ΤΟΜΟΣ 15, ΤΕΥΧΟΣ 2
VOLUME 15, ISSUE 2

ISSN 2732 – 71915
E-ISSN 2732 – 7205

DE JURE
Journal

LAW JOURNAL OF THE EUROPEAN LAW STUDENTS' ASSOCIATION – ATHENS

OFFPRINT

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Suggested citation:

Agapi-Alexia Zeriti & Dionysis N. Fotopoulos, 'NPLs Securitization in Greece: Legal perspectives, financial trends, and risky pathways' (2022) 15(2) De Jure Journal 110.

Available at www.dejurejournal.com/journals

The European Law Students' Association
ATHENS

NPLs Securitization in Greece:

Legal perspectives, financial trends, and risky pathways

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NPLs ratio in Greece rose to high levels after the country was hit by the global financial crisis in 2008 and the ensuing Eurozone debt crisis. The policy response was to find the suitable framework that would assist credit institutions with offloading their balance sheets from NPLs by means of securitization, thus re-boosting credit extension in the economy. The present paper attempts to delve into the legal structures and financial trends of the Greek NPL market and to discuss the mechanisms of securitization under Greek Laws. Hence, it places emphasis on the particularities and interplay of relevant Laws 3156/2003 and 4354/2015, as well as on the recent government backed securitization scheme and its affinity with, and divergence from, the Italian one.

I. Introduction

In the aftermath of the global financial crisis in 2008 and the ensuing Eurozone debt crisis, securitization mechanisms have been at the epicentre of interest, and have often been regarded in two diametrically opposing ways. On the one hand, it has been argued that securitization was one of the driving forces of the crisis;[1] simultaneously, securitization has been perceived as a financial scheme that could be utilised to effectively surpass the credit crunch, and alleviate the burden endured by banks due to the accumulation of Non-Performing Loans (NPLs) in their balance sheets.[2]

From the onset of the financial crisis, NPL levels rose significantly, affecting the liquidity and profitability of credit institutions.[3] Greece in particular, was plagued by the rising volume of NPLs, which reached its peak in the third quarter of 2016, with a ratio of 49,1%.[4] Banks implemented the financial structure of securitization, as introduced by Greek Law 3156/2003 (the 'Securitization Law'),[5] as a means to raise funds from debt capital markets and reduce the rising volume of NPLs. With a rich precedent of sealed securitization deals, and increased investor demand in securitized transactions over the years, it would be reasonable to estimate that NPL transactions would primarily rely on this type of structure, in the process of reducing the country's voluminous NPL stock.[6] In 2015, however, the Greek legislator enacted Law 4354/2015 (the 'NPLs Law'),[7] aspiring to specifically regulate the management of NPLs and develop a secondary NPL market, which would benefit both credit institutions and creditors.[8] Although clearly inspired by certain features of securitization, the NPLs Law introduced a more restrictive and regulated framework on the acquisition and servicing of NPLs, and it was not until it incurred certain amendments that it was actively implemented in the Greek market.[9]

In view of the above, the present paper will attempt to unfold some important perspectives of the NPLs' securitization structures, as encountered in the Greek market. We will commence by conceptualising NPLs, Non-Performing Exposures ('NPEs'), and Forborne Exposures ('FBEs'), in the context of the European Union ('EU'), as well as the generic mechanisms of securitization. Then, we will present the particularities of the two most relevant pieces of legislation in Greece, i.e., the Securitization Law and the NPLs Law, and will endeavour to explain their interplay and manner of coexistence. Subsequently, we will place emphasis on the recently enacted Greek regime for government backed securitization, i.e., the Hercules Asset Protection Scheme ('HAPS').[10] Brief attention would be given to its affinity with, and divergence from, the relevant Italian Garanzia Cartolarizzazione Sofferenze ('GACS') scheme.

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[1] Dov Solomon, 'The Rise of a Giant: Securitization and the Global Financial Crisis' (2012) 49(4) AmBusLJ 859, 862-863· Georgios Lekkas, 'Corporate finance (in particular securitization) and the financial crisis' (2010) 4(1) Financial Law (ΧρηΔικ) 16, 22 [In Greek].

[2] Athanasios Kouloridas, 'The securitization of claims as a mechanism for the management and refinancing of business and housing loans' (2017) 23(8-9) Business and Company Law (ΔίκΕΕ) 1018, 1028 [In Greek]· Miguel Segoviano et al., IMF Working Paper: Securitizations: Lessons Learned and the Road Ahead (International Monetary Fund 2013) 9.

[3] Konstantinos Nikolopoulos and Andreas Tsalas, 'Non-performing Loans: A review of the Literature and the International Experience' in Platon Monokroussos and Christos Gortsos (eds), Non-Performing Loans and Resolving Private Sector Insolvency: Experiences from the EU Periphery and the Case of Greece (Palgrave Macmillan 2017) 47, 48.

[4] Bank of Greece, Financial Stability Review: January 2021 (Bank of Greece 2021).

[5] Law 3156/2003 Government Gazette 157/A/25-6-2003 Bond loans, receivables' securitization and securitization of mortgage claims and other provisions.

[6] Christina Papanikolopoulou and Kely Pesketzi, 'Securitization: Greece: Trends and Developments' (2019) 3 Chambers: Global Practice Guide <https://www.zeya.com/sites/default/files/2020-01/2019-Chambers-Securitisation-Guide-Greece.PDF?fbclid=IwAR2RSeQdK0p4twHHQYSNf5iwaY8YinePp62sE57VUFAysaMJGkGUeURE-Nk> Accessed 29 October 2022

[7] Law 4354/2015 Government Gazette 176/A/16-12-2015 Management of non-performing loans, wage regulation and other urgent provisions for the implementation of the agreement on fiscal targets and structural reforms.

[8] Hellenic Parliament, 'Explanatory Report for draft Law 4354/2015' (2015) 1-2 <https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/d-damme-eis.pdf?fbclid=IwAR34u5FFiW7MCFEmyeLug_MsPTCDptWlolBZjkcqeFwPpJnrjKTCNzHXOQ8> Accessed 30 October 2022 [In Greek]· Zafirios Tsolakidis, 'Transfer of receivables from non-performing loans' (2016) 16 (2) Annuals of Private Law (ΧρΙΔ) 641, 642-643 [in Greek].

[9] Papanikolopoulou and Pesketzi (n 6) 3.

[10] Law 4649/2019 Government Gazette 206/A/16-11-2019 Scheme for the provision of guarantee in credit institutions' securitization.

II. Conceptualizing securitization of NPLs

1. NPLs, NPEs and FBEs: Preliminary Remarks under the EU framework

At first, it would be useful to conceptualize what an NPL is, as well as to demarcate other distinct yet related concepts such as the NPEs and the FBEs – concepts that are commonly found in relevant literature and normative or soft law texts and may confuse. In that direction, the European Banking Authority ('EBA') provides for relevant guidelines

In order to characterize a loan as NPL, both primary and secondary criteria are employed.[11] The primary criteria refer to two facets of credit extension; (**i**) the facet that relates to the observance of the repayment's timeline, i.e., the fact that a loan is past due and not paid; and (**ii**) the facet that relates to the loan's quality, i.e., the consideration that the credit institution is unlikely to receive the payment for the loan without having recourse to actions such as the realization of security.[12] As to secondary criteria, they refer, *inter alia*, to restructuring or to the existence of collaterals.[13]

'NPEs' is a much broader concept than 'NPLs', and EBA has opted to use this concept for purposes of specifying sound management practices of credit institutions' assets, for restoring market trust in the banking system, and for assisting in the implementation of interstate policies for the resolution of NPLs' issues under common terms and conditions. Apart from loans, 'NPEs' cover also such other exposures as advances, debt securities, assumed credit commitments, and provision of financial guarantees.[14]

EBA has determined the past due criterion[15] with reference to the default of an obligor under Credit Requirements Regulation ('CRR').[16] Pursuant to Article 178(1)(d) of CRR, a default is considered to have occurred when the obligor has been past due more than 90 days on its obligations. The credit institutions shall recognise the credit obligation as past due, when any amount of principal, interest or fee has not been paid at the date it was due.[17]

As to the indications of unlikeliness to payment, again EBA makes reference to the CRR and its definition for default. Under Article 178(3) of CRR, elements to be taken into account by credit institutions include the putting of the credit obligation on non-accrued status, the recognition of credit adjustments, the selling of the credit obligation at a material credit-related economic loss, the institution's consent to a distressed restructuring of the credit obligation, the filing for the obligor's bankruptcy, and, *a fortiori*, the declaration of the obligor's bankruptcy.

EBA has also determined what an FBE is. When forbearance measures have been extended to the obligor, its exposure is characterized as 'forborne'. Forbearance measures may be '*any concessions towards debtors facing, or about to face, difficulties in meeting their financial commitments*'.[18] Credit institutions should be able to identify at an early stage any sign of difficulty in meeting financial commitments, including both apparent and non-apparent signs, such as changing market conditions that affect the borrower's ability to repay.[19] Moreover, the existence of third party guarantees or collaterals should not be taken into consideration.[20] Lastly, in the words of the EBA, '*[w]hen granting forbearance measures to performing exposures, credit institutions should assess whether these measures lead to a need to reclassify the exposure as non-performing*', while the extension of forbearance measures does not affect the non-performing status.[21]

2. The financial structure of securitization in general

Credit institutions, especially at times of crisis, often take advantage of securitization mechanisms so as to extend more credit to the real economy.[22] From an economic point of view, securitization is critical for credit institutions aiming at deleveraging, by offloading their balance sheets from distressed assets.[23]

In general, securitization can be defined as the pooling of homogenous claims, or other assets into a portfolio and the transfer of the said portfolio to a special purpose vehicle ('SPV').[24] 'Cash securitization', the traditional mode of securitization, involves the actual sale and transfer of assets. 'Synthetic securitization', a distinct mode of securitization, which will not be addressed in detail herein,[25] is defined as the

[11] Panagiotis Alexakis and Faidon Kalfaoglou, The Normative Framework of the Operation of Banks (Nomiki Vivliothiki 2019) 264 [in Greek].
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] EBA Guidelines on the management of non-performing and forborne exposures EBA/GL/2018/06 [2018] 43.
[16] Regulation 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation 648/2012 [2013] OJ L176.
[17] EBA Guidelines on the application of the definition of default under Article 178 of Regulation (EU) No 575/2013 EBA/GL/2016/07 [2017]

[18] EBA Guidelines (n 15) 43-45· UniCredit, 'Non-performing and forborne exposure' (2016) 1 <https://www.research.unicredit.eu/DocsKey/credit_docs_2016_157444.ashx%3FM%3DD%26R%3D41029801> Accessed 11 November 2022.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Lekkas (n 1) 20· Orestis Omran, Sean Murray and Conor Houlihan, Greek NPL market snapshot (DLA Piper 2020) 3 <https://www.dlapiper.com/en/uk/insights/publications/2020/12/greek-npl-market-snapshot/> Accessed 20 October 2022.
[23] Gert Wehinger, 'Bank deleveraging, the move from bank to market-based financing and SME financing' (2012) 2012/1 OECD Journal: Financial Market Trends 1, 9.
[24] Kouloridas (n 2) 1019; Angelos Delivorias, Understanding Securitization: Background – benefits – risks (European Parliamentary Research Service 2015) 9 <https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/569017/EPRS_IDA(2015)569017_EN.pdf> Accessed 22 October 2022.
[25] For more details on synthetic securitizations see European Banking Authority, The EBA Report on Synthetic Securitization (European Banking Authority 2015) <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/983359/03ed077f-cdf9-4f6c-901b-fb7fda0e44a3/EBA-Op-2015 26%20EBA%20report%20on%20synthetic%20securitisation.pdf?retry=1> Accessed 20 October 2022.

type of securitization '*where the transfer of risk is achieved by the use of credit derivatives or guarantees, and the exposures being securitised remain exposures of the originator institution*', as stipulated in Article 242(11) of the CRR.[26] As a tool of financing, securitization differs from the borrowing of funds, resulting in debt and constituting a liability on the transferor's balance sheet – rather, by means of securitization, the transferor is discharged from distressed assets and receives a sum for the transfer.[27] Securitization is a phenomenon of 'disintermediation' of credit institutions from corporate financing, and is instead based on investor financing.[28]

The financial structure of traditional securitization[29] operates as follows: A firm – this is named the 'originator' and could be, of course, a credit institution – seeks for instant financing; meanwhile, it happens to be the beneficiary of certain receivables, stemming e.g. from loan agreements, payable by their obligors on an arranged due date. As the firm cannot guarantee the timely payment of such receivables, which are associated with the risk of non-collection, it decides to *securitize* its assets: the firm sells and transfers the assets to the SPV, against an agreed contract price; the SPV, in turn, secures the repayment of the said contract price through the issuance of a bond loan; the listed bonds, as debt securities, are then sold to third party investors in the capital markets.[30] The bondholders' claims are satisfied through the collection of the receivables arising from the assigned and securitized claims. Third party investors interested to invest in the debt securities issued by the SPV evaluate whether such investment is worth it by referring to relevant ratings of credit rating agencies.

Often, the assets may be classified into sub-portfolios, according to their intrinsic credit risk.[31] In that case, the issuance of debt securities will take place for each and every sub-portfolio separately.[32] It is understandable that the issued notes are predominantly distinguished into two categories – senior and junior notes based on the ratings received by rating agencies.[33] The senior notes will be highly rated as they have lower credit risk – hence, the yield from the bond (coupon rate) will be lower.[34] This structure is particularly important in cases of government backed securitization, as will be shown below (III.4).

[26] Regulation 575/2013 (n 16).
[27] Lekkas (n 1) 19.
[28] Theodoros Koulourianos, 'Securitization of receivables as a form of corporate financing' (2006) 6 Annuals of Private Law (ΧρΙΔ) 181 [in Greek].
[29] See Kenneth Kettering, 'Securitization and its discontents: The dynamics of financial product development' (2008) 29(4) CardozoLRev 1553, 1564· Steven Schwarcz, 'The Alchemy of Asset Securitization' (1994) 1(1) StanJLBus&Fin 133, 135.
[30] Koulourianos (n 28) 181.
[31] Kouloridas (n 2) 1019.
[32] Kouloridas (n 2) 1020.
[33] Ibid.
[34] Ibid.

III. Securitization of NPLs in Greece

As indicated above, the two key pieces of Greek legislation applicable to the securitization of an NPL portfolio are Law 3156/2003 (the 'Securitization Law') and Law 4354/2015 (the 'NPL Law'). It should be clarified, by way of introduction, that the NPL Law was designated to specifically address the transfer and management of debt receivables stemming from *non – performing* loans and credits granted by credit or financial institutions. The older Securitization Law on the other hand, governs *any transfer of business receivables* executed *by way of securitization,* regardless of whether the portfolio to be securitized includes non – performing receivables or not.[35]

1. Law 3156/2003 (the '*Securitization Law*')

Article 10(1) of the Securitization Law defines securitization as *'the transfer of business claims by way of a written sale agreement between the transferor and the transferee, in conjunction with the issuance and disposal of notes, of any type or form; repayment thereof is funded by either (i) the proceeds of the transferred business claims or (ii) loans, credits, or financial derivative agreements'.*

The transferor involved in the securitization transaction must be a merchant, having its residence or seat in Greece, or operating through a permanent establishment in Greece.[36] The transferee of the business receivables and issuer of the notes taking part in the transaction is always an SPV, with the exclusive purpose of acquiring business claims for securitization and issuing the relevant notes.[37] SPVs incorporated in Greece should bear the form of a 'société anonyme', and are subject to Greek corporate legislation on Sociétés Anonymes ([Law 4548/2018), i.e. requirements on minimum share capital].[38]

The collection and servicing of the receivables transferred by way of securitization, may be contractually delegated to a third party which has either guaranteed or undertaken the collection of the receivables prior to the securitisation transaction, to a credit/financial institution in the European Economic Area, or even to the transferor in its capacity as servicer.[39] It is noted that the regulated servicers referred to in the NPL Law, which are established and licensed by the Bank of Greece, are treated by Law as financial institutions and may act as servicers for the purposes of the Securitization Law.[40]

Therefore, the securitization structure regulated by the Securitization Law, involves the conclusion of the following primary agreements: (i) a sale agreement, between the transferor and the transferee, governed by the provisions of Article 10 of the Securitization Law and Articles 513 et seq. of

[35] Omran, Murray and Houlihan (n 22) 5
[36] Law 3156/2003 (n 5) art. 10(2).
[37] Ibid.
[38] Law 3156/2003 (n 5) art. 10(3)· Omran, Murray and Houlihan (n 22) 5.
[39] Law 3156/2003 (n 5) art. 10(14)-(15)· Lekkas (n 1) 16-17.
[40] Papanikolopoulou and Pesketzi, (n 6) 2.

the Greek Civil Code; (**ii**) an assignment agreement, again between the transferor and the transferee, governed by the provisions of Article 10 of the Securitization Law and Articles 455 et seq. of the Greek Civil Code; (**iii**) a servicing agreement for the management of the business receivables, between the transferee and the servicer of the securitized assets; (**iv**) the financing agreement (i.e., loan, issuance of notes, note subscription agreement, etc.), via which the transferee raises the capital required for the acquisition of the business receivables [Article 10(1) and (7) of the Securitization Law], as well as any other contracts for credit or derivatives that are concluded by the SPV for the purposes of the securitization[41]

According to Article 460 of the Greek Civil Code, the perfection of the assignment of receivables is effected insofar as the obligors are served with notice of the assignment, by the assignor or the assignee. By way of exception, in securitization transactions, such a requirement is considered to be fulfilled with the registration of the summary of the assignment and transfer agreement in the public book of Greek Law 2844/2000[42] kept with the competent pledge registry of the registered seat of the originator.[43]

2. Law 4354/2015 (the '*NPLs Law*')

Having endured various amendments since its enactment,[44] the NPL Law specifically addresses the management of NPLs – currently covering, however, the acquisition and servicing of all bank and credit receivables.[45] Under the NPL Law, the *transfer and management of debt receivables arising from loans and credits granted by credit or financial institutions* is a highly regulated process, implemented through/ executed by means of (**i**) a transfer agreement by way of sale and (**ii**) a servicing agreement.[46] The NPLs Law explicitly provides that the implementation of its provisions does not prejudice the implementation of the provisions of the Securitization Law; [47] the latter are applicable to any transfer of receivables for the purposes of securitization, regardless of whether the portfolio to be securitized includes non - performing receivables or not.[48]

Claims arising from loans or credits granted by credit or financial institutions in Greece, are sold and transferred to Credit Acquiring Entities, by virtue of a written sale and transfer agreement. Given that the NPLs Law sets a special regime on assignment of claims, the transferor and transferee engaged in the transaction must fulfil certain requirements: The transferor must either be a credit or financial institution, as such terms are defined in Greek Law 4261/2014 (the 'Banking Law')[49] and the CRR, with the explicit exception of the Loans and Deposits Fund.[50] The transferee, on the other hand, must either be (**i**) a Greek Société Anonyme, whose scope as indicated in its articles of association includes the acquisition of loan and credit receivables, or (**ii**) a company whose registered seat is located in any other member state of the European Economic Area, or (**iii**) a company having its registered seat in a third country, which is not deemed as a tax privileged jurisdiction or a non - cooperative state.[51] It is noted that the special purpose vehicles acquiring business receivables under the Securitization Law may also qualify as Credit Acquiring Entities under the NPLs Law, insofar as the statutory purpose of such SPVs is the acquisition of receivables.[52] There has been some controversy on whether such transfer is governed by the provisions of the NPLs Law or the Securitization Law; the issue should be resolved in view of the level of protection afforded by each law to debtors and guarantors, to the benefit of the parties to the transaction.[53]

The NPLs Law stipulates that, in case the borrower is a consumer pursuant to Article 1(a) Law 2251/1994,[54] it is a condition precedent to the sale agreement that the debtor and guarantor are served with a 12-month extrajudicial notice, for the settlement of their liabilities on the basis of an appropriate settlement scheme.[55] This restriction is questionable, as it imposes a time consuming process, requiring the individual assessment of each obligor, so that the appropriate arrangement scheme is structured; it seems to be pretty inconsistent with the overall logic of the Law which is to encourage the development of a secondary NPLs market, by simplifying the procedure for the transfer of claims.[56]

The servicing of claims arising out of loans and credits falling within the scope of the NPLs Law, shall exclusively be assigned to specially designated Credit Servicing Entities, by way of a written agreement whose minimum content is

[41] Georgios Lekkas, In rem securities in bond loans and securitization of receivables (Sakkoulas Publications 2005) 174-175 [in Greek]· Lekkas (n 1) 17.
[42] Law 2844/2000 Government Gazette 220/A/12-10-2000 Contracts on movable property or claims subject to publicity and other guarantee contracts
[43] Law 3156/2003 (n 5) art. 10(8)-(10)· Papanikolopoulou and Pesketzi (n 6) 4.
[44] Tsolakidis (n 8) 642-643· Papanikolopoulou and Pesketzi (n 6) 3.
[45] Nikos Fragos, 'Management of Non-Performing Loans (NPLs) Under the New Regulatory Framework of Law 4354/2015' (2018) Greek Law Digest <http://www.greeklawdigest.gr/topics/banking/item/305-management-and-transfer-of-non-performing-loans-npls-under-the-new-regulatory-framework-of-law-4354-2015?fbclid=IwAR3nlkgXi3sucLrjo3s1c0RSi7GwcvinCpqKV5MsLfFN0DtcTlhOGBHPu2A> Accessed 29 October 2022· Tsolakidis (n 8) 647.
[46] Georgios Orfanidis, 'The regulatory content of Law 4354/2015' (2021) 11 Applications of Civil Law and Civil Procedure (ΕφΑΔΠολΔ) 1283, 1283.
[47] Law 4389/2016 Government Gazette 94/A/27-5-2016 Urgent provisions for the implementation for the fiscal agreements and structural reforms and other provisions, art. 70.
[48] Omran, Murray, and Houlihan (n 22) 5.
[49] Law 4261/2014 Government Gazette 107/A/5-5-2014 Intervention in the credit institutions' operation and credit institutions' prudential supervision (transposition of Directive 2013/36/EU), abolition of Law 3601/2007 and other provisions.
[50] Law 4354/2015 (n 7) art. 3(1)· Anastasios Kalergis, 'Conditions for the valid transfer of receivables arising from loans and credits pursuant to the provisions of Law 4354/2015' (2019) 8-9 Business and Company Law (ΔίκΕΕ) 1088, 1089.
[51] Law 4354/2015 (n 7) art. 1 (1)(b).
[52] Tsolakidis (n 8) 646· Kalergis (n 51) 1089.
[53] Law 4345/2015 (n 7) art. 1(1)(b)· Kalergis (n 51) 1090.
[54] Law 2251/1994 Government Gazette 191/A/16-11-1994 Consumers' Protection.
[55] Law 4354/2015 (n 7) art. 3(2).
[56] Kalergis (n 51) 1091.

provided in the NPLs Law.[57] Credit servicing entities are subject to a special operational licence granted by the Central Bank of Greece, overseeing compliance with any regulatory requirements.[58] The accredited servicer should either be a Greek Société anonyme having as its exclusive business the servicing of loans and credits, or a company registered in the European Economic Area, legally established and operating in Greece through a branch office. [59] The conclusion of a servicing agreement between the transferee of the receivables and a licensed servicer is a condition precedent to the validity of the sale agreement referred to earlier.[60]

Further, in order to be valid, the sale and transfer agreement must be registered with the public book of Article 3 Law 2844/2000, kept with the competent Pledge Registry.[61] Upon completion of such registration, the transfer of the receivables, along with any ancillary rights pursuant to Article 458 of the Greek Civil Code, any rights in rem, personal guarantees, etc., is effective against the obligor and third parties.[62] The NPLs Law additionally requires that notice of publication of the registration be given to the debtors and guarantors by any appropriate means.[63]

3. The interplay between the Securitization and the NPLs Law

As it derives from the presentation of the most essential features of the above frameworks, both the Securitization and the NPL Law share the same rationale and do display certain similarities; both pieces of legislation regulate a structure whereby a borrower assigns by way of sale their claims to an SPV to gain financing by collecting a contract price; such structure is conducive to the development of an active loan market. Why did the Greek legislator decide to set in force an additional law in 2015, aimed precisely at the management of NPLs and the sanitization of the banking system, when the existent securitization mechanism worked just fine and could be broadly used for the alleviation of the NPL problem? Technically, the disposal of an NPL portfolio – and particularly the conclusion of the sale and servicing agreements – can take place either pursuant to the Securitization Law or the NPL Law, or even a combination of both structures. If such transfer is made for the purposes of securitization, then the financing aspects of the transaction are governed exclusively by the Securitization Law, as the NPLs Law simply provides for an alternative structure on the sale and servicing of the portfolio.

Practice has shown that the NPL Law is the prevailing choice for retail, unsecured portfolios.[64] On the contrary, for secured corporate portfolios, the market has demonstrated a consistent reliance on provisions of the Securitization Law.[65] A legitimate explanation is that, arguably, the NPLs Law is more focused on safeguarding the interests of obligors[66], which is clear through various explicit and special provisions it contains in that regard. Indicatively, Article 3(7) of the NPL Law expressly states that the sale and transfer of receivables and assignment of servicing thereof shall not impair the substantive and procedural position of the obligor and guarantor, thus specifying a common principle underpinning assignments of receivables. Meanwhile, it provides that the unilateral amendment of any contractual term or interest rate is precluded.[67] It is also noteworthy that the NPLs Law sets extra requirements for the validity of the sale and assignment agreement, i.e. the prior service of an extrajudicial notice to the obligor/guarantor for the settlement of their liabilities (in case the obligor can be characterised as a 'consumer' – as explained in section III.2), as well as the compulsory conclusion of a servicing agreement between the credit acquiring company and a duly licensed servicer. On that note, the NPL Law also incorporates individual provisions regarding the implementation of Law 2251/1994 on Consumer Protection, to secure the rights of obligors falling under such category [68].The said law also imposes additional disclosure requirements for the perfection of the assignment of the receivables: apart from registration of the executed agreements in the public book of Law 2844/2000, such publication needs to be notified to the obligor and guarantors. By setting these additional steps to the closing of the transaction the NPLs Law does formulate a more obligor – friendly regime, but arguably does hinder the effectiveness of the process; and that is why it is not predominantly chosen by credit institutions striving to rapidly sanitize their balance sheets and achieve instant financing. The Securitization Law, on the other hand, entails a series of legal benefits that are attractive to banks and international investors: Indicatively, it provides for creation of a statutory pledge in favour of the securitisation creditors over the transferred receivables and the collection amount[69], combined with a negative statutory pledge obligation of the transferee in respect of the said assets. The statutory pledge is immune from the claw-back effect in the event the transferor or servicer are declared bankrupt.[70] Further, from a tax law perspective, the Securitization Law provides that the profits arising from the transfer of receivables, execution of loans, credit agreements, and financial derivatives are exempted from any direct or indirect tax.[71]

[57] Law 4354/2015 (n 7) art. 2.
[58] Law 4354/2015 (n 7) art. 1(c).
[59] Law 4354/2015 (n 7) art. 1(1)(a).
[60] Kalergis (n 51) 1094· Tsolakidis (n 8) 648.
[61] Law 4354/2015 (n 7) art. 3(3).
[62] Kalergis (n 51) 1096.
[63] Law 4354/2015 (n 7) art. 3(4).
[64] Papanikolopoulou and Pesketzi (n 6) 3· Fragos (n 46).
[65] Fragos (n 46).
[66] Orfanidis (n 47) 1283.
[67] Law 4354/2015 (n 7) art. 3(7).
[68] Law 4354/2015 (n 7) art. 1(22).
[69] Law 3156/2003 (n 5) art. 10(18)· Lekkas (n 1) 16· Lekkas (n 42) 138.
[70] Papanikolopoulou and Pesketzi (n 6) 3.
[71] Law 3156/2003 (n 5) art. 14· Omran, Murrey and Houlihan (n 22) 7.

In view of the aforementioned, it is clear why the NPLs Law was amended to explicitly provide that the provisions thereof do not prejudice the implementation of the Securitization Law. The amendment in question reflects the importance of paving the way to a liquid loan sale market, by providing investors with alternative tools to structure their transactions.[72] Upon exercising the appropriate due diligence to evaluate the logistics and specialties of each transaction, market players may choose the most suitable scheme. Another parameter to be taken into consideration is the potential application of the Hercules Asset Protection Scheme (HAPS) and the granting of the Greek State Guarantee. This is where our analysis now turns.

4. Government Backed Securitization: Particularly the Hercules Asset Protection Scheme (HAPS)

In general, *government backed securitization* may be defined as the legal scheme whereby the government provides guarantee for the most senior class of notes issued for the purposes of financing the transfer of receivables; at the same time, the junior notes are sold to third party investors.[73] On 16 December 2019, the Greek parliament, after an initiative by the Hellenic Financial Stability Fund,[74] enacted HAPS by means of Law 4649/2019,[75] which is the main legislative text for government backed securitization in Greece.

The aim of HAPS is to help credit institutions to securitize large volumes of NPEs through the assistance of the state, which acts as a guarantor of the most senior notes.[76] The first phase of the scheme lasted 18 months, commencing on December 2019.[77] As the scheme was named with success, bringing about the conclusion of certain deals, it was extended for another 18 months, until October 2022 (HAPS II).[78] It is worth noting that during the period of the first phase of HAPS (December 2019-April 2021) the NPLs recorded in the balance sheets of the four Greek 'systemic' credit institutions' (i.e., National Bank of Greece, Alpha Bank, Eurobank, Piraeus Bank) were reduced by €31,35 billion.[79]

Notably, the HAPS was under scrutiny by the European Commission, as to its compatibility with EU state aid rules, particularly Article 107(1) of the Treaty on the Functioning of the EU.[80] The Commission found, as in the case of the Italian GACS, that the HAPS was an appropriate policy measure and a '*good example of how Member States can help banks clean up their balance sheets without granting aid or distorting competition*', as Commissioner Margrethe Vestager put it.[81]

The scheme covers securitizations carried out through the Securitization Law.[82] It sets, however, additional formalities. After the transfer of the NPL portfolio from the originator, which pursuant to Law 4649/2019 should be a credit institution, and the issuance of the notes in order to finance the said transfer, or the forthcoming transfer, the credit institution or the acquiror may file an application for state guarantee.[83] The petition should be addressed to the noteholders and should be in favour of the acquiror.[84] The petition is filed to the Directorate of Financial Policy of the Greek Ministry of Finance and the guarantee is accorded by a decision issued by the Minister of Finance.[85] As in generic securitization, a servicing entity is called upon for the management of the loans' portfolio, which should be independent and non-controlled by the originator.[86]

As said, the state guarantee is provided solely for senior tranches of notes, i.e., notes that receive at least a BB- rating[87] by a credit rating agency[88], while, apart from junior notes, there is also the option for the issuance of mezzanine notes. Pursuant to Article 6(2) Law 4649/2019, the guarantee on the part of the Hellenic Republic consists of the assumption of the obligation to pay for the obligations assumed by the acquiror in order for any claims arising from senior notes to be fully paid. The guarantee includes the payment of both principal and interest for the whole period of the notes, and the state is obliged for the payment as if it was a primary obligor[89] being

[72] Papanikolopoulou and Pesketzi (n 6) 3.
[73] Iain Balkwill, 'Navigating the NPL securitization maze' (2020) Reed Smith: Structured Finance in Brief <https://www.structuredfinanceinbrief.com/2020/11/navigating-the-npl-securitisation-maze/> Accessed 22 October 2022· Johannes Kasinger et al., Non-performing Loans - New risks and policies? (Leibniz Institute for Financial Research SAFE 2021) 20-21.
[74] Hellenic Financial Stability Fund (HFSF), 'Banks' Asset Quality: Hellenic Asset Protection Scheme ("Hercules" initiative)' (n.d.) <https://hfsf.gr/en/banks-asset-quality/> Accessed 30 October 2022.
[75] Law 4649/2019 (n 10).
[76] Gkikas Hardouvelis, 'Financial Crisis and Non-performing Exposures in Greece' (2021) LSE Hellenic Observatory Discussion Papers on Greece and Southeast Europe: GreeSE Paper No.159 <http://eprints.lse.ac.uk/110411/2/GreeSE_No159.pdf> Accessed 22 October 2022· Nikolaos Barbas, Principles of Fiscal Law (9th edn, Sakkoulas Publications 2022) 404 [In Greek].
[77] HFSF (n 75).
[78] Ibid· Christina Papanikolopoulou, Mary Nigritinou and Athina Palli, 'Greece: Hercules II: A New Set Of Labours' (2021) Mondaq. <https://www.mondaq.com/financial-services/1120504/hercules-ii-a-new-set-of-labours> Accessed 24 October 2022.
[79] Ministry of Finance, 'The prolongation of "Hercules" is approved by the European Commission' (2021) Ministry of Finance: Press Release. <https://www.minfin.gr/en_US/web/guest/-/ten-paratase-tou-schediou-erakles-enekrine-e-europaike-epitrope?inheritRedirect=true&redirect=%2Fen_US%2Fweb%2Fguest%2Fanakoinoseis> Accessed 24 October 2022.
[80] Consolidated version of the Treaty on the Functioning of the European Union of 13 December 2007 [2008] OJ C115, art. 107(1).
[81] European Commission, 'State aid: Commission approves market conform asset protection scheme for banks in Greece' (2019) European Commission: Press Release <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6058> Accessed 26 October 2022.
[82] Law 4946/2019 (n 10) art. 1(2).
[83] Law 4649/2019 (n 10) art. 9(1).
[84] Ibid.
[85] Ibid.
[86] Law 4649/2019 (n 10) art. 5
[87] For the purpose of the present paper, we use the Standard and Poor's rating scale.
[88] Law 4946/2019 (n 10) art. 11(1).
[89] Law 4649/2019 (n 10) art. 6(4)· Barbas (n 77) 406.

jointly and severally liable[90] along with the acquiror vis-à-vis the noteholders for the payment of their claims arising out of the issued notes.

It is worth noting that the total amount of the guarantee scheme amounts to €12,000,000,000[91] and that the state will receive a guarantee fee (i.e., a commission), the amount of which is contingent on the risks assumed by the state acting as guarantor and the maturity dates of the notes.[92]

As to the guarantee's forfeiture, Article 13 Law 4649/2019 stipulates that after 50 days from the non-payment of any obligation, arising from the senior notes, by the acquiror, the noteholders should file through their legal representative a forfeiture request to the Greek State.[93] The latter, after receiving the request, is obliged to pay to the noteholders all the requested amount according to the conditions of the securitization.[94] If the State pays for the notes – and because of its status as primary obligor – it fully substitutes the noteholders, acquiring their rights and claims vis-à-vis the acquiror pursuant to the securitization terms and conditions. Accordingly, it has the right to have recourse against the acquiror and claim the pecuniary amount it paid to the noteholders.[95] In essence, and because of the fact that the State acquires the right to have recourse, it is stressed out that HAPS, in principle, caters for public finances as it provides for a particular and solid framework for the recovery of sums paid by the State acting as primary obligor.[96]

Lastly, for the guarantee scheme to enter into force, it is required that 50% +1 of the non-guaranteed and risk-bearing notes are successfully sold to third party investors.[97] This ensures that the risk is rather filtered and confirmed in market terms before it is assumed by the State and it is thus kept to minimum.[98]

5. HPAS and the Garanzia Cartolarizzazione Sofferenze (GACS) scheme: Is there any room for the Greek State to be driven into risky pathways?

On 15 April 2015 the Italian government enacted by means of legislation the Italian guarantee scheme for securitization, the GACS.[99] As with HAPS, the purpose of GACS was to assist credit institutions in disposing of their NPEs and offloading their balance sheets.[100] The structure of GACS is pretty similar with HAPS, and, as has been highlighted, the former has served as a model for the latter and many similarities can be identified.[101]

Under GACS, a securitization takes place pursuant to the fundamental Italian Law 130/1999 on Securitizations,[102] the State provides guarantee for the senior tranches of notes issued against the non-payment of sums due for principal and interest, and junior and mezzanine notes (if any) are sold to third party investors.[103] Moreover, the management of the securitized portfolio takes place through an independent servicing entity.[104]

GACS, as amended, requires a minimum BBB rating by a credit rating agency for the characterization of notes as senior and for the respective state guarantee to be accorded.[105] On the contrary, as said (under III.4), HAPS requires a BB- rating. The different ratings for the relevant State to be able to provide guarantee depicts that the Italian is allowed to provide guarantee for less risky notes, while the Greek State is driven to the assumption of greater risk. According to the Standard & Poor's Long-Term Issue Credit Ratings, a BBB rating refers to an obligation exhibiting *adequate protection parameter* and whose obligor, in case affected by adverse economic conditions, may only be led to a weakened capacity to observe the said obligation.[106] On the other hand, a BB rating (with a minus symbol) depicts a speculative issue facing '*major ongoing uncertainties or exposure to adverse business, financial, or economic conditions which could lead to the obligor's inadequate capacity to meet its financial commitment on the obligation*'. Such issues are commonly considered issues falling into the '*non-investment grade'*.[107]

Bearing in mind the above, it is understandable that, under HAPS, the Greek State may guarantee notes which, in market terms, are considered speculative and may be affected by major risks of non-payment. This, of course, raises some concern. Why the two schemes – HAPS and GACS – despite their profound affinity in terms of concept and structure, opted for different metrics and thresholds particularly for the guarantee provision?

One reason could be that the Greek legislator is more eager to provide greater assistance to the banking system – that assistance takes the form of the guarantee provision even to

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[90] Greek Civil Code, art. 481 et seq.
[91] Law 4946/2019 (n 10) art. 6(1).
[92] Law 4946/2019 (n 10) art. 7 & Annex B'.
[93] Law 4946/2019 (n 10) art. 13(1).
[94] Law 4946/2019 (n 10) art. 13(2).
[95] Law 4946/2019 (n 10) art. 8(d).
[96] Barbas (n 77) 407.
[97] Law 4946/2019 (n 10) art. 10(1).
[98] European Commission (n 82).
[99] Italian Legislative Decree 18/2016 Government Gazette 37/15-02-2016 re. urgent measures for the reform of cooperative credit banks, the state guarantee on the securitization of NPLs, the tax regime relating to crisis procedures and collective asset management, as amended.
[100] Philippe Steffens (ed), A Global Guide to Legal Issues in Securitisation (Baker McKenzie 2022) 118 <https://www.bakermckenzie.com/-/media/files/insight/guides/2022/global_securitisation_guide_2022.pdf?sc_lang=en&hash=6702AD793D21F8A8A376A29D7E0E8644> Accessed 28 October 2022.
[101] Barbas (n 77) 404· Hardouvelis (n 77) 34· European Commission (n 82).
[102] Italian Law 130/1999 Government Gazette 111/14-05-1999 on provisions for securitization of credits.
[103] Steffens (n 101) 119.
[104] Ibid.
[105] Italian Legislative Decree 18/2016 (n 100) art. 5(1).
[106] Standard & Poor's, 'S&P Global Ratings Definitions' (2016) 4-5 <https://www.maalot.co.il/Publications/GMT20160823145849.pdf> Accessed 28 October 2022.
[107] Thomson Reuters Practical Law, 'Glossary: Standard & Poor's (S&P)' (n.d.) <https://ca.practicallaw.thomsonreuters.com/5-575-5345?transitionType=Default&contextData=(sc.Default)&firstPage=true> Accessed 28 October 2022.

notes that fall below the Standard & Poor's 'investment grade' and depict a higher degree of possibility for non-payment by the SPV. It should not be forgotten that this possibility is, of course, attributed to the SPV's difficulty to collect the money from the securitized loans. Thus, the case is that the higher the possibility for non-payment by the SPV, the higher the possibility that the noteholders will request the payment by the state guarantor, which – because of its capacity as primary obligor – will have to honour its obligation.

It is obvious and, from the legislator's prism, desirable that credit institutions are availed of the state guarantee and, consequently, they are able to offload more exposures. This is rightly so because of two reasons: *First*, the state guarantee to riskier notes augments the 'credibility' of the said notes for the investors, which have two entities to request their payment from – the SPV and the State; *second*, the SPV, being aware that the State will provide guarantee, will be more eager to securitize riskier exposures. Arguably, as said above, HAPS provides for a solid framework for the recovery of sums if the state finally pays any amount. However, the divergence of HAPS from its reference point, GACS, particularly with regards to the notes' ratings, raises some concern on how much the Greek public finances, having a turbulent trajectory in recent economic history, will be burdened in practice. If the State finally pays, it will be in need to be having recourse against SPVs, carrying out litigations which cost time and human capital, and may have uncertain outcomes. The overall operation of the HAPS in the long run remains to be seen.

IV. Concluding Remarks

Undeniably, the Greek market has long been troubled by stocks of NPEs accumulating in the credit institutions' balance sheets, especially during times of crisis. As the policy objective was to assist credit institutions with deleveraging, the Greek legislator opted to take advantage of the legislative mechanisms of the past, i.e., the Securitization Law of 2003, while it also enacted new legislation such as the NPL Law of 2015, which introduced a special regime for the transfer and management of debt receivables, and the HAPS of 2019, which brought about the possibility for state assistance in the securitization process.

The Greek legislator particularly catered for the interplay between the Securitization Law and the NPL Law, providing that the applicability of the latter shall not be contingent upon the applicability of the former. In essence, the current regime reflects that the role of the parties to the securitization transaction is dominant; they can either opt for the Securitization Law, or a combination of the two frameworks, which entails that the NPLs Law will be regulating the transfer of the NPEs portfolio and the Securitization Law the financing side of the transaction.

As to HAPS, its objective is to improve the credibility and marketability of notes issued for the purposes of securitization. Despite its success and renewal, and the risk filtering in place, there remains some concern as to its function in the long run. What surprises the most is that, even though HAPS profoundly resembles with the Italian GACS, it adopts different metrics for the purpose of determining the notes that will benefit from a guarantee by the Hellenic Republic as senior. Hopefully, the Greek state will not be dragged into paying for the guarantees and, subsequently, having recourse against SPVs – a scenario that, if realised, could place burden on public finance.