

# WATSON FARLEY & WILLIAMS

## BRIEFING

# NEW REGULATORY FRAMEWORK FOR NON-PERFORMING LOANS IN GREECE JUNE 2016

THIS BRIEFING SETS OUT THE KEY FEATURES OF THE NEW LEGISLATION, INCLUDING HOW THE COMPANIES WHICH WILL MANAGE NPLs AND OTHER LOANS WILL BE LICENSED AND OPERATE.



### INTRODUCTION

The wide-ranging amendments to the law on NPLs which were introduced on 27 May and 6 June 2016 have considerably broadened the application and scope of the legislation introduced by Law 4354/2015, which entered into force on 16 December 2015. The legislation is intended to create a secondary market for non-performing loans in Greece with a view not only to stabilising the banking sector by providing immediate liquidity to the relevant credit institutions, but also to help defaulting borrowers to restructure their debts more efficiently.

This briefing sets out the key features of the new legislation, including how the companies which will manage NPLs and other loans will be licensed and operate.

Law 4354/2015, as initially enacted, set out the minimum requirements for the establishment and operation of specialised companies managing debt receivables from non-performing loans ("NPLs"<sup>1</sup>) in Greece. Law 4354/2015 as amended by Law 4389/27.5.2016 and Law 4393/6.6.2016 (the "NPL Law") provides that, in addition to the management of debt receivables from NPLs, these entities can now also manage debt receivables from any loans or credits granted by credit or financial institutions with the exception of loans and credits granted by the Deposit

<sup>1</sup> In accordance with Law 4354/2015, as initially enacted, any loan or credit agreements which are due and unpaid for a period of more than 90 days fell within the definition of a "non-performing loan". This definition is in line with the respective definition included in the technical standards of the European Banking Authority on Non-Performing Exposures and Forbearance, which provides consistent indicators of asset quality of banks across the European Union. However, this definition is not included in the NPL Law as currently in force.

and Loan Fund (collectively, the “Loan Assets”)<sup>2</sup>. Law 4389/2016 also introduced much-needed provisions on the tax treatment of the management and sale of Loan Assets.

The entire NPL market will be supervised and regulated by the Bank of Greece (“BoG”), which the law establishes as the competent licensing authority.

## LOAN ASSET MANAGEMENT COMPANIES AND LOAN ASSET ACQUISITION COMPANIES

### Loan Asset Management Companies

The management of Loan Assets, including debt receivables from NPLs, may be assigned exclusively to specialised companies established for this purpose in accordance with the NPL Law (the “LAMCs”). LAMCs need a special licence from BoG, which also supervises their operation.

A company eligible to obtain such a licence must be either:

- a company incorporated in the form of a “*société anonyme*” with its registered seat in Greece and with exclusive scope of business to manage loan assets<sup>3</sup>; or
- a company with its registered seat in a member state of the European Economic Area (“EEA”) but which is legally established in Greece through a branch and with scope of business to manage loan assets, subject to the provisions of the NPL Law and the relevant EU legislation.

LAMCs are listed in a special register at the General Commercial Registry and are subject to the provisions of the NPL Law, as well as the provisions of the law on *sociétés anonymes*<sup>4</sup>. Their shares must be registered and they are required to keep a minimum share capital of €100,000, fully paid up at all times<sup>5</sup>.

### Loan Asset Acquisition Companies

Loan Assets, including debt receivables from NPLs, may only be sold and transferred to a company (a “LAAC”) which has entered into a Loan Asset management agreement with a LAMC and is either:

- a company incorporated in the form of a *société anonyme* with its registered seat in Greece, which is registered with the General Commercial Registry and may acquire assets from loans and credits in accordance with its articles of incorporation; or
- a company with its registered seat in the European Economic Area which may acquire assets from loans and credits in accordance with its articles of incorporation subject to the provisions of EU legislation; or
- a company with its registered seat in a third country but with the discretionary power to establish a branch in Greece, which may acquire assets from loans and

<sup>2</sup> Loans guaranteed by the Hellenic Republic, which were explicitly exempted from the scope of Law 4354/2015 by virtue of Law 4389/2016 are now included in the definition of Loan Assets by virtue of Law 4393/6.6.2016.

<sup>3</sup> The obligation for the management of loan assets to be the exclusive scope of business of a LAMC is subject to paragraph 20 of article 1 of the NPL Law providing for the option of LAMCs to acquire (additionally) a licence for the granting of loans and credits for refinancing or corporate restructuring purposes of the respective borrowers.

<sup>4</sup> Codified Law 2190/1920.

<sup>5</sup> Reduction of the share capital below this limit is only permitted on the condition that a special plan for the closure of the LAMC’s operations has been approved by BoG.

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credits in accordance with its articles of incorporation subject to the provisions of EU legislation and provided that its registered seat is not: (a) in a country with “a favourable tax regime”; or (b) in a non-cooperating country (as these countries are set out in the acts issued under the Greek Income Tax Code).

### Granting of new loans and credits

According to the NPL Law, LAMCs may obtain a licence for the granting of new loans and/or credits (under the requirements of article nine paragraph two(a) of Law 4261/2014 (the “Greek banking law”)) to the borrowers whose Loan Assets they are managing, but solely for refinancing purposes or for corporate restructuring purposes of the respective borrowers by virtue of a specific restructuring plan agreed between the parties and subject to the prior written consent of the beneficiary of the Loan Assets.

These new loans and credits shall be considered to be banking loans and credits, governed by Greek law and shall be subject to the exclusive jurisdiction of the Greek courts. Additionally, they shall be subject to the duty on interest imposed by Law 128/1975, the payment of which LAMCs shall be liable for.

The licence for the granting of new loans and credits shall be issued on the following conditions:

- the LAMC has already deposited €4,500,000 as minimum share capital either in a bank account held with a Greek credit institution (for LAMCs with their registered seat in Greece) or in a bank account held with any credit institution of a member state of the EEA (for LAMCs with their registered seat in a member state of the EEA and legally established in Greece through a branch); and
- the LAMC is in compliance with all relevant BoG acts and regulations.

LAMCs which have been licensed to grant new loans and credits are obliged to draft their financial statements in accordance with International Financial Reporting Standards.

## MANAGEMENT OF LOAN ASSETS

### Agreement

The management of Loan Assets is assigned to LAMCs by virtue of a written agreement entered into between a LAMC and the beneficiary of the Loan Assets, which must include at least the following information<sup>6</sup>:

- a description of the Loan Assets (with special reference to the stage of non-performance in the event of debt receivables from NPLs);
- an outline of the management actions that will be undertaken by the LAMC<sup>7</sup>; and
- the amount of the management fee, which under no circumstances may be passed on to the borrowers whose Loan Assets will be managed.

<sup>6</sup> The minimum information which must be included in this agreement may be set out in further detail in further BoG Acts.

<sup>7</sup> Examples of such management actions constitute the legal monitoring of debts or the monitoring of accounts, the collection of debts, any negotiations to be carried out with the borrowers, the entry into settlement agreements in accordance the provisions of the Greek Civil Code or any debt settlement arrangements in accordance with the Banking Code of Conduct.

BoG is responsible for reviewing the drafts of these agreements to ensure compliance with the NPL Law. Thereafter, a copy of each executed agreement is sent to BoG within 10 days of its execution.

#### Licence for Loan Asset Management

The NPL Law sets out the documentation which must accompany the application to be submitted by a company applying for the LAMC licence, as well as the criteria by which the BoG will assess the application<sup>8</sup>.

- Among the necessary documentation, the company should provide:
  - the identity of all persons (individuals and legal entities) holding direct or indirect ownership or voting rights of 10% or more of the applicant company's share capital (including through undertakings within the meaning of article three paragraph one (34) of the Greek banking law);
  - the identity of all persons (individuals and legal entities) exercising control over the company by virtue of a written agreement or other arrangement or concerted action<sup>9</sup>;
  - the identity of all members of the company's Board of Directors or administrators; and
  - a comprehensive report describing in detail the basic principles and methodology for the successful restructuring of loans and presenting debt restructuring methods as alternative solutions to enforcement proceedings in accordance with the Banking Code of Conduct and the relevant EU and national legislation. This should also take into account the specific characteristics that potentially classify an individual borrower as a member of a socially vulnerable group.
  
- The criteria that should be met are the following:
  - the company is in a position to fully comply with the NPL Law;
  - the persons holding ownership rights of at least 10% of the company, the persons exercising control over the company as well as the company's Board members have the reputation, knowledge, skills and experience to undertake all the actions necessary and fulfil the criteria of competency and suitability which are set out in the relevant BoG Act;
  - the company's organisational structure and internal procedures are appropriate for the relevant services to be provided under the NPL Law;
  - the company's business plan describes in detail the company's planned actions, strategy and available resources; and
  - none of the persons holding ownership rights of at least 10% of the company, the persons exercising control over the company or the company's Board members are related to any politically active individuals or individuals holding high executive positions at the regulatory authority, which would render BoG's supervising powers less effective.

BoG must promptly send the application file, together with a short note, to a three-member committee (the "Committee") which reviews the application file and gives

<sup>8</sup> The Executive Committee of the BoG issued Act no. 95/27.5.2016 which includes detailed provisions regarding the licensing procedure replacing the previous Act no. 82/8.3.2016.

<sup>9</sup> (in Greek «από κοινού δράση», as defined in article 23 paragraph five of the Greek banking law)

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its opinion within 10 business days<sup>10</sup>. The meeting of the Committee is not public and its minutes are confidential.

If BoG ascertains that the above criteria have been met, the licence is granted within two months from the day the application file was found to be complete (once any additional documents or information requested by BoG have been submitted). The licence is published in the Government Gazette, as well as on BoG's website.

If the criteria are not met, BoG rejects the application and notifies the applicant. The reasons for the rejection must be set out. BoG may also refuse to grant the licence if it concludes that the company has been incorporated for money laundering purposes.

It should be noted that BoG issues its decision (either granting the licence or rejecting the application) without the Committee's opinion in the event that the 10-day period provided by the NPL Law lapses without any response from the Committee.

A licence may be revoked or suspended by BoG for any of the reasons set out in the NPL Law.

On revocation of the licence, the provisions for the special liquidation of credit institutions (article 154 of the Greek banking law) shall apply by analogy and the LAMC remains under the supervision of BoG until the detailed action plan for the closure of its operations as approved by BoG has been fully implemented.

If a LAMC decides to terminate its activities, the provisions of the law on *sociétés anonymes* shall apply.

### Prudential Supervision by BoG

#### Annual Fee

Each LAMC must pay an annual fee to BoG covering all expenses relating to BoG's supervising powers over the LAMCs; the amount of this fee as well as any other relevant information will be set out by virtue of a separate BoG Act.

#### Acquisition or disposal of a holding

The BoG must be notified by the potential acquirer in the event of a proposed acquisition or disposal, direct or indirect, of a qualifying holding<sup>11</sup> in a LAMC, or in case of a proposed increase or reduction, direct or indirect, of such qualifying holding in a LAMC by any person (individual or legal entity) resulting either: (a) in that person's participation in the LAMC's share capital reaching, exceeding or falling below the limits provided in the NPL Law or (b) in the LAMC becoming or ceasing to be that person's subsidiary.

If BoG decides to permit the proposed acquisition, it may set out a deadline and/or certain conditions for its completion. However, BoG may not allow the proposed acquisition if it ascertains, within two months of the date of the notification, that the proposed acquirer is not an appropriate person or that the proposed acquisition is taking place for money laundering purposes.

<sup>10</sup> This Committee was established in April 2016 by virtue of a joint ministerial decision.

<sup>11</sup> (in Greek «ειδική συμμετοχή», as defined in article three paragraph one (33) of the Greek banking law)

#### Information Requirements

In order for BoG to exercise its supervising powers over LAMCs, the NPL Law sets out an obligation for the LAMCs to provide copies of their financial statements to BoG, as well as any other information which may be required by BoG.

#### Replacement of Board members

BoG has the right to request in writing the replacement of a member of the LAMC's Board of Directors should it ascertain that this person is not competent to act as a board member, in accordance with the criteria which will be set out in a BoG Act.

### SALE AND TRANSFER OF LOAN ASSETS

#### Agreement

The sale and transfer of Loan Assets to a LAAC is effected by virtue of a written sale and transfer agreement entered into between that LAAC and the beneficiary of the Loan Assets, on the condition that the LAAC has already entered into an agreement with a LAMC assigning to the latter the management of Loan Assets; this condition must be satisfied for each subsequent transfer of such Loan Assets.

The rights arising from the Loan Assets transferred may only be exercised through the LAMCs. The Loan Assets transferred are considered to be banking assets even after completion of the transfer.

Loan Assets can be sold as units or in groups. In the event of the transfer of a group of claims, article 479 of the Greek Civil Code providing for the liability of the transferee for debts relating to the assets transferred does not apply. Other associated rights, even if they do not constitute ancillary rights (*«παρεπόμενα δικαιώματα»*), may be transferred along with the Loan Assets.

#### Obligation for prior notification

In the event that debt receivables from NPLs are offered for sale, the selling entity must necessarily have sent an extrajudicial notice to the relevant debtor and, if applicable, any guarantor to settle their outstanding debts at least 12 months prior to the sale. The notice must contain a written proposal with an appropriate settlement option and specific repayment terms in accordance with the provisions of the Banking Code of Conduct.

This provision does not apply in case of disputed claims, adjudicated claims or claims against borrowers deemed to be non-cooperating pursuant to the Banking Code of Conduct. The notice which starts the 12-month period can have been sent to the borrower before the entry into force of the NPL Law.

Any new assignee of debt receivables from NPLs must re-start the Arrears Resolution Procedure in accordance with the Banking Code of Conduct.

#### Registration requirements

In order for the sale and transfer agreement to take effect, it must be registered with the relevant pledge registry in the public registry books kept in accordance with Law 2844/2000. Following such registration, the borrower and, if applicable, any guarantor should be notified by any appropriate means.

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A non-assignability clause in any agreement between the credit or financial institution and the borrower may not be raised against the LAAC. LAMCs undertake to pay the contribution of Law 128/1975 from the date of such registration.

### PROTECTIVE PROVISIONS

1. The substantive and/or procedural rights of any borrower and any guarantor whose debts are to be managed or sold and transferred may not be prejudiced as a result of the assignment of the management or the sale and transfer of the relevant Loan Assets.
2. Furthermore, no term in the existing loan agreement may be unilaterally amended; the same applies in relation also to the interest rate. In the event that the Loan Assets transferred relate to a loan agreement with floating interest rate, the LAAC may not set out a margin higher than the one originally set out by the credit or financial institution at the time the transfer was registered, unless the loan agreement includes provisions setting out specific and objective criteria for changes to the margin.
3. The NPL Law also provides for the protection of consumer rights; it stipulates that Law 3758/2009 relating to notifications to borrowers for debts in arrears is applicable to the LAMCs. The LAMCs may subcontract the specialized collection companies operating under Law 3758/2009 or companies with similar scope of business operating in a member state of the European Union or the EEA to proceed to the respective notifications to the borrowers related to NPLs.

### COURT PROCEEDINGS

The NPL Law entitles the LAMCs to bring any legal action and proceed to any other judicial action for the collection of debts held under management, as well as to initiate, attend or participate in any pre-bankruptcy rehabilitation or insolvency proceedings and procedures for debt settlement or special administration in accordance with Law 4307/2014, on pre-bankruptcy procedures for businesses. In all such court proceedings, LAMC appears as a non-beneficiary party and any relevant judgement shall be binding upon the lenders of the relevant loans.

### SECRECY

The professional secrecy obligations of the beneficiary of the claims under management are lifted in relation to the LAMC to the extent necessary for the needs of the management. The provisions of Law 3156/2003 in relation to banking secrecy and the protection of personal data (article 10 paragraphs 20 and 21) do apply by analogy.

### SUSPENSION OF APPLICABILITY

The sale and transfer of Loan Assets relating to loan agreements secured by mortgages or mortgage pre-notations on real estate properties constituting primary residences with an objective value of up to €140,000 are suspended until 31 December 2017.

However, it should be noted that according to the NPL Law as amended by Law 4393/2016, the management of these Loan Assets may be assigned by credit institutions to LAMCs. According to the preamble of Law 4393/2016, this amendment has been deemed necessary in order for claims arising from such loans to be properly managed.

## TAX PROVISIONS

Law 4389/2016 introduced tax-related provisions. In particular, it stipulates that the goodwill arising from the sale and transfer of Loan Assets to a LAAC is subject to income tax; this also applies to all subsequent transfers of Loan Assets by the LAACs.

Furthermore, no stamp duty shall be payable in relation to the loan agreements to be entered into by the LAMCs which have been authorised to grant new loans and/or credits to the borrowers for refinancing or restructuring purposes as referred to above.

Finally, a fixed amount of €2,500 shall be payable<sup>12</sup> for any registration of a sale and transfer agreement to be made under the NPL Law in any public book or record, excluding any further charges or duties; the Law also states that this cost shall not in any case burden the borrower or guarantor.

## OTHER GREEK LAWS' PROVISIONS

The NPL Law states that its provisions do not amend the provisions of the Greek banking law and the other Greek banking and finance laws, *i.e.* Law 3156/2003 on bond loans and securitisation of claims, Law 1905/1990 on factoring agreements, Law 1665/1986 on leasing and Law 3606/2007 on markets in financial instruments.

## CONCLUSION

The effects that the NPL Law, as well as the BoG Acts and the ministerial decisions already issued or to be issued pursuant to it, will have on the liquidity of the credit institutions, the distressed assets and the economic recovery of the country in general remain to be seen; however, tackling the increasingly problematic issue of non-performing loans in Greece constitutes a very challenging objective. Any efforts to incentivise banks, borrowers and external investors to reach constructive resolutions to the non-performing loans weighing down the Greek financial sector can only represent a step forward.

<sup>12</sup> The fixed amount of €20 shall be payable for any registration in any public book or record of a mortgage or pledge or other ancillary right or privilege securing the Loan Assets transferred under a sale and transfer agreement.

## FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.

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