

your Legal Lab

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New Regulatory Framework for NPLs in Greece

Is this the start of the resolution of an increasing problem?

Introduction

Shortly after the finalization of the long-awaited recapitalization process of Greek Banks and the introduction by the Government of a legal framework regarding the NPL sales, we would not think of a more compelling timing to address key legal issues of NPLs.

Greek banks need to free capital and resources to support new loans and lowering of interest rates that the Greek economy desperately needs. On the other hand the development of an efficient NPL market is linked to the existence of third party specialized services and companies allowed to purchase and hold distressed debt which could improve bank risk management as well as recovery rate and management speed.

Through recent reforms many impediments, which could hinder the development of a NPL market, have been eased, namely measures by the Bank of Greece regarding supervisory of NPLs (Bank of Greece Code of Conduct, Executive Committee Act 42/ 30.5.2014), reform of Civil Procedure Code to expedite enforcement procedure, reform of Bankruptcy Code.

However, what was missing was a law establishing a licensing framework for specialized servicing and acquiring companies under the supervision of the Bank of Greece. Recently the Parliament passed law 4354/2015 introducing a regulatory framework for servicing and transferring NPLs (hereinafter "**the Law**").

Our experience has shown that there are several levels of complexity which need to be addressed in

a NPL transaction that to some extent are resolved by the new Law but there are still many matters that need to be considered before the NPL market is really developed in Greece.

Overview of the Law

Type of Loans covered – Capacity of Servicers and Purchasers

The Law is not applicable until 15.2 2016 as regards consumer loans, loans secured with mortgage or prenotation of mortgage over primary residence, SME loans and loans guaranteed by the Greek State. Special legislation will be enacted for these types of loans. Servicing and acquisition of NPLs can be undertaken exclusively by companies servicing receivables out of NPLs ("**Servicing Companies**") and companies purchasing receivables out of NPLs ("**Purchasing Companies**") in the form of sociétés anonymes either domiciled in Greece or in EEA but operating in Greece through a subsidiary, whose purpose must consist in the servicing and acquisition of NPLs, subject to a license obtained by Bank of Greece on the basis of an opinion of a three-member Committee to be appointed through a common ministerial decision.

The shares of these companies, if not listed, are registered. In addition during the licensing process the applicant should reveal the identity of the persons, who through direct or indirect participation in the companies or the provisions of the Articles of Association, or a contract have the power to direct the company's management and

policy as well as the members of the Board of Directors and the management of the company.

The Bank of Greece grants the license on the basis of suitability and competence criteria as these will be determined by separate Acts of Bank of Greece. The license can be suspended or revoked by the Bank of Greece under circumstances set forth in the Law, whilst Bank of Greece has extended supervisor powers.

The Purchasing Companies should at all times maintain a share capital up to 100,000 euros.

Loan Servicing

Up until the introduction of the Law servicing of receivables was recognized only in the framework of securitisation transactions to appointed servicers according to Law 3156/2003, whilst outside securitization the banks could only appoint Debtor Briefing Companies of law 3758/2009 which are entitled to negotiate on behalf of the banks the time and the manner of repayment of debt under strict debtor protective rules, without however being entitled to collect debt.

This need for non –bank servicers with full power to collect and enforce a delinquent loan claim outside a securitisation transaction has been addressed by the Law. Servicing Companies are entitled to proceed to any action allowed for a bank to pursue its claim, namely apply Code of Conduct regarding restructuring of the loan, collect payments, exercise any judicial remedies and enforce the originating bank’s rights.

Suitable loans for servicing are claims out of loans and/or credit, which are non-performing for a period exceeding 90 days or performing loans of the same debtor, the servicing of which is assigned together with the non-performing portfolio. Loans which are subject to the protection of law 3869/2010 regarding over-credit individuals are not deemed as delinquent so they do not qualify as suitable loans in the above sense, unless they are co –serviced by the Servicing Company with non-performing loans.

The servicing agreements should have a minimum content as this will be prescribed by Acts of the Bank of Greece which will be issued.

Transfer of Loan

Capacity of Seller and Purchaser

As sellers can act Greek credit institutions, the Greek subsidiaries of credit institutions or the Purchasing Companies of the Law, whilst purchasers can be either credit or financial institutions or the Purchasing Companies.

Suitability of Loans sold- Legal Requirements

Qualifying loans for purchase are claims out of loans and/or credit which are non- performing for a period exceeding 90 days or performing loans of same debtor, which are co-transferred. This possibility is particularly important in case a debtor’s portfolio involves multiple loans, some of which are performing, whilst others are non-performing, especially if granted to affiliates or loans that are cross- collateralized and are subject to cross default clauses. 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 within 12 months by the date the Law comes into force, to settle their loan. This prerequisite however does not apply for claims in dispute, claims awarded by a court claims, as well as claims against non -cooperative debtors as defined in the Code of Conduct.

As regards the legal requirements for the agreement for the sale and transfer of claims of NPLs the following are to be highlighted:

1. A sale is effective despite non-assignability provisions of the underlying contract.
2. According to Greek law an assignment is permitted without the borrower’s consent but for unfunded commitment the consent of the borrower is required for the transfer of the funding obligation of the selling bank. Purchasing Companies can acquire unfunded loans if they hold a relevant license by the Bank of Greece in line with the existing regime of institutions granting credit.
3. According to Greek law in order for assignment of claims to be effective, it needs to be notified to the underlying debtor. The sale agreement needs to be registered but registration does not work

as deemed notification (alike securitization), to the effect that individual notifications to debtors need to take place. The law does not provide for particular form of notification.

4. From a data protection perspective, there is no exemption in the law for purchaser and the latter should inform the debtors for the processing of their data, whilst the purchaser should register its files by the local Data Protection Authority.

Debtor protective provisions

Consumer protection law, data protection laws, and the Code of Conduct for non-performing loans bind both the Servicing and Purchasing Companies. In addition it is expressly provided in the Law that the substantive and judicial position of the debtor should not deteriorate due to the servicing or the transfer of the loan. Finally, the restrictions of law 3758/2009 on Debtor Briefing Companies as regards personal data, protection of debtor privacy and personality apply to Servicing Companies.

Considerations for the stakeholders

It is true that the new Law removed many barriers for servicing and asset management companies to enter the Greek market and introduced a protective regime for debtors. However there are other areas, which still remain unclear or raise concern:

1. Alike securitization the new Law does not contain provisions stipulating that the transfer cannot be challenged on the grounds of insolvency of the seller and, therefore, the purchaser is exposed to claw-back risks.
2. The disclosure requirement for the shareholders of both the Servicing and the Purchasing Companies does not extend to ultimate shareholders and the term "indirect participation" is not specified in the Law.
3. Set-off rights of the debtor (e.g. from bank accounts kept by the seller) could be particularly problematic since according to Greek law claims that have been established prior to the notification of the

assignment of the principal claim may be set off under certain circumstances.

4. The Law does not introduce a regulatory framework which would provide for a floor of sale price which could protect the seller from litigation if sold at a loss especially with regard to state selling banks.
5. Purchasers of loans can be financial and credit institutions. However the Law does not require such institutions to be established in Greece. If domiciled abroad, choice of law issues arise. Seller and Purchaser may choose a foreign law to govern the sale agreement. An issue arises which limitations exist with regard to provisions of the Law being deemed mandatorily applicable Greek law.
6. The Law lacks tax exemptions (e.g. transfer taxes on the sale of portfolio, or establishment of new security) to the effect that the cost of resolution could be increased.

The present note only highlights some key issues and questions arising from the new regulatory framework. The Law works as an umbrella; law Norms and separate acts to develop and clarify such framework are expected from the Bank of Greece. **Your Legal Partners** will closely follow up with any legislative developments and will keep clients, friend and market players briefed.