

## *your* Legal Lab

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### **Challenges with Greek NPL portfolio transactions following recent revisions of legislation**

Greek Parliament has passed on 22.5.2016 a voluminous bill with a series of reforms that paved the way for an agreement on bailout loans and debt relief discussions<sup>1</sup>. Within the measures passed, the framework on NPLs has been revised to help the development of the NPL market in Greece. Although previous NPL framework, namely [Law 4354/2015](#) and [Bank of Greece \(BoG\) ECA 82/2016](#) has been welcomed by the market players as an additional tool to solve a long lasting problem, many issues had remained unsolved. This fact coupled with the macroeconomic perspectives and the political instability in Greece have not led to the creation of an NPL market in Greece. The new framework endeavors to address many of these issues and streamline the NPL regime by using the long tested precedent of securitization law which has effectively regulated sale of bank receivables since 2003.

#### **Overview of the New Regime (Amended NPL Law)**

##### **Type of Receivables covered**

The Amended NPL Law covers receivables out of loans and credits having been granted by credit and financial institutions, save any loans granted by the Depository and Loans Fund. However, it is not applicable until 31.12.2017 as regards loans

secured with mortgage or prenotation of mortgage over primary residence with a presumed value for tax purposes not to exceed 140.000 euro as well as loans guaranteed by the Greek State. Thus, unlike the previous framework, Amended NPL law covers also consumer and SME loans.

Another noteworthy amendment is that Amended NPL Law in line with the endeavors to precipitate a NPL market, does not set any restriction for the status of loans or credits to be serviced or purchased, namely the new law captures both performing and non- performing loans, without setting minimum days of delinquency for the qualification of “non-performing” loans and without restricting bundling of performing and non-performing loans to be serviced or purchased only to loans of the same debtor.

#### **Outsourcing of Servicing of Loan and Credit Receivables to Servicers**

As Servicers can act:

- (i) special purpose companies in the form of société anonyme domiciled in Greece having as exclusive object the servicing of loans;
- (ii) credit and financial institutions which operate with any status compatible with Directive

<sup>1</sup> The time this briefing was released the new law had not yet been published in the Government Gazette.

2013/12/EU acting through a branch established in Greece having as the object of the branch the servicing of loans.

The following regulatory requirements apply for the above companies:

1. Acquisition of a special license by the Bank of Greece (BoG), which is granted following an assessment of capability and suitability based on the opinion of a three-member Committee. The criteria and the documents that need to be filed for such license are to be determined with a separate BoG Decision. However [BoG ECA 82/2016](#) applies to the extent not contradictory to the Amended NPL Law.

2. Registration by the Registry of Greek Companies

3. In respect with companies under (i) above share capital amounting at least 100.000 euro.

On the basis of the BoG ECA 82/2016 and Directive 2013/12/EU, we understand that branches under (ii) above can operate in Greece following a notification to the Bank of Greece and subject to compliance with Amended NPL Law. In addition, it is specifically stated in the Amended NPL Law that the operation of branches under (ii) does not prejudice the provisions of MIFID Directive on investment firms, as well as the operation of the factoring companies, consumer credit companies, investment firms, and leasing companies as well as servicers under a securitization scheme. It is unclear whether through BoG norms these regulated entities established in Greece would be allowed to extend their license to include servicing of loans (as was the case in the previous regime), especially given that the Introductory Report of the Law stresses the importance of servicing companies having as exclusive object the servicing of the loans and credits.

Servicing companies could request a special license by BoG regarding granting new loans for the purpose of refinancing NPLs subject to having as minimum paid up share capital the amount of 4.500.000 euro and complying with the norms and the supervisory powers of BoG. Such loan

agreements would be governed by Greek law and the Greek Courts would be competent for resolving any dispute arising therefrom.

### **Licensing Procedure**

The NPL Law sets forth in general terms the licensing procedure, leaving the details to a BoG Decision to be issued. The procedure, similarly to the previous regime, ensures disclosure of shareholders and officers up to the ultimate beneficial owners and comprehensive information for BoG to assess the application. What is noteworthy, is that among the documents that need to be submitted within the licensing procedure is a report setting forth the restructuring procedures which are alternative to foreclosure within the framework Decision No. 116/25.8.2014 of the Credit and Insurance, Affairs Committee of the Bank of Greece establishing a code of conduct for the management of NPLs (the Code of Conduct), Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and Executive Committee BoG Act 42/30.5.2014 especially with regard to the categorization of individual borrowers, who belong to vulnerable social groups. We understand that the Servicers will be required to have an organizational structure and arrangements that would encourage reasonable forbearance before foreclosure proceedings are initiated especially with regard to socially vulnerable borrowers.

The license can be suspended or revoked by the Bank of Greece under circumstances set forth in the Amended NPL Law, whilst Bank of Greece has extended supervisory powers, such as change of Board of Directors members or in situ audits and access in company's records.

### **Purchasers of Loans and Credits**

No restriction or qualitative characteristics are set for the sellers of the loans. Unlike the previous regime that limited sellers to the securitization SPVs, credit institutions registered outside Greece and NPL purchasers, Amended NPL Law sets no

restriction on the Sellers. However, there is a restriction on the type of receivables to be transferred. Non -banking loans or other type of receivables are excluded from the Amended NPL Law.

**As Purchaser can act:**

- companies in the form of société anonyme domiciled in Greece having as their object the purchase of receivables out of loans and credits granted by credit and financial institutions, which are registered in the Greek Registry of companies;
- companies domiciled in the European Economic Area, which according to their statutes of incorporation are allowed to acquire receivables out of loans and credits, without prejudice to the European Union law;
- companies domiciled outside the European Economic Area, which according to their statutes of incorporation are allowed to acquire receivables out of loans and credits, without prejudice to the European Union law, provided that their seat is not registered in a country with a privileged tax regime or in a non-cooperative country as each time determined by pertinent legislation.

A prerequisite for the above companies to act as Purchasers is to assign the servicing of loans to the Servicers which are licensed and supervised by the Bank of Greece. This is a requirement that applies also for any subsequent transfers of such receivables. The receivables continue to qualify as banking receivables irrespective of their transfer.

Thus, compared to the previous regime:

- standalone Purchasers are introduced (without a need to couple the operations with loan servicing);
- purchasing activity is allowed also to companies established outside Greece subject to conditions;

- Purchasers are obliged to enter into a servicing agreement with the Servicers and they are exempt from licensing requirements.

Purchasers should at all times maintain a share capital up to 100,000 euros.

**Transfer Agreements**

A prerequisite for the eligibility of the loans to be transferred is the prior invitation of the debtor and the guarantor through an extrajudicial notice to settle their loan within 12 months by the date the Amended NPL Law comes into force or prior to this. This prerequisite existed in the previous regime. We understand that invitations sent under the previous regime also count as invitations under the current regime and there is no need for addressing a new such invitation. Similar to the previous law this prerequisite does not apply for claims in dispute, claims awarded by a court claim, as well as claims against non -cooperative debtors as defined in the Code of Conduct.

A noteworthy additional requirement is that any new acquirer of the above receivables needs to follow all the stages of communication with the borrowers in accordance with the Code of Conduct without taking into account any previous stages already taken place by the seller of the receivables.

The seller of the receivables is deemed as a process agent in order to facilitate servicing of documents addressed to the borrower.

**Debtor protective provisions**

Consumer protection law, data protection laws, and the Code of Conduct for non-performing loans bind the Servicing Companies. It is also expressly provided, in line with previous regime, that the substantive and judicial position of the debtor should not deteriorate due to the servicing or the transfer of the loan and the underlying agreement cannot be unilaterally amended. This is further specified in case of underlying performing loans bearing a fluctuating interest rate, in which case no additional interest can be imposed by the acquirer.

## **Tax and Registration Costs Considerations**

### **Income taxation of capital gains arising from purchase of claims**

Pursuant to Amended NPL Law capital gains arising from purchase of loan and credit receivables are subject to income tax in accordance with the Greek Code of Income Tax. The latter provides that the term capital gains refers to the difference between the selling price and the acquisition price and includes any relevant expenses. Same income taxation applies to further transfers of the above receivables.

In order to determine the amount of capital gains, the Greek Code of Income Tax provides two different types of calculation, based on whether the titles transferred are listed on the Stock Exchange or not. It is evident that these determinations are not fit for purpose of the case concerned. Therefore, further clarification by the competent authorities is required.

### **Contribution of L. 128/75**

It is specifically provided in the Amended NPL Law that the loan and credit receivables continue to bear the special levy of L. 128/75<sup>2</sup> even after their transfer to Purchasers. The Servicers are obliged to pay such tax to the Bank of Greece.

### **VAT on sales of receivables and fees charged by the Servicers**

The Servicing fee to be charged by the Servicers attracts VAT. In addition, VAT is imposed on transfer agreements. The latter provision deviates both from a general consideration of Greek VAT law, namely that such transactions could be

deemed as banking operations and thus be exempted from VAT, as well as securitization law<sup>3</sup> that provides that the transfer of receivables are exempted from all direct or indirect taxes, including VAT. Such a tax burden is expected to be a potential impediment for NPLs transfers.

### **Exemption from withholding tax and stamp duty**

Interest paid under the loans and credits serviced or purchased under the Amended NPL Law and any new loans granted by the Servicers are exempt from withholding tax. In addition, loans granted by Servicers to borrowers in order to enable the latter to restructure their debts will not be subject to stamp duty.

### **Non-taxation of the benefit arising from writing off debts**

The Amended NPL Law provides that the benefit arising in favor of legal entities and individuals from writing off of their debts towards a credit or a financial institution or Servicers or Purchasers within a framework of a settlement or following a court decision is not subject to income tax<sup>4</sup>. As far as individuals are concerned the aforementioned favorable provision will apply to individuals that obtain income from business activity<sup>5</sup>.

### **Registration Costs**

The contract for the transfer of the receivables shall be registered in a summary form, incorporating the contract's essential terms, in accordance with article 3 of Law 2844/2000. If a receivable under transfer is secured through a mortgage or a prenotation of mortgage or a pledge

<sup>2</sup> According to Law 128/1975 (art. 1), all Greek banks which grant loans are obliged to deposit a special levy to a specific account of the Bank of Greece, defined to the annual percentage of 0.6% on the loans granted by them (which is 0.05% per month). Said obligation is provided as well for foreign banks according to art. 22 par. 2 of Law 2515/1997. The above obligation is considered to be a genuine indirect tax burden aiming to the support of the export and industrial enterprises. Said levy is computed every month on the basis of the average monthly residual of credits and must be deposited to a special account of the Bank of Greece until the last working day of the following month which is deemed the date of valeur.

<sup>3</sup> Law 3156/2003, art 14 par. 4.

<sup>4</sup> More specifically, in cases of an extra-judicial settlement the above described favorable tax regime will apply a) to debts that

on 31.03.2016 were in delay, in dispute or arranged, and b) to extra-judicial settlements concluded between 01.01.2016 – 31.12.2017. With regard to writing off debts due to enforcement of a judgment the exemption from income tax will apply to debts that on 31.03.2016 were a) in dispute, or b) arranged through a judgment issued as of 01.01.2016, or c) in delay and the relevant applications before the Court are submitted until 31.12.2017

<sup>5</sup> In particular, the benefit of such individuals from writing off debts will not be subject to income taxation provided that on 31.03.2016 the debt at issue was in delay, in dispute or arranged as well as in cases where an extra-judicial settlement is concluded until 31.12.2017.

or other ancillary right or lien, which has been made public by way of its registration with a public registry or record book, the filing of the certificate of registration with the public registry book of article 3 Law 2844/2000 and the indication in a summary form of the security interest, ancillary right or lien are required for the registration of the beneficiary's change. Each such registration by any Land Registry, Pledge Registry, or Cadastre is subject to fixed dues amounting to Euro 2.500 €, all other charges or duties being excluded. With regard to Land Registries and for the transitional period that they operate as Cadastres the above fees are increased with an extra fee of 500 € to be paid a special Fund for the financing of court buildings.

### **Transition provisions**

As stated above, BoG ECA 82/2016 continues to apply to the extent not contrary to the Amended NLP Law. However in parallel a new BoG decision is to be issued setting the details of the licensing procedure. Meanwhile, any pending petitions under the previous regime have two months to comply with the Amended NPL Law; otherwise BoG will resume the licensing process.

### **General Considerations**

It is true that the Amended NLP Law followed in many respects the tested practice of securitisation law and removed some of the issues that we have indicated in our previous briefing. However there are other areas that remain unresolved or unjustifiably deviate from the tested practice.

1. Purchaser is exposed to claw-back risks.
2. Purchaser is exposed to set -off rights of the debtor (e.g. from bank accounts kept by the seller).
3. No floor of sale price and no liability immunity for officials of the Seller, which could protect them from litigation if sold at a loss.
4. Transfer of Loans is subject to VAT.
5. Heavy operational requirements for Servicers.
6. Transition to the new law may cause confusion.

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