies is lifted in the following cases:

a) In case no. 1275/2022 MPrAth, according to the facts of which all the plaintiffs, employees of a subsidiary company of the group, had been hired by the legal representative of the parent company, when, following the termination of their contracts, the first company owed them accrued wages and severance pay, the court decided to waive its legal independence and establish joint and several liability of both companies, based on the criteria specifically mentioned below, namely: **"(a) the assignment to the plaintiffs of the claims of the second defendant parent company for the purpose of paying accrued remuneration plus allowances to employees of the first defendant subsidiary company, b) the payment of salaries (accrued remuneration and allowances) or part thereof in lieu of payment by the second defendant company to employees of the first defendant company (in this case, the plaintiffs), in the absence of cash reserves of the said subsidiary (first defendant), c) the invoicing by the first defendant, the subsidiary company, of health services that it provided directly to the second defendant, the parent company, which collected the corresponding amounts each time in order, among other things, to settle**



*Nea Efkarpia, Thessaloniki, on ....., following the instructions of the brothers ....., who alone decided on their fate and reaped the profits from their activities. Consequently, there is a legitimate reason for revoking the legal personality of the first defendant and the other companies mentioned, resulting in the affirmation of the joint and several liability of the first defendant company and the other companies for the payment of the claims sought by the plaintiff for the services provided by him. Therefore, the plaintiff has the right to pursue his claims against any of the companies jointly and severally liable to him, including the first defendant, the parent company of the group, and the second defendant is in any case liable – regardless of the Court's ruling that he is the main shareholder and manager of all the companies in the group – on a personal basis, jointly and severally with the first defendant as its general partner.*

d) Similarly, in No. 873/2009 AP, it was ruled that foreign companies (parent company and subsidiary limited liability company) systematically performed employer functions vis-à-vis employees of a domestic subsidiary limited liability company, with the result that the former were liable to the employees of the latter. The facts that led the court to the above ruling in this case were as follows: "*...all subsidiaries are required to apply in all cases and in their entirety the binding guidelines ... Furthermore, the second appellant foreign parent company, against the establishment of the sixth respondent, set its capital at the minimum amount required by the law in force at the time, i.e. 6,000,000 drachmas (Article 4 of Law 3190/1955), which meant that its survival depended on funding from its parent companies. This indicates the complete control and dominant influence of the Greek subsidiary by the appellant parent companies, given that the former had no real*

*ability to decide for itself on its future and even its very existence. ... The plaintiffs - the first five respondents - provided their services normally without any problems until 31 May 2002, when for the first time they were not paid their accrued remuneration, specifically their salary for May 2002. In response to their complaints to the administrator of the sixth respondent and the legal representatives of the appellants, the latter assured them that this was a temporary cash flow problem due to a delay in payments from Germany. In view of these assurances, the plaintiffs continued their work as normal until 1 July 2002, when the manager of the sixth respondent, X1, together with the representative of the appellant companies, E1, announced that the latter had decided to terminate their employment contracts without paying them their statutory compensation [...]. The conduct of the foreign companies appealing against the first five respondents was in bad faith, given that although they themselves were in fact performing the functions of employers, from May 2002 onwards, they engineered the collapse of their Greek subsidiary...'*

#### **Conclusion**

From all of the above, it follows that, in principle, even if a company belongs to a group of companies and serves the financial interests of its main shareholders or those of another company, e.g. its parent company, it still retains its legal autonomy (financial, property, etc.) and is only liable for its own debts. **However, under certain conditions and if certain factual circumstances exist, it is not excluded that the Court may rule that its legal independence should be lifted and established, thus establishing its joint and several liability for the debts of another sister company in the same group.**

## THE "MOSAIC" OF THE DEBTOR'S OPTIONS: BANKRUPTCY, EXTRAJUDICIAL MECHANISM, RESTRUCTURING OR CODE OF CONDUCT?

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*New out-of-court mechanism, second chance, banking mediation, consolidation, code of conduct, bankruptcy, etc. We are not exaggerating when we claim that the landscape is extremely complex, not only for those directly involved (debtors) but also for the specialist advisors themselves (lawyers, accountants, etc.). In this article, we will try to provide some guidance so that each debtor (legal or natural person) can make more rational decisions, responding to indicative examples.*

New out-of-court mechanism, second chance, banking mediation, consolidation, code of conduct, bankruptcy, etc. **We are not exaggerating when we claim that the landscape is extremely complex, not only for those directly involved (debtors) but also for the specialist advisors themselves (lawyers, accountants, etc.).** Once again, however, the new bankruptcy law (euphemistically titled "debt settlement and second chance") has achieved its goal in terms of communication: press releases from the relevant ministry and various announcements about the possibility of writing off debts, surcharges and fines have attracted the interest of a large proportion of debtors. However, it is difficult for anyone to really know what the best arrangement is for them, which is understandable when faced with a multitude of alternatives. **In this article, we will try to provide some guidance so that each debtor (legal or natural person) can make more rational decisions, responding to indicative examples.** It should be noted in advance that, in addition to this article, the website of the Special Secretariat for Private Debt Management (<http://www.keyd.gov.gr>) provides particularly useful answers to dozens of questions that have been submitted during seminars held throughout Greece.

**1. I have debts to banks, suppliers, the State and the EFKA. I run a small sole proprietorship and have no real estate (or I have my residence, which is, however, encumbered with liens for amounts far greater than its commercial value). The most appropriate solution in this case is bankruptcy in combination with the "second chance" institution (discharge of the debtor from their debts) and possibly the "vulnerable debtor" (transfer of residence to the acquiring entity and re-rental).** With the issuance of the bankruptcy decision and the

After three years (or one year, depending on the assets owned by the bankrupt person), the debts are "written off" and the debtor can start afresh, even launching a new business venture (which they can start immediately after the bankruptcy decision is issued). Furthermore, the equipment of the sole proprietorship will be essentially unseizable (the bankruptcy estate includes all property belonging to the debtor at the time of the declaration of bankruptcy, wherever it is located; but the bankruptcy estate does not include unseizable assets, which include items necessary for the work of those who earn income from a sole proprietorship). However, the debtor's residence will be liquidated for the benefit of his creditors, unless he is deemed a 'vulnerable debtor' and chooses to transfer the residence to the acquiring entity and lease it from the latter. **Please also note the following: in the event of debt write-offs from insurance contributions for self-employed persons, the insurance period and insurance rights of self-employed insured persons are cancelled.**

**2. I have a large amount of real estate, the value of which exceeds my total debts. However, I do not have the liquidity to pay off my debts to the State, Banks and EFKA when they become due.**

**In the above example, the best solution would be to join the out-of-court mechanism of the New Bankruptcy Law.** This is because the value of the property will be assessed on the basis of ENFIA (Single Property Tax) and the debtor's income situation, so that their debts can be adjusted accordingly, with the possibility of repayment in up to 240 instalments for debts to the State and Social Security Funds and 420 instalments for financial institutions (in particular, debts to banks and loan managers can be settled if they are mortgage loans).

loans in up to 420 instalments, while for business loans in up to 180 instalments, based on the guidelines of the EGDIC). However, please note: as the Special Secretariat for Private Debt Management characteristically responds, *"...in the Extrajudicial Debt Settlement Mechanism process, there is no obligation on credit institutions or loan managers (representing the funds) to settle the debts of debtors."* Furthermore, for a settlement to be accepted, the debtor must be deemed to have the necessary income to comply with a payment plan; if their income is zero (or minimal), no settlement will be accepted (through the out-of-court mechanism platform), but the process of compulsory liquidation of their assets will be preferred.

**3. I have no assets and no business activity. I am an employee. However, I owe large amounts to insurance funds and the State from my previous business activity.**

**Filing for bankruptcy is the most appropriate solution.** This is because, three years after being entered in the solvency register, the debtor will be released from their debts and will be able to acquire assets in their name again. However, according to paragraph 2 of Article 7 of Joint Ministerial Decision No. 44510 EX 2021, in the event of the write-off of debts from insurance contributions for self-employment due to the debtor's discharge following a declaration of bankruptcy, the insurance period and insurance rights are cancelled.

**4. I am a shareholder and CEO of a company that has high debts to the State and credit institutions. The value of the fixed assets is, in relation to the amount of the debts, quite small. The business is labour-intensive and the expertise I have acquired is ultimately what has the greatest value. I have no personal assets.**

In this case, bankruptcy could be considered, with the representative being released from the debts that weigh on him personally due to his representation of the company (based on Article 195 of the Bankruptcy Law). Similarly, if there are debts due to guarantees (e.g. for loans to credit institutions), which are not written off due to the bankruptcy of the principal debtor company, the possibility of filing an individual application could be discussed.

bankruptcy while the company remains inactive (and its assets are sold off through compulsory enforcement by its creditors). In this case, the managing director is "cleared" of all debts existing at the time of filing for bankruptcy and may then start a new business activity. His shares or company shares (if it is a limited liability company or a private company) in the old company will also be sold by his creditors. In this way, he manages to make a new business start without the burdens of the past. It is, of course, also possible to try to reach a restructuring agreement with the lenders of the public limited company in order to avoid bankruptcy. **However, the latter option will only be possible if the lenders agree to write off debts of such an amount as to make the business viable (see question 7 below).**

**5. I am the legal representative of a public limited company that has debts to only one credit institution.**

In this case, the out-of-court mechanism cannot work (debts to only one credit institution). **Therefore, the only solution is to apply the Code of Conduct, as amended a few months ago (Decision No. 392/1/31.5.2021), with specific restrictions, however, for companies with a turnover of more than €1,000,000.** Ultimately, the problem of over-indebtedness will be resolved between the company and the bank through negotiations, which can sometimes be quite tough and depend on the bargaining power that each party has at the critical moment. The legal representative is not liable with his personal assets for debts to credit institutions, unless he has guaranteed them (which is usually the case in family businesses). **It is also possible to use the consolidation procedure, provided that the credit institution agrees (the code of conduct aims at agreement, while the consolidation procedure basically requires it; the choice of one of the two mechanisms also depends on the tax treatment of any debt write-off).**

**6. I have a sole proprietorship that only has debts to EFKA and the State.**

**In this case, the appropriate solution seems to be the out-of-court mechanism with**

Based on the bilateral  
settlement mechanism.

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**based on the bilateral settlement mechanism.** For debts to the Tax Administration and/or Social Security Institutions exceeding €10,000 per creditor, the debtor may apply to the out-of-court mechanism, which is forwarded to the creditor (the State and/or EFKA) in order to propose a settlement. This arrangement is based on a special algorithm (i.e. an automatic calculation tool) that assesses the debtor's financial situation (i.e. income and assets), while instalments can be up to 240. The basic debt of insurance contributions and withheld/imposed taxes (VAT, FMY, etc.) cannot be written off. Other taxes and insurance debts can be written off by up to 75%. Pre-increases are written off up to 85% and fines up to 95% (while separate fines up to 75%). The State and Social Security Institutions must each separately propose the conclusion of bilateral debt restructuring agreements, provided that the agreement makes the debtor viable or creditworthy, as the case may be, and the recovery by the State or the Social Security Institution is at least equal to the estimated recovery in the event of bankruptcy. Repayment is made in monthly instalments with interest at the 3-month Euribor rate + 5% margin. An application may be submitted for the settlement of debts already settled under previous laws. Debts that are already certified at the time of application (basic debts including surcharges, interest, fines) are settled. The debtor, provided they are not in arrears, must cite events that show a 20% deterioration in their financial situation.

**7. I am a major shareholder/partner/CEO of a company with high debts to banks, EFKA and the State. The value of the company's assets is significant but less than its debts.**

**The appropriate solution for the company is that of an out-of-court mechanism or consolidation.** The choice of the most appropriate institutional framework between the two will depend on the amount of the debts owed to the State/EFKA in relation to those owed to the banks (e.g. under the out-of-court mechanism, basic VAT, FMT, insurance contributions, whereas in the consolidation process this is possible; in the

, the presumed consent of the State/EFKA is provided on the condition that the debts are below 1.5 million, while in the consolidation process, this limit is increased to 15 million euros for the State and EFKA separately). **A prerequisite, of course, is the support of the bank or banks (in general, financial institutions) that hold the largest percentage of claims (60% of total claims, including 50% with special privilege for the consolidation process and 40% for the out-of-court mechanism).** However, it should be noted that any write-off of debts to the State and EFKA does not benefit jointly liable persons, such as the representative of a public limited company. In other words, a large part of the principal debt and penalties/interest owed to the State and EFKA may be written off with regard to the company, but the representative is also jointly and severally liable for these debts (see, for example, Article 50 of the Tax Procedure Code), the latter will continue to owe them with his personal property as collateral (unless the State/EFKA agrees otherwise – Article 60(3) of Law 4738/2020). This is also stated in the relevant POL of the AADE, but it is an issue that will be decided in court in the future.

**8. I am a representative of a public limited company that has high debts to the State and EFKA. There is no possibility of consolidation and the company is not viable.**

**In this case, the best alternative is to file for bankruptcy on behalf of the public limited company in combination with the discharge of the legal representative from debts to the State and EFKA (Article 195 of the new Bankruptcy Law).** Under this provision, the administrator is released from any liability for debts owed by the public limited company to the State and EFKA that arose 3-5 years prior to bankruptcy (the duration depends on the time when the company ceased its payments), unless an appeal is lodged by any person with a legal interest against the exemption. Otherwise, i.e. if the above option is not exercised, even if the public limited company has no assets, the State and EFKA will take action against its representative, who will be liable with his personal assets.

*With Law 4738/2020, restructuring has been reinstated as the basic institution for the settlement of corporate debts, mainly because of the great flexibility it offers in terms of debt settlement and write-off, provided that the majority of creditors required by law agree. However, certain limits are placed on the possibilities for settlement based on the principles of not worsening the position of creditors and the principle of equal treatment of creditors, which is examined here.*

## 1. Introduction

Law 4738/2020 (new bankruptcy code), like the previous bankruptcy code, sets as a condition for the ratification of the consolidation agreement on the one hand, compliance with the principle of non-aggravation of the position of non-consenting creditors and, on the other hand, compliance with the principle of equal treatment between these creditors. We have already referred to the first of these principles in a previous article, and it could be summarised in the following sentence: no creditor (of those who disagree with the restructuring agreement) may find themselves in a worse position under the agreement than they would have been in if the company had gone bankrupt and its assets had been liquidated.

**The second of these principles, which is the subject of this article, requires equal treatment of creditors (again, those who do not consent) who are in the same position. For example, can a company agree to repay the banks with interest and repay the State without interest? Can it agree that its suppliers will be fully satisfied, while part of its debts to the EFKA will be written off? Or that it will grant a mortgage lien in favour of only one credit institution and no other creditor? These and other related questions will be addressed in this article.**

## 2. Which creditors are in the "same position"?

According to paragraph 3 of Article 54 of Law 4738/2020:

*"The court shall ratify the consolidation agreement when, in addition to the conditions of paragraphs 1 or 2, as applicable, the following conditions are also cumulatively met: [...] (d) The restructuring agreement treats creditors in the same position on the basis of the principle of equal treatment."*

The concept of "equal treatment" is easy to

understand. **Indeed, if, for example, we had two creditors in exactly the same position (e.g. two unsecured suppliers equally important to the operation of the business, both with claims of the same amount against it), it is obvious that equal treatment would mean agreeing on exactly the same terms of repayment of the debt for both of them.**

What is difficult to interpret and ultimately differentiates the situation is determining when two creditors are in the same position – in which case they must be treated equally – and when they are in different positions – in which case their treatment may differ.

The law itself, however, explicitly mentions certain cases where deviation from equal treatment is permitted, stating that: *"Deviations from the principle of equal treatment between creditors are permitted for important business or social reasons, which are specifically set out in the court's decision, or if the affected creditor consents to the deviation. For example, favourable treatment may be given to claims by creditors of the debtor's business, the non-satisfaction of which would substantially damage its reputation or the continuation of the business, claims the repayment of which is necessary for the maintenance of the creditor and his family, as well as labour claims.*

The courts have repeatedly ruled on the compliance of the terms of consolidation agreements with the principle of equal treatment of creditors, thus defining which terms are compatible with consolidation and which are not.

## 3. Equal treatment of creditors through court case law

Knowledge of the correct application of the principle under consideration – as well as the principle of non-aggravation

P- is very important for the formulation of the terms of the consolidation agreement.

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position of creditors – is very important for the formulation of the terms of the consolidation agreement. Below is a case study on permissible deviations from this principle in the agreement, i.e. cases where it was deemed justified to treat a creditor differently:

**a) Secured and unsecured creditors** It is generally accepted that creditors who have a special privilege in enforcement (i.e. their claim is secured

secured by a mortgage, mortgage pre-notation or ) are in a different position from those who have a general privilege (e.g. the State or the EFKA), as well as from unsecured creditors (the so-called 'unsecured'). **Thus, , for example, Decision 5177/2017 of the Athens Court of Appeal ruled that the term providing for interest-bearing repayment of debts to banks and interest-free repayment of debts to the State and EFKA does not violate the principle of equal treatment because the banks "are effectively secured by mortgage liens on the applicant's hotel complex".**

Similarly, in decision no. 132/2020 of the Court of First Instance of Nafplio, it was ruled that the preferential satisfaction of credit institutions and employees over the claims of farmers is justified **because credit institutions have a special privilege (mortgage notes), while employees have a general higher-ranking privilege in relation to farmers.**

Along the same lines is Decision No. 11/ 2020 of the Court of First Instance of Rethymno, which ruled that a term of a consolidation agreement providing for the repayment of bank claims in 10 years and claims of the State and the EFKA in 15 years was valid, *"since there is no question of unequal treatment between the EFKA, which belongs to the category of generally privileged creditors, and the contracting financial institutions, which are secured creditors."*

The same conclusion was reached in Decision No. 233/2019 of the Athens Court of First Instance, which stated: *"The claim of [...] EFKA that the consolidation agreement to be ratified violates the [principle of equal treatment of creditors], because it (EFKA) will be repaid in part without interest and with a reduction in additional*

*fees, while the banks will be satisfied with interest, must be rejected as unlawful, because the principle of equal treatment applies to creditors who are in the same position, which is not the case here, given that the banks are specially privileged creditors of the applicant, since they hold collateral on the assets of both the latter and its shareholders, while the State and EFKA are generally privileged creditors of the applicant.*

**b) Serious social reasons (especially with regard to labour claims)**

**According to an explicit provision of the law, deviations from the principle of equal treatment of creditors are permitted if there is an important social reason, and the law itself cites the example of workers' claims.** Thus, decision no. 132/2020 of the Court of First Instance of Nafplio ruled that an agreement providing for a lump sum repayment of employees' claims and repayment of the Greek State's claims in 12 monthly instalments was justified because "there is a serious social reason for the lump sum repayment of the claims of the applicant's employees, as the financial viability of the employees and their families is directly at stake, while the partial payment of the claims to the main intervener will not cause it any corresponding damage, nor will it threaten its viability."

**c) Business reasons**

As mentioned above, business reasons may justify deviations from the principle of equal treatment of creditors. An indicative example is Decision No 20/2017 of the Court of First Instance of Corinth, which ruled that: *"[...] the principle of equal treatment is not violated in any way: the term of the agreement under which the claims of non-consenting suppliers with balances of less than €100,000 will be repaid in full is necessary for both business and social reasons, as the non-contracting creditors for whom no reduction is provided are suppliers of the applicant, and maintaining cooperation with them is necessary for the applicant to continue operating its business."*

**(d) Continuation of cooperation with 'critical suppliers'**

Very often, companies maintain partnerships with multiple suppliers, some of which are more important to the continued operation of the business than others. **It has been ruled in case law that the critical importance of maintaining a partnership with a key supplier justifies its preferential treatment over others.** Thus, according to Decision No. 185/2016 of the Athens Court of First Instance, the principle of equal treatment of creditors is not violated by the distinction between critical and non-critical supplier creditors, *taking into account that the latter are suppliers who do not supply products that are absolutely critical to the continuation of business activity, or that the applicant could easily find another supplier for the same products, or that the continuation of cooperation with them is not expected with them. In other words, different treatment of these creditors is justified on business grounds.*

**e) The provision of new financing by banks** Another reason that has been found to justify the more favourable treatment of credit institutions in relation

other creditors is the **possible continuation of financing of the company under consolidation, in which case the deviation from equal treatment is justified for important business reasons.**

**(f) The need for the creditor's participation in order to ratify the reorganisation agreement**

**The fact that the creditor's consent is necessary in order to obtain the required majority and ratify the reorganisation agreement has also been considered a reason justifying differential treatment in favour of a creditor.** In this regard, Decision No 289/2015 of the Court of First Instance of Athens ruled that: *'In particular, the more favourable treatment of creditor banks [...] is justified on serious business grounds. In particular, these are the main creditors of the applicant, without whose consent the final agreement would not have been reached.'*

A similar ruling is contained in Decision No. 2/2018 of the Court of First Instance of Syros, which, with regard to the term providing for preferential treatment in favour of

EFKA, ruled that: "This provision cannot be considered to constitute a violation of the principle of equal treatment of other generally privileged creditors and secured creditors, since EFKA, as stated above, is the applicant's largest creditor [...] and therefore without its participation it would not be possible to collect 60% of the claims and [...] the agreement could not be concluded."

**(g) The need to ensure the viability of the business**

**Finally, some decisions suffice to justify the less favourable treatment, in particular of the State and EFKA, on the grounds that such less favourable treatment is necessary to rescue the company.**

A good example is Decision 37/2018 of the Court of First Instance of Alexandroupolis, which says: *"Therefore, in the present case, where the repayment of the entire principal amount is provided for, with the capitalisation of interest-free surcharges to the EFKA and the ETEAEP, this Court considers that this does not violate the principle of equal treatment of creditors, due to the above-mentioned important business reason, namely the rescue of the applicant company's business."*

**4. In conclusion**

The principle of equal treatment, in conjunction with the principle of non-deterioration of the position of creditors, are the two basic principles that set the limits on the free formulation of the content of the consolidation agreement. On the basis of the above, the conclusion is that more favourable terms may be agreed in favour of banks that have collateral security, in favour of the company's main supplier, which is necessary for the continuation of its operations, in favour of its employees or in favour of its main creditor, whose consent is necessary for the agreement to be ratified. The correct application of the two principles above is of paramount importance for the final ratification of the agreement by the court.

## SOLIDARITY LIABILITY OF MANAGERS OF LEGAL ENTITIES FOR THE PAYMENT OF INSURANCE CONTRIBUTIONS

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*In our previous note, we addressed the issue of criminal treatment of managers of legal entities vis-à-vis the State and Social Security Organisations for non-payment of tax and insurance debts, respectively, debts incurred by the legal entity. In this note, we examine the parameters of the joint and several liability of the directors themselves for the payment of insurance contributions that are, in principle, the legal entity, i.e. the conditions under which these persons are required to cover, with their personal assets, the debts of the legal entity to the insurance institutions.*

### 1. Introduction:

In the field of insurance contributions, the person liable for payment is the employer, i.e. the natural or legal person on whose behalf the insured person works. **Thus, when the employer is a public limited company, the obligation to pay the relevant contributions lies with the company itself and not with its shareholders or the persons who manage it.**

A prerequisite for making a natural person who manages a capital company liable for the payment of the contributions incumbent upon it is the introduction of a special provision establishing what is known as "joint and several liability" on the part of that person, i.e. their obligation to pay the relevant contributions from their personal assets. In this context, the legislator expressly regulated, in Article 31 of Law 4321/2015, the liability of directors of legal entities for the payment of insurance contributions, additional fees, surcharges and other charges owed by these legal persons and legal entities to the social security institutions. This provision aimed to harmonise joint and several liability towards social security institutions with the joint liability of managers towards the tax authorities, which was first established by Law 2238/1994, the provisions of which were applied mutatis mutandis to insurance contributions owed to IKA-ETAM, initially at the time of dissolution or merger, and subsequently during the operation of legal entities.

In the case of both tax and insurance contributions, the reason for establishing the parallel liability of natural persons who manage capital companies lies

that their duties include ensuring that the company complies with its obligations to the tax authorities and insurance institutions, respectively. **Thus, their liability is based on the negligent performance of their duties, to the extent that the company ends up neglecting to fulfil its obligations. In this context, establishing the liability of the director of a legal entity is a mechanism for compelling the latter to comply with its obligations so that they do not burden the director, threatening his personal assets.** Ensuring the collection of contributions owed to the Funds is, according to case law, a matter of public interest (Council of State 1028/2013), while, in one view, it also contributes to the realisation of the institution of social security.

### 2. Conditions for establishing liability:

The provision of Article 31 of Law 4321/2015, as amended by Article 64 of Law 4646/2019, establishes the joint and several liability personal and joint and several liability of the legal representatives, chairpersons, administrators, managing directors, persons in charge of management and liquidators of legal persons and legal entities at the time of their dissolution or merger for the payment of insurance contributions, additional fees, surcharges and other charges owed by these legal persons and legal entities to the Social Security Institutions, regardless of when they were certified. **With the amendment of Article 64 of Law 4646/2019, the liability of the above-mentioned persons was linked, on the one hand, to the expiry of the deadline for the payment of insurance contributions**

**and, on the other hand, with the existence or absence of fault on their part.** In particular, the above persons are liable under the following conditions:

**A) the above-mentioned persons, listed exhaustively, had one of the above capacities either during the operation of the legal entity or at the time of its dissolution, liquidation or merger, or during the liquidation of the legal entity:** The above-mentioned capacities refer to persons who, according to the articles of association and the decisions of the General Meeting and the Board of Directors, have individual power to manage and represent the company, whether or not they are members of the Board of Directors. The responsible persons do not include deputies, even if these persons may have exercised management or been involved in the management of company affairs, nor do they include the vice-presidents of the company. In this context, it is not examined who actually exercises the management and administration of the company, in contrast to the provisions in force in the field of criminal liability of managers, whereby, if all the specified persons are absent, the members of the boards of directors of these companies are considered to be the perpetrators, provided that they actually perform one of the management duties on a temporary or permanent basis (Article 25 of Law 4075/2012). As a result, a person may be convicted of a criminal offence for non-payment of contributions owed by the company, but may not be jointly and severally liable under Article 31 of Law 4321/2015.

It has also been ruled that the provisions on joint and several liability are, by their nature, to be interpreted narrowly and, consequently, do not apply in the case of provisional administration, which has been appointed by court decision pursuant to Article 69 of the Civil Code (Council of State 1183-1187/2018 • Administrative Court of Appeal 1026/2021).

**B) the debts became due during their term of office in one of the above capacities: Based on this condition, liability is limited to the term of office of the persons jointly liable under the law, excluding debts whose payment deadlines expired before they took office.** Consequently, from the date of entry into force of the new provision,

i.e. from 12 December 2019, jointly and severally liable persons are personally and jointly liable with the legal entity they manage only for insurance contributions whose payment deadline expired during their term of office in that capacity. **In practice, therefore, the CEO of a public limited company with a term of office from 15 October 2020 to 16 September 2023 is liable only for debts with an insurance period from the 9th of 2020 to the 7th of 2023, because the payment deadline for the 9th of 2020 expired on 30 October 2020, i.e. during his term of office.2023, because the payment deadline for the 9th.2020 expired on 30.10.2020, i.e. during his term of office, as did the payment deadline for the 7th.2023, which expires on 31.8.2023.** He will not be liable for the 8th instalment of 2023, because the payment deadline expires after the end of his term of office, on 30 September 2023. Consequently, the responsibility of administrators now includes acts of certification of debts relating to insurance periods that begin within the month preceding the month in which their term of office begins and end within the month preceding the month in which their term of office ends (EFKA Circular 9/2020).

For debts that have been subject to a settlement, joint and several liability rests with the jointly liable persons, provided that they meet the relevant conditions at the time each instalment of the arrangement became due or the arrangement was lost. Furthermore, if the debts were identified after an audit, joint and several liability lies with the persons who met the relevant conditions during the year or period to which these debts relate.

**C) the debts in question were not paid or returned to the State through the fault of the above persons:** The persons alleged to be jointly liable on the basis of the above characteristics are required to prove that they are not at fault. As specified in EFKA Circular No. 9/2020: *"This claim is not examined within the framework of the administrative procedure, nor will related issues be resolved out of court. Instead, the claim of non-liability must be proven by the persons concerned in the context of exercising the legal remedy of appeal against the cash confirmation of debts or any enforcement measures."*

In this regard, by decision No. 65118/6.9.2021 of the Deputy Minister of Labour and Social Affairs,

Certain cases of lack of fault, which imply that joint and several liability does not apply, have been regulated in a manner similar to the regulation under item A.1082/7-4-2021 of the Deputy Minister of Finance, which lists cases of lack of fault in the context of joint and several liability for the payment of tax debts. These include the following:

- 1) Prolonged inability to perform management duties due to serious illness, as well as lack of legal capacity at the time in question.**
- 2) Exclusive assignment of specific management and representation duties that are not related to the insurance obligations of the legal entity, provided that the persons in question do not have the authority to exclusively represent and manage the legal entity, according to published documents.**
- 3) Existence of an irrevocable acquittal by a criminal court or an irrevocable acquittal decision or a final court decision expressly establishing the absence of fault.**
- 4) Resignation prior to the critical period or proven non-acceptance of the appointment.**
- 5) No actual involvement in the administration/management of the legal entity's affairs, even though the person holds one of the decisive positions: in this case, factors such as the lack of remuneration to that person are assessed as a whole and taken into account, the lack of a shareholding or corporate relationship with the legal entity or legal entity, the non-execution of banking transactions, the non-management of corporate bank accounts, the non-signing of Board of Directors' minutes or financial statements, in conjunction with evidence proving who actually manages the company's affairs.**

In this context, it has been ruled that the position of chairman alone is not sufficient if it is not accompanied by the power to manage and represent the company, but that these powers have been delegated to another person or persons (DPTes 4150/18). In the same context, in its decision No. 2396/2023, the Administrative Court of First Instance

The Thessaloniki Court ruled that the condition of fault did not apply, taking into account, among other things, the lack of a signature sample in the records of the banking institution with which the legal entity of the alleged co-debtor manager of a private capital company cooperated. In the critical considerations of the decision: *"Because, with these data, the Court takes into account, first of all, that [...] the manager of a private capital company is exempt from joint and several liability for the latter's insurance debts, provided that he was not actually involved in the management of its affairs, a fact that is proven by taking into account relevant data and parameters. Indicatively, the following are taken into account in this regard: the non-participation in the share capital of the (natural) person in question, the non-provision and non-payment of remuneration to that person, the limitation of their responsibilities or their exclusion from the most basic corporate responsibilities (administration and management), the non-signing of corporate documents under the company name, the lack of knowledge of the details of his signature by banks serving or transacting with the company or the lack of documents of decisions or acts on behalf of the company taken by him and bearing, as mentioned above, his signature, any testimony to this effect by persons related to the company's activities (employees, accountants, external associates, etc.) [...] In this case, as evidenced by the articles of association of the above I.K.E., [...] the appellant: a) did not hold a share in the company in question, b) was appointed as its manager for a period of less than three (3) months, c) the articles of association of the company in question did not provide for remuneration for the management duties assigned to him, in accordance with the provisions set out in the main consideration, and d) he did not have the power to manage and represent the above company for transactions exceeding the amount of 250 euros, as well as for all, ultimately, almost all essential corporate matters, for which the co-signature of the partner was also required [...] In other words, any assignment (only) to him of management and representation powers was formal and a verbal trick, since the rest of the text of the articles of association essentially revoked the initial assignment to him of corporate management and representation powers based on the same text.*

included an explicit condition of co-signature by the above-mentioned principal (almost exclusive, as stated above) partner [...] in essence for any matter serving the corporate purpose, i.e. not only for transactions exceeding 250 euros but for anything in practice. From the above information, in conjunction with the documents submitted by the appellant (private agreements, electronic correspondence), in which the above partner appears and is said to act as a representative of the company in question, it can be inferred that the latter was in fact managed by the aforementioned partner and not by the appellant, who was formally appointed as its manager.

### 3. Cessation of joint and several liability:

Upon termination of the person's management of the legal entity, their joint and several liability for debts arising from contributions due, which arose after the termination, also ceases. **As ruled by the Plenary Session of the Council of State in decision no. 674/2021, upon the resignation of the jointly liable person, the assumption of the duties of the new management is not a prerequisite for the termination of his joint and several liability.** According to the critical considerations of the decision: *"It follows that the above persons remain liable for the company's debts incurred prior to the time of their resignation, but are not liable for debts incurred after the time of their legally proven resignation (cf. Council of State 3936/1999 7m). This is regardless, in principle, of whether a new management has taken over the company, since such a condition is not provided for in the above exceptional provisions*

*of Law 2238/1994, and the opposite interpretation would imply, in accordance with the above reasoning, a violation of the principles of legal certainty and proportionality, indefinitely and for an unpredictable period of time, an extension of the liability of those persons for the company's debts arising from actions over which they had no influence. Otherwise, the person remains liable for debts incurred prior to the above termination.*

### 4. Conclusion:

**The establishment of the liability of directors for the payment of insurance contributions, in parallel with the liability of the legal entity, is undoubtedly a "thorn" in the side of natural persons who have undertaken its management and representation.** It should be noted in this regard that the provision of § 2 of Article 31 of Law 4321/2015, which established the same liability for shareholders or partners of capital companies with a participation of at least 10%, at the time of dissolution of a legal entity, as well as for the payment of relevant debts incurred during the period of their status as shareholders or partners, was strongly criticised and repealed as soon as it came into force. **Already today, the correlation of liability with the expiry of the deadline for the payment of insurance contributions and with the existence or absence of fault, which was introduced by the amendments to Law 4646/2019, has resulted in a clearer definition of the conditions for joint and several liability, creating a more favourable regime for the persons involved.**

## ABUSIVE SUBMISSION OF AN APPLICATION FOR DECLARATION OF BANKRUPTCY BY A CREDITOR

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*Economic conditions may force a debtor to file an application with the Bankruptcy Court for a declaration of bankruptcy, especially if he is generally and permanently unable to meet his due obligations. However, the right to file for bankruptcy is also granted by law to the debtor's creditors. But how can the debtor defend himself in this case if he does not agree with the declaration of bankruptcy? The abusive filing of the petition by the creditor is a reason for rejecting the petition and a means of defence for the debtor. In this article, we will examine cases that meet the criteria for abuse, citing relevant case law examples.*

### 1. Introduction

The conditions and procedure for declaring a debtor bankrupt are regulated in detail in Law 4738/2020. According to its provisions, a debtor who is in default of payment, i.e. who is unable to meet their financial obligations in a general and permanent manner, is declared bankrupt. An application for the declaration of bankruptcy of a debtor may be submitted to the competent court, in addition to the debtor himself, by one or more of his creditors with a legal interest. In principle, a creditor who has a mature and legally enforceable claim against the debtor for a monetary or monetary equivalent benefit has a legal interest in filing the application, provided that he is to become an insolvency creditor.

### 2. Abuse of creditor's application

In addition to the general subjective and objective conditions that must be met in order for a debtor's bankruptcy petition to be accepted, as set out in Articles 76 and 77 of the above-mentioned law, the law imposes an additional condition for the acceptance of the application. More specifically, according to Article 80(2) of the above law, ***"The bankruptcy court shall reject the application if it is proven that it is being exercised abusively. An application is abusive in particular if the creditor uses it as a substitute for individual satisfaction proceedings or to pursue purposes unrelated to bankruptcy, as an institution of collective enforcement"***

***, and if the debtor submits it for the purpose of fraudulently avoiding payment of his debts."***

The law lists two indicative cases in which a bankruptcy petition filed by a creditor is considered abusive. These are applications for a declaration of bankruptcy which do not seek to achieve the purpose of bankruptcy as an institution of collective enforcement for the proportional satisfaction of creditors, but pursue purposes unrelated to it, and the court has broad discretion to assess the circumstances (PPRath 65/2014). It should be noted that the list in the law is not exhaustive ("in particular") and there is scope to consider that the application is being exercised abusively in other cases as well, provided that these cases meet the criteria for abuse. If the Bankruptcy Court finds that the application is being exercised abusively by the creditor, it will reject the application.

### 3. Case law

#### a) As a substitute for individual satisfaction proceedings:

The first case of abusive filing of a bankruptcy petition referred to in the above article is that in which the creditor uses it as a substitute for individual satisfaction proceedings. **In other words, by filing for bankruptcy, the creditor attempts to exert excessive pressure on the debtor in order to force him to pay the applicant's claim.** However, as is well known, the declaration of bankruptcy does not constitute for the

lenders, who must first take enforcement measures and, if these prove fruitless, resort to bankruptcy. In other words, a creditor's failure to bring individual proceedings against the debtor does not in itself constitute an abuse of the application, but this is examined on a case-by-case basis, taking into account additional information.

Factors indicating that the creditor's bankruptcy petition has been filed as a substitute for individual satisfaction have been found to include: **the absence of other claims against third parties, the fact that the applicant creditor's claim has been satisfied for the most part, that the creditor, following the issuance of an enforceable title, has initiated enforcement proceedings to satisfy his claim without this having yet been unsuccessful, and that the debtor has not yet been declared bankrupt.**-subsequently submits an unjustified bankruptcy petition, that the creditor's claim is not due but seeks, through the debtor's bankruptcy, to disclose the latter's assets in order to then initiate enforcement proceedings.

Here are some examples from case law:

- In decision no. 388/2015 of the Piraeus Court of Appeal, the filing of the bankruptcy petition was deemed abusive, prior to the issuance of a negative decision on the creditor's claim, which was disputed by the debtor: "**{...} on the contrary, it was proven that the bankruptcy petition was filed abusively, within the meaning of Article 6(1) and (3) of Law 3588/2007, since the applicant proceeded with the filing of the petition before the issuance of aon its claim, which would have made it certain and settled in view of the fact that the defendant disputes the amount thereof and, in particular, whether it includes the agreed discount on unpaid invoices.**"
- Similarly, in decision no. 571/2014 of the Court of Appeal of Larissa, the Court ruled in favour of the

the admissibility of the application, because it was submitted for the sole purpose of collecting the applicant's individual claim, and indeed before obtaining an enforceable title: "*In particular, from the testimony given in court by F. A., a member of the management of the applicant public limited company, it is further proven that the applicant submitted the application for the sole purpose of satisfying the claim which, according to her own allegations, she holds against the debtor on the basis of the project contract. The latter stated in the hearing that the application under consideration was submitted to secure the payment of the claims for which the action has been brought before the Single-Member Court of First Instance and to collect at least part of the claim in question, before the final decision on the lawsuit is issued. In other words, the application was submitted abusively, with the knowledge of the applicant public limited company, as a substitute for individual enforcement proceedings, and even before an enforceable title had been obtained.*"

- On the contrary, in decision no. 12/2014 of the Larissa Court of Appeal, it was ruled that the failure of the applicants to bring an individual action is not in itself sufficient to characterise the bankruptcy petition as abusive: "*This argument, with which the respondent attempts to substantiate an objection based on Article 6(3) of Law 3588/2007 (PtK), is unlawful and inadmissible, because the mere invocation of the failure of the applicants to bring individual legal proceedings, without additional factual circumstances demonstrating the substitution of this procedure with the institution of collective enforcement, with the aim of exerting pressure on the defendant, as mentioned above, is not sufficient to characterise the exercise of the applicants' right as abusive.*"
- The Piraeus Court of Appeal, in its decision No. 74/2011, cites evidence suggesting that the petition was filed as a substitute for individual satisfaction proceedings: "On the contrary, it was proven that the bankruptcy petition was filed abusively {...}. **The absence of other due and payable debts to third parties, the satisfaction of the largest part**

*the amount initially amounting to a significant sum, the dispute over its amount that arose at a later date, the knowledge that this debt is primarily borne by the shipowner and secondarily by the co-debtor manager of the ship, the filing of a counterclaim for the disputed claim against both the shipowner and the manager, while the bankruptcy petition against the latter was pending, but also the applicant's own statement-as a party without oath before the court of first instance that he did not know whether his opponent also owed money to third parties and that he had filed the petition as a means of pressuring her to pay the amount owed, are elements that clearly indicate that the application was filed as a substitute for individual satisfaction proceedings.*

- Finally, the applicant's refusal to accept the debtor's proposal for partial repayment of the debt in instalments does not render the subsequent bankruptcy petition abusive, according to decision no. 589/2013 of the Larissa Court of Appeal: *"Furthermore, from the same evidence above, it was not proven that the applicant filed the bankruptcy petition abusively and that he used it as a substitute for individual satisfaction proceedings or to pursue purposes unrelated to bankruptcy, given that, due to the existence of the aforementioned overdue debts of the respondent and the non-satisfaction of his (the applicant's) own overdue debt, {...} and his (the applicant's) refusal to accept the respondent's proposal for the gradual repayment of part of the debt (€120,000) in twelve equal quarterly instalments of €10,000 each over a total period of four (4) years, i.e. until November 2015, does not render the application abusive.*

#### **b) Pursuit of objectives unrelated to bankruptcy as an institution of collective enforcement:**

The second case of abuse referred to in the law concerns the pursuit, on the part of the creditor, of purposes unrelated to bankruptcy as an institution of collective enforcement.

pursuing objectives unrelated to bankruptcy as an institution of collective enforcement. **This case includes applications aimed at discrediting the debtor, forcibly removing him from the management of his property, to divert the debtor's clientele, to exclude the debtor from participating in public tenders and from accessing professions that require the debtor not to file for bankruptcy.** Any competitive business activity that the creditor may maintain may be an indicator of the abusive nature of the application submitted.

#### **c) Other cases of abuse:**

As mentioned above, the law sets out two indicative cases of abuse. However, it is at the discretion of the Court, after assessing the facts of each case, to rule in other cases that the application is abusive and contrary to good faith and fair practice.

A typical example of this is the ruling No. 990/2021 of the Athens Court of First Instance, which rejected as abusive an application for a company to be placed under special administration (which can be applied analogously to a bankruptcy petition due to the similarity of the two cases). **More specifically, it was ruled that the debtor company had made repeated attempts to restructure its debts with a banking institution, while the applicant Bank did not fulfil its obligation in good faith to exhaust all possibilities for settlement, rendering its subsequent application abusive.**

#### **4. Compensation for abusive creditor application**

Furthermore, Article 80(3) provides that if the application is found to be abusive, the

Bankruptcy Court may, upon a separate application by the debtor, award compensation against the person who submitted the application, provided that damage resulting from the abusive submission of the application is proven. However, this provision does not restrict the debtor who has suffered damage as a result of the creditor's abusive application from claiming compensation for the damage suffered or even satisfaction for moral damage, on the basis of the general provisions of Articles 57, 59 and 914 of the Civil Code. In such cases, however, the courts shall have jurisdiction in accordance with the general provisions.

Related to the above, the assumptions of decision no. 74/2011 of the Piraeus Court of Appeal: *"Furthermore, in view of the fact that the bankruptcy petition was filed abusively, because it was proven that the petitioner-defendant was aware of the lack of conditions for its declaration, his legal action caused damage to the applicant's reputation, which manifested itself in the form of mistrust in its financial standing and a decline in its reputation in the commercial and trading circles of the shipping market in which it operates. The adverse effects of the bankruptcy petition were also evident in its relations with the banks with which it cooperated ..., which were clearly negatively affected and did not approve the granting of credit and financing in general, since the information in the bankruptcy petition, which is a more drastic measure than the issuance of a payment order, undermined the company's prestige and professional*

*. In view of the above, the award of damages against the applicant-defendant is justified, to be set at €5,000, after weighing up all the circumstances, in particular the nature of the offence, the type and size of the business, the smooth running of its operations and, in general, its normal functioning.*

#### **5. In conclusion**

The existence of a creditor's claim against the debtor, even if it has been definitively established, is not sufficient for the acceptance of any application submitted for the declaration of the debtor's bankruptcy. The creditor must first prove the debtor's permanent and general inability to meet his due obligations. Secondly, even if the above condition is met, the court may rule that the application is abusive and does not fall within the general framework of collective enforcement for the proportional satisfaction of creditors. **It should be noted, however, that the debtor bears the burden of proving the facts that render the application abusive, since a general invocation is not sufficient to have the application against him dismissed.**

## RESIGNATION OF A COMPANY DIRECTOR AND ISSUES OF RELIEF FROM LIABILITY FOR DEBTS OWED TO THE STATE

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*In our previous note, we examined the parameters of joint and several liability of the managers of legal entities for the payment of insurance contributions that are, in principle, borne by the legal entity, analysing the conditions that must be cumulatively met in order for the natural person to be held liable. In this note, we will continue our analysis by presenting the exact steps that the administrator of a legal entity should follow in order to be released from joint and several liability arising from this capacity, for the debts of the legal entity to the tax authorities.*

### 1. Introduction

Article 50 of Law 4174/2013, i.e. the Tax Procedure Code (K.F.D.), as amended by Article 34 of Law 4646/2019, establishes the joint and several liability of natural persons who manage legal persons and legal entities for the latter's tax debts to the State. **This liability is personal and joint with the legal entity, i.e. the managers are liable with their personal assets and, at the same time, are obliged to pay the entire amount owed to the State, thereby creating pressure on managers to diligently fulfil their obligations in the context of the administration and management of the company.**

The subjective scope of the provision covers persons who are executive chairmen, directors, general managers, administrators, managing directors, authorised representatives in the management and liquidators of legal persons and legal entities (ex officio liability), as well as persons who actually manage or administer a legal person or legal entity. **Furthermore, the objective scope of the provision covers debts relating to the payment of income tax, withholding tax, any additional tax, VAT and ENFIA (single property tax) owed by these legal entities, regardless of when they were assessed, as well as interest, fines, surcharges and any administrative financial penalties imposed on them.**

However, in order to establish the joint and several liability of the above persons,

the following conditions must be cumulatively met:

- a) **The managing persons must have had one of the above capacities, either during the operation of the legal entity, or at the time of its dissolution, liquidation or merger, or during its liquidation.**
- b) **The debts or instalments for the repayment of debts in instalments became due during their term of office, under any of the above capacities, subject to the following paragraphs.** If the debts are established after an audit, only persons who met the conditions of points a) and c) during the tax year or period to which these debts relate shall be considered jointly and severally liable within the meaning of this paragraph. In the event that the tax debts referred to in this paragraph have been subject to a settlement, joint and several liability shall also be borne by persons who met the conditions of paragraphs (a) and (c) at the time each instalment of the arrangement became due or the arrangement was forfeited. For the amounts of interest, surcharges, fines and other financial penalties, joint and several liability shall be borne by the persons who are jointly and severally liable for the principal debt on which these amounts are calculated and imposed.
- c) **The debts in question have not been paid or returned to the State through the fault of the above persons** {for a more detailed report on the issues arising from the conditions for the creation of joint and several liability, please refer to our previous note}.

**But what happens in the case where the**

**company director wishes to resign from his position in the legal entity and how, ultimately, will this affect his liability to the tax authorities?**

**2. Cessation of joint and several liability of the company director due to resignation:**

As we have already explained, the joint and several liability of the company director arises upon acquisition of that status and is maintained as long as he continues, at the relevant time, to manage and legally represent the legal entity. **Consequently, given the interdependent relationship between the position of director and the joint and several liability that follows, if the director resigns from his duties or is legally removed from them in any way, his liability for debts incurred after the time of his removal from office is lifted.**

However, it should be examined whether, in this specific case, the joint and several liability is lifted from the moment of his lawful resignation or whether the commercial publicity formalities required for the respective corporate form must first be complied with. More specifically, the act of resignation of the person managing the legal entity must be published on the GEMI website, in accordance with the provisions of Articles 12(1)(c) and 13 of Law 4548/2018 for public limited companies and Article 63 of Law 4072/2012 for private limited companies. Of course, it is worth noting that the publication of the resignation is of a confirmatory nature and not constitutive, so this change in the company's management has legal effect from the time the decision was taken and not from the date of its publication. Consequently, if the publicity formalities are not complied with and the resignation is not published, it remains fully valid, but as a result, this change cannot be opposed to third parties, unless it is proven that they were aware of it. A crucial issue in this case is whether the State falls within the category of 'third party'

and, consequently, whether the termination of the joint and several liability of the person managing the legal entity takes effect from the time of submission of his valid resignation or from the compliance with the publicity formalities for the change in question.

Case law has accepted that, if the publicity requirements for termination due to resignation are not complied with, the managers of legal entities cannot invoke their resignation from the management position against the State, unless they prove that the Greek State was aware of the change in management. However, in recent years, a section of case law has favoured the opposite interpretation, ruling that if the legal representative and administrator of the legal entity has validly resigned, he is not liable for taxes incurred after his resignation, even if his resignation has not been given the required publicity, as the State cannot be considered a "third party" when it exercises sovereign administration by imposing taxes and collection measures. Given the importance of the issue and due to the conflicting court decisions, the matter was referred to the Plenary Session of the Council of State, in the context of decision no. 1296/2019 of the same court.

The above issue was therefore ruled on by the Plenary Session of the Council of State in Decision No. 1366/2021, which states the following: "[...] *the details of public limited companies for which the law imposes publicity requirements are entered in the tax register as they appear in the corresponding entries and publications in the commercial register (the Register of Public Limited Companies, at the relevant time, and now the GEMI), and such details also include those relating to the identity of their legal representatives. Thus, for the deletion from the tax register of a public limited company (or other legal entity whose details are recorded in this register) of a person who has lost the status of chairman of the board of directors or managing director (and, in general, the position of legal representative of the legal entity) as a result of resignation, dismissal or retirement, the above requirements must be met.*

*legal formalities of commercial publicity (entry in the register of public limited companies and publication in the Government Gazette, subsequently GEMI) must have been complied with. This is because, although it has been consistently ruled that these formalities are of a confirmatory and declaratory nature and not of a constitutive nature, with the result that failure to comply with these formalities does not in itself affect on the validity of the resignation, which, if proven in a lawful manner, is valid regardless of its publication, However, as expressly provided for in paragraph 13 of Article 7b of Law 2190/1920, the company cannot, in principle, oppose the change to third parties, unless it invokes and proves that they were aware of it. [...] These third parties include the State, given that it meets all of the above characteristics, and its legal relations with the company include those arising from tax legislation, including, inter alia, the provisions on the tax register set out in the previous paragraph (as well as the provisions establishing the joint and several liability of directors for the payment of company debts).*

As is evident, with the above extremely important decision, it was accepted that, in order to terminate the joint and several liability of the legal representative due to resignation, the publicity formalities must be complied with, i.e. the act of resignation must be published in the General Commercial Registry (G.E.M.I.) or an act of formation of a new Board of Directors must be published, from which the termination of the duties of the former manager of the legal entity will result. However, in practice, compliance with these obligations may prove to be an obstacle, as the company's Board of Directors may not proceed with the reconstitution, or may fail to publish the act of resignation, with the result that the natural person risks being liable for the company's tax debts incurred after his removal from the management and representation of the public limited company.

**In this case, the resigning director must prove that he has exercised "due diligence" to cause the publications required by law** (or at least that he was unaware of the

non-publication of the resignation. On this matter, it was ruled in No. 1366/2021 of the Plenary Session of the Council of State that: *"Therefore, the law does not preclude the initiation of the publication procedure by any interested party, and in particular by the directors of the company of natural persons, who, moreover, precisely because of their capacity, are familiar with and able to comply with the relevant legal requirements. [...] the latter persons are also required to exercise due diligence and to proceed themselves with the notification of their resignation to the competent authority, as referred to in Article 7b(14) of Law 2190/1920, at the same time providing evidence that they have validly and seriously resigned, in order to be released, for the future, from their joint and several liability towards creditors (and the State). [...] In addition to their resignation, they must prove that they have exercised due diligence to effect the publications required by law (or at least that they were unaware of the non-publication of their resignation through no fault of their own). Only if they have exercised such diligence is the tax authority obliged to investigate the substance of the matter, within the framework of its auditing powers, in order to determine whether the applicant's resignation is indeed valid.*

A similar conclusion is reached in Decision No. 1504/2022 of the Council of State (Second Chamber, Five-Member Panel), which states the following: *"Because what the applicant invoked and presented, as evidenced by the information in the file and referred to above, and in the contested act itself, apart from being sufficient to prove the existence and validity of his resignation on 2 February 2002, of his resignation, also proved, in principle, that he had exercised due diligence in order to effect the publications of said resignation required by law. Consequently, the tax authority was obliged to investigate the substance of the matter, within the framework of its auditing powers, in order to determine whether the applicant's resignation was indeed valid and, if so, to 'remove' him from the tax register from the date of his resignation, under the*

*meaning of registration in that of the finding made."*

**In conclusion, in order to be released from liability, the natural person responsible must first submit to the board of directors of the legal entity their lawful resignation from their position as Chairman, Managing Director, Director of the Board of Directors or any other position held in the management of the legal entity and which gives rise to said liability, and then ensure that the formalities for the publication of his resignation are complied with.**

In particular, if the Board of Directors of the legal entity, either due to refusal or negligence, fails to take the necessary actions, the resigning natural person (or their authorised representative) **must contact the competent department of the General Commercial Registry (G.E.M.I.) and voluntarily initiate the procedure for publishing their resignation.** More specifically, they must go to the GEMI service and submit their resignation statement, as well as the report on its delivery to the other members of the legal entity's Board of Directors, requesting that their resignation be published on the GEMI website. It should be noted that the resigning member may notify the remaining members of the Board of Directors of his resignation from his position in the legal entity even by e-mail, which must show that the members of the company's Board of Directors have been informed of his resignation. In practice, the competent department of the GEMI takes it for granted that the above-mentioned persons have been duly informed, provided that the message containing the resignation has been sent to the corporate email addresses of the members of the company's Board of Directors. In this case, the resigning member must also take the other actions mentioned above, i.e. submit a relevant application to GEMI requesting the publication of his resignation, providing the email message with which he notified the Board of Directors of the legal entity of his declaration. In addition, it is recommended, as a precautionary measure, that the resignation statement be submitted to the competent Tax Office and E.F.K.A.

so that the State and the Social Security Institution are aware of this change and, consequently, of the termination of the joint and several liability of the former legal representative.

**3. The assumption of duties by the new Board of Directors as a prerequisite for the termination of joint and several liability:**

**During the implementation of the law on joint and several liability, serious concerns arose as to whether an additional condition was required, the appointment of a new management in order to terminate the liability of the company's director who has resigned from his duties.** Previous case law accepted that only the formation of a new board of directors of the legal entity would terminate the liability of the resigning legal representative, as this avoids the risk of the latter evading his liability to the State at critical moments for the legal entity. **Furthermore, this ensures that there is always at least one natural person jointly liable with the legal entity for its tax debts.**

However, in Decision No. 1213/2019 of the Seven-Member Composition of the Council of State, it was ruled that the termination of the joint and several liability of the legal representative occurs regardless of the time at which the new management assumes its duties, thus adopting an interpretation more consistent with the letter of the law. In particular, the appointment of a new administration is not defined as a prerequisite for the termination of joint and several liability in an explicit formal provision of law, so that such an extension is contrary to the principles of proportionality and legal certainty. **Otherwise, the natural person who has legally resigned risks being liable for tax debts arising from management actions in which they did not participate, and for an indefinite period of time, as the time that will elapse between their resignation and the formation of the new Board of Directors cannot be predicted.**

The above issue was referred to the Plenary Session of the Council of State, which, in its decision No.

In its decision 674/2021, it ruled that the assumption of duties by the new management is not a prerequisite for the termination of the joint and several liability of the natural person, as evidenced by the following passage: *"It follows that the above persons continue to be liable for the company's debts incurred prior to the date of their resignation, but are not liable for debts incurred after the date of their legally proven resignation (cf. Council of State 3936/1999 7m).*

***This applies regardless of whether a new management has taken over the company, since such a condition is not provided for in the above exceptional provisions of Law 2238/1994, the opposite interpretation would imply, in accordance with the above reasoning, a violation of the principles of legal certainty and proportionality, indefinitely and for an unpredictable period of time, an extension of the liability of those persons for the company's debts arising from actions over which they had no influence.***

#### 4. Instead of a conclusion

In conclusion, the termination of the joint and several liability of the person managing the legal entity occurs as a

**legal consequence of his valid resignation from the representation and legal management of the legal entity, provided that the publicity formalities are complied with, i.e. from the time of publication of his resignation in the General Commercial Registry (G.E.M.I.).** Therefore, if the resigning administrator has published his resignation, or, if he has done everything in his power to cause the publication of his resignation in accordance with the applicable provisions on commercial publicity, then he is deemed to have fulfilled his obligation to exercise "due diligence" in this regard and bears no responsibility for the tax liabilities of the legal entity arising after his resignation, regardless of the timing of the appointment of the new management of the legal entity. **It should be noted, however, that his joint and several liability with the legal entity for those tax debts that became due during his term of office remains unchanged, provided that he is responsible for their non-payment.**

## THE DEFENCE OF THE DEBTOR IN THE BANKRUPTCY PETITION BY REFUSING TO ENTER INTO A STATE OF SUSPENSION OF PAYMENTS

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*In a previous article, we analysed how a debtor who does not wish to be declared bankrupt can defend themselves against a relevant application submitted by one of their creditors, citing as grounds for rejection the abusive filing of the petition. This article will examine another reason for rejecting the creditor's bankruptcy petition, which consists of the debtor's refusal to comply with the substantive conditions set by law for his inclusion in the bankruptcy proceedings and, in particular, its entry into a state of cessation of payments.*

### 1. Introduction

The substantive conditions that must be met in order for a debtor, natural or legal person, bankrupt are set out in Articles 76 and 77 of the new Bankruptcy Law (Law 4738/2020, as amended and in force). If even one of these conditions is not met, the creditor's bankruptcy petition is dismissed as unfounded.

Specifically, Article 76 sets out the subjective conditions for entering into bankruptcy proceedings, specifying the persons who are eligible for bankruptcy, and Article 77 sets out, respectively, the objective conditions for inclusion, which relate to the financial situation of the person who may be declared bankrupt, as a factor that justifies, moreover, their submission to bankruptcy proceedings. One of these objective conditions, which will be analysed below, is **the debtor's state of insolvency**.

### 2. The concept of 'suspension of payments'

According to Article 77(1) of Law 4738/2020, a debtor who is in default of payment, **i.e. one who is unable to pay their due financial obligations in a general and permanent manner**.

This inability shall be **general**, in cases where the non-fulfilment of obligations covers – at least as a rule – all of the debtor's obligations, so that it constitutes an inability to pay 'to the public'. However, this generality is not negated by any exceptional payments made by the latter.

the latter makes. Thus, as clarified in paragraph 2 of the same article, the selective fulfilment of due financial obligations does not remove the suspension of payments, which may also consist in the inability to fulfil **even one significant due financial obligation**. **However, in this case, however, is whether the latter is qualitatively significant for the operation of the business** (e.g. debt to a key supplier resulting in the interruption of supplies, to a key financier resulting in the interruption of liquidity, etc.).

Furthermore, the inability to pay will be considered **permanent** when it does not result from a temporary and reversible situation but, on the contrary, is expected to have a negative impact on future debts. Of course, if there are **reasonable expectations of recovery** (such as, for example, approval of a subsidy, conclusion of an agreement with a major investor, new partnerships, etc.), the suspension of payments is lifted.

Furthermore, according to this provision, payments made fraudulently (such as However, refusal to pay due to objections that the debtor considers to be well-founded does not constitute proof of suspension of payments (e.g. disputes over the validity of the debt, disputes over the amount of the debt, disputes over the existence of the debt, etc.). However, refusal to pay on the basis of objections that the debtor considers to be well-founded in good faith does not constitute proof of cessation of payments (e.g. disputing the existence or amount of the debt).

With regard to the timing of the cessation of payments, it should be noted that the latter must exist

at the time of the hearing of the application before the bankruptcy court and, in any case, **at the time of publication of the first instance decision** (see EfAth 2077, 1182/2019).

It should be noted that, if the cessation of payments is diagnosed at the time of the hearing of the relevant bankruptcy application, any decision issued, for example, on a previous application for admission to the reorganisation procedure (whether or not cessation of payments was recognised) **does not have res judicata effect in the bankruptcy proceedings** (see Perakis, E., Bankruptcy Law, 2021, p. 151).

### 3. The presumption of cessation of payments

The second paragraph of Article 77 provides for a **presumption that the debtor is in default of payment** in the event that the latter fails to pay his due financial obligations to the State, Social Security Institutions or credit or financial institutions, amounting to at least forty per cent (40%) of their total due obligations for a period of at least six (6) months, provided that their non-performing obligation exceeds the amount of thirty thousand (30,000) euros.

For example, the debtor is presumed to be in default when he has overdue debts to the State amounting to 100,000.00 euros and to banks amounting to 140,000.00 euros (or, for example, only to the bank an overdue debt of €240,000.00), while his total overdue debts amount to €600,000.00, for a period of at least six (6) months. The end of the six (6) month period is considered to be the time of the hearing of the application in the competent court.

It should be noted that this presumption differs in the case of small-scale bankruptcy, i.e. bankruptcy in which the debtor cumulatively satisfies all three

(3) criteria for determining a very small entity under Article 2 of Law 4308/2014 (A' 251), in which case the above percentage rises to sixty

percent (60%), pursuant to Article 176(1) of Law 4738/2020.

This presumption is defined as **contestable**, in the sense that **it can be overturned** by anyone with a legitimate interest, including the debtor, by proving that there has been no actual cessation of payments (i.e. by invoking specific facts and presenting the relevant evidence).

As has been ruled in case law, the inability to meet due obligations will usually appear as "**cessation or interruption of commercial activity, irreparable damage to the merchant's creditworthiness or disruption to his financial standing**". In other words, such inability will exist when the debtor's trading partners get the impression that he is unable to meet his due obligations, with the result that **his financial credibility is undermined**. Such indications include, for example, the debtor's flight or disappearance, the permanent closure of the store or cash register of his business, protests by creditors for non-payment, non-payment or reduction of the salaries of the company's staff, etc. (see Psychomanis, Bankruptcy Law, 10th ed., 2022, pp. 69–72).

### 4. Case law indicators for the absence of cessation of payments

According to the relevant case law, evidence indicating that the condition of cessation of payments has not been met, which the debtor must invoke and prove before the court, includes, indicatively, the following:

- a) **absence of debts to the State and EFKA or their settlement and partial repayment** (TrEphVorAigaio 7/2022, TrEphThes 1863/2021, EfAth 1117/2001) and insurance/tax compliance (TrEphVor Aegean 7/2022).
- b) **coverage of operating expenses, such as utility bills, insurance premiums, maintenance costs, etc.** (TrEphVorAigaio 7/2022, TrEphThes

1863/2021, ΠΠρΛαμ 4/2019).

**c) employment of a sufficient number of employees and proof of their payment** (PPram 4/2019).

**d) payment of significant amounts of money to settle transactions** (TrEfThes 1863/2021 – in this case, for the purchase of real estate).

**e) continuous supply of materials for the business's commercial needs, which indicates the credit provided to the business by the supplier companies** (EfAth 1117/2001).

**f) reasonable expectations of recovery, e.g. due to taking into account the market situation caused by the coronavirus pandemic that affected the company's activity** (TrEfVorAigaio 7/2022, TrEphThess 1863/2021), **due to the collection of a large sum of money** (MefDod 51/2020) **or due to the full repayment of a significant debt** (EfAth 1117/2001) **or due to a positive development in the company's legal battle** (TrEfAth 3528/2018 – in this case, cancellation of acts determining large amounts of tax, with the consequent resolution of a problem that had a significant impact on the company's progress, as an obstacle to the settlement of debts to the State, obtaining tax clearance, collection of contract payments owed by the State, etc., resulting in the inability to repay its debts) **or due to a reasonable possibility of settling another part of the company's debts by entering into an alternative debt settlement procedure** (PPLaM 4/2019).

It should be noted that the claim of a reasonable expectation of recovery of the debtor should be based **on tangible and specific evidence and not on unrealistic or vague plans and wishes.**

**g) conclusion and compliance with a debt settlement agreement with the main creditor** (TrEfThes 1863/2021).

**h) absence of commercial credit disruption and business activity stagnation** (MEF Dod 51/2020, PP Lam 4/2019, Ef Ath 1117/2001).

## 5. In conclusion.

Indeed, by adopting the presumption of cessation of payments in Article 77(2)(a) (and Article 176(1) for small-scale bankruptcy) of Law 4738/2020, the law seems to make it easier for creditors to get their debtors declared bankrupt, if the debtors meet the conditions set out in that provision. **However, with the appropriate handling of the case, it is possible to overturn the above presumption by proving that there is no actual cessation of payments. To this end, it is crucial to correctly identify and invoke the appropriate facts that indicate that the debtor's activity has not ceased or, in any case, that there is a reasonable expectation of recovery, as well as the correct compilation of the relevant evidence.**

## REORGANISATION TRANSFER OF REAL ESTATE UNDER LAW 4738/2020 – TAX EXEMPTIONS AND RELATIONSHIP FORMATION

Ada Tsogia

LL.M. (mult.)

*The collective pre-bankruptcy restructuring process is the most useful debt settlement tool for viable businesses, enabling them to conclude and implement agreements that are flexible in terms of content. In our previous articles on the institutional framework of the restructuring process, we focused on the two basic principles that govern the process and define the possibilities for settlement, namely the principle of equal treatment of creditors in the same position and the principle of collective satisfaction of creditors in the sense of not worsening their position, as well as the possibilities for the enterprise to settle its debts to public bodies. In this article, we will focus in particular on the issue of including in the consolidation agreement a term for the repayment of certain debts through the transfer of the company's real estate, the anticipated tax advantages for the company, and how the above option affects the formation of relations between the parties covered by the agreement.*

### 1. Introduction

The consolidation process, according to Law 4738/2020, is a collective pre-bankruptcy procedure aimed at maintaining, utilising, restructure and rehabilitate the business by ratifying the relevant agreement, without prejudice to the collective satisfaction of creditors. In accordance with the relevant legislative provisions, the company undergoing reorganisation may agree with its creditors on any arrangement of its assets and liabilities, depending on the rescue strategy it chooses to follow. The indicative content of a reorganisation agreement, as provided for in Article 39 of the above law, includes the possibility of settlement through the sale of individual assets. **In this case, in accordance with Articles 170 and 171 of the above law, significant tax concessions, in particular, are provided for the benefit of the company in order to remove a series of obstacles and disincentives to the restructuring of its assets and liabilities or the liquidation of its assets for the purpose of restructuring the company.**

### 2. Debt restructuring through the sale of assets

Within the framework of the private autonomy of the parties, the contracting parties (the debtor company and its creditors) are free to negotiate the content of the reorganisation agreement. The only limitation imposed on the parties is the very purpose of the restructuring institution, within the framework of

the relevant agreement must include measures aimed at maintaining, exploiting, restructuring and rehabilitating the company, always ensuring that the collective satisfaction of creditors is not prejudiced, so that it can be ratified by the competent court.

According to Article 39 of Law 4738/2020, which indicates the relevant possible configurations:

"1. *The consolidation agreement may have as its object any arrangement of the debtor's assets and liabilities, and in particular: [...] e) The sale of individual assets of the debtor. [...]*". This case seems to concern assets of the company that are not directly related to its productive activity, in order to ensure the smooth continuation of its operation (e.g. sale of ancillary real estate). It should be noted that it is also possible to agree on the transfer of all or part of the company's assets or individual assets and, where applicable, if expressly provided for in the agreement, part of its debts to the company undergoing restructuring, while the other obligations, as the case may be, are settled from the proceeds of the sale of the company or part thereof, are written off or, in the case of a transfer of part of the business, remain as liabilities of the debtor or are capitalised (Article 39(1)(f) in conjunction with Article 64 of Law 4738/2020).

### 3. Tax advantages – Concessions

**a) Income tax exemption:** The main

The tax advantage under paragraph 3 of Article 170 of Law 4738/2020 is as follows: *"The profit from the transfer of the debtor's assets pursuant to a consolidation agreement, in accordance with Chapter B of Part Two of Book One of this law or the liquidation of Chapter B of Part Five of Book Two of this law, is exempt from income tax for natural and legal persons."*

It should be noted that Circular E2032/2024 on the completion and settlement of the income tax return of legal persons and legal entities for the 2023 tax year states in point II.36. that: "Code 496 is used to record the profit from the transfer of assets pursuant to a consolidation agreement or the liquidation of Chapter B of Part Two of the First Book of this law. "Code 496 is used to record profits from the transfer of assets pursuant to a consolidation agreement or liquidation under Law 4738/2020 (see paragraph 3 of Article 170 of Law 4738/2020). In the event of distribution of the above amount, the provisions of paragraph 1 of Article 47 of the Income Tax Code shall apply." In other words, if the amount corresponding to the company's profit from the transfer of its assets pursuant to the consolidation agreement (which is exempt from income tax in accordance with the above) is distributed, it is taxed as profit from business activity, regardless of the existence of tax losses. Circular E.2028/2024 Instructions for completing form E3 (Statement of Financial Data from Business Activity) and the Tax Adjustment Statement for the 2023 tax year states in point 54 that "In codes 144, 244, 344 and 444 "Minus: Tax-exempt income", the data entered, as applicable, in the relevant sub-table created, which includes amounts paid under current legislation and defined as tax-exempt, and more specifically: [...] • the amount that a business benefits from the write-off or settlement of part or all of its debts pursuant to the provisions of Article 170 of Law 4738/2020 (A'207), which does not constitute taxable income and in the case where the natural person carrying out business activities keeps simple books, it is monitored off-balance sheet (ref. E.2164/2020 circular) (option 007) [...]".

The justification for the adoption of the above legislative

provision, according to the explanatory memorandum to the above law, is to remove the existing disincentives to the transfer of assets in the context of consolidation agreements. **The legislator's aim is to ensure that the benefits are enjoyed exclusively by the company undergoing restructuring and not by its shareholders.** For this reason, in the event of distribution of the profit acquired from the transfer, this amount is taxed in accordance with Article 47(1)(b) of the Income Tax Code.

**b) Exemption from stamp duty and indirect taxes or fees:** According to paragraph 4 of Article 170 of Law 4738/2020: *"Without prejudice to paragraph 6, any contract concluded and any act performed within the framework of [...] the consolidation agreement of Chapter B of Part Two of Book One [...], the resulting individual transfers, transcriptions and any other acts for their implementation shall be exempt from stamp duty and any other indirect tax or fee (except VAT, to which the VAT Code and the F.M.A. apply). These exemptions shall apply automatically, without the need to submit any relevant declaration to the competent Public Financial Service (PFS). In such cases, by way of derogation from any general or specific provision, it is not necessary to mention or attach certificates from the tax administration of any form or use, or from any other public service, organisation or company or local authority of any degree, nor certificates or solemn declarations by third parties provided for in any provision of law [...]"*. **With regard to the Real Estate Transfer Tax (F.M.A.), from which the relevant contract is not exempt, it should be noted that there is no reason for exemption, given that, according to the current legislative framework, it constitutes a tax obligation of the acquirer.**

It is noted that, according to Opinion No. 14/2022 of the Supreme Court of Cassation, Granting of certificates under Article 54A of Law 4174/2013 (current Article 60 of Law 5104/2024 – KFD), in a company under consolidation, the notarial deed correcting the contract for the acquisition of company property, which was subject to the provisions of the law on business consolidation, in order for these to be transferred by a subsequent notarial deed, as assets, in accordance with the terms of the reorganisation agreement, constitutes an act of implementation of that agreement and falls within its terms,

and is therefore subject to the relevant exemption (this concerns the previous legislative regime – Article 99 et seq. of Law 3588/2007, which, however, does not differ from the current regime on this issue).

**Furthermore, it should be noted that automatic exemption from any tax, fee or duty payable to the State or third parties, as well as stamp duty, with the exception of VAT, is provided for in Article 170(6) of Law 4738/2020 for contracts and acts performed in the case of transfer of property or business (Article 64 of Law 4738/2020) and for the resulting individual transfers, transcriptions and any other acts for their implementation.**

**c) Exemption from gift or income tax:** In any case, the restructured business also benefits in this case, where part or all of its debt is written off as a result of the restructuring of its debts following their settlement through the sale of its real estate. In fact, the benefit it derives as income from business activity from the relevant write-off is exempt from income tax (Article 170(1) of Law 4738/2020).

**d) Limitation of fees for notaries, lawyers, bailiffs and registrars to 30% (Article 171(1) of Law 4738/2020).**

**e) No assumption of debt in the event of transfer of a group of assets:** It should also be noted that, in accordance with paragraph 4 of Article 171 of Law 4738/2020, specifically in the case of transfer of a group of assets pursuant to a consolidation agreement (Article 64 of Law 4738/2020), Article 479 of the Civil Code on debt assumption does not apply. As a result, the acquirer is not liable for the debts of the transferred assets to the creditors of the company undergoing reorganisation, unlike what would happen if the relevant acquisition of the group of assets took place outside the reorganisation (transferor) and the acquirer of the group of assets, contrary to what would happen if the relevant acquisition of a group of assets took place outside the institutional framework of consolidation.

#### 4. Other Issues – Formation of Relationships

In the case of reorganisation measures consisting of the sale of the debtor's assets, in accordance with the above, the following should also be noted:

- **The law does not provide for a specific procedure for the sale of the asset in question.**

Therefore, it is up to the debtor company to take steps to find a potential buyer, who may be one of the creditors, and to agree on the price, which may extend to the write-off of the debt by the buyer – creditor. All the relevant issues may be subject to agreement between the parties.

For example, decision 779/2015 PPraAth states: "[...] *Furthermore, the consolidation agreements stipulate the following: a) in the event of the sale of the company's real estate, 50% of the proceeds received will be used to pay off the debts of secured creditors, while in the event that there are collateral securities for bilateral loans on the specific property, this amount will be used to repay only the first secured creditor. The remaining amount will be distributed as follows: aa) 50% will be used to repay the instalments of the employees, bb) 25% will be used to repay the instalments of the insurance funds, and cc) 25% will be used to repay the instalments to the Greek State. The sale price shall be the average of the appraisal value of the property in question by two independent appraisers and shall not be less than its objective value [...].*

- **Issuance of a certificate of good standing:** According to Article 60(6)(c) of Law 4738/2020: "*Regulated debts to the State and Social Security Institutions shall be deemed to be up to date, provided that the consolidation agreement is complied with, and the competent authorities shall issue the corresponding certificates of good standing, in accordance with the provisions of the consolidation agreement.*" The Administration is obliged to act in compliance with the ratifying decision and to apply the terms of the ratified agreement, which prevails over the current legislative and regulatory framework for the issuance of certificates of compliance or debt certificates (GNSK 55/2016, section A). **Therefore, if the consolidation agreement stipulates that for the transfer of the company's real estate, the competent authority is obliged to issue the debtor company with the required certificate of good standing to the State and the Social Security Funds, the Administration must issue it in accordance with the terms of the certified consolidation agreement, even if**

Pthe debtor company has not submitted the relevant documents to the competent authority.

**For example, it is provided that it may be granted with a lower than the statutory withholding rate or even with a zero withholding rate. The same applies to the obligation to issue an ENFIA certificate (GnNSK 14/2022 section B).** In any case, when drafting the relevant term, the principles of non-deterioration and equal treatment must be taken into account in order for the agreement to be legally valid.

- **Removal of encumbrances and seizures:** The agreement may contain a further term requiring the removal of existing encumbrances on the properties for sale and the lifting of any seizures imposed, even in derogation from the provisions in force (see GNSK 55/2016, section A). A'). It should be noted again that in any case, the principles of non-deterioration and equal treatment must be taken into account when drafting the relevant terms of the agreement.

- **Decision on disposal by the company's management body:** In cases where there is no explicit provision of law granting relevant authority to shareholders, partners or their collective bodies, as the case may be, their consent is not required and the commitment of the debtor by its administrative body is sufficient. This applies even if there is a contrary provision in the debtor's articles of association, provided that it appears that the shareholders or partners will not be worse off as a result of the reorganisation agreement than they would be in the event of bankruptcy (e.g. when in the bankruptcy scenario there would be no value left for the shareholders). This will be certified in the expert's report (Article 35 of Law 4738/2020).

- **If the restructuring agreement includes an obligation to transfer real estate, the restructuring agreement must also be notarised.** If the restructuring agreement

is concluded by private document, the form may be replaced by the statements of the contracting parties before the court (Article 42 of Law 4738/2020), while the notarial form will be observed only for the final acts of transfer of the property (1033 AK).

- If the consolidation agreement provides for the transfer of business assets and liabilities in execution of a consolidation agreement, in accordance with Article 64 of Law 4738/2020, without specifying the amount of repayment of the State's claims and/or the repayment period, the expert's report must include an explicit statement that he cannot certify that the State's position has not worsened for the application of the presumption of consent of paragraph 2 of Article 37 of Law 4738/2020 and, therefore, the presumption of consent of the State to the consolidation agreement does not apply (Article 11(4) of Ministerial Decision 26400 EX 2021 (B' 865/5-3-2021).

## 5. In conclusion

The organisation and implementation of the restructuring process is a strategic choice for each company, which can be implemented in different ways, taking into account the specific economic conditions of each case. The possibility of selling off the company's assets appears to be an important and necessary restructuring measure, especially in cases of companies with insufficient liquidity. In this context, legislative support for companies undergoing restructuring with a view to ensuring their viability, given their contribution to the country's economy, is clear and is confirmed, inter alia, by the legislator's decision to remove a number of obstacles and disincentives to the transfer of assets, in particular through the introduction of tax exemption provisions.

# THE "SIDE EFFECTS" BENEFITS OF THE DEBTOR FROM THE EXTRAJUDICIAL MECHANISM OF LAW 4738/2020 WITH REGARD TO THE STATE AND SOCIAL SECURITY INSTITUTIONS

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*The out-of-court debt settlement mechanism provided for in Law 4738/2020 has proven to be an extremely useful tool, especially for settling debts owed to the State and Social Security Institutions, as it allows debts to be settled over a period of up to 20 years at a fixed interest rate of 3%. However, the advantages that this tool offers to the debtor are not limited to these preferential settlement terms. On the contrary, other benefits of the out-of-court mechanism, such as the suspension of enforcement measures, the suspension of third-party seizures, the granting of tax/social security clearance, etc., are extremely important measures, especially for businesses. In this article, we examine these "side" benefits of the out-of-court mechanism, both from the final submission of the application and from the entry into force of the arrangement.*

## 1. Introduction

As is clear, the main consequence of submitting an application and concluding an out-of-court debt settlement agreement is the long-term settlement of the applicant's debts (for the issue of debt settlement with the State and Social Security Institutions through the out-of-court mechanism, see here). However, beyond this basic consequence, there are other important consequences for the debtor of both the final submission of the application and the conclusion of the settlement agreement. These include the **suspension of individual prosecutions, the suspension or, under certain conditions, the termination of criminal proceedings for offences of non-payment of debts and non-payment of social security contributions, and the granting of a certificate of good standing from the Social Security Funds (FKA), the cessation of criminal prosecution for offences of non-payment of debts and non-payment of insurance contributions, and the granting of a certificate of tax/insurance compliance.**

## 2. Consequences of the suspension resulting from the final submission of the application for an out-of-court mechanism

In accordance with the provisions of Article 18 of Law 4738/2020: *"From the final submission of the application until the conclusion of the procedure in any manner, in accordance with Article 16, the taking of enforcement measures and the continuation of enforcement proceedings against claims, movable and immovable property against the debtor, as well as criminal prosecution for the offences referred to in Article 25 of Law 1882/1990 and Article 1 of Law 86/1967 in relation to the debts for which the settlement is requested."*

Based on the above provision, the final submission of the application

out-of-court mechanism has the following consequences:

– The commencement and continuation of enforcement proceedings against the debtor's claims, movable and immovable property is suspended.

– Criminal prosecution for the offences of non-payment of debts and non-payment of insurance contributions is suspended.

Firstly, as noted in Circular No. E.2065/2022 of the A.A.D.E., this suspension applies not only to the debtor but also to persons who are jointly and severally liable with him.

**With regard to the above suspension, however, three specific issues need to be clarified:**

**a) Fate of seizures in the hands of third parties imposed prior to the final submission of the application:** The final submission of the application for the out-of-court mechanism does not entail the suspension of seizures in the hands of third parties imposed by the State/FKA for debts for which settlement is sought, even with regard to any future claims that are the subject of the seizure, provided that the seizure in question was imposed before the application was submitted. **For example, if the State has imposed a seizure on the lessee in order to satisfy its claim, the latter will continue, even after the final submission of the application for an out-of-court mechanism by the debtor-lessor, to pay the rent amounts to the State.** However, the State/FKA cannot, after the final submission of the application, and therefore the commencement of the suspension, impose a seizure on a third party for the

satisfaction of claims for which the settlement is requested in the application.

**b) Issuance of tax/social security clearance certificates during the suspension period:** During the suspension period provided for in Article 18 of Law 4738/2020, debts owed to the State/Social Security Fund for which a settlement is requested **are not subject to suspension of collection but are due and payable, and therefore the debtor is not granted tax/social security clearance.**

**c) Possibility of offsetting by the State of claims that are suspended with counterclaims of the debtor:** The final submission of the application for an out-of-court mechanism has no effect on the State's ex officio offsetting of its claims, for which settlement is requested, against the debtor's counterclaims against the State.

### **3. Consequences of entering into a debt restructuring agreement**

As mentioned in the introduction, the main consequence of accepting the debt restructuring agreement, which is also the main objective of the applicant, is the settlement of their debts. However, signing a debt restructuring agreement also has other important consequences for the debtor, which are listed below:

**a) The taking of enforcement measures and the continuation of enforcement proceedings against the debtor's claims, movable and immovable property are suspended.**

**b) Seizures imposed on third parties by decision of the Head of the competent Tax Office are suspended.**

In particular, the law provides that, provided that the debtor i) has paid the first instalment of the arrangement, ii) has paid off or settled in a lawful manner his other debts not covered by the arrangement, and iii) has submitted the required income tax and VAT returns, they may request that the seizures imposed on third parties do not include future claims. In other words, this is a "inactivation" and not "cancellation" of these seizures, in the sense that seizures of claims already incurred are not cancelled, but simply not seized, from the moment of notification of the positive decision

by the Tax Administration, future claims are not seized. Claims arising up to the time of the above notification are paid to the State.

On the contrary, the lifting of seizures requires that 75% of the total amount payable to the State under the debt restructuring agreement has been paid, as well as the issuance of a relevant decision by the Head of the competent Tax Office.

**c) Criminal proceedings for the offence of non-payment of debts to the State and non-payment of insurance contributions are suspended or terminated, and the enforcement of any sentence imposed is postponed or, if it has already begun, is interrupted.**

In particular, with regard to debts to the Social Security Fund, the provision of Article 8 of Law 4997/2022 shall apply, according to which "1. *In all cases of settlement of debts to social security institutions, regardless of the specific legislative framework governing them, the following consequences shall apply with regard to the criminal treatment of the debtor who is subject to the settlement and provided that the conditions thereof are met: a) the offence is time-barred, criminal proceedings against the debtor are discontinued, in accordance with Article 1 of Law 86/1967 (A' 136), and the relevant case file is archived by order of the competent Public Prosecutor. [...] In the event of a settlement by a debtor who has lost a settlement in the past for the same debt, criminal proceedings against the debtor are suspended, in accordance with Article 1 of Law 86/1967, and the statute of limitations for the criminal offence shall be suspended, by way of derogation from the time limits laid down in Article 113 of the Criminal Code, and (b) the enforcement of any sentence imposed shall be suspended or, if enforcement has already begun, it shall be interrupted [...]*".

Consequently, for debts owed to the Social Security Funds, and provided that the debtor has not previously lost another arrangement for the same debts, criminal proceedings are suspended and the relevant case file is archived.

A similar provision was introduced by the recently enacted Law 5193/2025 concerning the offence of non-payment of debts to the State. Specifically, Article 227 of the above law amended paragraph 5 of Article 25 of Law 1882/1990, so that paragraph b of Article 5 now provides that: "*If the debts due*

*are subject to any debt payment arrangement in accordance with the first subparagraph of paragraph (a) before the expiry of the period referred to in the first subparagraph of paragraph 1 and for as long as it remains in force, no application shall be submitted by the competent bodies of paragraph 1 to the competent Public Prosecutor. If the period of time referred to in the first subparagraph of paragraph 1 has elapsed and no application has been submitted to the competent Public Prosecutor, the competent bodies referred to in paragraph 1 shall not submit the application to the competent Public Prosecutor. If an application has already been submitted to the Public Prosecutor and no criminal proceedings have been brought, the competent authorities shall inform the Public Prosecutor accordingly, and if criminal proceedings have already been brought, they shall be discontinued by decision of the court.*

Consequently, with regard to the offence of non-payment of debts, if the settlement through the out-of-court mechanism takes place either before the expiry of four months from the certification of the last debt on the list or after that date, no criminal prosecution shall be brought or any prosecution that has been brought shall be terminated by a court decision. This avoids the practice of constant postponements of the relevant cases by the courts, resulting in time savings for all parties involved in the proceedings.

**d) The debtor is granted a certificate of tax and social security compliance for the debts covered by the arrangement.** As stated in the provisions of Article 23 of Law 4738/2020, the settlement of debts under the out-of-court mechanism is considered a partial payment arrangement for the purposes of applying the provisions on tax and social security compliance. Therefore, provided that there are no other outstanding debts to the State and the Social Security Funds, the debtor will be able to obtain a certificate of tax and social security compliance as specifically referred to in the provisions of Articles 12 of the Code of Tax Procedure and 24 of Law 4611/2019. **However, specifically with regard to the collection of money from the**

**State and the transfer of real estate, a withholding condition is imposed for the granting of tax clearance, ranging from 30 to 70% (on the amount collected by the State or on the amount of the consideration for the transfer of the real estate, respectively).**

The above legal effects of signing a debt restructuring agreement apply not only to the applicant - primary debtor, **but also to any co-debtors**, provided that the arrangement is complied with.

Finally, as regards the offsetting of claims by the State against counterclaims by the debtor, this is normally permitted, a distinction is made depending on whether the cause of the State's claim dates from before or after the entry into force of the debt restructuring agreement. Thus, if the public sector claim proposed for offsetting dates from a time after the entry into force of the restructuring agreement, the instalments of the arrangement are credited with priority through offsetting, otherwise debts outside the agreement, instalments of other arrangements, etc.

#### **4. In conclusion**

In this article, we have examined the other benefits, beyond the debt arrangement itself, the benefits that a natural person or a business may derive from submitting an application to the out-of-court mechanism, specifically at two points in time: when the application is finally submitted and when the debt restructuring agreement enters into force. These benefits are extremely important, especially for the debtor entrepreneur, as they relate both to issues concerning his criminal liability and to issues directly related to the continuation of his business activity, such as the fate of seizures by third parties or the possibility of obtaining tax/insurance clearance.

## EXEMPTION OF LEGAL REPRESENTATIVES FROM DEBTS TO THE STATE

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It is well known to all entrepreneurs that the position of Chief Executive Officer is one of responsibility not only to the company's shareholders but also to the State and the EFKA (Unified Social Security Organisation). For a variety of taxes and insurance contributions, the CEO of a public limited company is held accountable and liable with his personal assets. This, however, may discourage executives from taking over the management of a company facing financial difficulties. For this reason, in 2020, the legislator passed a provision which, for the first time, introduced the exemption of representatives from the debts of insolvent companies to the State and the Social Security Fund: Article 195 of the New Bankruptcy Code (Law 4738/2020). According to the explanatory memorandum to the law, this decision was prompted, among other things, by the finding that the personal liability of representatives of legal entities in the event of the latter's bankruptcy acts as a deterrent to entrepreneurship, while also preventing competent managers from taking on the management of companies in financial difficulty.

On the basis of this provision, (36 months after the filing of the bankruptcy petition or 24 months after the declaration of bankruptcy) from any joint and several liability for debts owed to the State and the EFKA (Unified Social Security Fund) by the public limited company that arose 3-5 years prior to the bankruptcy (the duration depends on the time when the company ceased its payments). The representative loses the exemption if, within the period of 24/36 months, an appeal is successfully lodged by anyone with a legal interest against the exemption. Regarding this provision, we note the following:

**1. The CEO has every reason not to risk delaying the filing of the bankruptcy petition.** This is because if there is a disproportionate delay, the debts may be carried over to periods beyond five years, where the exemption cannot be extended.

**2. The taxes for which the CEO is jointly and severally liable**

and for which he may be exempted under Article 195 are mainly the following: income tax, withholding taxes (e.g. FMY), attributable taxes, VAT and ENFIA.

**3. Equally important, however, is the following: the beneficial effects of the exemption also extend to the criminal aspect of the case.** According to the relevant Ministerial Decision (44510 EX 2021), the debts to which the exemption applies are not taken into account for the prosecution of the representative for the offence of non-payment of debts to the State.

**4. The only case in which the legal representative will not be exempted is if an appeal is lodged by the AADE or e-EFKA and this appeal is accepted.** The court will mainly examine the good faith of the legal representative. In order to be considered to be acting in good faith, the CEO must **a)** have demonstrated good faith both at the time of the declaration of bankruptcy and during the bankruptcy proceedings, **b)** have cooperated and continue to cooperate with the bankruptcy authorities, **c)** not be burdened with acts or omissions that caused or delayed the bankruptcy, and **d)** the bankruptcy not be due to his fraudulent actions.

**5. What is even more interesting is that this provision also applies to old bankruptcies.** Specifically, for bankruptcies declared before 1 July 2021, the discharge of the representatives of the bankrupt companies will take place on 1 January 2022, unless an appeal is lodged by the State/EFKA by 31 December 2021. For example, the Attica KEBIS recently issued a debt certificate, which shows **the discharge of the representative of the bankrupt SA from debts totalling €992,880.91 from joint liability**, taking into account that he was the representative of a legal entity that went bankrupt in 2013 and the debts to the State relate to the years 2010-2012. Specifically, the certificate stated the following: *"In particular, the taxpayer is exempt from debts relating to the 36-month period prior to the suspect period, namely from 26/7/2009 to 26/07/2012."*

6. Finally, here's a recent example: a few months ago, decision no. 252/2025 of the Athens Multi-Member Court of First Instance was published. The latter declared a public limited company providing human resources services bankrupt for debts to the State and EFKA exceeding €5,000,000. The court accepted that the applicant company's cessation of payments was due to "commercial accident" and unsuccessful business choices. According to the assumptions of the decision, the applicant made an effort to prevent the cessation of payments, such as submitting an application to the out-of-court debt settlement mechanism, but due to the

obligation to retain almost 250 employees in order to remain competitive, it was impossible for it to meet its obligations (in particular to the Social Security Fund and the State). Therefore, in accordance with the disputed Article 195, **the legal representative of the company filing for bankruptcy, who is jointly and severally liable for the debts to the State and EFKA, will be released from the latter when, in this case, 24 months have elapsed since the declaration of bankruptcy and no successful appeal against the discharge has been lodged in the meantime by the State or EFKA.**

## OUT-OF-COURT MECHANISM: THE SETTLEMENT OF DEBTS FROM JOINT LIABILITY – THE CASE OF LIQUIDATED OR LIQUIDATION LEGAL ENTITIES

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*The amendment of Article 7 of Law 4738/2020 (scope of application of the law) by Article 75 of Law 5043/2023 put an end to a significant asymmetry in the out-of-court mechanism, now allowing the settlement of debts from dissolved or still liquidated legal entities through an application by the natural persons who are jointly and severally liable (such as administrators, board members or partners). Now, after following the procedure for updating their personal tax identification number with the debts of the legal entity for which they are liable, natural persons can submit an application to the out-of-court mechanism and settle all their debts - personal and joint and several liabilities.*

One of the most serious problems faced until recently by those wishing to settle debts to the State and social security institutions was the inability to include in the out-of-court debt settlement mechanism debts arising from dissolved or liquidated legal entities in which they had previously participated as partners or legal representatives, and, in this capacity, were jointly liable for these debts. In order to enable settlement through the out-of-court mechanism in such cases, the legal entity had to be revived first, so that it could submit an application to the out-of-court mechanism and settle these debts in its own name, while it would have to continue to exist until the out-of-court settlement was completed.

This situation presented a stark contradiction: the State sought to collect significant amounts from natural persons who were considered jointly liable (through enforcement measures), but did not give them the opportunity to settle these same debts through the out-of-court mechanism of Law 4738/2020, despite their willingness to repay the above debts under sustainable terms. This created an unreasonable "hostage situation" for debtors: while there was an intention to settle and a possibility of repayment, the institutional framework did not allow for any solution, resulting in both the inability to "restructure" the natural persons themselves and the loss of public revenue, since the companies that had created the debts no longer existed.

Furthermore, an additional technical obstacle concerned the method of certifying these debts. According to established practice, the amounts are certified exclusively to the company's tax identification number, and not to the natural persons

(managers, board members or partners), with the result that it was not possible to submit an individual application to the out-of-court mechanism (because it was impossible to retrieve these debts from the out-of-court platform). This obstacle was explicitly confirmed by Circular **EGDICH 151323 EX 2021/29-11-2021**, which stipulated that it is not possible to include debts of dissolved legal entities when these have not been transferred to the tax identification number of natural persons.

Finally, pursuant to Article 7(3)(c) of Law 4738/2020, as in force prior to its amendment by Article 75 of Law 5043/2023, legal entities in dissolution or liquidation **were excluded** from the scope of the law. Consequently, **the companies themselves** could **not** submit an application for settlement. The above situation was resolved following the amendment of the scope of Article 7 of Law 4738/2020 and the inclusion of the possibility of settling the debts of legal entities that have been dissolved or are in liquidation, at the request of a third party who is jointly and severally liable with the legal entity for the debts certified against it.

### THE PROCEDURE

The procedure for settling the above-mentioned debts requires the natural person's tax identification number to be updated with the legal entity's disputed debts. The specific issues of the procedure, as it has now been formulated, are regulated by Joint Ministerial Decision No. 13131 EX 2024. Prior to this procedure, of course, it must be ensured that the legal entity is listed as dissolved or in liquidation in the General Commercial Registry (GEMI) and the EFKA, and that it has ceased its operations vis-à-vis the AADE.

Once the above has been completed, any jointly liable natural persons who wish to take advantage of this option provided by law must complete, prior to submitting their application on the out-of-court mechanism platform, a specific procedure in order for the legal entity's debts to be attributed to their personal tax identification number. The procedure is separate for debts arising from joint liability to the AADE and to the EFKA.

Specifically, with regard to debts **to the AADE**, before creating the application on the out-of-court platform, the natural person must submit a request on the AADE's electronic platform, after logging in with their personal taxisnet codes, in order to update their tax identification number (AFM) with the debts of the legal entity. The request must be submitted together with supporting documents the

"Notice of Commencement of Liquidation" of the legal entity to the General Commercial Registry (GEMI), as well as the "History of Changes of Natural Person" in order to verify the period in question during which the natural person is liable for the debts. Once the request has been accepted, a certificate of information on the natural person's tax identification number will be issued, and then they will be able to successfully submit their application to the out-of-court mechanism.

With regard to the settlement of debts arising from joint liability **to the EFKA**, the procedure is carried out in the physical presence of the natural person or their legal representative at the competent KEAO branch (of the legal entity), and the same supporting documents are required as those submitted with the request on the AADE electronic platform ("Notice of Commencement of Liquidation" of the legal entity to GEMI, "History of Changes to Natural Persons"). In this case, the management period of the natural person in question is recorded, and, by extension, the debts certified to the legal entity during the period in question are attributed to the natural person.

Finally, once the above procedures have been successfully completed, the natural person can create the application on the out-of-court mechanism platform. When following the steps to create the application, the applicant must not forget to state that they

they also wish to settle their debts arising from joint and several liability, by selecting the corresponding option provided by the platform. Provided that all the steps have been followed correctly, the debts of the legal entity are included in the natural person's application.

*Special case: Most people are jointly liable for the same debt*

The out-of-court settlement will be based on the applicant's ability to repay. Therefore, in the event that there are several jointly and severally liable persons, the arrangement may vary depending on the financial and property situation of each applicant or depending on the existence of other debts to be settled in their name. Regardless, the legal consequences of the arrangement apply both to the applicant and the legal entity against which the debts covered by the arrangement have been certified, as well as to any third parties who are legally jointly and severally liable-responsibility for the debts covered by the settlement.

In particular, in the case of several persons being jointly and severally liable for the same debt, Joint **Ministerial Decision No. 13131 EX 2024** (para. 4) stipulates that, by way of derogation from the rule of paragraph a` 2. of Article 22 of Law 4738/ 2020 (A` 207), in the event of loss of the arrangement, a new arrangement for the same jointly and severally liable debts is permitted, provided that the application is submitted by another jointly and severally liable person who is not excluded from the scope of Chapter A of Part II of Law 4738/2020.

**In conclusion**

The above regulation constitutes substantial institutional progress, as it resolves a significant impasse for natural persons who had become jointly liable for financial debts without having the possibility of settlement. At the same time, it offers the State and insurance agencies a more effective collection tool, strengthening voluntary compliance and promoting a more realistic and fair approach to dealing with business debt.

## THE CHANGE IN THE EXTRAJUDICIAL MECHANISM THAT MAKES IT DIFFICULT FOR LEGAL ENTITIES TO SETTLE THEIR DEBTS WITH PUBLIC BODIES AND THE IMPROVEMENTS BROUGHT ABOUT BY JOINT MINISTERIAL DECISION 77129/7.5.2025

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*The out-of-court mechanism is a debt settlement tool which, since its introduction in 2021, has undergone successive amendments, particularly with a view to improving arrangements for debtors with both public and financial institutions. However, Decision No. 77522 EX 3.6.2024 introduced changes to the calculation tool that significantly altered the arrangements with public institutions. These burdens on arrangements with public institutions were mitigated by the recent Joint Ministerial Decision No. 77129/7.5.2025.*

### 1. Introduction

As we have noted elsewhere, settlement solutions in the out-of-court mechanism are arrived at using a calculation tool (algorithm). The first computational tool takes into account only the debtor's income and assets when calculating the settlement solution, while the second computational tool – which is generally used when financial institutions are involved – also takes into account the income and assets of co-debtors (especially guarantors).

Based on this information, the calculation tool first calculates the Debtor's Maximum Debt Repayment Capacity (MDRC), which **cannot in any case be less than the liquidation value of their assets**. More specifically, Article 8A of Joint Ministerial Decision 67360/10.6.2021 stipulates that:

*"Repayment capacity or Maximum Debt Repayment Capacity (MDAC) is the maximum value between: a) the Net Present Value (NPV) of the MDAC based on the debtor's tax data, b) the NPV of the MDAP resulting from the monthly repayment capacity flows declared by the debtor in the application [...] and c) the minimum amount recoverable by creditors, i.e. the amount that each secured creditor would receive from the liquidation of the debtor's assets.*

The major change brought about by Joint Ministerial Decision No. 77522 concerned the method of calculating repayment capacity using tax data and

led in practice to a significantly increased MDAHO, as explained below.

### 2. The change brought about by Joint Ministerial Decision No. 77522 in the first calculation tool

Until the amendment brought about by Joint Ministerial Decision No. 77522, the basis for calculating the repayment capacity of a debtor – legal entity based on its tax data was the field "Total profits" or "Loss balance" field in tax form N. It was explicitly stated that: *"In cases where the final amount of income is negative due to losses, the income to be taken into account for the calculation of the repayment capacity of the legal entity through tax data will be zero."*

Consequently, until June 2024, the basis for calculating repayment capacity was the profit for the year, while if the legal entity showed losses in the last financial year, a zero amount was taken into account. In the latter case, if the legal entity did not have significant deposits or other financial assets (shares, bonds, etc.), the repayment capacity would necessarily be determined on the basis of its assets or the monthly repayment capacity declared by the debtor itself.

However, **Joint Ministerial Decision No. 77522 introduced a presumption regarding the available annual income of the legal entity**. Specifically, it was stipulated that: *"In the event that the above amount (i.e. the amount resulting from the profits/losses of the legal entity with the*

*corresponding adjustments) is less than 10% of turnover, then the available annual income is adjusted to that percentage."*

**It is now presumed that the income of the legal entity, which can be used to service the settlement resulting from the calculation tool, amounts to at least 10% of the turnover of the relevant financial year achieved by the legal entity, regardless of the actual results of the financial year.**

### **3. The change brought about by Joint Ministerial Decision No. 77522 through a practical example**

But what did this change mean in practice and how did it ultimately differentiate the settlement proposal that the debtor – a legal entity – would receive? Let us take the following example: A legal entity with total assets worth €200,000.00 and bank deposits of €10,000 has incurred losses over the last three years, while its turnover over the last three years has fluctuated between €300,000 €350,000 and €400,000, respectively.

Until the above change, the calculation tool would take into account the legal entity's losses as the basis for calculating its repayment capacity under tax data and, therefore, would consider that the above legal entity has zero income. Consequently, the legal entity's repayment capacity would be based on the liquidation value of its assets and would be considered to amount to a total of €210,000.00 (value of assets plus deposits), which would then be distributed over time to formulate the settlement proposal.

Following the above change, the calculation tool will not take into account as a basis that the above legal entity has zero income. Instead, based on the above presumption, it will consider that its income amounted to €30,000, €35,000 and

40,000 euros, respectively, and, therefore, the repayment capacity will be calculated on the basis of the tax data, with the corresponding distinctions of paragraph 5 of Article 8A of Joint Ministerial Decision 67360 EX 2021 (i.e., for the calculation of the first year's instalments, the tax data for the last year will be taken into account, for the 2nd to 4th year, the average of the two highest values of the last three years at a rate of 65% will be taken into account, and for the 5th year onwards, the average of the two highest years of the last three years will be taken into account).

**In practice, therefore, the amendment to the law led to a significant increase in the above example of annual repayment capacity and, by extension, to a shortening of the duration of the arrangement that will be achieved through the out-of-court mechanism.**

### **4. The recent change with Joint Ministerial Decision No. 77129/7.5.2025**

The recent Joint Ministerial Decision No. 77129/7.5.2025 aligns the operation of the first calculation tool with that of the second calculation tool, for which the relevant changes took place a few months earlier.

Thus, first of all, the above presumption no longer applies to bilateral arrangements entered into by large legal entities (a large legal entity is considered to be one that has a turnover of at least €2.5 million in at least one of the last three years, as shown in form E3).

For small legal entities (those i.e. those with a turnover of less than €2.5 million in each of the last three years, as shown in form E3), the above presumption continues to apply with regard to their income available to service the arrangement, it is now explicitly stated that "the maximum number of instalments per debt category of each creditor shall apply". Consequently, although the presumption may affect

the amount of the debt write-off for the debtor, it will no longer affect the duration of the arrangement.

#### **5. In conclusion**

The introduction of the presumption regarding the calculation of the income of the debtor legal entity initially had an adverse effect on the arrangements made by legal entities through out-of-court settlements, both

the amount of write-offs they could achieve and the duration of the arrangement. However, with the recent Joint Ministerial Decision, these adverse effects are eliminated for large legal entities, while for small legal entities they are significantly mitigated, as they no longer lead to a reduction in the duration of the arrangements.



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