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deal insight

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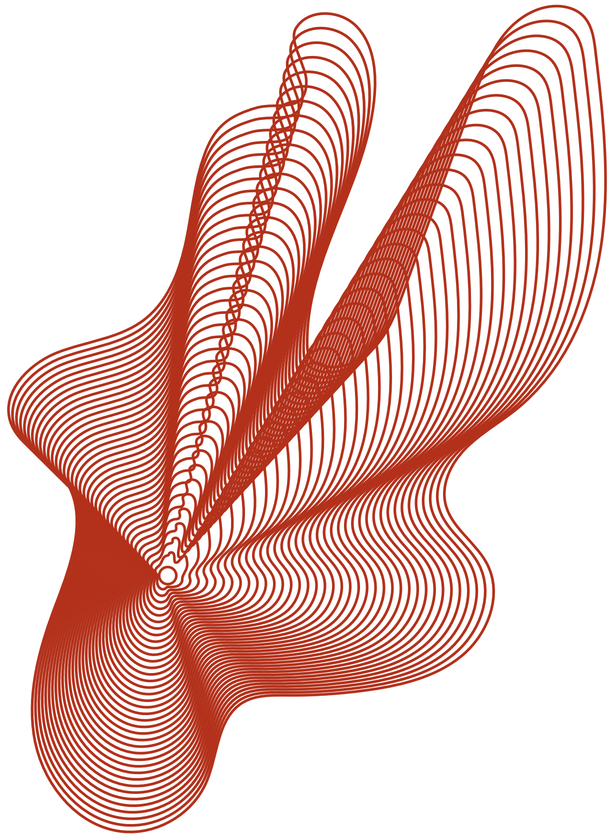
Project Amoeba marks the genesis of the Greek NPE market



On 29 May 2018 Piraeus Bank, a Greek systemic bank listed on the ATHEX, announced that it entered into an agreement with Bain Capital Credit LP for the sale of non-performing and denounced corporate credit exposures, secured with real estate collateral, equivalent to €1,950mn total legal claims or €1,450mn on-balance sheet gross book value (Project Amoeba).

The long awaited systemic firstborn

The market had long been appetent for this transaction which was the talk of the banking town for quite some time, being the first of a secured NPE type to be launched by a systemic bank in Greece. Project Amoeba marks the opening of the secured NPE market in Greece further to a series of legislative initiatives and regulatory NPE reduction targets in the last few years aiming to establish a liquid market for the nearly €100 billion of NPEs of the Greek banks. It also attests international investors' interest to invest in Greek NPEs, given that the number of investors that took an interest in the transaction went far beyond what would be expected in a first-time systemic NPE deal, which is a very positive sign for the coming Greek NPE sales.

Project Amoeba follows Project Artemis, a highly diversified secured NPE securitisation launched by Attica Bank, a small sized non-systemic bank, in the summer of 2017, which was the first ever NPE disposal in the Greek banking market. These two deals are expected to constitute benchmarks for transactions to come and pave the way for the sale of other similar portfolios from Greek systemic banks. Zepos & Yannopoulos was involved in both projects acting for each of the Sellers. We take pride in having designed the legal structure that was used in both transactions, adjusted for the specifications of each bank and its particular goals for each respective sale.

Anatomy

The legal structure combines the Greek securitisation law (3156/2003, the **GSL**) with the Greek law on servicing of loan and credit receivables (4354/2015, the **2015 Law**). The scheme makes use of the optimum features of each set of legislation, by applying the GSL to the sale leg of the transaction but using the 2015 Law for the servicing of the securitised portfolio, thus producing a transaction package meeting the needs of each of the parties thereto, seller and investor.

In both transactions, the bank sold in accordance with the GSL the receivables arising from an NPE portfolio (along with all related security interests and ancillary rights, including future and contingent receivables) to a securitisation SPV set up by the investor; the SPV then issued notes as way to raise funds to finance the payment of the purchase price to the seller. Concurrently, the seller had set up and licensed a servicing platform under the 2015 Law, and offered to sell the shares in that vehicle to the investor as part of the transaction, subject to successful completion of a regulatory fit & proper test required under applicable legislation.

Securitisation spine

As there's many a good tune played on an old fiddle, there's many a good transaction based on an old, well-tested and clearly written securitisation law. The GSL came into force back in 2003, it generated a wealth of precedents with performing bank portfolios, posed no interpretational issues and it survived the massive consolidation and reform of the Greek banking sector between 2013 and 2015. Given the Greek banks' eagerness to attract top quality international investors in this emerging market of Greek NPLs, it is no wonder they opted for a legal tool familiar to investors and widely used in international financial markets. The marketability of the securitisation notes and transferability of the shares in the securitisation SPV significantly facilitate NPE transactions in a secondary market taking also into account that this was one of the priorities of the Greek government when implementing its obligations with respect to NPL sales towards its sovereign lenders[1].

Securitisation, by default, brings together not only the seller and the purchaser but also the purchaser's funding sources whereas in outright sale frameworks, as is the 2015 Law, one would need to resolve into additional legal structures to cater for the purchaser's creditors. The GSL establishes upon perfection of the transfer (via registration in designated public records), a statutory pledge in favour of the securitisation creditors over the transferred receivables and the collection account combined with a statutory negative pledge obligation of the purchaser with respect to these assets. The statutory pledge (as well as the transfer of the receivables as such) is immune from the bankruptcy of the seller and of the servicer while the securitisation creditors rank above all other creditors of the SPV by way of a supra-priority privilege. Subject to standard commingling risk, the pledged collection account is by operation of law segregated from the estate of the account bank and the servicer and is immune from bail-in on the basis of article 44 paragraph 2 of the BRRD which provides that the bail-in tool may not be exercised in respect of secured liabilities.

Finally, the GSL, as opposed to the 2015 Law, grants investors with a series of practical benefits such as clearer tax regime and lower perfection costs, specific exemptions from the current restrictions on the outflows of funds from Greece (capital controls) and preservation in the name of the purchaser of any legal and enforcement privileges applicable to the selling credit institution on the grounds of its capacity as such.

1 The creation of a dynamic secondary NPL market was explicitly mentioned as a legislative goal in the explanatory report submitted to parliament for the enactment of Greek law 4389/2016 amending Law 2015 by, among others, expanding its scope of application to the sale and servicing of both performing and non-performing loan receivables.

Servicing limbs

A series of legal and business arguments drove the need to engage a licensed servicer to manage the securitised portfolio. As a matter of GSL requirements, the securitisation SPV may not manage the transferred receivables itself while the seller would need to be disengaged from the pool from an economic, accounting and operational perspective given the statutory NPE reduction requirements it has to meet.

The appointment of a servicer licensed and, therefore, thoroughly regulated and supervised by the Bank of Greece, ensures the maximum level of protection for the debtors in terms of transparency, compliance with the Bank of Greece's NPEs code of conduct, limited access to personal data (as the Tiresias credit bureau is only accessible by banks) etc. Given the fast-paced emergence of a local servicer market, intense competition not only establishes benchmarks but also fosters good customer service, pragmatic portfolio management and diligent regulatory compliance.

In the absence of clear guidance, at the time, on whether servicers licensed under the 2015 Law constitute financial institutions and are thus eligible securitisation servicers or not, the seller would assign the servicing of the portfolio to the licensed servicer before the transfer concluded and therefore comply with the GSL provision allowing the post securitisation servicer to be whichever entity serviced the receivables before them being sold to the SPV. Following amendments brought to the 2015 Law on 14 June 2018, licensed servicers are explicitly qualified as financial institutions, thus rendering this interim step to the process redundant.

Gestation and delivery

Implementation of this structure required bold legal reasoning against a newly formed regulatory framework where, for some, the GSL and 2015 Law struggle to co-exist.

When the 2015 Law was introduced back in December 2015 as a set of rules for both the sale and the servicing of non-performing loan receivables, it was criticised by nearly all market players, including law firms, for the restrictive, highly regulated and intensely supervised framework it introduced. It was then amended (twice) in June 2016 to relax some of its cumbersome provisions, expand its scope of application to, among others, performing loan receivables and allow interaction with other loan investment schemes, such as securitisation, factoring etc. Technical faults and drawbacks were soon noted as deals started to be designed and the law was again amended in May 2017 and recently in June 2018 to presumably address those more practical points. One would assume that, with 3 years of life, 5 rounds of amendments and four[2] transactions implementing it, the NPL Law has passed the market test and works. This is far from happening. In a jurisdiction that has been implementing novel legislation since 2010 (when the country first joined a bail-out programme reforming nearly every aspect of economic and legal life), few legal texts have been so diversely interpreted, debated and approached by legal practitioners, market players, and even regulators.

The two interpretational questions that Amoeba (and Artemis) had to resolve to materialise what was the optimum structure for the reasons explained above were the following:

Does the 2015 Law create an absolute NPL sale framework by exclusion of all other receivable sale alternatives?

The answer is no; and it was an obligation of the Greek government towards its sovereign lenders to make that clear. The Supplemental Memorandum of Understanding executed by (among others) the Greek government on 16 June 2016, included an undertaking to adopt amendments to the 2015 Law to (among others) make clear that the GSL is not affected by the 2015 Law. The Greek government passed Greek law 4389/2016, pursuant to which paragraph 1(d) was added to article 1 of the 2015

[2] Eurobank's Project Eclipse, Alpha Bank's Project Venus, NBG's Project Earth, and Piraeus Bank's Project Arctos; all outright sales of unsecured consumer credit receivables

Law pursuant to which "the provisions hereof do not affect the applicability of (...) [the GSL]". The explanatory report to the law introducing this clarification emphasises on the need to establish a liquid loan sale market by providing investors alternative tools to structure transactions. In essence, it is the servicer status and framework that protects sensitive debtor groups not the sale regime as such.

Are the NPL specific provisions of the 2015 Law applicable to a GSL sale?

This is a question looking at the 2015 Law's infamous "invitation for settlement". The 2015 Law provides, as condition precedent to the validity of the sale, for a prior invitation by the banks to obligors to settle their debts on the basis of an "appropriate settlement scheme"; this should have occurred during the 12 months preceding the "offer to sell". Neither the concept of "appropriate settlement" nor the timing of an "offer to sell" is clearly defined in the law. The latest set of amendments to the Law 2015 which were enacted in 18 June 2018 provide that this obligation is no longer applicable unless the relevant debtors are considered as "consumers" within the meaning of the Greek consumer protection law (2251/1994, as in force) which, in turn, will continue to pose interpretational issues when it comes to debtors who are legal entities as opposed to individuals.

This is the quicksand to pricing a deal. If it is a write-off that is offered as an "appropriate settlement", what is the total exposure investors will calculate purchase price on? If it is a rescheduling, does it turn the loan into performing status, thus implying a totally different assumption base and/or servicing approach? To make matters worse, voices in the market have interpreted this obligation, as a form of call option of the obligor. As this was an intensive political debate which was never included in the version of the law that was passed in parliament, some consider that if the loan is non-performing, rescheduling discussions must have been held and failed and thus the borrower must be offered a haircut approaching the non-collectability rate the investor has assumed for the entire portfolio. Because of the nature of this obligation as a condition to the validity of the sale, some market players consider litigation risk to be very high in the absence of a settlement invitation; no one however can preclude that litigation risk is any different even if invitations do take place on the grounds of the proposal not being "appropriate".

In any event, based on the approach that the two legal texts (the 2015 Law and the GSL) are distinct and operate alternatively and independently, the settlement invitation provisions should not spill over from the 2015 Law to the GSL.

Leap to life

With Project Amoeba paving the way for the sale of secured NPE portfolios and a solid track record of unsecured consumer credit portfolio sales from all four systemic banks, the Greek NPE market has come to life. The banks' stock of nearly €100 billion of NPEs as at May 2018 faces the regulator's expectations to sell approx. 10% of those by end 2019 while the Greek economy is slowly moving towards positive growth rates, the real estate market starts to show signs of reflation and a new market of NPL servicers has emerged. In light of positive economic and market developments the new regulatory, legal and judicial environment that was formed to support investments in NPEs will be echoed to the structures and business plans designed for the transactions to come, either by rediscovering old tools or implementing new ones. Navigating in these waters may not be as difficult as it once was but, as with all things new, will require diligent research and robust reasoning.

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