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Comments on the NPL Law and the BoG regulation of NPL Buyers and Services

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“ Distressed loans in the Greek banking system: restructuring portfolios, reviving enterprises”

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Why the NPL Law?

- Law 4354/2015 ("NPL Law") purports to establish the framework for the operation of an NPL market in Greece
- In implementation of that law, the BoG has drafted a draft regulation for the licensing and supervision of buyers and services of NPL portfolios
- Why do we have the law and the regulation?

Many impediments to an NPL market

- The Greek banks carry a very substantial number of NPLs and may need the option of selling some of them off to third parties
- Third parties may be more efficient in settlements and collections that banks
- However, a market has failed to emerge, even though strong investor interest
- Apparently, this is due to existing impediments; many of a legal, regulatory nature

What are the impediments?

- The most recent agreement with the official creditors required the HFSF to produce a study on these impediments; some of the impediments identified that relate to the legal framework are:
  - The insolvency laws and their implementation
  - Inefficiencies in the enforcement of creditors' rights
  - Cumbersome and costly transfer of NPLs to non banking institutions:
    - Stamp duty
    - Notice
    - Data privacy issues
  - Restrictions on restructuring financing by non-bank servicers

Deficiencies in insolvency law and implementation

- This may deserve to be called: the elephant in the room
- There are problems with the law, the courts, the insolvency professionals and the coordination of lenders
- Some progress has recently been made:
  - in pre-insolvency proceedings (but still extremely lengthy)
  - first steps for the establishment of an insolvency profession
  - Some attempts to enhance court infrastructure by no specialisation effort
- No reforms to insolvency liquidation, a "black hole" – no ability to extract value from claims against debtors who are not going concerns. Reportedly (no reliable stats) ¾ of insolvencies end due to inadequate assets
- Little apparent progress in lender coordination (to prevent insolvencies and preserve value) – no "London Approach"

Pressure on creditors' rights

- Strong institutional bias in favor of debtors that may represent danger for payment culture in Greece
- Some recent limited enforcement procedural improvements have faced strong resistance and implementation uncertain
- Legislative interventions exacerbate problem:
  - Katselis law is prime example as it combines long standstill on debt repayments, ability of court to reduce debts and to replace security (if prime residence) with obligation to repay deemed value over time; recent amendments have yet to be tested
  - Variety of means to resist enforcement; e.g. use of consumer protection laws
  - Severe regulatory restrictions on collection agencies

Impediments as to NPL transfer

Transfer (assignment) of loan receivables:

1. requires notice to the individual debtor which is both costly and time consuming,
2. requires the payment of stamp duty on the face value of the transferred asset (except if between credit institutions),
3. may be subject to claw back if made during the suspect period,
4. may be challenged as a fraudulent conveyance if not for cash and not for (what a court may deem) adequate consideration,
5. may expose the transferor's management or competent committee to liability for breach of fiduciary duty if consideration is deemed inadequate,
6. transfer of files may require permission on a case by case basis from the authority responsible for data privacy,
7. transferee's standing in court proceedings against the debtor or for the realization of the security may be open to challenge,
8. may be prohibited under the terms of the loan agreement without the debtor's consent,
9. there may be obstacles to the assignment of certain securities, e.g. further assignment of state subsidies that may depend on consent by the competent state authority)

These, then were some of the problems the NPL law should address

Impediments as to servicing NPLs

An NPL servicer who is not a bank may be concerned about the following:

1. the servicing of bank debts lies on the border line of banking services -regulatory risk for those that intend to engage in that business
2. a credit institution has certain privileges in terms of enforcement (e.g. ability to by-pass executory title)
3. Would not enjoy certain privileges in connection with restructuring under Dendias law 4307/2014
4. Would not be able to provide restructuring or interim financing; therefore it may be hampered in assisting restructuring efforts; also non bank loans face interest rate cap (anti usury measure)
5. may be deemed to be a collection agency and become subject to the constraints imposed on such enterprises

How the new legislation deals with transfer impediments

obstacles	What the new legislation provides	assessment
Notice requirement	Notice by all suitable means (in addition to publication)	Insufficient – should have been waived (see securitisation law that only requires publication)
Stamp duty (2.4% on face)	No exemption	Major problem – exemption in securitisation law
Claw back	No exemption	x
Fraudulent conveyance	No exemption	x
Breach of fiduciary duty (problem of *real* value)	No safe harbor provision	x – recent spate of prosecutions for debt forgiveness exacerbates problem

Continuing on transfer impediments

Obstacles	What the new legislation provides	assessment
Requirement for permission under data privacy rules	No exemption; only lifting of non disclosure obligation for transferor	Major problem – exemption in securitisation law
Succession in litigation	Yes	√
Contractual prohibitions to assignment	override	√
Statutory prohibitions	N/a	x
n/a	Demand notice within 12 months of transfer	Adds to cost and administrative burden; little if any utility

The new law creates new transfer impediments

- The new legislation states that NPLs may be transferred exclusively to entities licensed as NPL buyers
- Requirement to have provided notice to each individual debtor within 12 months
- Transfer only of NPls (and of performing if by same debtor)
- Vague definition of NPLs; what if partial performance?
- This effectively excludes the benefits of use of securitisation law for NPLs
- Licensing and supervisory requirements under the proposed BoG regulation are very substantial but do not seem to address any apparent risk.
- Buyer deemed “supplier” of debtor for the application of consumer protection laws!

And, of course, all but large corporates’ loans are still excluded

How the new legislation deals with servicing impediments

obstacles	What the new legislation provides	assessment
Regulatory risk – re providing banking services	Licensing provided expressly	√
Banks' enforcement privileges	n/a	x
Restructuring privileges under Dendias law	n/a	x
Inability to provide restructuring financing	Yes, but only by ad hoc permission by the BoG and only for refinancing – excludes DIP financing!	Overly restrictive
Usury cap on interest	n/a	x
Risk of being deemed a collection agency	Collection agency law made expressly applicable	X – remarkable as it includes prohibition of taking action to enforce!

And some new impediments as to servicing

- Servicing may only be taken over by a licensed services; seems to exclude all others, including credit institutions or transfer of the economic interest while the transferor reserves the servicing
- Servicer is deemed a “supplier” of the debtor for the application of consumer protection law – reverses the burden of proof as to certain of debtor’s claims

There could be an easy win

- Rely for transfers on Law3156/2003 (the "Securitisation Law"):
  - a framework for the transfer of loan receivables by the originating banks to SPVs, in order that they may be used as assets to back the issuance of debt securities to be privately placed;
  - used successfully on numerous occasions since 2003
  - efficient framework as to transfer and transferees that could also include NPLs (but not exclusively) – all that is needed is expansion of the scope of the Securitisation Law to include transfers which are not solely for securitisation
  - No need to license buyers unless they also do the servicing of the transferred receivables (they get servicer license)

Limited regulatory intervention needed only for servicing

- Servicing to be reserved for licensed entities or credit institutions
- Clearly distinguish servicer status from collection agencies (which are call-centres)
- provide licensed servicers with the same procedural enforcement privileges as the banks
- allow all restructuring financing on the same terms as banks, and
- require licensed servicers to comply by the BoG Code of Conduct as necessary safeguard

Thank you for your attention!