Towards A Greek Asset Management Company

Contractual architecture for the management of bad debts

The structure of legal relationships and a comparative examination of the issue particularly in the financial sector[1]

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The issue

The efficiency of a legal order is not judged only by its ability to resolve the crucial issues already arisen in the context of the transactional activity of the persons whose legal relationships it regulates. Primarily, the provisions of a legal system should act pre-emptively to the extent that foreseeing and observing the phenomena to be regulated allow the legislator's respective intervention. In cases where the crucial legal issues are related to social and economic developments, which are expressed in a uniform and homogenous way in the so-called developed countries, it is imposed that the domestic legislator adapts timely to all acute needs. More specifically, in the context of the looming financial crisis, which has taken global characteristics a long time ago, the domestic legislator and other servants of the legal science are called to develop that crucial regulatory framework which shall confront the adverse consequences of the worldwide financial recession. Upon performance of this duty, they should take into account the interventions already made in similar legal orders. Such obligation becomes more compelling if one considers that due to the universality of the phenomenon and the acidity of the consequences of the crisis all kinds of organisations, legal and natural persons participating in the transactional field are now affected with respective intensity.

The field of the credit institutions is one of the transactional fields primarily affected by the phenomena of the financial crisis; it constitutes a lever that mitigates or aggravates the effects of the crisis on almost all transactional parties according to legislative options from time to time. The significance of the regulations of the relevant field of law is entangled with the wide range of the various legal relationships in which credit institutions are involved and the importance of their assets.[2] The all-inclusive character of the legally most important person of private law, that is the banking corporation, is not justified only by its effect on private law interests, but by its increasing effect on public interest as a result of the most acute crisis as well.[3] Such effect is intensified if one considers that the financial crisis affects horizontally every organisation acting in the transactional field regardless of its size. The financial institutions are significantly affected by the generalised depression, the loss of liquidity in the real economy, the limitation of financing sources, the depreciation of real properties and securities and the insolvency of their debtors.[4] A major outcome of the constant recession is the gradual depreciation of the credit institutions' assets (but those of other enterprises of respective size as well, which have a big clientele and are exposed to the credit risk of their counterparties). Respective, though, consequences result against other legal persons, which develop transactional relationships of high value and are subject to a more and more increasing risk of insolvency of their counterparties. Such depreciation worsens the doubtful nature of the creditors' claims during the period of the financial crisis, causes significant losses in their portfolios and shakes the foundation of banks and big enterprises that need further capital support. Exactly at this point the legally important need for a timely legislative intervention in the field of management of bad debts of credit institutions particularly is created (a field whose regulation may be used as a model for enterprises of other category as well), before these "ill" cells "pollute" the remaining body of this all-inclusive organisation with negative consequences for its counterparties and the entire society as well.[5]

[1] The present study constitutes a pre-publication of the Honorary Issue which is about to be published in memory of Professor Emeritus Elias Krispis; at the same time it constitutes a written reflection of the author's introduction in the context of the event organised at Athens Bar Association on March 11, 2013 by the International Legal Studies Institution, which is established and left as legacy by the honoured Professor.

[2] Kallimopoulos already before the crisis noted that the more and more intense interaction of social and economic conditions with banking operations creates increasing legal issues to be regulated, Kallimopoulos, "Examination of issues of banking law" [2007] *Finance-Banking Law Edition* (ΧρηΔικ) 6.

[3] It is characteristic that from Law 3723/2008 on enhancing liquidity to Law 4021/2011 on the recapitalisation of credit institutions the effort for maintaining the stability of the financial system comes through the public budget and burdens the fiscal debt.

[4] An objective demonstration of the financial crisis' impact on banks is made by Dellios, "Credit agreements in periods of financial crisis" (2012) *Chronicles of Private Law* (ΧρΙΔ), p.249 onwards.

[5] The rules of pre-emptive supervision of credit institutions do not suffice, as de facto it is proved, for addressing the most acute difficulties created by the financial crisis, since the accentuation of country and credit risk in general demands a prompt regulatory intervention of central supervision authorities and national parliaments. See in general for the pre-emptive supervision in Douvlis, *European Banking Law*, p.152 onwards and more closely Gortsos, in Rokas/Gortsos, *Elements of Banking Law*, (2012), p.124 onwards.

It is true that a variety of legal relationships of credit institutions are regulated by provisions which incorporate European Union law and concern all stages of operation of an institution from the beginning until the end of its operations. Nevertheless, no homogenous institutional framework has been drawn up by the European bodies for an efficient method of management of bad assets of banks (or other big sized enterprises), before such assets are fully depreciated and constitute the main cause for the placement of these corporations under insolvency procedures.[6] Moreover, such a framework has not been drawn up for enterprises of other sectors of the economy, which face problems of respective nature.[7] On the contrary, there are material differentiations in the regulation of the issue by the legal orders of the Member States. The Proposal for a Directive for the recovery and resolution of banks constitutes a recent attempt for a uniform regulation of the issue of management of assets of credit institutions, but such proposal is very far from becoming a binding text.[8] In the absence of a uniform European regulation, the comparative examination of the provisions of European legal orders facilitates the legislative operation, with the aim of resolving the arising issues in a more efficient manner. Since, under such procedure conflicting pursuits and vital interests of social groups and transactional sectors are compulsorily intermingled, it becomes necessary to create a flexible and efficient regulatory programme for the management of bad assets, which shall balance adequately the interlocking interests (*Interessenjurisprundenz*).[9]

The regulation of the domestic legal order regarding the management of bad assets

In the domestic legal order, the notion of management of claims of high value on the basis of saving cost and money is not completely unknown. The provision of the domestic legislator for the beneficial and timely management of bad business debts has indirectly passed through the laws regarding factoring and securitisation (Law 1995/1990 and art.10 of Law 3156/2003). The need for beneficial utilisation of the big enterprise's claims may be deemed as an evaluation[10] already existing in the relevant rules of law. This can be achieved through timely divestiture of groups of claims from the company's assets and their discounting due to transfer (assignment) having as cause the sale.[11] The emergence of a legal-political need for correct evaluation and effective management of bad assets is expressed more clearly in the area of corporate accounting law. Its partial provisions impose obligations of correct and objective assessment of the corporation's assets, updating of the value of the assets to be liquidated (movable and immovable properties of the legal person) and taking provisions for the depreciation of the corporation's assets.[12]

In the sub-system of banking law, the need for timely and beneficial management of assets of credit institutions is not independently demonstrated. The regulatory architecture is focused on the credit institution itself. The method of intervention of the supervisory body and other administrative authorities adopted in regulations lex specialis focuses on the same legal person of the bank, as a cell of a broader domestic credit organisation. In case where such cell becomes ill and jeopardises the health of

[6] It is characteristic that there is no uniform regulation at European level even for the regulation of the collective procedure of liquidation of assets of credit institutions. Only at a secondary European Community level the liquidation of credit institutions is regulated in an absolutely general manner by Directive 2001/24 on the reorganisation and winding up of credit institutions [2001] OJ L125/15, as it was incorporated into the domestic legal order by Law 3458/2006. See Venieris, *European Community Credit Institutions* (2006), p.41 onwards, Douvlis, *European Banking Law* (2003), p.106 onwards, Moustairas, *Directive 2001/24/EC on the reorganization and winding up of credit institutions* (Armenopoulos 2005), 321 onwards, Nierop/Stenstrom, *Cross-border aspects of insolvency proceedings for credit institutions-A legal perspective* (European Central Bank, 2002), p.1 onwards, Wessels, "Banks in distress under rules of European insolvency law" [2006] *Journal of International Banking Law and Regulation* 301 onwards, Perakis, "The Law 3458/2006 for the resolution and liquidation of credit institutions" [2007] *Finance-Banking Law Edition* (ΧρηΔικ). Regulation 1346/2000 regarding the insolvency procedures [2000] OJ L160/37 does not even include credit institutions in its scope of application. See Anthimos, *Recent case law of the Court of European Union regarding the Regulation 1346/2000* (Armenopoulos, 2010), p.1627 onwards. Avgitidis, "Addressing insolvency at Europeam community level—the limits of community legislator's intervention in bankruptcy law" [2007] *Chronicles of Private Law* (ΧρΙΔ) 398 onwards.

[7] The business reorganisation procedure provided for in our country, as integrated in the system of insolvency law (art.99onwards of the Bankruptcy Code) does not address substantially the issue of management of assets, but it focuses on the enterprise's performing its liabilities and particularly during the stage that the entity is already under present or imminent inability to pay its debts past due in a general manner, compare Avgitidis, "The Bankruptcy Code of 2007. The change in direction of the Greek insolvency law" [2007] *Commercial Law Review* (ΕΕμπΔ) 549 onwards by the same author, *Reorganization of Enterprises* (2011), Perakis, "The Law 3458/2006 for the resolution and liquidation of credit institutions" [2007] *Finance-Banking Law Edition*, (ΧρηΔικ), Michalopoulos, "The de-dramatisation of bankruptcy in accordance with Bankruptcy Law in effect" [2009] *Commercial Law Review* (ΕΕμπΔ) 729 onwards. Papagiannis, *Chronicles of Private Law* ((ΧρΙΔ) 2010), p.12 onwards, Schinas, "The New Bankruptcy Code: From the 'bankruptcy' to the 'reorganization' of the Greek bankruptcy law" [2008] Chro*nicles of Private Law* (ΧρΙΔ) 289 onwards, Psaroudakis, "Reorganization procedure and employment relationships" [2012] *Bulletin of Labour Legislation* (ΔΕΝ) 737 onwards.

[8] See Proposal for Directive of European Union (COM 2012/280/3) for the recovery and resolution of credit institutions.

[9] For the legislator's obligation to balance the conflicting private interests by invoking the principle of harmonisation practice (Prinzip der praktischen Konkordanz), in accordance with which the legislator is under the obligation to set the limits for the conflicting rights which are constitutionally established in a manner that prevents the rush balance of the one right against the other and so that the exercise of one party's rights does not exclude the exercise of the other party's rights, see Dagtoglou, *Private Rights* (1991), p.94 onwards, Dimitropoulos, *Constitutional Rights, General Part* (2006), p.243, Manesis, *Constitutional Rights, Private Liberties* (1982), p.65 onwards, Mpeis Evag, *The principle of proportionality D* (1999), p.467 onwards and especially p.483 onwards, D. Tsatsos, *Constitutional Law, Issue C* (2002), p.296 onwards, Hesse, *Grundzuge des Verfassungsrechts der Bundesrepublik Deutschland* (1999), p.72 onwards. Also for the legal relationships of purely private law, where upon balancing of interests the principle of transactional good faith takes effect, see Androulidakis, *The obligations of transactional faith* (1972), p.121 onwards, Doris, *Limitations of contractual liberty in exclusive international jurisdiction clauses* (1988), p.294 and p.347, Papantoniou, *The good faith in civil law* (1957), p.104 onwards, Stathopoulos, *Civil Code*, Georgiades-Stathopoulos, art.288 No.45.

[10] See for the operation of legal evaluations Larenz/Canaris, *Methodenlehre der Rechtswissenschaft* (1995), p.208 onwards and especially Papanikolaou, *Methodology of Private Law and Construction of Contracts* (2000), p.257 onwards.

[11] See for the legal nature of old line factoring agreement and the laying down of contractual relationships in the context of securitisation of business claims, Kontogiannis, "The operation of assignment in the context of factoring agreement" [1999] *Law of Companies and Enterprises* (ΔΕΕ) 378 onwards, Liappis, "The architecture of securitization of business claims. The contractual relationships, Single supervision of financial sector, Securitization of claims" Minutes of 1st Annual Conference 2008, p.91 onwards.

[12] This legal-political option is reflected in arts 134 onwards of Law 2190/1920, as well as in International Accounting Standards Nos 36 and 37, which have been adopted by the EU and are obligatorily applied to corporations of which the shares or other securities are listed on an organised stock exchange, as well as to credit and financial institutions as provided for by Regulation 1606/2002 on the application of international accounting standards [2002] OJ L243/1.

the domestic credit system, then the procedure provided for by law is activated. The credit institutions under distress have two options; either apply the resolution measures adopted by the Bank of Greece (BoG), as provided for by Law 3601/2007 or be placed promptly under liquidation, upon withdrawal of their licence by the supervisory body. Articles 62–69 of Law 3601/2007, as amended by Law 4021/2011, regulate in detail the procedure and the measures which may be taken in case of resolution and liquidation of a credit institution. Pursuant to art.3 of Law 3458/2006, as amended by art.8 of recent Law 4021/2011, resolution measures are defined as follows:

> "the measures aiming at safeguarding or restoring the financial state of the credit institution and may violate preexisting rights of third parties, including the measures entailing the suspension of payments, suspension of enforcement measures or reduction of the amount of claims."

The drawing up of a recovery plan and the increase of the share capital of a credit institution could be characterised as milder resolution measures.[13] The following measures could be deemed as more drastic resolution measures:

- the appointment of a trustee at a credit institution by the BoG pursuant to art.63 of Law 3601/2007;
- the extension given to a credit institution by the BoG for paying certain or the total of its debts past due pursuant to art.63A of Law 3601/2007;
- the obligation imposed to a credit institution to increase its share capital pursuant to art.63C of Law 3601/2007;
- the transfer of assets of a credit institution pursuant to art.63D of Law 3601/2007;
- the establishment of a transitional credit institution pursuant to art.63E of Law 3601/2007.

The method adopted for the management of pathogenic legal relationships and bad assets of a credit institution is activated with a significant delay and only in the context of intense viability issues of a bank, without acting pre-emptively. This results indirectly from the provision of art.62 of Law 3601/2007, which referring to the causes of activation of resolution measures reveals that this procedure applies to credit institutions that are at the edge of their placement under insolvency procedure.[14] A common result is the placement of the failing credit institution under special liquidation procedure either this takes place after the imposition of separation of its assets as a resolution measure or immediately after the withdrawal of its license and its operation within the context of the liquidation purposes.

In the first case, the BoG, as competent supervisory authority, aiming at resolving the credit institution under distress may decide the transfer of selected assets of said institution to an existing credit institution, which does not face any problems of respective size, or the establishment of a transitional legal person (bridge bank), to which specifically defined assets and liabilities of the above failing institution are transferred, so that the new bank continues the banking operations and is more easily transferred in the future.[15] With regard to the items being transferred the law does not define their exact content. Nevertheless, the existing will of the historical legislator is enlightened by the provision of art.63D of Law 3601/2007, in which it is provided that subordinated debts are not transferred. Based on the interpretive argument "a contrario" and the inherent teleology of the law, the so-called healthy assets of the credit institution under supervision are transferred to the acquirer institution. These assets to be transferred are concretised in the BoG's decision and may be contractual rights, real property rights (especially full ownership on immovable properties) and contractual relationships that may provide a considerable benefit to the transferee institution and above all do not present any pathogenesis. On the contrary, mostly the non healthy assets of the credit institution are included in the items not being transferred such as credit agreements with debts falling past due and in general doubtful legal relationships. Therefore, there is no special provision for the timely and beneficial management of banking corporations' claims for which is uncertain whether they are going to be satisfied.

In all the above cases, the "failing" credit institution deprived of its "healthy" assets, is placed under special liquidation and is called to terminate its operations, after having proceeded to the liquidation of its remaining assets. The liquidation takes place in accordance with the provisions of the Regulation regarding the special liquidation of credit institutions, which was issued by the BoG pursuant to the express legislative authorisation of art.68 of Law 3601/2007 (meeting No.2/21/4.11.2011 of

[13] The Bank of Greece may request from credit institutions to draw up a specific recovery plan and submit to it the BoG pursuant to the terms set by the latter. Except for the submission of a recovery plan on the part of credit institutions, the BoG itself may draw up a resolution plan for credit institutions at its own initiative. The evaluation of the recovery plan and the drawing up of the resolution plan does not bind the BoG as to its actions, which may, in the parallel, appoint a trustee pursuant to art.63 of the above law or take resolution measures pursuant to art.63C–E. In case that an issue of non compliance or indications of non compliance on the part of a credit institution occur, the BoG may request, by issuing a decision, from a credit institution to increase its capital within a deadline and pursuant to the more specific terms set in the decision itself. The procedure to be followed for the share capital increase in that case is described in the same decision of the BoG, which the credit institution is under the obligation to prepare for implementation within 3 days.

[14] See this way accurately Tsolakidis, "The transfer of assets of credit institutions (art.63D–63E Law 3601/2007) in the light of private law" [2012] *Finance-Banking Law Edition* (ΧρηΔικ) 361 onwards.

[15] In the second case, the BoG, after having diagnosed its inability to save the credit institution by taking any resolution measure, it shall withdraw the licence of the banking corporation and shall place it under liquidation. However, the beginning of liquidation stage does not prevent the BoG to impose to the liquidator the obligation to transfer any healthy assets to an existing credit institution.

the Credit and Insurance Committee “the Regulation”).[16] The Regulation, together with art.68 of Law 3601/2007 and the provisions of the Bankruptcy Code which are complementarily applied,[17] constitute the special legislative framework, pursuant to which the procedure of special liquidation of banks is regulated and especially the liquidation of assets and the collective payment of creditors. Nevertheless, the procedure of utilisation of bad debts of financial institutions is subject to the publicity formalities and the provisions of increased formality of the above regulatory framework; consequently, the immediate and expedient management and satisfaction of these claims is not facilitated.[18]

Based on the above, it results that the domestic legal order does not address separately the issue of management of bad assets of credit institutions, but it integrates the development of legal relationships of credit institutions in the general regulatory outline of the viability of the same legal person of the bank. As a result, the bad assets of an initially viable and sound bank accumulate as “black holes” in its balance sheet, “pollute” the financial organisation and in the end follow it at the final stage of its operation, its liquidation. These items usually constitute the only assets of the “problematic” credit institution, nevertheless, the procedure for their utilisation and liquidation is subject to slow and inflexible regulations regarding the special liquidation of credit institutions and the bankruptcy of commercial companies, which results in their further depreciation. Under the existing regulatory programme, the procedure of liquidation of the banking corporation having been initiated, the bad assets are depreciated and they do not bring the expected benefits to its creditors and shareholders.[19] At this point, exactly, the legally significant need for an independent regulation of the management of assets of a financial organisation under distress is created with the aim of a more beneficial utilisation of these assets for the benefit of third parties, having legal interest in such procedure. The legislator’s prudence should be aiming at the creation of a regulatory programme which shall form a more attractive transactional environment for the exploitation of the above assets, with partial targets the flexibility of conditions to be met, the abolition of strict formality and the saving of cost and time. The legal comparative study of the partial regulations of certain European legal orders particularly in the subsystem of financial law facilitates the formulation of the appropriate proposal de lege ferenda towards this direction.[20]

The micro-comparative examination of regulations of European legal orders for the management of bad debts of financial sector

In general

The financial crisis of the last years, which began in United States with the crisis of subprime housing loans and was followed by the spectacular collapse of Lehman Brothers and of series of investment financial organisations expanded rapidly in Europe and affected the financial institutions having their registered seat here, especially in the periphery of our continent. The latter institutions are not affected exclusively because of their interaction with the credit system beyond the Atlantic Ocean, but mostly due to the speedy de-industrialisation, the lack of primary production of surpluses and liquidity and the consequences of fiscal deficits of local national economies on all categories of transactional parties. The general economic depression contributes in the financial difficulties of the banking corporations, which are related to, among others, the lack of funding sources and the inability of finding liquidity and results in the increasing regulatory intervention of the supra-legislative authorities and supervisory bodies and inevitably makes the rules of operation of credit institutions stricter.[21] Despite the coordinated efforts for confronting the above difficulties and the constant programmes for recapitalisation and reorganisation of national financial systems, the depreciation of all bank assets is intensified. The decline in these values takes place without distinction either they concern real property rights on movable and immovable property, or primarily contractual claims vis-à-vis

[16] *Governmental Gazette* Issue B 2498/04.11.2011. As expressly defined in the Preamble, “by the present [decision] the Bank of Greece exercises its regulatory competence derived from article 68 paragraph 2 of Law 3601/2007”.

[17] See the first paragraph of the Preamble of the Regulation regarding the special liquidation of credit institutions, where it is clearly provided that: “… An independent regulation for the special liquidation of a credit institution which would cover the relevant issues without need for recourse to the Bankruptcy Code is not laid down. On the contrary, special rules are introduced where it is required, while for the rest the Bankruptcy Code applies complementarily…”

[18] More specifically, art.2 sets out the procedure for making the inventory of assets of the institution under liquidation. This article is related systematically to art.5 referring to formalities of sale of the assets inventory. Articles 3 and 4 lay down special terms for the crucial procedure for the creditors’ giving notice of their claims and the proving of such claims by the institution under liquidation. Finally, the distribution of the product of liquidation of assets to the institution’s creditors is analysed in art.6 of the Regulation. In these provisions, the conditions for the sale of assets of the institution under special liquidation are set, such as the BoG’s giving permission, the institution’s prior filing of its inventory report and submission of contracts to the bankruptcy court for ratification.

[19] The effort to exploit immovable or movable properties in the context of sale of securities (mortgages, pledges, liens) and especially the effort to exploit claims in the context of assignment of claims arising out of credit agreements is made more difficult, when such items are integrated in the assets of an institution under liquidation, which is under the obligation to proceed to certain additional publicity formalities, to receive the prior approval of the bankruptcy court, while, in the end the BoG may object to the sale of any asset of the institution. This management indecision is intensified, if one considers that the utilisation is undertaken by the “failing” credit institution, under the corporate mantle of a de facto bankrupt corporation, with all the consequences that this entails for the objective valuation and easy transfer of its assets.

[20] It is, according to Evrigenis (in Symeonidis/Evrigenis/Frantzeskakis, *Studies of Comparative Law* (1978), p.113) the procedure of micro-comparative examination of the partial regulations of legal orders (of the same basically legal family) on a crucial issue under examination which intersects them horizontally, the particularity of which is enlightened more completely in this way. For the merits of legal comparative examination see Papanikolaou, *Methodology of Private Law and Construction of Contracts* (2000), art.288 onwards, Doris, “The micro-comparative legal research and its utility in the interpretation of Greek private law” [1993] *Legal Tribune* (NoB) 615 onwards, Papanikolaou-Karabatzos, *The new law of sale* (2003), art.270 onwards.

[21] Gortsos, *Introduction in international financial law* (2011), p.296. See instead of others, for the rules of pre-emptive supervision on the capital adequacy and the liquidity of credit institutions, Gortsos in Rokas/Gortsos, (2012), p.139 onwards and p.162 onwards, Vasilakou, *The development of the framework of financial supervision “Basel II” under the state of the worldwide financial crisis* (2010).

contracting parties, even if the satisfaction of such claims is secured by personal guarantee or mortgages and pledges.

The creation of the so-called "failing banks" or "problematic banks", also known as "bad banks" was one of the way-outs selected by European legal orders in order to address the depreciation of assets of credit institutions. This option is not new since it has been used during previous financial crises in some cases. A standardisation of these choices may be effected on the criterion of initiative of establishment and the applicable rules which govern their operation. On the one part, we observe the establishment of corporate formations which manage assets of banking corporations and shall be active in the context of rules of internal operation or intra group organisation of the legal persons which decide to establish them. It is obvious that in these cases special rules of law (lex specialis) do not apply, but the corporate law regulations of each legal order. On the other part, at a centralised or a decentralised level, new independent legal persons are established which acquire ex lege the ownership of bad assets of financial organisations and have as a special purpose the beneficial management and liquidation of these assets. In this case, a specific regulatory programme is set up for the establishment and operation of said corporate formations which usually have not only economic and financial independency but legal independency as well. The regulation of these sui generis formations differs significantly in the partial legal orders, since various differentiations between the selected models are observed. These corporate formations are legal persons controlled by the state, while there are cases in which the control stays with the transferor. These differences create an inhomogeneous legal environment within the European Union; therefore, the phenomenon is not efficiently addressed and the need for a legal comparative examination of its partial expressions is intensified.

The two archetypal examples of the United States and Sweden

At the end of the decade of 1980, tens of small financial institutions in the states of the United States were shaken due to their adverse financial results. This difficulty was caused by the big discrepancy between the high deposit interest rates and the lower housing loans interest rates of that period. This discrepancy, in combination with the non payment of the loan claims of the banks, resulted in jeopardising the foundation of these institutions.[22] Therefore, in 1989 the first, worldwide, "bad asset management company" was created.[23] This legal person of special purpose was mostly funded by state funds and to a limited extent by private investors.[24] Nowadays, and after addressing ineffectually the issue of bankruptcy of Lehman Brothers, two school of thoughts were shaped: the one suggested the intensification of the already existing legislative regime of common bankruptcy law and the other the formulation of a special system of rules of law with specialised resolution mechanisms for the big credit institutions in order to lessen the burden of public budget and therefore that of taxpayers. The second position having temporarily prevailed, the Dodd-Frank Act was enacted which provides for special resolution regimes for failing financial institutions; said special resolution regimes are still though under process.[25]

The financial system in Sweden was affected by the most acute crisis in the decade of 1990, during which three out of the four biggest banks were placed under insolvency proceedings. The Swedish Government chose to provide the required capital in order to guarantee the viability of the banks but did not take any measure in order for their shareholders to be saved and maintain the control of the credit institutions. In parallel, the government in cooperation with the supervisory authority decided to establish two legally independent persons[26] which acquired the total of non performing loans of the two biggest bankrupt banks.[27] The claims of the two under bankruptcy credit institutions on the non-performing loans were completely separated from the assets of the above banks. Under this basic legislative option the initial credit institutions managed to restructure more easily the items of their balance sheets and return gradually to granting credits to businesses and natural persons, to the extent that the absorbing bank was privatised and operated again in accordance with the rules of free market. Nevertheless, the operation of bad banks presented difficulties due to their inability to manage efficiently the delinquent loans and due to their delay in presenting satisfying results, which increased significantly the cost of capitalisation of

[22] During the period from 1980 until 1994 more than 1.600 banks were placed under insolvency regime or needed state aid.
[23] This corporate formation was named Resolution Trust Corporation (RTC).
[24] This corporate formation managed more than 394 billion dollars bad debts, but cost the US more than 75 billion dollars.
[25] Chapter II (Receivership) of the Dodd-Frank Act, governing the resolution of issues of systemic important financial institutions, demonstrate 3 basic options: first, a mechanism for rapid restructuring; secondly, the demand from the systemic important financial institutions to develop a viability plan and thirdly, a liquidation procedure for complex financial institutions that have a worldwide impact. Title II shall be invoked if there are no viable solutions in the private sector. More generally, a central option of these new provisions constitute the separation between the systemic important credit institutions and the institutions of smaller range and the allocation of the burden of supporting the banks under distress to the shareholders, through the ambitious provision for an establishment of a financial sector reorganisation fund. See for the contents of the Dodd-Frank Act and for the general operation of Federal Deposit Insurance Corporation (FDIC), that is the framework regarding the bankruptcies of failing banks in the US, Senbet/Wang, *Corporate Financial Distress and Bankruptcy: A Survey* (2012), 54 onwards, Morrison, "Is the Bankruptcy Code an Adequate Mechanism for Resolving the Distress of Systemically Important Institutions?" [2010] *Temple Law Revue* 449 onwards, Ayotte/Skeel, "Bankruptcy or Bailouts",[2010] *Journal of Corporation Law* 469 onwards, L. Chan Ho, [2008] Capital Markets Law Journal 323, R. Hynes and S. Walt, "Why Banks are Not Allowed in Bankruptcy" [2010] *Washington and Lee Law Review* 985 onwards, E. Hupkes, "Insolvency-why a special regime for banks?" in *Current Developments in Monetary and Financial Law, International Monetary Fund* (2003), 10 onwards.
[26] These 2 corporate formations had financial and legal independency vis-à-vis transferor institutions, bearing the characteristic names "Retriva" and "Securum".
[27] The banking corporations under name "Gotabank" and "Nordbanken" respectively, which afterwards merged, Bergstrom/Englund/Thorell, *Securum and the Way Out of the Swedish Banking Crisis* (2003), Ketzler/Schäfer, *Nordische Bankenkrisen der 90er Jahre: Gemischte Erfahrungen mit "Bad Banks"*, DIW Berlin Weekly Report 5/2009, 87–99.

these corporate formations by the state, since amounts corresponding approximately to 2.1 per cent of Sweden's GDP were spent.

The first company for the management of the looming financial crisis in Switzerland

Switzerland was the first country to adopt the mechanism of failing bank during the current financial situation. The country's central supervisory authority (Swiss National Bank, "SNB") established an independent legal person having as an exclusive purpose to acquire and manage assets acquired from UBS, a private interest bank. This new legal person constituted a special purpose vehicle controlled in its majority by the Swiss State. UBS was obliged to transfer bad assets and in exchange it received bonds issued by the Swiss State. The transferred assets were evaluated by independent rating houses at a value close to the one stated in the transferor's accounting books. The characteristic of the new formation's operation was that management and collection of claims have been assigned to the transferor enterprise pursuant to the standards of securitisation procedures. This structure of contractual relationships did not exclude the transferor's complete divestiture from the transferred assets. Nevertheless, the transferor bank participated in profits and losses arising out of the liquidation of the transferred assets by the "bad bank.[28]

The particular Irish model

On December 21, 2009 the legislative regulation for the establishment of a National Asset Management Agency came into force as voted on November 22, 2009 by the Irish Parliament.[29] A legal-politic aim of this innovative regulation was to restore the stability of the credit system, facilitate the restructuring of the systemic important Irish banks and assure the efficiency of state aid programme for credit institutions. In this context, the above organisation of public law is established and is controlled by the National Treasury Management Agency, a state authority which borrows for the account of the Irish State and manages the public debt.[30] This organisation's mission is to manage assets of the country's eligible credit institutions, which are considered as important banking corporations for the stability of the Irish credit system. With regard to the kind of transferred assets the legal act proceeds to the following specialisation: the selected systemic important credit institutions transfer part of their assets which is characterised as the most doubtful; they do not assign though the total of their claims not paid but only these claims on loans secured by mortgaged properties or exploitation of land, as well as development-business projects.[31]

The National Asset Management Agency operates as an independent legal person governed by corporate law, supervised by National Treasury Management Agency; its bodies are its board of directors, and its executive president, both appointed by the Minister of Finances. The National Treasury Management Agency supports the operation of the Agency through an agreement for lending services and staff. The Agency reviews, gathers and assesses the loan portfolios to be transferred by the selected credit institutions. Nevertheless, Irish legislation provides that a Special Purpose Vehicle shall proceed to the acquisition of the assets ("the Master SPV").[32] This company's objective is to acquire and further dispose of the assets transferred by the selected credit institutions. The special purpose company establishes subsidiaries companies, each of which shall assume the management of the transferred loan claims portfolio of one of the selected credit institutions. The aim of the operation of the network of special purpose vehicles is to derive the highest possible gain from the acquisition and further exploitation of said assets.

Therefore, a principal activity of the partial special purpose vehicles is the classification of the acquired assets according to their type, their securities, their general evaluation and their sale in the secondary market. If there are profits from this activity it is provided that private investors and the Agency shall receive annual revenue, which depends on the return of the management of claims and the operational cost of the company. In case the legal person is placed under liquidation, the Agency receives the capital contributed to it, while private investors, besides the capital, take additionally one fixed amount calculated as a percentage of the capital (further equity bonus). Of course, in case of losses it is provided that the invested capital shall be lost. It is noteworthy that the institutional framework governing the Agency provides for special privileges, facilitations and immunities in the context of an easy acquisition of transferred loans, privileged enforcement on the debtors' property, unhindered information from the tax authorities on borrowers' income, movable and immovable property etc. The duration of the Agency is ten years.[33]

[28] *Bank for International Settlement*, An Assessment of Financial Sector Rescue Programmes, BIS Papers July 2009.
[29] Act 34/2009, National Asset Management Agency (NAMA) Act 2009.
[30] This is National Treasury Management Agency (NTMA).
[31] Within the context of application of this legislation, the Irish Government pre-approved 5 credit institutions as systemically important and allowed the sale on their part of loan claims to the National Asset Management Agency. The payment of the price for the transfer of the above assets, which ranged 1/3 lower than their initial nominal value, took place with the delivery of bonds issued by NAMA and guaranteed by the Irish State instead of payment of cash. From the transferred claims only 40% brought cash flows to the transferee legal person, while the remaining part did not bring any flows, since it included debts past due.
[32] The share capital of the special purpose vehicle is controlled by private investors (51%) and the Agency (49%). The company's Board of Directors is comprised by representatives of both classes of shareholders; nevertheless, the Agency's representatives hold a veto for all the crucial decisions that may affect the interests of the Irish State, since the latter has guaranteed the payment of the price for the acquisition of the credit institutions' claims.
[33] For more on the operation of this mechanism see the European Commission's report dated February 26, 2010 Establishment of a National Asset Management Agency (NAMA), Asset relief scheme of banks in Ireland, EC, C (2010) 1155.

The centralised option of the Spanish legal order

In August 2012, the Spanish Government approved the Royal Decree 24/2012 on restructuring and dissolution of credit institutions, which reflects the Memoranda of Understanding (MoU) between the Spanish Government and Eurogroup and replaces older Royal Decree 18/2011, which regulated respective issues.[34] Within this context, three main pillars emerged:

- the determination of capital requirements of credit institutions through assessment of assets and submission of each banking corporation under solvency test;
- the procedure of recapitalisation and restructuring of the credit system which includes cases of mandatory dissolution and winding up of problematic credit institutions through the operation of the domestic Bank Restructuring Fund (FROB)[35];
- the collection and transfer of depreciated assets to an independent legal person, ex lege regulated, which shall take the form of an asset management company (SAREB).[36]

Pursuant to the seventh additional rule of Royal Decree 24/2012 the Bank Restructuring Fund establishes a legal person governed by private law, which shall have as an exclusive objective to acquire, manage and further dispose of the assets which the Fund considers that they must be removed from the balance sheet of the banking corporations so that their financial statements are restructured and their recapitalisation needs are limited. The duration of this company is set from ten to 15 years.[37]

These credit institutions that are obliged ex lege to transfer their assets to the Management Company, on the one hand, are banking corporations already monitored by the Restructuring Fund and on the other hand, financial organisations which shall be placed under insolvency or liquidation procedure on the basis of the Central Bank's evaluation criteria. The eligible assets, particularly if these are loan claims, are assessed by independent rating companies and are selected to be transferred based on their characteristics of doubtfulness, the amount of their debts past due or not yet due and the provisions already made for their possibility of collection. The transfer of the above assets takes places at their actual market value so that the transferors' total accounting loss is recorded at their transfer time. In exchange for the sale of their claims the transferors receive either a participation of respective value in the capital of the Management Company either funds or bonds guaranteed or issued by the Spanish State, which is either responsible directly as issuer or secondarily as guarantor of the principal debtor which is the Bank Restructuring Fund. The agreements for the assets transfer, regulated by the law, is exempted from any formality imposed by the Spanish law regarding companies and capital market, is not subject to any procedure of bankruptcy revocation and it is not subject to taxation.

The twofold character of the German legal system

Confronting the financial crisis up to now burdened particularly the state budget and consequently the German tax payers, which induced the legislative authorities to draw up the ameliorating Financial Stability Programme.[38] A central choice of this regulatory programme was to replace the pathogenic items of the balance sheet with bonds guaranteed by the German state, but with simultaneous shifting of the financial risk to the banking corporations' shareholders. More specifically, the fermentations that took place in the context of addressing the issue of restructuring of credit institutions and the pre-emptive resolution intervention in the assets of banking corporations ended up in the formation of a (quasi) twofold legal subsystem which provides two way-outs in accordance with the public or private character of the credit institutions involved. On the one part, it is provided that banking corporations of the private sector shall transfer bad assets to a special purpose company and they shall receive in exchange bonds guaranteed by the Financial Market Stabilisation Fund (SoFFin).[39] On the other part, it is provided that entire corporate sectors or business subdivisions may be transferred to an organisation of public law with the purpose of settling the legal relationships included therein.

The plan of formation of a special purpose company (SPV Scheme) provides for the possibility particularly of private credit institutions and their subsidiaries companies to form a special purpose vehicle having the form of a corporation which is not supervised by the Central Bank. This is a legal-politic option for a decentralised allocation of bad assets to partial corporate formations, which shall acquire the toxic assets of credit institutions and in exchange they shall issue and transfer to banking corporations bonds amounting to 90 per cent

[34] Real Decreto Ley 24/2012 de reestructuración y resolución de entidades de crédito (RDL 24/2012).
[35] *Fondo de Reestructuracion Ordenada Bancaria* (FROB).
[36] *Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria SA* (SAREB).
[37] The Shareholders of the Asset Management Company are the Bank Restructuring Fund, which is controlled by the Spanish State, the Deposit Guarantee Fund, credit institutions, investment companies, insurance companies, social security-pension funds, holding companies as well as foreign companies with same as above activities. In any case, it was provided that the Spanish State shall have a minority participation in the Company's share capital. The Company's and its bodies' operation is governed by corporate governance rules, since for instance the members of the Company's Board of Directors are selected on the basis of their knowledge and education and they are distinguished into independent and non independent. The corporate bodies provided for (Board of Directors, Audit Committee, Monitoring Committee) shall be comprised by persons outside SAREB.
[38] *Finanzmarktstabilisierungsfortentwicklungsgesetz* (FStFEntwG, July 17, 2009).
[39] *Sonderfonds Finanzmarktstabilisierung* (SoFFin).

of the accounting value of said assets.[40] These bonds issued by the companies of special purpose shall be guaranteed by the Financial Market Stabilisation Fund.[41] The banks' divesting of toxic assets of their balance sheets and recording the claims on the guaranteed bonds fortifies their capital adequacy and frees funds for financing healthy sectors of the national economy. The transfer of assets to the special purpose company is made upon completion of particularly strict evaluation procedures. It is noteworthy that this regulatory programme provides for a compensation procedure of the Financial Market Stabilisation Fund, which takes into consideration two accounting sizes: in case that the actual market value of the assigned loan claims and other assets of credit institutions is significantly less than the agreed consideration for the transfer paid by the special purpose company, then the transferor is under the obligation to pay this difference to the Financial Market Stabilisation Fund, which has already guaranteed for a higher amount. This compensation shall result from the profits generated by the corporate vehicle. In case that this compensation is not sufficient for the satisfaction of the Fund's claim any distribution to the company's shareholders is prohibited.[42]

The regulatory programme includes a second way out for the failing credit institutions, a more centralised one. This is the so called Unification Plan,[43] which is addressed mostly to state controlled banking corporations (Landesbanken), but to private financial institutions and special purpose companies as well. In the context of this plan an eligible credit institution requests for the formation of an independent legal person for asset management which operates in accordance with public law rules and is supervised by the Federal Agency for the Financial Market Stabilisation. This legal entity (AidA) has as an exclusive purpose to acquire and further dispose of bank assets, not only "specific" toxic assets but entire business sectors that do not present positive results as well.[44] Therefore, in the transferred assets are included besides loan claims, securities, legal relationships on credit agreements and guarantees, participations in company share capitals, rights on titles and securities etc. The mode of transfer varies in accordance with the kind of transferred assets: if these are entire business sectors, the transfer takes the form of a corporate transformation, such as a split-off, while if the object of transfer is only certain legal relationships of loan agreements, with debts falling past due, then the contractual type of assignment is selected. As a consideration for the transferred assets it is agreed that the transferor shall either acquire a respective participation in the legal entity's capital or shall receive a specific price. In any case, though, the transferor's divestiture from said assets does not exempt the transferee legal entity and its controlling shareholders from their liability for the operation and viability of successor entity. The transferee institution must draw up a business plan for the efficient operation and capitalisation of the acquirer legal entity, set out the procedure for further sale of transferred assets and fulfil all legal obligations relating to any transferred employment relationships. With the same rationale, it is imposed that the transferee credit institution, as well as natural or legal persons controlling it directly or indirectly, are civilly liable ex lege for any financial damages arising out of the activity of the successor legal entity. In case that the transferor institution is controlled by the German Federal Republic, the Financial Market Stabilisation Fund or any German State, then all the above formations are liable for the restoration of any damage arising out of the operation of the management company.[45]

Legislative analysis of the contractual architecture of bad debt management in the domestic legal order. The bad debt management company

The above non-detailed legal comparative examination as well as the short but critical time that the above regulations are in force in the partial legal orders, give sufficient provisions for the emergence of an appropriate mechanism for the bad asset management in the domestic legal order. As already stated,[46] in the Greek legal order there are no regulations, focusing on addressing the issue of management of bad assets of banking corporations and other enterprises as well. Nevertheless, the lack of legislative provisions for the assets of big sized enterprises and financial organisations in particular, results in a rapid depreciation of the already doubtful assets, since the possibilities of a profitable sale after they are placed under any special insolvency procedures are drastically shrunk. At the same time, the general mixture of the regulations of the Bankruptcy Code and the enforcement provisions of the Code of Civil Procedure in the context of business reorganisation, and more specifically the provisions of

40 FStFEntwG, § 6a, (1).
41 FStFEntwG, § 6a, (5) 2.
42 Nachhaftungspflicht, FStFEntwG, § 6c.
43 FStFEntwG, § 8a.
44 This legal person is not subject to the Central Bank's supervision since it is not deemed to be a financial institution nor is it under the obligation to maintain a minimum amount of regulatory capital.
45 It is noteworthy that the participation in the above regulatory programme remains voluntary for the all credit institutions of public and private character, which has resulted in the limited utilisation of the enacted provisions. The complexity of regulations, the reinforced obligations of the shareholders of the transferor credit institutions, the short time provided for the payment back of compensations in favour of Financial Market Stabilisation Fund and the self evident risk of damaging the reputation of the credit institution having recourse to the mechanism contribute in this result.
46 See above.

the Regulation on special liquidation of credit institutions prevents the profitable exploitation of the assets of these legal persons. At this point a need emerges for the legislator's pre-emptive intervention in the management of assets especially of banking corporations, already from the time that these assets appear to be pathogenic and of declining value.[47]

Furthermore, as noted in terms of economic science, credit institutions are required to incorporate liquidity risk in their business strategy more effectively and review their operation model. From this point of view, the gradual decrease of short term financing from money markets (secured or non secured financing), as well as from central banks, imposes a more effective differentiation of the financing sources by issuing middle-long term debt and selling it in the secondary market. On the other part, we need to demonstrate the need for maintaining as reserves only the immediately liquid assets, which may be converted immediately into cash in order to deal with any obligations in periods of crisis. At the same time, we should take into consideration that credit institutions have liabilities which consist in returning deposits which are usually available on demand. On the contrary, most assets of banks are loans (consumer, housing, business) whose term ends after the term period of the deposits. This deviation in the end of term between liabilities and assets creates a serious problem to banks, when in periods of crisis phenomena of panic appear, resulting in bank runs, while at the same time the assets do not generate the expected revenues.[48]

On the basis of the above, it is compelling that banking corporations dispose legally and at the same time substantially the adverse effect of their "toxic" assets. Therefore, a legislative regulation should serve two central evaluations:

- the need for timely cleansing the financial organisation (other big sized enterprises as well) from the cancer cells polluting the principal organisation, that is bad debts, before the creditor enters into a resolution or liquidation procedure with no return;
- the need for a beneficial utilisation of bad assets and for shifting the risk of collecting the claims to the secondary market, with the lowest possible cost for the legal person's shareholders and creditors but mostly without further burdening the public debt.[49]

Under the above ratio legis a regulatory programme should be drawn up, which shall express the following basic principles.

The selected contract type of ex lege assignment and the systemic or non systemic credit institution divestiture of its unhealthy portfolio

The assets to be transferred should be definitely separated from the balance sheet of the financial organisation (and any other legal person as well), so that, on the one part, they do not block the company's regulatory capital, and on the other part, they do not damage the company's assets because of their risk of depreciation. This divestiture is achieved by disposing of this particular class of assets of the legal person by means of sale. An essential condition is that this transfer should be definitive, without possibility of reversing the legal consequences of sale, or the acquirer's rescinding from the agreement or agreeing on a term for transfer of ownership as a security (fiducia is excluded). This is a transfer of claims, which is similar to the old line factoring agreement (assignment of business claims without right of recourse)[50] and securitisation of business claims.[51]

In order to achieve the above aim the transfer should be expressly provided as a substantial reorganisation measure and take the form of ex lege assignment pursuant to art.469 of Civil Code. In this way, the transfer of the group of assets shall be rendered mandatory for the contracting parties, since it shall take place in the context of fulfilment of a legal obligation. Furthermore, since the assignor shall not be liable for the solvency of the debtor, nor for the existence of the claim, the rescission of the sale shall be excluded.[52] At this point, therefore, the principle of separation of claims and exclusive disposal of these claims on the part of the assignee becomes effective. In order to better serve the proposed teleology the competent supervisory body, the Bank of Greece, shall monitor the application of these provisions; the BoG, on one part, shall intervene in the selection and the

[47] The burdening of financial statements of credit institutions and the appearance of loss-making results due to maintaining these bad assets in their portfolio create constantly new needs for financing banking corporations and renders difficult the diffusion of credit capitals in the market for the reinforcement of healthy business and other activities of borrowers. The problem is getting bigger due to the looming financial crisis, because of which the possibility for finding liquidity in the credit system is drastically limited, while the doubtful character of assets of institutions is geometrically increased.

[48] See more in *Hellenic Bank Association*, Collective issue, "The international crisis, the crisis in Euro zone and the Greek financial system" (2012), pp.243–45, 548 onwards, 595 onwards.

[49] These central legal-political options are already reflected with clarity in the Proposal of a Directive (COM 2012/280/3) for the establishment of an institutional framework for the resolution and recovery of credit institutions. As expressly stated in the relevant section: "The resolution objectives referred to in paragraph 1 are: (a) to ensure the continuity of critical functions; (b) to avoid significant adverse effects on financial stability, including by preventing contagion, and maintaining market discipline; (c) to protect public funds by minimising reliance on extraordinary public financial support; (d) to avoid unnecessary destruction of value and to seek to minimise the cost of resolution; (e) to protect depositors covered by Directive 94/19/EC and investors covered by Directive 97/9/EC; (f) to protect client funds and client assets".

[50] See for this contract type Ap. Georgiades, *New types of contracts in the modern economy*, p.136 onwards, Liakopoulos, "Factoring Agreement" *Commercial Law Review* (ΕΕμπΔ) 39, 377 onwards, Vathis, *Factoring Agreement* (1995), Psychomanis, *Factoring as business claim agency agreement* (1996), by the same author, "Banking Law" [2010] *Law of Banking Contracts* II 120 onwards, K. Pampoukis, "The various types of international Factoring and the regulation of legal issues of private international law" *Legal Tribune* (NoB) 46, 920 onwards, Kontogiannis, "The operation of assignment in the context of factoring agreement" [1999] *Law of Companies and Enterprises* (ΔΕΕ) 378 onwards.

[51] See instead of others Lekkas, *Real property security of bond issues and securitisation of claims* (2006).

[52] For the operation of the ex lege assignment, see G. Georgiades, in Georgiades, *Brief Interpretation of Civil Code* (ΣΕΑΚ), art.479 para.2, Kritikos, *Civil Code*, Georgiades/Stathopoulos, art.469 no.15.

evaluation of the assets to be disposed of and, on the other part, it shall impose sanctions in case of deviation from the regulatory provisions. As a consequence of the transfer of bad debts, any secondary right or privilege accompanying the bad debts of the transferor institution shall be transferred as well (art.458 of Civil Code), even those having a personal character, in analogue application of the provisions regarding securitisation.[53] Therefore, the transfer of the above claims of credit institutions shall not transform the substantial, procedural and tax nature of the transferred claims and relevant rights, as in effect before the transfer. All kind of special privileges in favour of the transferor remain in effect in favour of the acquirer, without the prior consent of the security provider being required and without need for entering into new secondary agreements (such as, for instance, in case of art.439 of Civil Code).

The transfer agreement shall be concluded by the contracting parties' signing the written contract. Nevertheless, in order for the agreement to be opposed to third parties the registration, free of charge, in the pledge books provided for by Law 2844/2000, of a summary of the framework agreement for the transfer of claims shall be required; such registration, which shall take place by simply stating the kind of the claims transferred, shall substitute any publicity formality or giving of notice to debtors of claims assigned.[54] Also, the agreements by which the assets of the transferor institution are transferred to the Management Company shall prevail over any agreement between the debtor and the credit institution providing for the prohibition of assignment (art.466 of Civil Code)[55]; furthermore, said agreements shall not be subject to any bankruptcy revocation (art.41 of Bankruptcy Code)[56] and shall not be reversed due to the transferor institution being placed under any kind of insolvency procedures. Finally, in any case, the mechanism of joint liability provided for by the ius cogens rule of art.479 of Civil Code[57] shall not be activated, since the transfer of bad debts shall not entail transfer of business.

The definition of bad assets to be disposed of

In order to achieve the best resolution result, the so called toxic portfolio should be defined with clarity and fully determined. At the same time, the definition of bad assets should be determined and expanded so that it does not include only the loan claims which are overdue, due to the debtor's default, since these claims are already significantly pathogenic and their value is materially declining. In the definition of bad asset, we should include any credit institution's claim with characteristics which make its satisfaction uncertain in total or in part because of its debtor who is either permanently in default (non performing loans) or still has potential to improve its solvency (sub-performing loans). Therefore, we should include in the definition of bad asset any claim relating to loan, credit agreement or other legal relationship, in the context of which events have arisen justifying the termination of a continuous agreement pursuant to art.288 of Civil Code, due to a significant cause attributed to the debtor's person, regardless of the latter's default.[58]This expanding approach of the definition of the assets to be transferred is justified on the one part because the bad asset is not created only in case of debtor's default but in any case where the possibilities of the creditor's being repaid are limited, on the other part because in this way the separation of assets is more beneficial for the legal person and the disposal of this crucial group of assets is made easier. In other words, the "toxic" character of transferred assets is not obligatorily related to loan claims falling past due; it must be diagnosed much earlier from the first indications of insolvency and inability of payment of the co-contracting party. Other assets, such as claims on bonds and other titles of money market, participations in companies' share capital etc[59] should be treated respectively.

The price for the assignment of bad debts

The calculation of the price for the sale of bad debts shall take place in deviation of the principle of art.361 of Civil Code providing for the self disposal of the parties contracting to the sale.[60] The valuation of the assets to be

[53] See art.10 para.6 section c of Law 3156/2003.

[54] This registration is deemed necessary despite the opposite provision of art.63D of Law 3601/2007, since on the one part the legal relationships to be transferred affect interests and rights of many categories of third parties, on the other part further transfers of bad assets shall take place between the same persons, which increase the need for transactional safety and protection of third parties. The definition of the transferred group of claims shall be made by simply stating the kind thereof in the context of assignment of bad debts of any category.

[55] See for this agreement. Georgiades G., in Georgiades, *Brief Interpretation of Civil Code* (ΣΕΑΚ), art.466 No.3 onwards, by the same author, *Assignment of future claims* (2006), p.136, Douvlis, *The transfer of bank credit with open account* (1994), p.47, Kritikos, *Civil Code*, Georgiades/Stathopoulos, art.466 No.2 onwards, Ladogiannis, *Business claims as security* (2006), 251 onwards, Kitsaras, *Contractual commitments of the power of disposal* (1999), 367 επ., Mpalis, *Contract Law* (1961) § 161, Roussis, "The effect of the agreement regarding the prohibition of assignment of claims resulting from an open account in the context of agency agreements and securitisation of business claims" [2011] *Finance-Banking Law Edition* (ΧρηΔικ) 383 onwards.

[56] See for the bankruptcy revocation instead of others Perakis, *Bankruptcy Law* (2012), p.262 onwards.

[57] See Varelas, in Georgiades *Brief Interpretation of Civil Code* (ΣΕΑΚ), 479 No.3, Supreme Court Decision 829/2003 Chronicles of Private Law (ΧρΙΔ) 2003, 883. Compare also art.63D para.5 section b Law 3601/2007.

[58] Such events giving grounds for a termination for cause pursuant to art.288 of Civil Code and facilitating the characterisation of an asset as bad are the failure of performance of general financial obligations of the creditor's co-contracting party, its exposal to debts towards the tax authority, its business activity deterioration, its mortgaged fixed assets drastic depreciation, a material change in its share capital composition, the appearance of negative results in the corporate financial statements or consolidated ones (when a member of a business group is a contracting party) and in general all these events constituting the notion of termination for cause of a continuous credit relationship (event of default).

[59] Therefore, in the group of transferred claims must be included not only the short term claims which are incorporated in the so-called current assets, but long term claims as well which appear in the fixed assets and may concern non immediately liquid assets, even placements of the corporation's funds in any kind of products, or titles, bonds or shares, the return of which is made doubtful, or in participations in other corporations.

[60] See instead of others Karabatzos, in Georgiades, *Brief Interpretation of Civil Code* (ΣΕΑΚ), art.513 No.44 onwards.

disposed of must be grounded on two bases: on the one part, it should be conducted by a legal person independent from the seller and the acquirer; on the other part, it should take into consideration the current market value of the assets and not their nominal value or the value stated in the transferor's financial statements (book value), even if this approaches the actual picture. The valuation procedure must be as objective as possible in order to correspond to the actual value of the assets and allow the contracting parties to set a reasonable price for their transfer. This aim is assured by the intervention in the procedure of sale of the assets of a third independent evaluator who shall be selected by the Bank of Greece and shall take into account all parameters of credit risk.[61] Such a valuation shall be binding for the contracting parties to the sale agreement and shall determine substantially the price for the acquisition of bad assets. This shall have as a consequence that the transferor legal persons shall record losses in their balance sheets since the successor enterprise shall acquire the assets at a significant lower price (discount) than their book value and the provisions made, therefore, a need for a recapitalisation of banking corporations particularly shall be created.

The legal independence of the acquirer person

A basic condition for the accomplishment of the abovementioned aim is the legal and financial independence of the legal person acquiring the assets to be transferred. The successor person shall not be related in any way to the transferor credit institution either by means of a relationship of mother-subsidiary company either by means of any other relationship provided for by arts 42e and 90 onwards of Law 2190/1920. Provided that the acquirer legal person is not included in the transferor's group the transferred claims of the latter shall be fully separated from its consolidated financial statements. On the contrary, the legal-political choice of the formation of a secondary legal person connected, e.g. with the financial organisation, in which bad assets shall be incorporated, shall not release the banking corporation from the depreciation (even if indirect) of its assets and the need for recapitalisation due to the loss-making results of its subsidiary company. This shall be valid a fortiori in the case where the management of the bad assets remains within the creditor's organisation, in the context of a simple restructure of its internal services and its operational organisational chart. Therefore, we should opt for the solution that the systemic and non systemic credit institutions and other big enterprises as well, transfer their bad assets to a legally and financially independent person.

The legal form of the successor person

The successor person shall absolutely have as an exclusive objective (corporate purpose) the management and further utilisation of the bad assets acquired. Since, the purpose is speculative, said formation shall have the legal form of a special purpose company (special purpose vehicle), and besides the special regulations, it shall be governed by the rules regarding corporations of Law 2190/1920. It is evident that the special purpose company shall not grant any loans or shall not proceed to any other activity pertaining to a credit institution and shall not be supervised by the Bank of Greece. Furthermore, it shall not proceed to any other activity which may jeopardise the fulfilment of its purpose. Based on the above, the corporate name of said formation, reflecting the object of its activities could be "Bad Debt Management Company" (BDMC).

The Management Company shall be managed by the General Meeting of its Shareholders and its Board of Directors. The Hellenic Financial Stability Fund (HFSF),[62] as controlling shareholder,[63] shall hold at all times the majority of the company's share capital, while it shall appoint obligatorily the majority of the members of the Board or its members shall reserve a veto right to any crucial decision taken by the Company's management.

Share capital structure and capital support of the Bad Debt Management Company. The architecture of the agreement on transfer of bad assets

The most crucial issue demonstrated by the need for establishment and operation of the Management Company, as results from the relevant examples of European legal orders as well, is, on the one part, the financing of its acquisition of bad assets and on the other part, the funding of its operation. This issue is connected inevitably with the share capital composition of the company, and the covering of the obvious losses which the transferor persons shall record at the time of transfer of bad assets. On the basis of the experience acquired by the legal comparative examination of the application of relevant regulation up to now and the provisions of

[61] In this context the independent evaluator shall evaluate the claims to be disposed of: (a) taking into account the expected and non expected loss in case of breach of contractual obligations on the part of the debtor, (b) updating the value of security of claims (real properties rights and personal guarantees) and (c) providing for the possibility of activating the techniques for reduction of credit risk and their results (e.g. liquidation of mortgaged properties through the procedure of forced sale of real properties).

[62] The HFSF was established by Law 3684/2010, amended by Laws 3870/2010, 3899/2010 and 4021/2011. The HSFS's purpose is to maintain the stability of the Greek banking system by supporting the capital adequacy of domestic credit institutions and subsidiaries of foreign credit institutions operating legally in Greece pursuant to a authorisation granted by the BoG, see *Opinion European Central Bank dated July 9, 2010 regarding the establishment of the HFSF*, CON/2010/54, p.1 onwards, *Opinion of European Central Bank dated September 19, 2011 regarding the amendments of Greek legal framework on resolution of credit institutions*, CON/2011/72, p.9 onwards, *Opinion of European Central Bank dated February 28, 2012 regarding the recapitalisation and resolution of credit institutions in Greece*, CON/2012/14, p.1 onwards, *Opinion of European Central Bank dated May 22, 2012 regarding the legal framework for recapitalisation and resolution of credit institutions in Greece*, CON/2012/39, p.1 onwards.

[63] See below.

domestic legislation, the structure of contractual mechanism and collaborating interests, particularly in the field of financial law, is reflected as follows:

- controlling shareholder of the Management Company is the HFSF, which shall pay the price for the acquisition of bad debts and in exchange it shall receive shares in the Company[64];
- the price for the transfer of assets, shall be paid mostly in cash and secondarily in bonds guaranteed by the HFSF, which shall be delivered instead of payment (art.419 of Civil Code) to the transferor person and in a smaller part in shares of the Management Company,[65] thereby the transferor institution becoming minority shareholder;
- at the same time, the HFSF shall assume the obligation to cover with its own funds the funding gap of the transferor institutions resulting from the losses due to transfer of bad assets at the actual market value and not at their book value, through a financing agreement which shall include either bond issues either direct capitalisation.
- on the other part, the transferor person undertakes to return the capital borrowed as above, by assigning all claims to any dividends to be distributed by the Management Company to its creditor, that is the HFSF; until full satisfaction of the HFSF's claim, the distribution of dividends of any kind to legal persons constituting the minority shareholders of the Management Company shall be prohibited.

Immunities and special privileges of the Management Company. Duration

Any agreement entered into in the context of transfer of bad debts, as any modification act on real property rights shall be exempted from any tax, duty or third party rights.[66]

For a more efficient satisfaction of claims of which the creditor is now the Management Company it may be expressly provided that all enforcement procedures shall take place in accordance with the provisions of Legislative Decree 17/7-13/8/1923, that is without the applicable enforcement procedure of Civil Procedure Code, which is time-consuming and onerous.[67]

Nevertheless, the possibility of setting off in favour of the debtor of the claims transferred (art.463 of Civil Code) shall remain intact,[68] as well as the even temporary prohibition of forced sale for the cases of assignees of claims of credit institutions.[69]

Also, in order for the Management Company to be more fully informed about the financial state of its debtors, it shall be provided that the banking and tax secrecy of its debtors may be lifted in favour of their new creditor; such new creditor shall be able to receive legally any information required for a better knowledge of the debtors' financial state in order to serve not only the procedure of transfer of claims, but their collection as well. Moreover, the Management Company shall not be required to receive any authorisation from the data subject or the Authority provided for by Law 2472/1997 for the process of the debtors' personal data.[70]

The company's duration shall not be limited to a suffocating time period of five years[71]; it shall be of indefinite duration since during the stage of life of the Management Company subsequent transfers of assets of credit institutions may take place. The legal person shall be dissolved when its purpose is fulfilled, that is when the acquired portfolio is liquidated by the Management Company and the latter is placed under special corporate liquidation procedure, during which the HFSF's claim shall be satisfied first and then these of other creditors.

Mandatory character

In order to achieve more efficiently the purpose of the above regulations it should be provided that the participation of the banking corporations particularly in the regulatory programme shall be mandatory in cases where the BoG deems it necessary and that in the contrary case the HFSF shall exclude these institutions from any future bank recapitalisation procedure.

[64] The HFSF may enter into the procedure in accordance with a relevant memorandum of cooperation with the BoG pursuant to provisions of art.6 of Law 3864/2010.

[65] This shall constitute an independent abstract obligation equivalent to fulfilment of the obligation due to performance instead of payment (art.419 of Civil Code), Mpechlivanides, in Georgiades, *Brief Interpretation of Civil Code* (ΣΕΑΚ) art.419 No.10 onwards, Appeal Court decision 782/2000 Hellenic Justice 2001, 243. See also Archaniotakis, *Transfer of assets or business* (1997), p.301 onwards, Douvlis, *Methods and legal framework for privatization of state enterprises in the Greek financial law* (1998), p.45 onwards, Psychomanis, *Banking Law-Law of banking contracts* (2001), p.85 onwards, Passias, *The company law*, Issue B, (1969), p.70, Georgakopolos, *The company law*, Issue III, The societe anonyme, B, (1974), p.176, Canaris, *Bankvertragrecht* (1975), 1042.

[66] Compare art.14 of Law 3156/2003.

[67] See Georgiades Ap., *The security of credits* (2008), p.475 onwards, Mazis, *Hellenic Justice* (2000), 1558.

[68] Compare art.63D para.7 of Law 3601/2007.

[69] See art.5 of Law 4228/2013, where it is noted that: "… The deadline of suspension of forced sales that are initiated for the satisfaction of claims not exceeding the amount of two hundred thousand Euros (200.000) by credit institutions and companies granting credit, as well as by the assignees of these claims, as described in paragraph 1 of article 1 of Act of Legislative Content dated 16 December 2011 as this Act was ratified by article first of Law 4047/2012, is extended until 31 December 2013 …"

[70] See art.10 para.20 and 21 of Law 3156/2003. The lifting of banking secrecy in domestic or transnational field takes place exclusively in the context of fighting tax evasion and legalisation (money laundering) of income generated from criminal activities, compare Douvlis, "Banking secrecy, protection of personal data and legalisation of illegal income during tax inspections" [2012] *Law of Companies and Enterprises* (ΔΕΕ), p.1093, Mpolos/Arnold, "The issue of Greek deposits in Switzerland" [2012] *Law of Companies and Enterprises* (ΔΕΕ) 299.

[71] This way the evaluation of the law regarding the desirable duration of the corporate liquidation provided for in art.49 para.6 of Codified Law 2190/1920, and the special liquidation of the credit institutions provided for in art.7 para.2 of the relevant Regulation.

Conclusion: Balancing the interests affected and the need for expansion of the regulatory programme to other categories of legal persons

The notion of bad debt, set out above, as object of crucial transactional relationships which should be subject to timely regulatory intervention on the basis of reorganisation of portfolio of legal persons active in the financial sector, but other significant sectors of national economy as well, comes clearly under an indirect though precise balancing of interlocking interests. Under this procedure, pursuits and rights of the legal persons themselves, those of their shareholders-owners, their creditors and their employees, those of third debtors, the citizens-taxpayers (to the extent that each recapitalisation programme burdens the public budget), the society more generally are intersected. The legislative analysis encompasses the teleology of timely divestiture of toxic assets and beneficial management of bad debts; therefore it has as a principal aim to limit the burdening of public finances and only secondarily to mitigate the burdens of shareholders and creditors, who must undertake a part of the business risk of said legal persons. From the contractual structure set out above it results that the legislative choice gives priority to the public interest and does not serve the isolated and mostly conflicting and contradictory pursuits of creditors and shareholders. Such a balancing takes into consideration that all transactional parties participate in the public interest.

An advanced legal-political option in the context of development of the above regulatory programme would contribute in the expansion of the partial regulations to all big sized enterprises regardless of their business sector, since in these cases the legally significant need for beneficial management of bad debts and pathogenic assets of these legal persons emerges. The described main points of the contractual architecture of the management of bad debts of a financial organisation may be applied, with some deviations, to other categories of legal persons (e.g. construction companies, industrial export companies etc), without this choice attributing an unbearable paternalism to the legislator in the field of legal relationships of private law. On the contrary, the need to resolve the legal persons that are important for the stability of national economy imposes the drawing up of a practical regulatory programme for the management of bad debts and pathogenic legal relationships, to the extent that a legal order should act pre-emptively in order to address the complex issues raised by the most acute financial crisis and protectively for the society against the risks created by the business recession.

