Greek (N)PLs law: extreme makeover

On 22 May 2016, the Greek parliament voted an extensive reform on the framework for the sale and servicing of non-performing loans (NPLs) (please see our detailed newsletters on this matter[1]). The new rules take a very different stance on the matter compared to the approach reflected in the initial legislative effort back in December 2015, introduce a tax framework for loan selling transactions and elaborate on technical details that have troubled the market in the past few months. On 2 June 2016, further amendments to the law were voted aiming to further enhance flexibility of the framework introduced by the new law, while on 3 June 2016 the Bank of Greece updated the relevant secondary legislation governing the licensing process and operational requirements of NPL managers.

In a nutshell

Since its enactment in December 2015, the Greek framework on the servicing and sale of NPLs has been at the centre of ongoing discussions between the Greek government, its sovereign lenders and market players with a view to create a liquid loan market while preserving regulatory monitoring. The new provisions of law 4354/2015 voted on 22 May 2016 (the **new provisions**) bring about significant changes in a series of key concepts (such as licensing and purchasing eligibility) and introduce tax rules which were absent from the initial version of the law. Most importantly, the law's scope of application was been extended to both performing and non-performing loans, thus creating a new structure for loan selling concurrent with existing schemes, which the market has been using to date. Furthermore, on 2 June, only within weeks from the enactment of the new provisions, additional amendments were voted by the Greek parliament, bringing about further technical improvements on the law. Immediately thereafter, on 3 June 2016, the Bank of Greece (**BoG**) updated the framework governing the licensing and operational requirements in line with the latest amendments to the law. The substance of the BoG decision remains essentially unchanged whilst adjusted for the new provisions of the law, primarily with respect to eligibility of managers.

Changes to an unimplemented law

(a) Perimeter

The initial version of the law, as enacted in December 2015, encompassed only non-performing loans (i.e. loans and credits in excess of 90 days past due, **NPLs**) with the –provisional– exception of certain specific NPL types[2]. The new framework is applicable to the outsourcing of the servicing and the sale of both performing and non-

[1] http://zeya.com/articles/greek-npls-law-first-step-towards-secondary-market and http://zeya.com/articles/greek-npls-law-implementation-unfolds on *Greek law 4354/2015 passed on 16 December 2015 (the NPL Law) and the Bank of Greece's decision No 82/2016 (the ExCo Decision) respectively.*

[2] *Namely consumer loans, loans to SMEs and loans collateralised with Greek State guarantees or the debtors' primary residence.*

performing loan receivables, including loans guaranteed by the Greek State (even if originated by commercial banks) which are now freely transferrable pursuant to the latest amendment to the law voted on 2 June 2016.

Loans collateralised with a mortgage on the obligor's primary residence of a taxable value of no more than Euro 140,000 cannot be sold until 31 December 2017, but their servicing can be outsourced to third-party eligible servicers. Loans granted by the Loans and Consignments Fund (a State-owned financial institution) fall outside the scope of the newly voted provisions, i.e. cannot be sold to or serviced by third parties.

Although the language of the new provisions is not entirely clear, the explanatory report submitted to parliament for the new provisions expressly states that originators will be free to choose between the existing securitisation framework, i.e. the **Greek Securitisation Law** (Greek law 3156/2003) and the new rules on loan selling. This formulation echoes the agreement between the Greek government and its sovereign lenders under the latest MoU[3] for Greece's Fiscal Adjustment Programme that the Greek Securitisation Law should not be affected by the new provisions on the sale of loan receivables.

(b) Flexibility on eligibility

Under the original version of the law, buyers and servicers were subject to the same set of rules given the approach taken at the time, i.e. that loan purchasing could not be pursued as a stand-alone operation but only in combination with the assumption of their servicing.

Under the new provisions, the requirement as to licensing and establishment in Greece is only reserved for servicers, which may only be special purpose société anonyme companies established in Greece and having a minimum capital of Euro 100,000, or Greek branches of foreign institutions established in an EEA country (**Servicers**).

Entities that purchase loans do not require a license but must have entered into a servicing agreement with a Servicer, otherwise the loan acquisition transaction will be null and void. Eligible buyers whose by-laws allow them to purchase loan receivables may be: (a) société anonyme companies established in Greece (b) entities established in an EEA country subject to EU legislation, or (c) entities established in countries outside the EEA with the exception of non-cooperative jurisdictions[4] and preferential tax jurisdictions[5] (**Eligible Buyers**). Such entities may, but are not obliged to, set up a branch in Greece, unless of course such obligation arises due to the existence of a permanent establishment for tax purposes in Greece.

(c) Transferred receivables

A long awaited clarification was included in the law, stating that transferred receivables are banking receivables. This ensures that certain enforcement, tax or other privileges and treatment reserved for banking institutions will remain in effect in spite of the transfer of the loan to a non-bank institution.

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[3] *19 August 2016* http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm.

[4] *According to a list of non-cooperative jurisdictions published on an annual basis by the Greek Ministry of Finance taking into account the countries' compliance with OECD standards of transparency and exchange of information.*

[5] *Namely jurisdictions where the entity in question is effectively not taxed or is taxed for income, profits or capital at a tax rate which is currently 14.5% or lower.*

On the downside, specifically with respect to NPL transfers, in addition to the 12-month consultation period between originators and NPL obligors as a prerequisite for sale, each Buyer must restart the consultation process via the Servicer once the Buyer acquires the loan. In addition, obligors' no-worse-off principle has been extended to prohibit Buyers from unilaterally amending terms of the loan agreements; the margin may be increased to the extent that that the respective loan agreement includes objective and specific criteria for margin increase.

(d) Servicing agreement

Servicing agreements were exempt from registration but had to be submitted to the BoG for review prior to their execution. This has now been replaced by a notification of the agreement to the BoG both prior to and after execution and a reference that the draft agreement falls within the supervisory powers of the BoG. Although the letter of the law does not require the BoG's prior approval on the servicing agreement, it remains to be seen in practice whether the BoG can or will intervene in this respect. In addition, a puzzling provision was introduced to the law, stipulating that a joint decision of the banking regulator (BoG) and the capital markets regulator (HCMC) will determine which information on Servicers having entered into servicing agreements with Buyers will be periodically disclosed to the public for transparency reasons.

(e) Refinancing rules

As was the case until now, Servicers can refinance loans subject to appropriate licensing; the Euro 4.5 million minimum capital requirement for licensing refinancing operations remains[6]. Refinancing loans are now explicitly considered by law to be banking loans and must be subject to Greek laws and jurisdiction; the standard levy of Greek law 128/1975[7] applies on the loans in question, as is the case with all banking loans. The law also requires that servicers with refinancing operations draw up their financial statements in accordance with IFRS and comply with all rules and regulations governing the granting of loans by credit institutions. The special liquidation applicable to the winding up of failing banks is also applicable to Servicers whose license has been revoked.

(f) Reporting and compliance

Reporting requirements have largely remained in the same spirit and context as before, with some additional clarifications as to the data expected to be submitted to the Bank of Greece. Language on compliance with anti-money laundering regulations is now stronger and requires Servicers to make available to obligors information on the ultimate beneficial owners of the Servicer. Reference to the obligation to issue registered shares has been limited to Servicers, thus implying that Buyers do not bear the same obligation; likewise, pursuant to the amendments voted on 2 June 2016, Buyers are no longer considered as "traders" for consumer law purposes, and thus only Servicers need to abide by those regulations. From 2 June 2016 onwards, the law subjects Servicers to certain rules applicable to debt collection agencies, primarily with regard to means of

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[6] *Pursuant to the amendments voted on 2 June 2016, Servicers established in Greece must deposit such amount in a Greek bank account whereas services established in the EEA (but maintaining a branch in Greece) can make the deposit with a bank operating in the EEA.*

[7] *The levy of law 128/1975 is imposed, with few exceptions, at an annual rate of 0.6 or 0.12 percent on loans and credits granted by Greek credit institutions and on loans and credits granted by foreign credit institutions to Greek borrowers.*

communication with borrowers, which add up to the Bank of Greece's Code of Conduct for non-performing borrowers.

Introducing a taxation framework

In its initial version, law 4354/2015 was silent on the tax treatment of the sale and servicing of loan portfolios. The new provisions introduced a specific tax regime, including tax exemptions.

(a) Withholding tax on interest

In particular, the new provisions extend the exemption from withholding tax applicable on interest -including default interest- payable to credit institutions, to interest payments to Eligible Buyers arising from receivables transferred under law 4354, as well as to interest payments to Servicers that arise from loans or credits granted by the latter under law 4354.

(b) Capital gains/losses

Any capital gain arising from the transfer of receivables to an Eligible Buyer under law 4354, or from a potential further transfer of the receivables by the latter, is subject to corporate income tax. The law does not confirm that any loss will be deductible from taxable revenues.

(c) VAT; stamp duty

The new provisions confirm application of the existing VAT rules, as these are applicable and may be interpreted from time to time. For example, as regards the sale of loan portfolios to Eligible Buyers, the Greek Ministry of Finance has taken the position[8] that sales of NPLs are VAT exempt.
The new provisions exempt from stamp duties loans and credits granted by Servicers in the context of refinancing operations and debtor restructurings. The levy of Greek law 128/1975 (see footnote 3) applies to such loans and credits.

(d) Debt write-off

Furthermore, the new provisions exempt, within certain time limits and under certain conditions, the benefit gained by borrowers from the write-off of debt claims. More specifically, the law provides that the benefit from the full or partial write-off of a debt claim towards (i) credit or financial institutions, (ii) credit or financial institutions under special resolution and (iii) Eligible Buyers or Servicers in the context of an extrajudicial settlement, is not subject to income nor gift taxation. This is under the condition that the relevant debt was in arrears or disputed before the courts or restructured as at 31 March 2016, or that the extrajudicial settlement will be reached by the end of 2017, and in the case of legal persons or entities and individuals earning business income, not earlier than 1 January 2016.

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[8] The position of the Ministry has been expressed in written replies to queries submitted by taxpayers on a case by case basis; such replies however do not have a binding effect.

Regarding legal persons or entities and individuals earning business income, this equally applies to write-offs of debt claims towards the parties referred to in the previous paragraph, occurring as a result of implementation of a court decision, provided that as at 31 March 2016 the debt was either disputed before the courts or restructured by way of a court judgment issued as of 1 January 2016, or that the debt was in arrears as at 31 March 2016 and the relevant application is filed before the courts by 31 December 2017.

(e) Registration fees

Filing and registration of a loan sale and transfer agreement concluded under the new provisions with a public record or registry is subject to a flat Euro 2,500 fee, increased by Euro 500 throughout the period during which Greek land registries operate as cadastral offices. Registration with public registries of changes of the beneficiary of a mortgage, mortgage pre-notation, collateral or other ancillary agreement or right securing receivables transferred to Buyers will be subject to a flat Euro 20 fee. These registration fees may not be rolled over to the borrower or guarantor.

Parallel universe

The new provisions create a parallel system of loan selling transactions which is both untested and burdensome. The Greek Securitisation law, which has been repeatedly used by Greek banks, is simpler and tax efficient. It would therefore appear that the new provisions are useful mostly for setting out the licensing and operational requirements for servicers who target the servicing of loan portfolios which continue to be held by the originator banks. We continue to be of the view that the optimal technology for the sale of banking receivables (NPLs or performing loans) is the Greek Securitisation Law, in which case both the securitisation SPV and the servicer[9] can perform their duties outside the scope of law 4354; alternatively, the servicer may be an entity licensed under law 4354 – but it should also comply with the servicer eligibility criteria of the Greek Securitisation Law.

[9] *Namely the originator; the guarantor of the securitised receivables; the entity that acted as servicer of the receivables prior to their securitisation; or a credit or financial institution validly operating in the European Economic Area.*

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