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New legislation in Greece gives immunity to bankers involved in NPL restructurings

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On 18 May 2017, the Greek Parliament approved another monster austerity package sought by the country's lenders to unlock vital financial aid. Among a wide range of measures adopted (including pension cuts, tax hikes and transfers of state assets to a vast new privatization fund), the new law 4472/2017 ("New Law") introduced a long awaited "immunity" for state and bank officials involved in bad loan restructuring. This is the newest attempt to tackle with Greek banks' bad loans saga, one of the most painful and complicated collateral damages of the Greek sovereign debt crisis, which erupted in 2009 and still plagues the country¹.

Greek banks carry a huge load of NPLs (108 billion Euros, according to the Bank of Greece 2016 Annual Report) and they are in dire need to clean up their balance sheets, in order to reduce their funding costs and boost their capital adequacy ratios. An aggressive NPL reduction policy will spread benefits to all market participants: freeing up of resources will translate into higher loan supply, lower borrowing costs for businesses and households and redistribution of capital to more productive businesses and sectors; in parallel, the restructuring of over-indebted but viable businesses could serve as a vehicle for attracting investment capital, thereby further stimulating investment demand.

It is a sad truth that despite various legislative and policy initiatives, an active loan market has failed to emerge in Greece, even though strong investor interest is present. It has been long argued that one of the key impediments for NPL restructurings and sales is the risk (or perceived risk) that these transactions may entail legal risks for the bankers approving them. In particular, bank officials approving or executing an NPL sale, write-off or workout could be held liable for breach of their fiduciary duties, opening the door to civil liabilities (or even criminal sanctions) for them.

The new legislation introduces a safe harbor both for state and banking officials. The safe harbor is article 65 of the New Law, which contains six paragraphs: paragraphs 1 and 2 provide the context for immunity of administrators of state and government property, while paragraphs 3 and 4 adopt a similar wording for bank officials; paragraph 5 stipulates that authorities entrusted with the task to decide whether the immunity protection applies must announce their decision within a period of four months; and, finally, paragraph 6 restricts the safe harbor protection only to transactions taking place after the publication of the New Law.

1. The "Mid – Term Framework of Budgetary Strategy 2018 – 2021", which is annexed to the New Law, characterizes non-performing loans (NPLs) as "systemic problem" of the Greek economy.

Paragraphs 3 and 4 provide the context and the mechanism for the safe harbor for bank officials approving loan write-offs, reading as follows:

“3. Those who ex lege or by contract have been assigned due care or management, in whatever form, of property of a credit or financial institution (entire or partial or just for a specific act) do not have criminal or civil liability for acts or omissions, which they perform for the purpose of reorganization or write-off of loans, obligations or indebtedness, pursuant to provisions of the Bankruptcy Code or Law 4469/2017 (A' 62) or Law 3869/2010 (A' 130) or in the context of special liquidation of articles 145 et seq. of Law 4261/2014 (A' 107) or articles 2 and 3 of Law 4354/2015 (A' 176), under the condition that these are in accordance with the rules and procedures provided in the above mentioned laws and relevant circulars, with what is provided in the internal regulations and the charters of the legal persons which they represent, and the legislation governing their operation, and that cumulatively the following conditions, where necessary, apply:

- a) the acts or omissions are performed in order to either collect at least part of the claim, or, in case of business loans, continue the operation of the business entity on the basis of a restructuring agreement or a reorganization and recovery plan, whereby they aim at securing collection of at least part of the claim,*
- b) during the reorganization or write-off of loans, obligations or indebtedness, the relevant regulatory acts of the Bank of Greece in relation to management of debt in arrears and management of non performing exposure, as in force from time to time, are not contravened, and also that the rules provided in the approved policy for reorganisations of the above institutions are kept,*
- c) decisions are in place by the existing approval committees or of the organs of the credit or financial institution or the Committee of Special Liquidations in relation to special liquidators,*
- d) do not lead to impairment of the real financial status of the legal person of the debtor, from the one it would have been, should the borrower, the debt of whom is reorganized or written-off, was declared in a state of winding up or liquidation of its assets after distress measures against it.*

The above also apply and in the case of reorganization or write – off of loans, obligations or indebtedness after a bilateral agreement between the credit institution and the debtor, which aim at the implementation of the internal approved policy of management of non- performing loans, either corporate or of individuals, in the context of implementation of the Code of Conduct (Bank of Greece decision 195/1/29.7.2016, B' 2376).

4. For acts or omissions of the previous paragraph, criminal prosecution may be filed following a petition of a three-member Committee consisting of judges at the appellate level, serving at the Athens Court of Appeals, [such three-member Committee] appointed by the Supreme Council of Judges. The Committee is chaired by the most senior Judge of the Court of Appeals and decisions are taken on majority voting. The Supreme Council of Judges appoints the aforementioned persons and their substitutes within fifteen (15) days from publication of the present law. A representative of the Bank of Greece, who is appointed by means of a decision of the executive committee of the Bank of Greece, drafts a special and comprehensive opinion, which he must submit to the above mentioned Committee within thirty (30) days in relation to the contravention or not of the conditions set in cases b and c of the previous paragraph. The time limit of thirty (30) days starts from the next day of the submission of the relevant petition of the above Committee to the Bank of Greece. The Committee seeks, if considered appropriate, additional information from any service or third person, especially from specialized experts. In the petition of the Committee to the competent public prosecutor, it must be specifically and comprehensively substantiated that the above acts

or omissions were performed in contravention of the conditions set forth in the previous paragraph. By means of a decision of the Minister of Justice, Transparency and Human Rights the Committee is established and their members and substitutes are posted for a term of one (1) year, which may be renewed once for one (1) more year. The members of the Committee exercise the above duties in parallel with their main judicial tasks. With the same decision officials of the Ministry of Justice, Transparency and Human Rights with university education are appointed as Secretaries of the Committee."

Certain key features of the above safe harbor introduced by the New Law should be underlined:

There are two (2) main requirements that must be present in order for a bank official to enjoy immunity: the **lawfulness** of the transaction and the **non-worsening** of the position of the bank. In particular: First, the NPL write-off/work out must have been approved and executed in accordance with all applicable legislation and procedures, including the Bank of Greece regulations and the internal regulations and procedures of the bank. Second, the NPL write-off/work out must not result in the worsening of the financial position of the bank (compared to what the bank would attain in a liquidation or forced execution scenario of the debtor). This obviously presupposes that, through the NPL write-off/work out, the bank will secure collection of at least a part of the outstanding loan. Legal mechanisms for measuring and coping with liabilities (civil and criminal) in the exercise of management duties, already existed in Greek law. Perhaps the most intriguing issue in the new legislation, is how this new safe harbor interfaces with the existing system of liabilities for corporate managers (civil, corporate and criminal). An analysis of such interface is, of course, way beyond the scope of this modest paper, but certain observations could be made.

a) Civil liabilities - The Business Judgment Rule ("BJR")

The Greek corporate law standard of care is that Board members and corporate managers are required to manage the company's affairs using the diligence of a "prudent businessman". Greek company law and jurisprudence has elaborated the elements of civil liability for corporate managers in line with the anglo-saxon concept of the Business Judgment Rule ("BJR"), a case law-derived doctrine in corporations law that courts defer to the business judgment of corporate executives. The BJR protection is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. It establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest.

On its face, the protection (or immunity) already afforded to corporate directors by the BJR is broader than the one prescribed in the New Law: under the BJR, an NPL sale or workout which ends up leaving the bank in a worse-off position, could still afford protection to the bank officers who approved it. The focus on the BJR inquiry is the merit of the decision, assessed as of the time it was made without the benefit (or the bias) of hindsight. However, this is not the case with the immunity under the New Law, in which the critical inquiry is whether the work out resulted in a better position for the lending bank compared to a forced execution, winding up or liquidation scenario.

b) Criminal liabilities

Pursuant to article 390 of the Greek Criminal Code, it is a criminal offense to intentionally incur losses to another's

wealth administered by the offender (either the administration was entrusted to the offender by law or by contract). If the pecuniary damage suffered exceeds Euros 30,000, the offender faces incarceration of up to ten years.

It is therefore evident that the main focus of the New Law was to provide a criminal law protection to bank officials. In order for criminal proceedings to be instigated against an alleged offender, a procedural prerequisite must be satisfied, namely a petition filed by the three-member Committee, as provided by article 65 paragraph 4 of the New Law². The whole process is tightened up with short time limits, which contribute to the quick examination of the accusations.

In conclusion, we are of the opinion that the legislative initiative is definitely moving towards the right direction. It affords a (qualified) immunity to honest banking officials in charge of management of NPLs, with the objective to encourage them to go ahead with restructurings, write-offs and sales, which will improve the overall financial situation of the credit institution they act for.

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2. Complaints against state officials can be filed only following a petition from the General Inspector of Public Administration.