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NON-PERFORMING LOANS, Electronic Platforms and Competition Law

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Questions Addressed:

1. Does the exchange of information (including competitively sensitive information) between credit institutions (four systemic Greek banks), about the financial status of specific borrowers, with the intention of adopting a uniform policy per borrower by the banks infringe article 101 TFEU?

2. Does the answer to the above remain the same, if such exchange is realized in the context of *Non-Performing Loans* aiming at their restructuring within an electronic platform framework between banks?

3. Does the creation of an electronic platform solution between banks for the management and restructuring of their Non- Performing Loans, constitute a concentration between undertakings? Does the electronic platform entail any pooling agreement?

I. Introductory remarks

Pursuant to Section 3 (Safeguarding of the financial stability) of the Memorandum of Understanding, which was attached to the Financial Assistance Facility Agreement entered into, among others, by the Hellenic Republic, the European Commission and the Bank of Greece on the 19th of August 2015, the Hellenic Republic undertook the commitment, among others, to develop a credible strategy for addressing the issue of non-performing exposures that aims to minimize implementation time and the use of capital resources, and draws on the expertise of external consultants for both strategy development and implementation.

In line with this commitment, law 4354/2015 on the management of non-performing exposures was enacted as subsequently amended and in force, liberalizing the servicing of non-performing loans (NPLs), providing for a legal framework for the assignment of management to licensed - Servicers and the sale of NPLs to potential investors and allowing for the establishment of a strictly regulated secondary NPLs market.

Several alternatives are being considered to avoid the negative effects of the NPLs. Managing the NPLs is the most important challenge that the banking system faces in

the period ahead. The reduction of the high NPE ratio of the Greek banks is a key requirement for gradually restoring an adequate and efficient supply of credit to the Greek economy and for achieving sustained growth.

Towards this direction, commitments of the Greek banks vis-à-vis the prudential regulator were introduced to meet specific operational targets with regard to NPLs. In this context, the Greek banks have set up comprehensive strategies, including detailed operational measures and actions, prioritized and scheduled, as well as numerical targets to significantly reduce their NPLs over the coming years.

The Banks decided, among others, to manage a selected pool of common non-performing loans of the four systemic Greek Banks under a common management and servicing framework. The objective of such collaboration is to maximize recoveries of the portfolio, reduce NPLs exposure, facilitate sustainability of Greek undertakings and enable asset deconsolidation. In order to reach such objectives, the initiative relies on selecting a third-party Servicer capable of managing the portfolio on an independent basis, through a pre-defined set of rules fair to all Banks. A fair treatment of each bank will be assured (each Bank will benefit at least what it could have obtained in the liquidation scenario), while maximizing recoveries of NPLs at portfolio level.

II. Merger Control aspects

The first question to be answered is whether the Management and Restructuring of Non- Performing Loans constitutes a concentration of undertakings. It has to be pointed out that the Servicer-Electronic Platform, would only take over the oversight, management and restructuring of the participating banks' non-performing loans (NPLs), and will not acquire the associated assets, e.g. the NPLs and/or personnel from the Banks. The NPLs stay with the respective accounts of the Banks. So, the platform would not constitute a concentration under the EU and Greek merger control rules.

The above is consistent with the European Commission Consolidated Jurisdictional Notice on the control of concentrations between undertakings (paras 25 and 26).

In case the Servicer's controlling shareholder acquires the Loans under management, then such distinct transaction shall qualify as concentration and shall be analysed accordingly.

Another question to be answered is whether the Management and Restructuring of NPLs entails any pooling agreement i.e. the joint exercise of voting rights in any of the undertakings included in the assigned portfolio. The whole Management of NPLs is irrelevant with any sort of agreement to exercise jointly their voting rights (if any) in the undertakings concerned.

III. Antitrust Issues and Exchange of Information

The illegal character of the trade and strategic information exchange system at issue between credit institutions involved, in regard to the financial status of certain borrowers, so as for a specific borrower to be addressed with a uniform trade policy,

is applied under normal operational conditions of the crucial respective market. It's the usual cases where competition is defined as "*the battle to win a leadership position – in business sector it implies the rivalry for customer attraction. Therefore by definition, competition requires more than one parties claiming business success.*" In this context, the European Commission outlines the target of article 101 TFEU as the "*protection of competition in the market so as to increase the consumer's prosperity and ensure an effective allocation of resources. Competition and market integration serve such goals, given that the creation and preservation of a unified open market favors the effective allocation of resources throughout the entire Community for the consumers' benefit.*"

The aforementioned fundamental function of competition, aiming at gaining market shares and business profits, is challenged in the case of insolvency and non-performing loans management procedures. More specifically, common ground of all the relevant legislative rules and regulations of the bankruptcy law field is the optimum exploitation for the creditors of the existing assets and in addition the safeguarding of (any ascertained) viability of the relevant business undertaking. In view of the aforesaid, it is effortlessly concluded that the corporate creditors' suffering of minor or more considerable property loss due to the debtor's subjection to one of the above mentioned procedures (*par condicio creditorum*) is counterbalanced and compensated by their increased potential to intervene and affect the procedures' development each time at issue. A reasonable requirement for this is the creditors' gathering of valid and credible information, concerning the debtor's financial situation, fact which facilitates the creditors' coordinated action within the framework of bodies and procedures provided by the insolvency or non-performing loans management legislation. Thus, the coordinated action of creditors and especially of credit institutions constitutes a legitimate implementation method of said legislation and so prevents the rise of compatibility issues with the Greek or EU antitrust legislation, as below described. More specifically, the creditors' coordinated action provided as compulsory, either due to their organizing in collective bodies or due to their need for prior mutual agreement as regards their steps of action to be followed, does not entail the competition's restriction in some relevant market, given that the corporate creditors participate exclusively and only in sharing the damage of the above procedures, which negates the basic and reasonable pre-requisites of the antitrust legislation.

As evidenced by the overview of the particular provisions, it is a "necessary synergy of the credit institutions involved", which arises as compulsory given the form and context of the insolvency or workout procedures, under the meaning of management and restructuring of non-performing loans.[1] Moreover, in view of the

[1] In the United States, the antitrust issue was raised in the context of a restructuring. In a case called CompuCredit Holdings Corporation v. Akanthos Capital Management, LLC. CompuCredit, a provider of credit and other financial services, initiated a tender offer for up to $160 million of its bonds at a price purportedly at market. Seventy percent of the notes were held by 21 hedge funds and none of them tendered. CompuCredit filed suit, alleging that the hedge funds had engaged in an unlawful conspiracy to boycott the tender offer to inflate the tender price. In June, 2011, the district court granted the funds' motion to dismiss and, on appeal, a panel of judges on the United States Court of Appeals for the 11th Circuit affirmed, holding that a violation of the Sherman Anti-Trust Act does not occur when creditors act collaboratively to collect preexisting debts. The 11th Circuit then granted CompuCredit's petition for "rehearing en banc" (by the entire court), which alleged that the panel's ruling results in an "implied exemption" to the Sherman Act, something forbidden by Supreme Court precedent. The LSTA filed an amicus brief arguing that were the 11th Circuit to adopt CompuCredit's proposed rule, it would threaten to freeze all pre-bankruptcy coordination among creditors for existing debt (including both bonds and loans) forbidding "as per-se illegal a long-established, near universal

nature of the NPLs at stake – where the same debtor has significant exposure to multiple banks - it is rather meaningless or inapplicable to ask whether "each operator- here each Bank- could be expected to act independently and autonomously when adopting a given course of conduct". The aim of the creditors here is not how to generate business in a less risky environment, but to minimize losses and keep the banking system afloat (including meeting prudential control/capital requirements etc.).

One could even argue that among the Banks there is no competition at all, i.e. practically they cannot acquire NPLs the one from the other and thus there is no respective relevant product/service market where the four act as competing undertakings. Accordingly, not only the NPLs Management has pro-competitive effects and thus falls outside Article 101 TFEU but the latter should be considered inapplicable because of the lack of such relevant product/service market with regard to the Banks.

A. Evaluations of the legislation on insolvency and workout of non-performing loans

Besides Bankruptcy Law provisions (including pre-bankruptcy proceedings) and Law 3869/2010 (Forbearance of overindebted natural persons' debt and other provisions) as amended, other recent developments in Greek legislation and implementing regulation also dictate the need for close cooperation of banks and, thus, for the minimum necessary exchange of sensitive information. Indicatively, we refer to:

(i) ***Bankruptcy law***. Basic pillar of the bankruptcy legislation is the creditors' mandatory formation of an assembly, in order to decide the manner of continuation of the bankruptcy proceedings, in accordance with the detailed provisions of articles 82 to 84 of the Greek Bankruptcy Code (hereinafter: ***BC***). Regulations of similar content are set out in article 121 BC, with regard to the restructuring plan. In addition, it must be highlighted that for the optimum co-ordination of the creditors' joint action, articles 85 to 88 BC provide for the establishment and formation of the creditors' committee, composed of members from secured and unsecured creditors. Said instruments realize what is known as "autonomy" or "independence" of the bankruptcy procedure, consisting precisely of the management, process and conclusion of bankruptcy based on the decisions to be taken by the creditors within the framework of specific bodies.

(ii) ***Pre-bankruptcy proceedings***. Within the framework of resolution proceedings, article 99 par. 4 and 5 in conjunction with articles 106a and 106b BC provide for the creditors' co-operation for the drafting of the resolution agreement, which is subsequently submitted to the court for ratification. It is also noted that article 106b BC provides for the immediate ratification of the resolution agreement, which may be entered into and submitted to the court for ratification even prior to the commencement of the resolution procedure, on the condition it is signed by the majority of creditors of article 106a BC.

All key procedures in the Greek pre-bankruptcy regime presuppose information sharing amongst creditors holding exposure to the same debtor. Typical

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creditor behavior that benefits not only creditors but also borrowers, businesses and the economy as a whole." The ten judges from the 11th Circuit heard oral arguments in Atlanta on Wednesday and two days later issued a one-page decision affirming the district court's decision. UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT No. 11-13254 Non-Argument Calendar D.C. Docket No. 1:11-cv-00117-TCB COMPUTERCREDIT.

example of this are the provisions of the Greek Bankruptcy Code on the rehabilitation process (article 99 et seq.), where under article 104 in order for a petition for the opening of any such process, submitted by the creditors of a debtor, without its involvement, to be admissible, such petition should be supported by an expert opinion, on the continuation of the debtor business as a going concern post restructuring, the preservation of the creditor "no-worse off principle" and the observance of the principle of (creditor) equality of treatment. It is impossible for any such expert opinion to be issued without the creditors delivering to such expert all the data and information they hold on the debtor. Further, exactly because such opinion is issued on the basis of a restructuring agreement, which is executed by the creditors of the debtor holding the requisite majorities (in terms of secured and unsecured claims), such creditors need equally to share amongst themselves all such data and information in order to reach an agreement on the restructuring.

Similarly, a petition of the creditors holding common exposure to a single debtor for its submission to special administration of article 68 of law 4307/2014, which is another very important pre-bankruptcy process, requires detailed description of all their claims against the debtor but also a statement by a special administrator, proposed by the creditors for appointment by the Court, on the acceptance of such proposal. Obviously, no such petition and proposal may be submitted unless the creditors have shared all the data and information on the debtor

(iii) ***L. 3869/2010 "Forbearance of overindebted natural persons' debt and other provisions"***. The creditors' joint action and their mandatory co-operation in the context of the procedure of L. 3869/2010 is already defined by article 7, providing for the possibility of a settlement plan and decision. In view of these, it is concluded that the need for acceleration of the respective proceedings, as well as their simplified nature in relation to undertakings' bankruptcy, do not exclude but rather require the potential for the creditors' coordinated action, pursuant to the same principles applicable within the scope of bankruptcy law, as already above stated. The fact that the legislator did not provide for the establishment of the creditors' assembly as a body of the procedure at issue, as is the case for instance in the regular bankruptcy procedure, should be attributed to the simplified nature of this procedure and the need for cost-reduction, costs which would arise as a result of said body's convening. However, the need to achieve specific majority thresholds among the creditors makes their mutual understanding mandatory, at least as far as the crucial matter of their consensus regarding the structure of the settlement plan, each time at issue, is concerned.

(iv.) Bank of Greece/**Executive Committee Act 42/30.5.2014 "Supervisory framework for the management of exposures in arrears and non-performing exposures"**. Article 1 par. 2 L. 4224/2013 authorizes the Bank of Greece to draft a supervisory requirements framework regarding the management of non-performing exposures. Within such framework, highly important is the distinction between (***i***) exposures in pre-arrears, (***ii***) exposures in early arrears: 1 to 89 days past due, (***iii***) non-performing exposures and finally (***iv***) denounced exposures, consisting of at least non-performing exposures to non-cooperative or non-viable debtors (Chapter III case a'). Moreover, on a level of corporate governance, Chapter IV par. 6 case c' determines the criteria to assess the sustainability of each workout measure (special tree-diagrams - "decision trees"). It is manifest that said assessment is inextricably connected also with the attitude to be adopted by the other credit institutions involved towards the debtor at issue. For this reason, credit institutions are obligated

to ensure that the exposures in arrears management function and the management body for monitoring such exposures enjoy an appropriate degree of independence in relation to their other functions and especially in relation to the lending and performing exposures management functions (Chapter IV par. 7). Basically, it is the adoption of what is known as "Chinese walls" by credit institutions, as well as the adoption of internal codes of conduct that ensure the independence of the parties involved.

Credit institutions' obligatory cooperation in the framework of non-performing exposures management, according to ECA 42/30.5.2014, is also effortlessly drawn from Chapter VII par. 14 case f', imposing the assessment of viability of the proposed forbearance measures on the basis of indicators measuring, as a minimum: (***i***) the percentage of forbearance solutions proposed to debtors, (***ii***) the percentage of proposed forbearance measures that were accepted, (***iii***) the exposures that perform following the forbearance measures, as a percentage of total agreed forbearance measures by forbearance measure category and the evolution of this percentage over time. It is manifest that both the proposal for a specific forbearance measure as well as its success (in the meaning of due performance of the existing exposure) depend directly also on the other involved credit institutions' behavior.

For this reason, the same supervisory authority recommends to credit institutions to mutually enter into Protocols for the management of common past due debtors, adopting the optimum international practices.

(v.) Bank of Greece/ **Revision of the Code of Conduct under L. 4224/2013**". Apart from the above, it is noted that article 1 par. 2 L. 4224/2013 provides for the issuance of the Banks Code of Conduct by the Bank of Greece. Said Code must include, among others, provisions referring to risk assessment procedures, repayment ability assessment procedures, as well as binding conduct rules for the banks with clear-cut time-schedules and in fact including the terms of communication between credit institutions and creditors. The need for credit institutions' coordinated action for the purposes of said Code already arises from the latter's general principles, consisting of the adoption of optimum practices aiming at the enhancement of a climate of trust, mutual commitment and exchange of necessary information between debtor and credit institution, in order for each party to be able to assess the benefits or consequences of alternative performance solutions (forbearance solutions) or a final settlement (final workout solutions) of loans in arrears, whose contract has not been terminated with ultimate purpose the adoption of the most appropriate, as the case may be, solution (First Chapter, C' par. 1).

To this end, Second Chapter (A' par. 2 ind. c) obliges every credit institution to gather adequate, precise and thorough information regarding the debtor's financial status from other sources as well (apart from the Standardized Financial Information Statement), in order to assess the appropriateness of alternative solutions of forbearance or final workout.

For such purpose, it is noted that Chapter Six of the revised Code of Conduct explicitly provides that in cases of multiple creditors, credit institutions are advised to seek for a mutually accepted solution, adopting the optimum practices of Annex III. It is noted that par. 2 and 3 of the particular Chapter set forth specific actions, which should be taken by every credit institution involved. Such actions include, following the debtor's consent, the mutual understanding with the other credit institutions involved, in order to agree on the abstention from judicial action and the proposal for a mutual solution of forbearance or final workout.

According to said Annex III bearing the title "Approach of the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL) in Cases of Multiple Creditors" the following are crucial:

1. All involved creditors must be willing to cooperate to ensure enough time (*standstill period*), in order to gather and evaluate information on the debtor's financial status.

2. During the standstill period, all involved creditors must agree to abstain from taking any measures aiming at reducing their claim against the debtor.

3. The involved creditors' interests are much better served when creditors are coordinated as to the manner in which they treat the debtor. Such coordination may be facilitated, when coordination committees, composed of the involved creditors' representatives, are established, also receiving support from experts.

4. Information gathered for the purposes of the present procedure, as well as any suggestions on the debt workout, should be available to all creditors involved, who should treat them as confidential, unless they are information already publicly available.

(vi.)Law 4469/2017 on Out of Court Workouts ("OCW") introduces a new process of extrajudicial settlement of debts (article 17): "When several credit or financial institutions or credit servicing firms of l. 4354/2015 have or manage outstanding claims against the same debtor, in regard to whom there are sufficient indications that they are currently or about to go into financial default, such institutions may cooperate in order to process and submit a common proposal with the debtor towards the adoption of a viable solution. To such end, the above entities may exchange as much information as required so as to assess the viability of the debtor's business and form the terms and conditions of the common proposal to be submitted within the context of the regulatory framework in force".

In view of these, it is manifest that the statutory framework governing the management of NPLs by credit institutions not only allows, but in fact imposes the exchange of information concerning every debtor examined from time to time, in order for a joint proposal to be adopted, namely a common strategy as regards their debts' workout.

All these developments are a sound argument for the pro-competitive effects of NPLs Management. The legislative framework for NPLs, the current Financial Adjustment Program for Greece and its commitments, and the stakes at risk for the Banks are more than sufficient to exclude any allegation that the NPLs Management and Restructuring through a third party Servicer has an object to restrict or distort competition

B. Assessment based on Art. 101 (1) TFEU

(i) Absence of competition restriction

The above provisions reinforce the initially supported view that the creditors' coordinated action constitutes an essential parameter of every form of insolvency and non-performing debt management procedure and therefore falls outside the scope of application of the Greek or EU antitrust legislation, since it cannot substantiate a certain competition restraint by object. As pointed out by the European

Commission[2], crucial in such cases shall be the quantification and weighting of the degree of transparency within the relevant market. As pointed out in Horizontal Guidelines, an information exchange that contributes little to the transparency in a market is less likely to have restrictive effects on competition than an information exchange that significantly increases transparency. Therefore it is the combination of both the pre-existing level of transparency and how the information exchange changes that level that will determine how likely it is that the information exchange will have restrictive effects on competition. Moreover, it is noted that the exchange of financial and strategic information at issue does not remotely affect the specific parameter in a negative way, since the level of information provided to the credit and financial institutions involved in the aforesaid procedures, remains unchanged. On the contrary, valid communication channels thereof are ensured, reaching a significantly higher degree of efficiency in management and assessment of the proposed forbearance requests. Besides, the non-binding (both on the debtor as well as on the credit institutions involved) nature of any forbearance solutions proposed, cannot induce any collusive outcome, since any deviation produces no legal consequences against the credit or financial institution at issue, but instead it is recommended, if such is deemed necessary given the ascertained circumstances. This is also supported by the judicial authority's involvement either towards the ratification of any reached settlement in the context of bankruptcy and pre-bankruptcy proceedings, or due to the debtor's rejection of any proposal submitted by their creditors. Said non-binding nature of the proposed forbearance solutions is now directly set forth in par. 3 of the Sixth Chapter of the revised Code of Conduct.

More particularly, in the present case of NPLs management through a third party, the three criteria set by the Court in the aforementioned case *Asnef-Equifax*[3] are unconditionally met, since the information exchange has an at least neutral – if not positive – impact on the market's competitive nature. In addition, access to the information under consideration is realized on terms of equal treatment on part of the credit institutions. As regards the third requirement set forth, it is observed that the disclosure of data on an anonymous basis, within the examined framework of individuals' insolvency, is not feasible, since first of all, the entirety of bankruptcy, resolution and non-performing loans management procedures is founded on the principle of creditors' open action and secondly, the whole economy of said procedures is based on the principle of transparency, which is anyway constantly monitored also by the judicial authority.[4] This fact over-rules any allegation referring to the possible disclosure of either the market position or the competitors' commercial strategy, since disclosure of the specific pieces of information is effectuated only towards the participants in said procedures and not towards uninvolved third parties.

Thus and in the light of the above assumptions of the Court and the European Commission, it is reasonably concluded that the examined herein information exchange, as regards the existing credits within the framework of the imposed by law collective action of creditors, is aimed at the proper functioning and efficiency of the procedure at issue, without imposing any restraint on competition. As a result, it is manifest that the information exchange at issue falls *in toto* outside the scope of application of the prohibition rules of article 101 par. 1 TFEU and article 1 par. 1

[2] Guidelines on the application of article 101 of the TFEU in the horizontal cooperation agreements, par. 35, 65-8 and 75-80.
[3] ECJ, judgement of 23.11.2006, case C-238/05 *Asnef-Equifax*, par. 62.
[4] ECJ, *Asnef-Equifax*, par. 55 et.seq.

Greek L. 3959/2011 on free competition. This way, on one hand the objectives towards correcting asymmetries in creditors' information are achieved, asymmetries which are sought to be diminished *ab initio* by the insolvency procedures as a whole, by virtue of the afore mentioned principle of "*creditors' autonomy*" (*Selbstverwaltung*), on the other hand, a more proper function of the national loan market provided to individuals and undertakings[5] is ensured.

In addition, the provision of uniform and unvarying solutions cannot be evaluated as standardization, which distorts competition, but as facilitation of the creditors involved in the developing of proper, efficient and viable solutions of forbearance, which in view of their reasonable nature are likely to be accepted by the debtor. Unarguably, it is precisely creditors' uncoordinated action, which is responsible for failure in the management of non-performing loans. On the contrary, the establishment of criteria determining the proper and in business terms prudent action facilitates the function of the debt forbearance procedure, promoting legal certainty and predictability of the related statutory framework .

Given the need for co-assessment of the particularities related to each involved debtor's financial status, no limitation of independence in decision making on the creditors' part can be diagnosed. Moreover, it is impossible to diagnose a restriction on competition, not only due to the fact that competition between credit institutions pursuant to the insolvency procedures is impossible, but mostly due to the non-establishment of distortion of the involved institutions' economic behavior aimed at gaining some objectionable, from antitrust legislation perspective, advantages. Otherwise, it is extremely unlikely, if not utopian to find an appropriate and viable forbearance solution as a result of a single credit institution's unilateral action, namely without any cooperation between the credit and financial institutions participating in the relevant procedures.

In any case attention should be given especially to the disclosure of the necessary and only information on debt forbearance, as well as to the full functional independence of all involved operations and systems of the individual credit institutions. It is evident that any other information disclosure to other parties involved in the general exercise of loan policy of each credit institution is forbidden. Establishment of protocols for the management of debtor with multiple creditors adopting the optimum international practices reinforces the necessary degree of transparency and predictability of said procedure.

In view of the above, the crucial timing for instigating the information exchange at issue should vary, depending on the nature and context of each procedure. With regard to bankruptcy procedures, crucial shall be either the submission of respective petition, or the diagnosis of at least the imminent suspension of payments. With regard to pre-bankruptcy procedures, crucial is also the commencement of negotiations for the conclusion of the resolution agreement. With regard to procedures of L. 3869/2010, decisive is the submission of the respective petition. Finally, with regard to forbearance procedures of non-performing debts crucial are the provisions of the Second Chapter case A par. 2 c and Third Chapter par. 2 c of the Revised Code of Conduct, obligating every credit institution to gather adequate, precise and thorough information regarding the borrower's financial data from other sources as well (apart from the Standardized Financial Information Statement), in order to assess the appropriateness of alternative solutions of forbearance or final workout (Stage 2 of the Arrears Resolution Process).

[5] See also guidelines on the application of article 101 of the TFEU in the horizontal cooperation agreements, par. 97.

As a result, the specific exchange of information is activated at the moment when the existing debts fall into arrears of more than 60 days. Said communication may be realized also later but not earlier than that (for example, cases of mandatory capital increase, diminution of the share's internal value etc.), if the legislative or regulatory coordination obligation for the involved credit institutions' behavior is lacking.

For the same reason, a uniform strategy (regarding interest rates, forbearance period etc.) towards undertakings of a specific sector is not acceptable, given that the particular general, otherwise standardized approaches are neither recommended nor imposed by the above legislation. Apart from the fact that said solutions cannot co-evaluate the individual characteristics of each borrowing undertaking (for example, viability, quality of securities, local particularities etc.), they involve a high risk of adopting a collusive conduct within entire economic sectors. Increase or preservation of the competition level in the *downstream market* is not achieved by adopting uniform solutions on undertakings not bearing the same economic features, given that the antitrust legislation does not impose the same handling of different cases. On the contrary, both the insolvency legislation (including the statutory framework of the non-performing loans management), as well as articles 101 TFEU and 1 L. 3959/2011 impose the differentiated treatment between viable and non-viable undertakings of the same sector.

In any case it is noted that said observations by no means prohibit the adoption of a similar or even identical forbearance or final workout proposal for same sector undertakings, on the condition that the economic data share a similarity that justifies such similar or identical proposal.

(ii) Rule of reason and ancillary restraint of competition

The above conclusions are reinforced also by reference to the rule of reason, otherwise "*rule of reasonable cause*" (*rule of reason*), which has been developed in antitrust law.

First of all it should be noted that in Greek and EU competition law the concept of ancillary restraints covers every assumed competition restraint, which is directly linked and is necessary for the realization of a main non-restrictive transaction and is corresponding to the latter. Consequently, if the basic parameters of a main agreement do not contain or result in competition restriction, then the restraints which are directly linked and are necessary for the execution of the main transaction also do not fall into the scope of application of the above prohibitive provisions.[6] As clearly defined by the European Commission,[7] a restraint is directly associated with the main transaction, if depended on the latter's realization and is inextricably connected thereto. The necessity criterion means that the restraint must be objectively necessary for the main transaction's realization and proportionate/corresponding to the same. In this context, each restraint, even if it is to be considered necessary for the agreement's conclusion, must be reviewed in its particular parameters, namely its duration, scope of application in terms of object and place and finally it must be ascertained whether it exceeds the necessary degree[8].

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[6] See General Court, judgement 18.9.2001, case T-112/99 *Métropole télévision (M6) and others vs Committee*, par. 104 et.seq.

[7] **G**uidelines on the application of article 81 paragraph 3 of the Treaty, EE C 101 (27.4.2004) par. 29 with further references.

[8] See ECJ, *Wouters*, par. 109. Likewise ECJ, judgement dated 15.12.1994, case C-250/92 *Goettrup-Klim Grovvareforening*, par. 35

It should be pointed out that the close interaction between the information exchange at issue and the structure and functionality of the insolvency and non-performing exposures' management procedures in general, does not fall under the prohibition rule, concerning the rules of regulatory nature which, in the light of overriding reasons of public interest, relate to the general regulation of specific procedures (*regulatory rules*). From case law in *Wouters*, *Arduino* and *Meca Medina*[9] arises the conclusion that the Court – by means of a "*competition balance sheet*" – proceeds with an *ad hoc* examination of a probable restrictive effect of competition, assessing the latter both based on the diagnosis of another purpose which promotes competition, as well as by virtue of the proportionality principle.

Consequently, the need for effective structuring of the insolvency and non-performing exposures' management procedures in general should be deemed as promoting the competition between credit institutions within the loan market. Said assumptions are effortlessly concluded from the relevant recommendations and obligations set forth by the competent supervisory authority, namely the Bank of Greece, in the specific regulations that are applicable pursuant to the above.

In any case, if the specific policy targeting is considered as neutral from the perspective of antitrust legislation, the public interest objective cannot be ignored, an objective aiming at the effectiveness of said procedures. In view of these assumptions, any competition restraints imposed contrary to expectations constitute an essential means for the achievement of the above purposes of public interest and in all cases they are subject to the proportionality test.

C. On the application of exemption rules (articles 101 par. 3 TFEU)

However, even in the unlikely scenario that the Banks were addressed with the allegation that the NPLs management entails anticompetitive effects, then they could invoke the exemption of para.3 of article 101 TFEU. The applicability of the exemption provided for in Article 101 (3) TFEU is subject to four cumulative conditions laid down in that provision.

The fulfillment of the above requirements, in a way that justifies any competition restraints deriving from the information exchange at issue, is demonstrated by the analysis of the macro-economic benefits from the specific procedural framework's function, having an impact on both the financial stability as well as on the Greek banking system's soundness. This fact entails lower risk for the Greek credit institutions and higher predictability as regards the non-performing loans management and so the risks assumed from banking loans are limited, credit availability is increased and loan interest rates are decreased to the benefit of consumer welfare and especially the reliable debtors. In this context, special mention should be made of the significant cost and human resources efficiencies regarding the procedures at issue.[10] As the Court explained in the Asnef/Equifax case, "in order for the condition that consumers be allowed a fair share of the benefit to be satisfied, it is not necessary, in principle, for each consumer individually to derive a benefit from an agreement, a decision or a concerted practice. However, the overall effect on consumers in the relevant markets must be favourable".[11]

As stated in the European Commission's Guidelines,[12] the following are fullfilled in the present case:

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[9] ECJ, judgment dated 18.7.2006, case C-519/04 P *Meca Medina*, par. 42

[10] Guidelines on the application of article 81 paragraph 3 of the Treaty, EE C 101 (27.4.2004), par. 97.

[11] Asnef/Equifax case, par. 70.

[12] Guidelines on the application of article 81 paragraph 3 of the Treaty, EE C 101 (27.4.2004) par. 97.

(***1***) *Efficiencies*: The information exchange at issue accelerates the effective execution of the non-performing loans' management procedure, achieves legal certainty and reduces the courts' huge workload; finally both the debtors as well as the involved credit institutions are released from the long-term and arduous litigations. Similarly, there is significant efficiency in both the operational cost of the credit and financial institutions as well as in the expenses burdening the debtors upon commencement and carrying-out of the relevant procedures. In addition, the viable and constant performance of due and payable loan obligations increases the cash flows of said institutions, decreasing the amount of NPLs and improving their capital adequacy. Said legal policy targets of public interest have a beneficial effect on competition between credit and financial institutions, since they create clarity as regards the amount of the required provisions and the calculation of exposures, while they also contribute drastically to the effective management of non-performing loans.

(**2**) *Necessity of competition restraints imposed contrary to expectations*: As afore cited, the creditors' coordinated action constitutes a necessary and integral parameter of bankruptcy and resolution legislation, without which the latter cannot function. On the contrary, uncoordinated action would cause debt forbearance and especially refunding of a certain undertaking to operate for the benefit of the particular credit institution which has not consented to a specific solution, seeking to be satisfied exclusively and preferentially by the means of enforcement law measures, consequently to the expense of the borrower and the rest involved credit institutions. To such end, article 106e par. 1 indent c BC regulates, among other things, the relationships between creditors following the agreement ratification, either in their capacity as creditors or, in case of capitalization, in their capacity as shareholders or partners. In this context, the resolution agreement may provide that a certain category of creditors cannot demand the repayment of claims to the same prior to another category's full satisfaction.

(***3***) *Consumers' benefit*: As aforesaid, both the national financial system's stability, as well as the increase of available credits in significantly lower terms of loan cost, are achieved. This particular macroeconomic parameter, consisting of the allocative efficiency and consumers' prosperity (*allocative efficiency*) is accompanied by the macroeconomic dimension of legal certainty for the benefit of both the debtors, as well as of the involved credit and financial institutions.

(***4***) *Non-elimination of competition*: Firstly, none of the credit institutions involved is obligated to proceed with a specific debt forbearance action proposed by the others. Let us note that the same applies also to the debtor, who reserves their intact right for non-consensus to the proposed forbearance measures and recourse to judicial proceedings. Secondly, credit institutions participating in the considered information exchange procedure do not gain from the coordination at issue any commercial or other business advantage against their other competitors. Non-functionality of the statutory framework in force proves the fact that without any regulatory intervention regarding the involved credit institutions' behavior, the management of non-performing loans shall remain obsolete and won't fulfill its purpose. The provision for an option of mutual understanding and cooperation subject to certain safeguards, concerning the due and proper actions, by no means eliminates competition, but instead allows the market's effective operation, even at the ultimate stage of forbearance of the due and payable loan obligations.

The assumptions at issue are upheld by the European Commission in the Notice regarding the horizontal cooperation agreements,[13] reading explicitly as follows:

> "*Exchange of consumer data between companies in markets with asymmetric information about consumers can also give rise to efficiencies. For instance, keeping track of the past behavior of customers in terms of accidents or credit default provides an incentive for consumers to limit their risk exposure. It also makes it possible to detect which consumers carry a lower risk and should benefit from lower prices. In this context, information exchange can also reduce consumer lock-in, thereby inducing stronger competition. This is because information is generally specific to a relationship and consumers would otherwise lose the benefit from that information when switching to another company. Examples of such efficiencies are found in the banking and insurance sectors, which are characterized by frequent exchanges of information about consumer defaults and risk characteristics*".

These assumptions do not only concern the data bases but also reflect the general legal policy targeting of the EU antitrust legislation with regard to the exchange of strategic information.

In view of the aforesaid, it is concluded that in any case, the information exchange at issue meets all four cumulative conditions set forth by articles 101 par. 3 TFEU and 1 par. 3 L. 3959/2011.

D. Remedies/Chinese Walls-Clean Teams

It is of paramount importance that the information exchange does not exceed the sharing of data necessary for the aims of Management and Restructuring of NPLs. Thus, the information exchange should not be extended to other non-performing or performing loans or neighboring products or price setting issues or other commercial policy matters. We have to avoid the spillover effects through the se so called clean teams.

It is evident that the Banks will need access to confidential information, including Competitively Sensitive Information. The Banks must only share information that is reasonably necessary to implement the Management and Restructuring of NPLs. Unnecessary information must not be sought from or shared with the other Banks. Information received must only be used for the above mentioned purpose. Access to Competitively Sensitive Information shall be limited to a clean team of pre-approved employees by each Bank (the "Clean Team"). The purpose of the Clean Team is to collect, share and analyse the collected Competitively Sensitive Information that will be used solely for purposes of implementing the above mentioned purpose and will be undertaken in a manner that is fully consistent with and in compliance with all relevant antitrust laws and regulations. The Banks must also enter into a non-disclosure agreement (NDA).

[13] Guidelines on the application of article 101 of the TFEU in the horizontal cooperation agreements, EE C 11 (14.1.2011) 1, no. 97.

Clean Team Members should not be involved in performing loans either for small or for big corporations.

The establishment of a Clean Team does not allow the exchange between the banks of the terms and conditions of non-performing loans other than syndicated loans offered by the Banks for a single/same borrower; information regarding competitors' commercial behavior and strategy in the markets in which they are active (i.e. all information that is capable of removing uncertainties concerning intended commercial conduct of the Banks); current or future business plans, strategies, marketing plans, pipeline projects, budgets, or any other non-public information about current or future operations of competitors; current or future information on prices, lending rates, deposit amounts, loan amounts, mortgage rates, pricing formulas, costs, margins, or credit terms; customer-specific information (contracts, customer lists, financial data) or customer-related strategies.

Furthermore, each Bank should include in its Clean Team either the inhouse lawyers of the Banks or external lawyer in order to prevent any exchange of confidential information. Prior to any meeting or conference call an agenda must be circulated to all those attending the meeting; the agenda for these meetings shall be prepared and circulated by the Servicer after having been pre-approved by - preferably external - legal counsel and/or inhouse counsel of each Bank. Random, non-scheduled meetings for Project must not take place. Minutes must be kept and signed off by all Banks and the legal counsel present in the meeting.

It should be noted that that a clear and distinct classification must be kept for this information (Clean Team Material) e.g. in subject-matter of emails, special Outlook subfolders etc.; and that certain docs/Clean Team Material may be locked with passcodes attributed to the members of the Clean Team.

The Clean Team may share Competitively Sensitive Information within each respective Bank only upon necessary sanitization (i.e. in a Non-Sensitive Summary", in a format that sufficiently aggregates and anonymizes the Commercially Sensitive Information including without limitation through removal of specific information).

Final Remarks

1. The information exchange between credit institutions involved as regards the financial status of specific borrowers falls within the prohibitive rules of both the article 1 par. 1 L. 3959/2011, as well as of the article 101 par. 1 TFEU. More particularly, it is generally accepted that exchanges between competitors of individualized data and even more so of trade and strategic information regarding the financial status of specific debtors constitute a serious restraint of competition. In this context, the justification of said restraint on the basis of the exemption rule set forth in article 101 par. 3 TFEU and article 1 par. 3 L. 3959/2011 is extremely difficult.

2a. The above assumptions apply to ordinary conditions of operation of the crucial relevant market of banking loans to debtors, where competition characterizes and defines the battle to win a leadership position in the business sector, in the sense of battle to attract customers. In other words, they require the active engagement of more than one parties fighting for business success. This particular fundamental

function of competition is challenged in the case of insolvency and non-performing loans management procedures, where there is no competition at all; where focus is shifted towards the most beneficial for creditors use of the existing assets and towards the safeguarding of (any ascertained) viability of the relevant undertaking. Within such context, the fundamental targeting of the involved parties is shifted towards the minimization of property loss that corporate creditors undoubtedly suffer due to the debtor's placement under solvency procedures (*par condicio creditorum*). Said shift is balanced and compensated by the increased potential of creditors intervention in the course and development of the procedures each time at issue, resulting in the correct and credible information provided to the creditors as regards the debtor's financial status. In other words, the mandatorily provided coordinated action of creditors either thanks to their organization in collective bodies or the need for their coordinated action does not result in competition restraint in the relevant market, given that the corporate creditors coordinate exclusively in order to minimize loss and share the NPLs exposure and damage, which eliminates competition concerns. It is the "necessary collaboration" of the involved credit institutions" to minimize losses in order to keep the banking system afloat, which exclude any allegation that there is a restriction or prohibition of competition.

2b. The above described assumptions are enhanced by a number of provisions of the insolvency legislation (including pre-bankruptcy proceedings) and L. 3869/2010 (Fortbearance of overindebted natural persons debt). In the context of non-performing loans, the Bank of Greece recommends to credit institutions to mutually conclude Protocols for the management of arrears of borrowers, adopting the optimum international practices. Annex III bearing the title "Approach of the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL) in Cases of Multiple Creditors" imposes the exchange of information and cooperation of all the involved credit institutions, in order for information regarding the debtor's financial status to be gathered and evaluated.

2c. Given the above, it is manifest that the statutory framework in force, governing the non-performing exposures management by credit institutions not only allows but in fact imposes the exchange of information concerning every debtor with multiple creditors examined from time to time, in order for a mutual proposal to be adopted, namely a common strategy as regards their debts' workout.

2d. The information exchange examined herein should be realized in the context and with the observance of all the requirements set forth by the statutory framework. In the present case, attention should be given especially to the disclosure of the necessary and only information on debt forbearance, as well as to the full functional independence of all involved operations and systems of the individual credit institutions. With regard to forbearance procedures of non-performing debts crucial are the provisions of the Revised Code of Conduct of Banks, obligating every credit institution to gather adequate, precise and thorough information regarding the debtor's financial status from other sources as well (apart from the Standardized Financial Information Statement), in order to assess the appropriateness of alternative solutions of forbearance or final workout. As a result, the specific exchange of information is activated the moment when the existing debts fall into arrears of more than 60 days. Said communication may be realized also later but not earlier than that (for example, cases of mandatory capital increase, diminution of the share's internal value etc.), if the legislative or regulatory coordination obligation for the involved credit institutions' conduct is lacking.

2e. For the same reason, the establishment of a common strategy (for instance interest rates, forbearance period etc.) regarding undertakings of a specific sector is

not acceptable (whereas a uniform settlement for a certain undertaking under the above requirements could be adopted, as already analyzed), given that the particular general, otherwise standardized approaches are neither recommended nor imposed by the above legislation. Apart from the fact that said solutions cannot co-evaluate the individual features of each borrowing undertaking (for example, viability, quality of securities, local particularities etc.), they involve a high risk of adopting a collusive conduct within entire economic sectors. In any case it is noted that said observations by no means prohibit the adoption of a similar or even identical forbearance or final workout proposal for same sector undertakings, if the latter's economic data share a similarity that justifies such similar or identical proposal. In this regard we note that there is no "one size fits all" rule nor any special standardization for loans established by the Banks via electronic Platforms.

2f. The main concern of any Competition Authority would be possible spill-over effects. In other words what is of paramount importance is that the information exchange does not exceed the sharing of data necessary for the aims of NPLs management and restructuring. Thus, the information exchange should not be extended to other non-performing or performing loans or neighboring products or price setting issues or other commercial policy matters. In line with New Money, no information should be exchanged with regard to terms and conditions of loans refinancing by the Banks (except of syndicated loans).

3a. Furthermore, it could be potentially submitted with the Competition Authority, although the relevant notification obligation has been abolished by R. 1/2003. Current EU competition enforcement rules allow for an informal guidance relating to novel questions concerning Articles 101 and 102 TFEU that arise in individual cases. Despite the fact that the law does not provide for approval or consensus thereof, leaving the entire matter in the discretion and individual autonomy of the involved parties, an affirmative view could contribute both to legal certainty, as well as to the removal of ambiguities concerning any weaknesses of the proposed cooperation framework. Such fact could prove beneficial as to ensuring the objectivity, neutrality and impartiality of said procedure.

3b. Another possibility would be the *de lege ferenda* legislative intervention in the specific sector in order for specific legal entities to become able and take action and serve the purpose of integrity, objectivity, neutrality and general impartiality of said procedure. Said intervention could have a twofold content, namely on one hand, consisting of the fulfillment of requirements for the information exchange (*review of lawfulness of the implementation*) and on the other hand the expediency of the information exchanged for the achievement of each intended result, as well as the impeccable character of the procedure at issue (*review of lawfulness of the exchange procedure*). In this context, a more active involvement of either the Financial Stability Fund or the Special Banking Liquidation Committee could be provided, given that their mission and current role are neither far from nor incompatible with the duties examined herein and so an extension of their competences following a legislative amendment could be possible.

3c. Remedies/Chinese Walls-Clean Teams. Access to Competitively Sensitive Information shall be limited to a clean team of pre-approved employees by each Bank (the "Clean Team"). The purpose of the Clean Team is to collect, share and analyze the collected Competitively Sensitive Information that will be used solely for purposes of implementing the Management and Restructuring Scheme and will be undertaken in a manner that is fully consistent with and in compliance with all relevant antitrust laws and regulations. Furthermore, each Bank should include in its Clean Team either the inhouse lawyers of the Banks or external lawyer in order to

prevent any exchange of confidential information. Prior to any meeting or conference call an agenda must be circulated to all those attending the meeting; Minutes must be kept and signed off by all Banks and the legal counsel present in the meeting.

4a. The Management and Restructuring of NPLs does not entail any pooling agreement i.e. the joint exercise of voting rights in any of the undertakings included in the assigned portfolio.

4b. The herein examined exchange of information regarding the financial status of a specific debtor (with multiple creditors) is not enough alone to establish or substantiate the exclusive or joint monitoring required by the Greek or/and EU law for merger control. That is possible only if additional circumstances concur (already prior to the information exchange) and especially if the information exchange at issue is combined with other agreements or options of the involved credit institutions, which include the possibility for intervention (positive or negative) in the management or the decisions taken by the banks. Otherwise, it is highly unlikely that the common decision of the involved credit institutions towards the specific debtor constitutes concentration under the meaning of the Merger Regulation and L. 3959/2011. The latter parameter should be always examined *ad hoc* and as the case may be.