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INVESTMENTS IN HEALTHCARE RECEIVABLES

LEGAL ASPECTS

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INTRODUCTION

Companies which, on the basis of a supply agreement, provide goods and services to public entities pursuant to a contract or otherwise, can find themselves in significant financial difficulties if they are not paid in accordance with the terms of the contract.

Such companies know that they will eventually receive in full what is due to them, but they are also aware that public entities often do not respect payment deadlines, which can cause financial and economic distress.

As far as the Italian healthcare system is concerned, according to the official data issued by the *Corte dei Conti* and by the *Uffici Regionali del Settore Sanità*, the indebtedness gained by the National Healthcare System towards the suppliers has significantly accrued in the past few years, amounting to nearly 32.2 billion of Euro.

In such situation, the main financial assets that companies can use to create liquidity are their monetary claims against the relevant public entities, which can be sold to third parties and, accordingly, monetized.

The securitisation of portfolios of monetary claims (including non-performing ones) is one of the most effective financial instruments used by companies dealing with public entities to obtain liquidity. The healthcare system, for example, often has debts outstanding to supplier companies.

This handbook aims at describing different types of securitisations carried out in Italy pursuant to Law No. 130 dated 30 April 1999 (hereinafter referred to as "**Law 130/99**"), with particular focus on those involving Healthcare Receivables[1].

We will also examine the provisions that were introduced by the Italian legislator involving Sace S.p.A. with the main purpose of allowing

[1] "Healthcare Receivables" means receivables, arising from contracts for the supply of goods and services in favour of healthcare authorities and/or hospitals and/or other healthcare entities, claimed by the suppliers against the latter, in default of payment.

suppliers of public entities to obtain access to credit.

An outline of how securitisation transactions of Healthcare Receivables have been structured in Spain, Portugal and Greece completes the overview offered by this handbook.

June 2010

P.M.

Chapter One

NATIONAL HEALTHCARE SERVICE: REGULATIONS AND HISTORY

SUMMARY: 1. General regulations of the National Healthcare Service. – 2. The principal sources of funding of the National Healthcare Service. – 3. Healthcare debt and remedies introduced by the financial budget laws.

1. *General regulations of the National Healthcare Service*

The National Healthcare Service (*Servizio Sanitario Nazionale* "**NHS**") was established in 1978 by Law 23 December 1978 No. 833 (the "**Law 833/1978**"), with the principal aim of promoting social justice by establishing a system which would guarantee access to healthcare service to all Italian people.

Law 833/1978 subdivided the NHS into a three-tier structure, namely: (i) the State; (ii) the Regions; and (iii) new bodies called **local healthcare entities** (*unità sanitarie locali*).

The NHS was redefined in 1992 pursuant to Legislative Decree 30 December 1992, No. 502 ("**Decree 502/92**"). The reform introduced by Decree 502/92, as amended from time to time, consisted of the following main features:

- Legislation to be enacted at central government level was limited to the establishment of general features, with the recognition of greater powers at a regional government level (as a consequence, Italian regions have used their autonomy to introduce different regional legislations);
- The transformation of local health entities into local healthcare businesses (*aziende unità sanitarie locali*) and major hospitals into hospital businesses (*aziende ospedaliere*). Local healthcare businesses, as opposed to local healthcare entities, whose

function was purely operational, are legal entities with a public nature (*personalità giuridica di diritto pubblico*), but their internal structure and management are organized by means of managerial acts based on contract law (*atti aziendali di diritto privato*).

It should be noted that local healthcare businesses and hospital businesses are not the only entities providing healthcare services. The organisation of the NHS provides for services to be supplied by different types of bodies (for instance the so-called IRCCS, *Istituti di ricovero e cura a carattere scientifico*) and the integrated hospital-university businesses (local healthcare businesses, hospital businesses, IRCCS and integrated hospital-university businesses, for the purpose of this handbook, will be jointly referred to as "**Healthcare Authorities**", each being "**Healthcare Authority**").

After the 1992 reform, the roles assigned by the NHS to each level of the three-tier structure are as follows:

(i) the State has a primary regulatory role, limited to very general features of the NHS, effective within the whole territory of the Republic of Italy;

(ii) the Regions are responsible for healthcare services within their territory and are required to: a) establish the principles for the organization of the healthcare services and for the activity devoted to healthcare, the organization of the regional territory into local healthcare businesses and hospital businesses; b) establish their funding criteria, the supervision and control provisions as well as the assessment of the performance of such enterprises; c) select the technical activities, promote and support the above-mentioned enterprises;

(iii) Healthcare Authorities have considerable operating autonomy and are permitted to manage the healthcare service in accordance with principles of general contract law.

2. *The principal sources of funding of the National Healthcare Service*

We outline below the main issues related to the funding of the NHS and in particular:

(a) decisions concerning the funding of the NHS;

(b) resources to be assigned to the funding of the NHS.

(a) Decisions concerning the funding of the NHS

The following is to be noted regarding the funding of the NHS:

(i) healthcare funding that is necessary to ensure essential levels of assistance at a national level is set annually by the State by means of the financial budget law (pursuant to articles 1 and 12, paragraphs 1 and 3, of Decree 502/92 and article 1 of the State-Regions agreement dated 28 September 2006);

(ii) funds are subsequently allocated among the Regions (on the basis of the so-called *quota capitaria*[2]) by the CIPE, pursuant to the proposal of the Ministry of Health;

(iii) each Region – after determination of their quota by the State – registers the amount of the relevant funds in their financial statements and, by means of regional decrees, allocates funds between the Healthcare Authorities located in its territory.

(b) Resources to be assigned to the funding of the NHS

With regard to the resources used for the funding of healthcare services to which the State ordinarily contributes (necessary to ensure the satisfaction of the essential levels of assistance), the following should be noted:

– before 2000, according to Decree 502/92, these resources were made up of financial allocation set out in the national budget

[2] This "*quota capitaria*" is calculated on the basis of several parameters which take into account, among other things, the age and sex of the population located in the Region and the patrimonial and technological instruments of each Region.

(income from revenue taxes) (art. 12 of Decree 502/92) and were integrated by welfare contribution paid by employers, including public entities, and by self-employed professionals to the relevant health insurance funds (article 11 of Decree 502/92) (such contributions were directly assigned to the Regions). In 1997, due to the introduction of the regional tax IRAP, revenue transfers were no longer integrated by welfare contributions (which now flow directly to the coffers of the State), but directly assigned to the Regions by the IRAP and the IRPEF surcharge;

- after 2000, by means of Legislative Decree 18 February 2000, No. 56 ("*decreto sul federalismo fiscale*"):
  - financial allocations charged to the national budget as set forth by paragraph 1 of the article 12 of Decree 502/1992 were frozen and substituted with resources from regional revenues;
  - since the contributions from citizens differ from Region to Region, a national equalizing fund (*fondo perequativo*), funded by a portion of the VAT quota of each Region (art. 7, paragraphs 1 and 2), was introduced in order to make sure that all Regions receive funds; and
  - a State guarantee fund was also introduced (*fondo di garanzia*) with the purpose of integrating the meagre revenues of those Regions where there is no correspondence between the forecasted regional resources and those actually collected (art. 13).
- Decree 502/92 had already established that Regions should utilize their own resources (*Autofinanziamento regionale*, article 13) in order to provide for the following:
  - higher levels of healthcare assistance;
  - different organizational models; and
  - settlement of the deficit of the Healthcare Authorities.

3. *Healthcare debt and remedies introduced by the financial budget laws*

Debt of the NHS has been caused, on one hand, by the increasing delay by which the State has granted funds to the NHS and, on the other hand, by the difficulties that the Regions have incurred in finding the necessary resources in order to maintain the economic and financial balance of Healthcare Authorities, by means of tax increases or other measures.

In order to reduce the previous indebtedness of the healthcare system in the Regions, the State has provided for additional funding, to be granted upon compliance with different requirements, and introduced the figure of the **state commissioner** (the "**Commissioner**") substituting the governor of the defaulting Region, the appointment of such Commissioner being the so called "***Commissariamento***".

In particular, in the latest financial budget laws, the following types of additional funding were provided:

(a) **2005 Financial Budget Law** (Law 30 December 2004, No. 311) provides for:

- State funding for the indebtedness of the regional healthcare service for 2005-2007, as well as a State intervention for the deficit recovery for 2001-2003; all subject to a State-Regions agreement which requires the Regions to ensure the financial-economical balance of the Healthcare Authorities (subject to quarterly monitoring) (article 1, paragraphs 164 and 173);

- the possibility for Regions to gain access to a "greater amount of funds" to be borne by the State (in addition to the one provided by the paragraph 173), and subject to a **special agreement** to be entered into between each Region, the Ministry of Health and the Ministry of Economy and Finance (the "**Recovery Plan**" *il Piano di Rientro*), whereby "*the necessary actions to obtain the economic balance, in compliance with the essential levels of healthcare assistance and in fulfilment of the agreement provided*

by paragraph 173" should be identified (article 1, paragraph 180).

(b) **2007 Financial Budget Law** (Law 27 December 2006, No. 296) establishes a temporary fund to be shared between any Regions experiencing a high deficit in the healthcare sector (article 1, paragraph 796), upon occurrence of certain circumstances.

(c) **2008 Financial Budget Law** (Law 24 December 2007, No. 244, article 2, paragraphs 46, *et seq.*) authorises the State to grant to the Regions who have had adopted the Recovery Plan a total amount of funds not exceeding Euro 9.100 million in order to recover the debts accumulated up to 31 December 2005[3].

(d) **2010 Financial Budget Law** (Law 23 December 2009, No. 191) allows the Regions who have had adopted a Recovery Plan, to adopt a new one[4]. In addition, it authorises the State to grant the necessary liquidity to the Regions that comply with Recovery Plans for healthcare balance deficit, up to an amount of Euro 1 billion, to recover by 31 May 2010 debts registered before 31 December 2005.

With the Recovery Plans, the Regions have, *inter alia*, undertaken to achieve a positive financial balance and to guarantee essential levels of assistance. The main purpose of the Recovery Plans is the reduction of costs of production and commercial debt readjustment.

From a general point of view, it should be noted that the *Commissariamento* procedure – together with the additional funds prescribed by the financial laws – aims to force Regions to commit to the fulfilment of their obligations.

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[3] In particular, such regulations aim at restructuring part of the healthcare deficit of the Regions of Lazio, Campania, Molise and Sicily, which had committed themselves in their respective Recovery Plans to enact procedures aiming at settling in advance healthcare debts accumulated up to 31 December 2005.

[4] In order to achieve of the objectives set out in the Recovery Plans, by Decree-Law No. 78/2010 has been introduced the barring of the enforcement procedures against Healthcare Authorities in those Regions that have adopted to the said Recovery Plans and are under *commmissariamento* at the date of the enforcement of the Decree.

Chapter Two

HEALTHCARE RECEIVABLES

SUMMARY: 1. Healthcare receivables and different types of healthcare suppliers. – 2. Enforceability of European interest rates for late payment to Healthcare Receivables. – 3. Protection of the public entities and formal requirements to be complied with for the transfer of receivables. – 4. Suspension of the payments according to article 48 *bis* of Presidential Decree No. 602/1973.

1. *Healthcare receivables and different types of healthcare suppliers*

Healthcare Receivables are receivables owed to different categories of individuals or entities, which supply, for different purposes and for a consideration, goods and services in favour or on behalf of the Healthcare Authorities (the "**Suppliers**").

The NHS uses different types of Suppliers, such as private hospitals, health centres, pharmacies, both public and private, manufacturing companies and/or suppliers of goods, equipment, *etc.*

In particular, depending on the type of agreements between the Suppliers and the Healthcare Authorities, we can divide Suppliers into three categories:

(a) suppliers of healthcare services;

(b) suppliers of goods and services; and

(c) pharmacies.

(a) Suppliers of healthcare services

This refers to Suppliers that provide healthcare services directly to individuals, on behalf of the Healthcare Authorities (*i.e.*: private hospitals, clinics, health centres, *etc.*). By providing these services, they become creditors of the Healthcare Authorities ("**Suppliers of Healthcare Services**").

According to articles 8 *bis*, *et seq*. of Decree 502/92, a Supplier of Healthcare Services may carry out services for hospitals when:

a) they have been authorised according to the applicable regional regulations (art. 8 *ter*);

b) they have received accreditation ("*accreditato*"), even if temporarily, by the competent Region through the so-called *accreditamento* procedure (art. 8 *quater*);

c) they are party to a contract with the Healthcare Authority (art. 8 *quinquies*).

The obligation of the Healthcare Authorities to pay the Supplier of Healthcare Services arises out of the contracts under point c) above.

The mere *accreditamento* would not theoretically be sufficient without the execution of a contract.

However, in practice, Suppliers of Healthcare Services often provide services without having entered into any contract with the Healthcare Authorities, based on regional resolutions enacted by the competent Regions. It is therefore necessary to verify in each case the source of the receivable claimed by a Supplier of Healthcare Services.

Each Region determines the healthcare budget according to central Government guidelines.

(b) <u>Suppliers of goods and services</u>

Healthcare Authorities, like any other public entity, also purchase from the market other goods and services which do not strictly qualify as healthcare services, such as food, equipment, *etc.* (the "**Suppliers of Goods and Services**"). The Suppliers of Goods and Services do not need to comply with the *accreditamento* procedure.

The Healthcare Authority is a public entity, therefore in order to choose any kind of supplier (or contractual counterparty), it must comply with formal public tender procedure containing the main terms and conditions of the contract to be executed.

(c) Pharmacies

The main activity of pharmacies (the " **Pharmacies**") consists of selling and distributing medicines to individuals, with or without a medical prescription.

For medicines sold under prescription, only a part of the price is paid to the Pharmacy by the individuals themselves (the so-called "**Ticket**"), while the remaining part is payable by the competent Healthcare Authority.

The contractual relationship between Healthcare Authorities and Pharmacies is set out in art. 8, paragraph 2, of Decree 502/92, which provides for such relationship to be regulated by *three-year agreements* with the relevant national trade association [5] (the "**Collective Agreement**").

2. *Enforceability of European interest rates for late payment to Healthcare Receivables*

In the past, in many European Union Member States, debtors of commercial transactions have taken advantage of low interest rates on late payments and/or slow procedures for redress. For this reason the European Parliament and the Council have enacted the EU Directive 2000/35/EC on Combating Late Payment in Commercial Transactions (the "**Directive 2000/35**").

The main features of Directive 2000/35 are the following:

(i) it applies to all payments made as consideration for commercial transactions, where "commercial transactions" means transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or to the provision of services for consideration;

(ii) Member States were instructed, among other things, as follows:

[5] Such relationship is currently regulated by Decree of the President of the Republic 8 July 1998 No. 371 which contains the provisions of the national agreement for the regulation of the relations with Pharmacies, in accordance with paragraph 2 of article 8 of Decree 502/92.

- to ensure that an enforceable title can be obtained, irrespective of the amount of the debt, normally within 90 calendar days of the lodging of the creditor's action or application with the court;
- to bring into force by 8 August 2002 the laws, regulations and administrative provisions that are necessary to comply with the Directive 2000/35;
- to exclude (i) debts that are subject to insolvency proceedings commenced against the debtor, (ii) agreements entered into prior to 8 August 2002, and (iii) claims for interest of less than Euro 5.

Directive 2000/35 was implemented in Italy by enacting Legislative Decree 9 October 2002, No. 231 ("**Decree 231/2002**") which provides as follows:

(i) its provisions apply to all payments made as consideration for commercial transactions, save for:

- debts that are subject to insolvency proceedings commenced against the debtor;
- claims for interest of less than Euro 5;
- payments for damages including those payments made by an insurance company;

(ii) if the parties to a commercial transaction do not agree on a contractual interest rate, the interest rate to be applied upon default of the debtor shall be the interest rate applied by the European Central Bank ("**ECB**") to its most recent main refinancing transaction carried out on the first day of the relevant semester plus 7 percent (the "**European Interest Rate**")[6]. The Italian Ministry of Economy and Finance, by a decree to be published in the Official Gazette of the Republic of Italy on the fifth working day of each semester, gives notice of the interest rate applied by the ECB to its

[6] For receivables arising from agreements for the sale of perishable food, the interest rate is increased by 2 percentage points and cannot be changed by the parties.

most recent main refinancing transaction carried out on the first day of the relevant semester;

(iii) any agreement between the parties setting forth exceptions to Decree 231/2002 on the consequences of late payments is void whenever it is deemed unfair to the creditor, having regard to the fair commercial practice, the nature of the purpose of the contract (*i.e.* services and/or goods), the situation and the relationship between the parties to the agreement and any other circumstances. In particular, agreements whose only purpose is to provide the debtor with additional liquidity at the expense of the debtor are deemed unfair and therefore void;

(iv) there is no need for any formal act by the creditor to place in the debtor default; this occurs automatically on the day following the due date for payment set forth by the relevant agreement or, in the absence of such a contractual provision, thirty days after invoicing or the other events set forth by Decree 231/2002)[7];

(v) Decree 231/2002 shall not apply to agreements entered into before 8 August 2002.

The Decree 231/2002 applies to Healthcare Receivables depending on which of the three kinds of the above mentioned healthcare Supplier is concerned, as described below.

– **Suppliers of Healthcare Services**

Concerning the Suppliers of Healthcare Services, a Healthcare Receivable arises as consideration of a contract with the Healthcare Authorities.

In such framework, since the contract between the parties is under private law, prevailing Italian case law[8][9] has deemed Decree 231/2002

[7] As to receivables arising from agreements of sale of perishable food, the payment must be made within 60 days from delivery and interest runs from the day following such payment term.

[8] See, among others Puglia Regional Administrative Court, 3 June 2004, No. 3334 and No. 2286 of 2003.

[9] See Lazio Regional Administrative Court 12 February 2004, No. 1379; Lazio Regional Administrative Court No. 12 February 2004, 1378; Lazio Regional Administrative Court 5 and 17 November 2003, No. 1362. Nonetheless, it should be pointed out that such jurisprudential trend may change in the future. In fact the Sicilia Regional

to be applicable to Healthcare Receivables notwithstanding the public nature of the Healthcare Authorities.

– **Suppliers of Goods and Services**

The contractual relationship is based on a contract to be executed by the Supplier of Goods and Services and the relevant Healthcare Authorities following **a tender procedure** based on the publication of a **public notice** to call the tender (*bando di gara*).

In relation to the applicability of Decree 231/2002 to payments due to Suppliers of Goods and Services by the Healthcare Authorities, **the main issue regards the provisions set out by public notices where it provides for exceptions to the Decree 231/2002**.

Assuming the general applicability of Decree 231/2002 to these receivables, there could be some clauses which derogate from the European Interest Rate. In this regard, two different scenarios are to be taken into account:

- exceptions to the European Interest Rates agreed in the supply contract: such hypothesis usually does not give rise to problematic issues, since article 7 of Decree 231/2002 sets out the possibility of exceptions to this latter;
- exceptions to the European Interest Rates contained in the public notice of the tender: Italian Courts generally deem such exceptions to be unlawful if they provide for penalty of exclusion from the tender. Such provisions – being unilaterally established by the public entities in spite of being agreed by the parties – create an unbalanced situation between the parties and are not in accordance with the law.

Administrative Court (8 June 2004, No. 1578 affirmed that, when the relevant agreement is "*ad esecuzione continuata*" ("continuous performance", meaning that the contractual obligation is fulfilled during the time and not at once), Decree 231/2002 applies to payments due for the services rendered after 8 August 2002, although the relevant agreement has been executed prior to such date (pursuant to article 1339 of the Italian Civil Code, that states, among other things, that clauses imposed by law substitute conflicting clauses provided for by agreements). Sicilia Regional Administrative Court 8 June 2004, No. 1578.

Therefore, even though Decree 231/2002 should be applicable to such contractual relations, it is necessary to analyze **in each case** the documents referring to the relationship between the Healthcare Authority and the Supplier of Goods and Services (due diligence is required on both the public notice and the supply contract) in order to verify the presence of clauses containing exceptions to European Interest Rates.

- **Pharmacies**

The relationship between Pharmacies and the Healthcare Authorities is currently regulated by the Collective Agreement, which also contains provisions regarding interest on late payments.

In this regard, Italian Courts have stated that Decree 231/2002 does not apply to late payments of Healthcare Receivables claimed by Pharmacies, since the Collective Agreement was entered into prior to 8 August 2002.

3. *Protection of the public entities and formal requirements to be complied with for the transfer of receivables*

Law 130/99 and Law No. 52 of 1991 (better known as the Factoring Law) are based on the legal institution of the "credit assignment", as set forth by articles 1260 *et seq*. of the Italian civil code.

According to the administrative law, in a securitisation transaction in which a public entity is involved (such as the "**Securitisation of Healthcare Receivables**"), several formal requirements have to be met.

Indeed, the main characteristic of the Securitisation of Healthcare Receivables lays in the public nature of the assigned debtor (the Healthcare Authority).

The assignment of receivables, in which the public entity acts as assigned debtor, are ruled by articles 69 and 70 of Royal Decree No. 2440 of 1923 (hereinafter referred to as the "**Royal Decree**"), setting forth provisions concerning State Accounting, and by article 117 of Legislative Decree No. 163 of 2006 (the "**Procurement Code**").

Pursuant to articles 69 and 70 of the Royal Decree, an assignment of receivables claimed against public entities has to comply with the following provisions:

(i) the assignment must be executed as a public deed (*atto pubblico*) or authenticated public deed (*scrittura privata autenticata*);

(ii) separate transfer agreements must be entered into any public entity involved;

(iii) the assignment must be notified to the assigned debtor/public entity;

(iv) in case of assignment of receivables deriving from on-going public procurement, the assignment must be approved by the assigned debtor[10].

Pursuant to article 117 of the Procurement Code:

(i) the assignment must be executed as public deed (*atto pubblico*) or authenticated public deed (*scrittura privata autenticata*);

(ii) the assignment must be notified to the assigned debtor/public entity;

(iii) the assignment is valid and effective towards the public entity if it is not rejected by the public entity within 45 days from the reception of the relevant notification;

(iv) the assignment of receivables may be either provided within the public procurement provisions or in a separate agreement.

4. *Suspension of payments according to article 48* bis *of Presidential Decree No. 602/1973*

In 2006, Presidential Decree No. 602/1973 was amended by the introduction of a provision ("**Art. 48 *bis***") implemented by the regulation No. 40/2008 of the Ministry of Economy and Finance, by means of which:

[10] Article 70, paragraph 3 and article 9, annex E, Law No. 2248 of 1865.

- before making any payment to its creditor[11] for an amount equal to or higher than Euro 10,000, a public entity[12] shall verify whether or not the creditor has failed to pay the tax agency an amount at least equal to Euro 10,000.

In case of assignment of receivables, a first interpretative circular issued by the Ministry of Economy and Finance (the Circular 22/2008) has clarified, *inter alia*, that:

- the public debtor (assignee) who received the notification of the assignment must verify with the tax agency if the assignor, as initial creditor, has complied with tax payments.

Upon the foregoing, should the creditor have failed to pay the tax agency for an amount in excess of Euro 10,000, the public debtor might reduce the payments accordingly.

On 8 October 2009, the Ministry of Economy and Finance enacted the Circular 29/2009 establishing that, in case of assignment of receivables, the public debtor should carry out a **double verification**:

(i) a preliminary verification on the assignor, when the assignment is notified to the debtor; and

(ii) a second verification on the assignee, when the debtor is going to pay, but only in case that the verification on the assignor does not give evidence of any failure of tax payment for an amount in excess of Euro 10,000.

[11] The Supplier, in the context of Healthcare Receivables.
[12] The Healthcare Authority, in the context of Healthcare Receivables.

Chapter Three

SECURITISATION OF HEALTHCARE RECEIVABLES: ITALIAN LEGAL FRAMEWORK

SUMMARY: 1. The first Securitisations of Healthcare Receivables structured by public arrangers. – 2. The amortization transactions of healthcare *deficit* structured in some Italian Regions. – 3. Private Securitisations of Healthcare Receivables.

1. *The first Securitisations of Healthcare Receivables structured by public arrangers*

The first Securitisations of Healthcare Receivables were structured by several Regions in order to allow their Healthcare Authorities to reschedule the payment terms with their Suppliers (the "**Public Securitisations**").

The first securitisation was structured by the Region of Lazio. Other transactions were structured in Regions with high healthcare debt (Regions of Campania, Sicilia, Piemonte and Abruzzo).

In some cases there was a double assignment of healthcare receivables firstly by the Suppliers (*originators*) to investment companies – such as *Società Finanziaria Regione Abruzzo* (Fi.R.A.) in the Region of Abruzzo, *Società Regionale Sanità* (So.Re.Sa. S.p.A.) in the Region of Campania – which put together the credit portfolio to be securitised, subject to "*certification*" of receivables.

This *certification*[13] was a key step in ensuring that the claim could not be opposed by the Healthcare Authorities, as it had been recognized by them as a "*certain, payable and enforceable claim*" and therefore "*due*".

Subsequently, the credit portfolio purchased from the Suppliers and certified by the relevant Healthcare Authorities, was securitised, and

[13] Unilateral deed judicially equivalent to a "debt acknowledgment", issued by the Healthcare Authorities following the conclusion of a complex procedure of financial reconciliation between the Suppliers' credit claims and the Healthcare Authorities' indebtedness

assigned to a special purpose vehicle ("**SPV**") to issue asset-backed securities. The purchase price of the receivables that the SPV had to pay to the regional investment company (and from the investment company to the Supplier) was funded by means of the income deriving from the placement of the notes issued by the SPV.

The main characteristic of such transactions consisted in the Regions' *delegation of payment* by which Regions committed themselves to the payment of the Healthcare Authorities' debt.

The delegations of payment used in these transactions were executed pursuant to the Italian civil code[14].

In the delegations of payments used in Healthcare Receivables transactions, the Healthcare Authorities (as delegant) gave the Region (as delegate) instructions to pay the Suppliers; and the Region, by accepting the delegation and giving a direct undertaking to the Suppliers, was directly bound to pay what was due to them.

In order to examine in depth the practical consequences of a delegation of payment as well as its different forms (with or without acceptance), the following summary may be useful:

(a) *Binding relationship NOT guaranteed by delegation*: the creditor (Supplier) may only start legal action against its debtor (Healthcare Authority);

(b) *Binding relationship WITH delegation of payment* (whereby the Region as delegate does not commit itself towards the Supplier): in such case, also the creditor (Supplier) can act only against its debtor (Healthcare Authority). The delegant-

[14] Technically, the delegation of payment is a sort of mandate agreement, according to which a party (*delegante*) delegates to another party (*delegato*) the payment of the amount due in favour of its creditor (*delegatario*). Usually, between a delegant and a delegatee there is a debt/credit relationship (the delegant is the debtor of the delegatee; while the delegate is often debtor of the delegant), which does not change and does not novate the contractual relationship. Nevertheless, should the delegate accept the delegation and commit itself towards the delegatee, a novation of the relationship between the involved parties occurs and the delegate personally becomes debtor towards the delegatee (individually, or rather jointly and severally with the delegant, the original debtor).

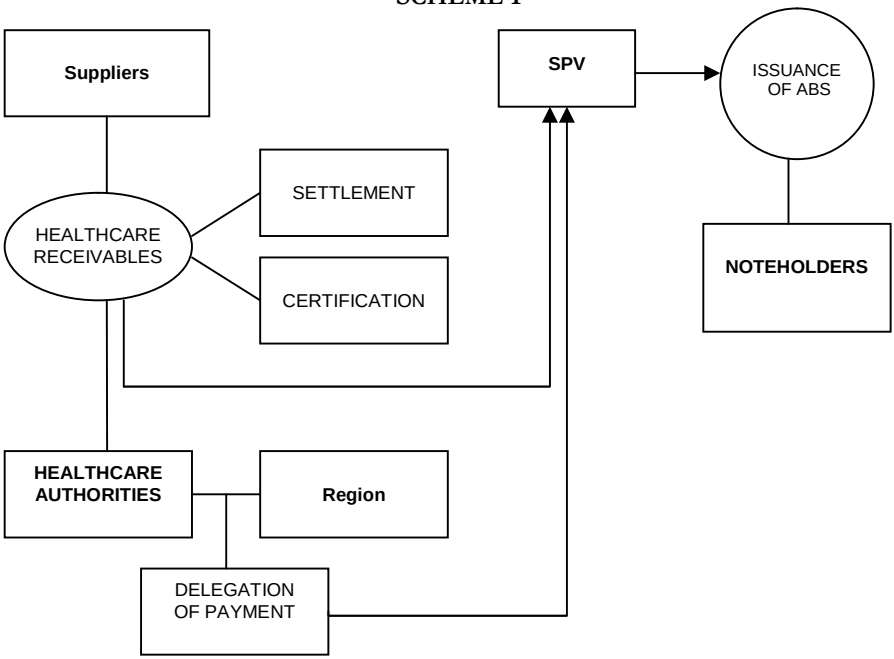
delegate (Healthcare Authority-Region) relationship remains an internal relationship between the two of them;

(c) *Binding relationship WITH delegation of DEBT* (with the acceptance of the delegate): in this case, the creditor (Supplier) may act directly against the delegate (Region) as the latter has committed itself towards the creditor, in addition to (when the acceptance of the delegation is not followed by the immediate release of the original debtor) the delegant (Healthcare Authority).

HEALTHCARE RECEIVABLES:

SECURITISATION WITH DELEGATION OF PAYMENT

SCHEME 1



The main steps may be summarized as follows:

- **Resolutions of Regional Board**

Usually the transaction started by means of political acts (resolutions of Board of the Region) which (i) resolve the incorporation of financial companies necessary to carry out the transaction; (ii) authorize the relevant Region to enter into settlement agreements in order to accept the order of payment in favour of the creditors (the delegation of payment); and/or (iii) authorize the Healthcare Authorities to enter into settlement agreements with their creditors.

- **Settlement agreements**

Before the assignment to the SPV, settlement agreements are executed between the Healthcare Authorities, the Suppliers and the relevant Region.

The main characteristic of these settlements is the delegation of payment by the relevant Region, by means of which the Region undertook to (i) guarantee the payment of the Healthcare Receivables after their certification by the Healthcare Authorities, or (ii) pay directly the principal amount as rescheduled under the settlements agreements.

- **Assignment of receivables**

The Suppliers assigned the receivables to the SPV. As explained above, the assignment could also be made in two phases: from the Suppliers to the regional financial company as intermediary, and from the latter to the SPV (as was the case of Fi.R.A. and So.Re.Sa.).

It should be noted however that only those receivables which were positively certified were then securitised.

- **Certification of receivables**

As mentioned above, the certification procedure of the receivables was a key element in most transactions, since, under the settlement agreement: (i) only certified receivables could be assigned to the SPV and securitised; (ii) the Region undertook the delegation of payment only in relation to the certified receivables; and (iii) any receivables settled but not certified were returned to the relevant Suppliers.

- **Delegation of payments by the Region**

Regions accepted the delegation of payment concerning the certified receivables. The formal acceptance of the delegation of payment by the Regions was necessary so that the notes issued by the SPV could obtain the same rating of the relevant Region.

- **Rating and issuance of the notes**

Because of the delegation of payment, the notes could have a higher rating (the rating of the Region) instead of the rating of the Healthcare Authorities. It was also possible to have the notes guaranteed by specific companies (*i.e.* monoline insurers), in order to improve the creditworthiness of the transaction.

- **Payment to the Suppliers**

The SPV paid the purchase price to the Suppliers using the issue price paid by the subscribers for the notes.

- **Instalments rescheduled under the settlement agreements**

The Regions paid the principal amounts of the Receivables to the SPV (as assignee) as rescheduled under the settlement agreements. The SPV, using collections of the principal amount of the Healthcare Receivables, made payments to the noteholders.

The main advantages of this type of transaction are the following:

- Regions have rescheduled the short-term debt of Healthcare Authorities;
- Suppliers have transferred the receivables *pro-soluto* (*i.e.* on a without recourse basis) and have monetized all of their receivables by benefiting from more favourable conditions. Moreover, through these transactions, it was possible to renegotiate the Healthcare Receivables on the capital markets, using the rating of the relevant Region, without going through other types of intermediaries (incurring further costs and expenses).

2. *The amortization transactions of healthcare* deficit *structured in some Italian Regions*

In 2007, some Italian Regions started to structure other types of transactions involving Healthcare Receivables.

These transactions were structured by Regions which adopted the Recovery Plans under the 2005 Financial Budget Law.

Those Regions – in order to structure the amortization plans of their healthcare deficit – had to comply with restrictions introduced by the 2007 Financial Budget Law.

Pursuant to article 1, paragraph 739, of the 2007 Financial Budget Law, certain transactions carried out by public entities are deemed to be public borrowing; in particular **a limitation to reschedule amortization plans for more than 12 (twelve) months has been introduced**, as this would cause an increase of the financial debt of the public entities, and as a consequence, of the indebtedness of the State.

In order to comply with the limits of the 2007 Financial Budget Law, certain Regions chose to structure amortization plans through the **execution of settlement agreements which would terminate within 12 (twelve) months** and according to which the Healthcare Authorities undertook – for the same 12 month period – to carry out the certification procedure and to pay the receivables in favour of the Suppliers; and the Suppliers undertook not to bring any legal actions during such 12 month period.

These types of transactions were carried out in the Regions of *Lazio* and *Campania*. The transactions have been authorized by means of board resolutions No. 347 and 1041 of 2007 and 689 of 2009 for the Region of *Lazio*; and No. 1956 of 2007 and 541 of 2009 for the Region of *Campania*. These resolutions were aimed at settling the credit-debt positions concerning receivables related to invoices issued starting from 2006 (for Region of *Lazio*), 2007 (for Region of *Campania*), till 2009.

The transactions were structured substantially following the typical scheme of public securitizations and, as a consequence, by means of: a) board resolutions of the relevant Region authorizing the transaction; and b) execution of settlement agreements entered into by each Healthcare Authority and its Suppliers.

The main difference consisted in the role of the Regions and their participation to the settlement agreement.

Due to the restrictions introduced by the 2007 Financial Budget Law, in order to avoid the re-qualification of the entire transaction as "*indebtedness*", Regions would not accept any delegation of payment or undertake any other type of obligation through the execution of the settlement agreements, or guarantee the payment by the Healthcare Authorities. Regions only participated to settlement transactions in order to acknowledge the terms and conditions agreed by the parties (literally "*prendere atto delle intese raggiunte tra le parti*").

Compared to public securitizations previously structured, these transactions differed for the following:

- the amortization plan was up to 12 (twelve) months;
- the relevant Region had a supervisory role, to ensure that all of the Healthcare Authorities agreed upon the same conditions;
- no issuance of notes followed the settlement of the receivables.

3. *Private Securitisation of Healthcare Receivables*

Other than in the context of Public Securitisations, Healthcare Receivables, like other types of receivables, have also been securitized without the direct involvement of Regions and/or Healthcare Authorities. These transactions could be defined, as private securitisations of Healthcare Receivables (the "**Private Securitisations**").

Public Securitisations and Private Securitisations differ in the following ways:

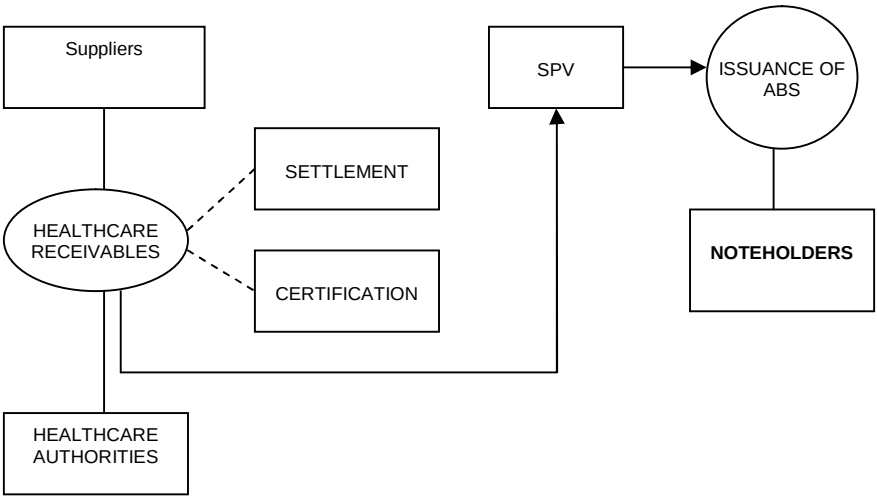
(i) in Private Securitisations there are no previous settlement agreements with an undertaking not to start any legal action;

(ii) in Public Securitisations, the notes are rated and traded on a regulated market, while in Private Securitisations the notes are unrated and unlisted.

HEALTHCARE RECEIVABLES:

PRIVATE SECURITISATION WITHOUT DELEGATION OF PAYMENTS

SCHEME 2



Chapter Four

RECOVERY OF HEALTHCARE RECEIVABLES

SUMMARY: 1. Judicial and extrajudicial instruments for the recovery of the Healthcare Receivables. – 2. Judicial instruments: payment injunction (*decreto ingiuntivo*); fulfilment proceeding and indirect recourse to the Region. – 3. Settlements agreements.

1. *Judicial and extrajudicial instruments for the recovery of the Healthcare Receivables*

Creditors of Healthcare Receivables (both Suppliers and assignees) can (as an alternative to ordinary proceeding, which may take several years) use several other methods to recover their claims, either judicial and extrajudicial, such as:

- payment injunction (by means of an injunction decree) followed by enforcement proceedings;
- fulfillment proceedings (*giudizio di ottemperanza*);
- indirect recourse to the Region;
- settlements with the debtors (extrajudicial).

2. *Judicial instruments: payment injunction (*decreto inguntivo*); fulfilment proceeding and indirect recourse to the Region*

(a) Payment injunction (*decreto ingiuntivo*)

The Italian Civil Procedure Code provides for a procedure for a creditor of an unpaid receivable to obtain an order of payment (injunction decree).

The requirements established by article 633 of the Italian Civil Procedure Code (certain, liquid and payable monetary claims based on written evidence) are satisfied in case of Healthcare Receivables as:

(i) Healthcare Receivables are monetary;

(ii) the written evidence of the receivable is given by (a) the contract with the Healthcare Authority; (b) the invoices; (c) the medical prescription for Tickets' refund, the recognition of debt issued by the Healthcare Authority (the so-called *certification*).

In general, the injunction becomes enforceable if, after 40 days from the service, no objection has been proposed by the debtor/Healthcare Authority.

Nevertheless, in case of Healthcare Receivables, the enforceability of the injunction differs from the usual procedure, as follows:

- a period of at least 120 days must elapse from the service of the enforcement title and the start of the enforcement procedure;
- takes the form of an attachment (*pignoramento*) of the relevant Healthcare Authority's funds or assets held by third parties (*i.e.* the bank appointed as treasurer by the Healthcare Authority);
- special laws provide for exemptions of funds or assets belonging to Healthcare Authorities that cannot be seized.

(b) <u>The fulfilment proceeding (*giudizio di ottemperanza*)</u>

The *giudizio di ottemperanza* is the enforcement proceeding under Italian administrative law that additionally applies to public entities who fails to comply with a judicial decision.

Suppliers or any other creditor of the Healthcare Authorities may start a fulfilment proceeding (*giudizio di ottemperanza*).

The main feature of the *giudizio di ottemperanza* is that the administrative court can appoint a Commissioner who is empowered to adopt the necessary initiatives to comply with the judicial decision (*i.e.* find the funds and pay the debtor).

(c) <u>Indirect recourse to the Region</u>

Some Suppliers – after obtaining an injunction decree against Healthcare Authorities – have commenced enforcement proceedings directly against the relevant Region, treating it as a direct debtor.

This direct obligation of the Regions arose from the delay in allocating the funds to the Healthcare Authorities, so that the Healthcare Authorities were unable to fulfil their payment obligations.

Should the Regions be considered the debtors, the Suppliers may commence the enforcement proceeding against them.

3. *Settlements agreements*

Starting from 2007, further to several regional resolutions aimed to restructure healthcare indebtedness, certain Healthcare Authorities entered into settlement agreements with their Suppliers.

By means of the settlement agreements, on one hand, the Suppliers have recovered their outstanding receivables; on the other hand, the Healthcare Authorities were able to reduce the amount of the interest due.

The settlement agreements provided for the following:

(i) as obligations for the Healthcare Authorities:

- to complete the certification procedure of the receivables in favour of creditors by an agreed date;
- to pay the nominal amount of the certified receivables, in two or more tranches, in any case not later 12 months after the execution of the settlement agreements; and
- to pay a fixed amount indemnity to be calculated on the nominal amount of the receivables for the related tranches;

(ii) as obligations for the Suppliers:

- to submit the request of certification and to settle the entire amount (and not a part) of the receivables claimed against the Healthcare Authorities and the consequent waiver to claim further amounts not included in the request;

- the waiver of the payment of the interest accrued and any other ancillary right attached to the receivables (except for the fixed amount indemnity);
- an undertaking not to start or continue any legal proceeding for the recovery of the receivables;
- interest is due in case of payments made after each *tranche* deadline (interest rates are determined in the settlement agreement).

The settlement agreements are expressly qualified to be without novating effects (*privi di efficacia novativa*). This means: (a) the possibility for the creditor to request the termination of the settlement agreement in case the Healthcare Authority does not fulfil its obligations of certification and payment; and, as a consequence, (b) the possibility to go back to claim default interest at the European Interest Rate.

Chapter Five

THE ROLE OF SACE AS GUARANTOR FOR THE PURCHASE OF RECEIVABLES

SUMMARY: 1. The role of Sace in respect to the receivables owed to the suppliers of public entities. – 2. Requirements of the Sace Guarantee. – 3. Purchase of receivables by Sace Factoring S.p.A.

1. *The role of Sace in respect to the receivables owed to the suppliers of public entities*

Further to the financial crisis that began in summer 2007, several provisions have been introduced in Italy to preserve the national financial stability.

In particular, the State owned company provider of export credit insurance (Sace S.p.A. - Società per i Servizi Assicurativi del Commercio Estero[15], "**Sace**") has been involved in activities aimed to support companies in necessary cash flow.

In particular, article 9, paragraph 3, of Law Decree No. 185 dated 29 November 2008 (turned into law by Law No. 2 of 28 January 2009), assigned to Sace additional functions to facilitate the recovery of the claims owed to supplier of goods and services by the public entities. With the aim to adopt such laws, on 6 November 2009 the by-laws of Sace has been modified[16].

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[15] Please note that, pursuant to article 6 of the Law Decree dated 30 September 2003 No. 269, as turned into law by article 1 of law No. 326 dated 24 November 2003 "The institute for external commerce borrowings and insurance (Sace) is being turned into a joint stock company (Sace S.p.A.) as of 1 January 2004. Sace S.p.A. succeeds to the rights, privileges and obligations of Sace, as of the date of transformation". Moreover, paragraph 2 specifies that: "any actions carried out by Sace S.p.A. may be assigned to the Ministry of Economy and Finance"

[16] Pursuant to the by-laws, the core activities of Sace are (i) ensuring, reinsuring and co-ensuring and guaranteeing from political, economical, natural, commercial and exchange risks and from all the complementary risks to which the companies are exposed, directly or indirectly, together with all the connected operators and entities in the export and internationalizations activities, (ii) granting, at market conditions and in

Article 1 of the Decree of the Ministry of Economy and Finance dated 19 May 2009 (hereinafter the "**MEF Decree**"), provides that the Sace may:

(i) insure and issue guarantees covering risks of reimbursement default financings granted by banks or other financial intermediaries to suppliers of the public entities (the "**Guarantees**");

(ii) insure and reinsure the insurance policies covering the risk of payment default of receivables towards public entities[17].

In addition, article 3 of the MEF Decree enables Sace to determine, in accordance with its corporate governance, what initiatives to take in favour of public entities suppliers, in accordance with its budget restrictions under Italian Financial Budget Laws.

2. *Requirements of the Sace Guarantee*

In order to put into effect the MEF Decree, on 30 June 2009 the Italian Banking Association and Sace entered into a framework agreement (the

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compliance with the Community Law, of guarantees and insurance policies in favour of foreign companies, in relation to strategic operations for the internationalization, the security and the activation of virtuous processes – in terms of functioning and occupational policies – of the Italian economy.
Pursuant to article 6, paragraph 9, of the Legislative Decree No. 269 dated 30 September 2003, as a general principle, the obligations undertaken by Sace during the insurance period and within the limits indicated by the Financial Budget Law, distinguishing between the guarantees covering a period higher or lower than 24 months. Pursuant to article 2, paragraph 4, of Law No. 192 dated 23 December 2009 ("*Bilancio di previsione dello Stato per l'anno finanziario 2010 e bilancio pluriennale per il triennio 2010-2012*") the limits concerning the obligations that might be undertaken by Sace under the guarantee of the Italian State have been fixed, for 2010 as (i) Euro 14 billion for guarantees with a duration of under 24 months and (ii) Euro 8 billions for guarantees with a duration of over 24 months.

[17] The MEF Decree did not comprise an additional Sace operating modality that, however, has been described in the document of the Ministry of Economy and Finance dated 25 March 2009 (in other words, the document prepared for the second meeting on "*Jobs, business companies and banks*" and better known as the second date "*Credit Liquidity Day*") according to which Sace could have paid directly the business company, acknowledging the priority to those requests, enclosing an offer of credit reduction and subrogating the company in all the rights arising from the receivables claimed from the Public Administration.

"**Framework Agreement**"), establishing the terms and conditions of the Guarantee and a draft of the agreement to be entered into by Sace and Italian banks (the "**Agreement**").

The Guarantee applies to facilities granted by the Italian banks (which were parties of the Agreement) and suppliers of goods and services to the public entities[18].

(a) Requirements to issue the Guarantee

Requirements needed to issue the Guarantee are the following:

(i) the borrower is a supplier of public entities and has unpaid receivables;

(ii) the public entities are comprised in the list under article 1 of the Legislative Decree No. 165 dated 30 March 2001 (which includes the Healthcare Authorities and the other entities of the NHS)[19]; and

(iii) the lending bank has entered into the Agreement with Sace[20].

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[18] The Framework Agreement only mentions those facilities granted by banks, whereas article 1 of MEF Decree comprises also those lent by those financial intermediaries that are authorized, pursuant to the Banking Law.

[19] Article 1 of the Legislative Decree No. 165 dated 30 march 2001 states "All the public administrations, including institutes and schools at each level of education, the companies and autonomous administrations, Regions, Provinces, Municipalities, Mountain Governments and related associations, universities, autonomous entities, popular housing associations, Chambers of Commerce, Industry and Agriculture and related associations, all the non economic public entities at a national, regional and local level, the administrations, the **National Healthcare Entities**, the Agency representing the Public Administrations in the negotiations (ARAN) and all the other agencies listed under the Legislative Decree No. 300, dated 30 July 1999"

[20] On 19 October 2009, Sace entered into the first Agreements applying the provisions of the Framework Agreement concerning the disinvestment of the receivables claimed by the business companies towards the Public Administration. In particular, as of the same date the covenants between Banca Monte Parma and Banca Popolare FriulAdria became effective, through which the suppliers of the Public Administration could have access to funds for a total amount of Euro 40 million, became effective.
On 19 January 2010, Sace entered into three new Agreements, respectively with Banca Popolare dell'Emilia Romagna (having validity for the entire BPER Group), Banca Popolare di Sondrio and ICCREA Banca, through which the relevant business companies could have access to facilities for a total amount of Euro 90 million. Such

(b) Purposes and limits of the Guarantee

The Framework Agreement defines the Guarantee by Sace as a first demand guarantee issued to the banks/lenders in the interest of the suppliers/borrowers, insuring the default of reimbursement of the facilities.

The Guarantee covers up to 50% of the principal amount and of the related interest (different percentages may be agreed upon by a bank and Sace).

The Guarantee is secured by the Italian State, within the limits established annually by Financial Budget Law[21].

The Framework Agreement also establishes that:

(i) Sace shall not raise any objection on the terms and conditions against the lender and on contractual relationship between the supplier and the public entity; and

(ii) the facility shall contain a provision pursuant to which any payment made by the public entities to the relevant supplier shall be used to reimburse the facility.

In addition, the Framework Agreement must establish the following[22]:

(i) the borrower's registered office, its research and development department and its core business must be in Italy;

(ii) the facility must be in the form of a bank advance (*anticipazione bancaria*) on receivables owed by the public entities to the supplier.

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covenants, in execution of the Framework Agreement, are directed to support the liquid assets of those companies, which may benefit from the new short-term financing, up to 24 months, and guaranteed by Sace up to the 50% of the allocated amount.

[21] With regard to the limits fixed for the financial year 2010, please see reference note No. 47.

[22] Notwithstanding the outline of the Agreement, ruling the functioning of the guarantee and the mutual obligations of the parties, these latter, in compliance with the provisions of the Framework Agreement and the Agreements, might set forth different provisions. For instance, the Framework Agreement, referring to Sace insurance coverage, establishes that the parties may agree different risk covering percentages instead of 50% as provided by the Framework Agreement.

3. *Sace Factoring S.p.A.*

In February 2009, Sace Factoring S.p.A. ("**Sace FCT**") was incorporated with the purpose of entering into factoring agreements with suppliers of the public entities.

Sace FCT, as factoring company, would purchase, directly, without recourse and with its own resources, the receivables claimed by the business companies towards the public entities.

Because of its new role, Sace plays a fundamental role within Italian economy also through activities which support liquidity of the banking system.

Chapter Six[23]

HEALTHCARE RECEIVABLES IN SPAIN, PORTUGAL AND GREECE

SUMMARY: *SPAIN* - 1. The Spanish healthcare system. – 2. Healthcare receivables. – 3. Debtors. – 4. Transfer of the healthcare receivables: formalities for the validity and effectiveness. – 5. Guarantees on the receivables. – 6. Recovery procedure. – *PORTUGAL* - 7. Securitization of healthcare receivables under Portuguese law. – 8. The National Healthcare System (NHS). – 9. Transferability of the healthcare receivables. – 10. The Portuguese health system. – 11. The recovery of healthcare receivables. – 12. – The Portuguese Healthcare – 13. Transferability of the healthcare receivables – 14. Formalities for the transferability of the receivables – 15. Insolvency matters – 16. Separation of securitized assets and commingling risk – *GREECE* - 17. The Greek healthcare system. – 18. Healthcare receivables. – 19. Recovery procedure. – 20. Greek securitisation law.

SPAIN

1. *The Spanish healthcare system*

According to article 43 of the Spanish Constitution, public authorities must protect people's health through prevention measures and healthcare services. This right to health protection was regulated further in the General Act for Health 14/1986, which created the National Health System (NHS).

Starting from the early 80s, the competencies have been given to the Spanish autonomous communities ("*Comunidades*", hereinafter, the "**Regions**") and are **currently run by the Autonomous Health Service** (the "**AHS**")[24] of each Region.

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[23] Please note that the definitions used so far, do not apply to this part of the handbook..

[24] The general Spanish name is "*Servicio Autonómico de Salud*", even though each Region uses a specific name. As example, the Region of Valencia refers to the "*Servei Valencià de Salut*".

Each AHS is responsible for the management of the medical centres and of the health services included in the public network of the Region to which it belongs. Each AHS is a separate entity from the relevant Region, with its own budget and balance sheet, even though it is a part of the regional administration and its balance sheet is consolidated with the balance of the relevant Region.

2. *Healthcare receivables*

Basically, there are three kinds of agreements from which the Receivables may arise out:

(a) Agreements between the AHS and the Healthcare Provider ("AHS Direct Agreements"): the AHS enters into agreements with the healthcare providers (the "**Healthcare Providers**") to provide certain services (*i.e.* building contracts, supply contracts or consultancy, assistance and services contracts, etc.). In this case, the Receivables are owed by the AHS to the Healthcare Providers.

(b) Agreements between the AHS and the Management Company ("AHS Indirect Agreements"): the AHS enters into agreements with private law companies (the "**Management Companies**") [25] to manage the healthcare system (*i.e.* contract to manage public services, concession of public work, agreements to include private medical centres or healthcare services in the public network managed by the AHS). In this case, the receivables are owed by the AHS to the Management Companies which have been encharged of the management of the healthcare system.

(c) Agreements between the Management Company and the Healthcare Providers ("**Management Companies' Agreements**"): the Management Companies – which manage the healthcare system on behalf of the AHS – enter into agreements with Healthcare Providers which provide healthcare services. In this case, the Receivables are owed by

[25] The Management Companies are companies incorporated in accordance with general principal of private law and they have no connection with the Region.

the Management Companies to the Healthcare Providers that have been encharged to provide healthcare services.

3. *Debtors*

Upon what stated above under paragraph 2, the debtors of the Receivables are the following entities:

(a) AHS Direct Agreements: **AHS**. This means that the market risk to be considered is the AHS' risk since such entity is the ultimate debtor of the Healthcare Providers.

(b) **AHS Indirect Agreements**: **AHS**. The market risk to be considered is the AHS' risk since such entity is the ultimate debtor of the Management Companies.

(c) **Management Companies' Agreements**: **Management Companies**. The market risk to be considered is the **Management Companies' risk** since such entities are the ultimate debtor of the Healthcare Providers.

The main consequence of the above is that if, as a matter of marketability of the possible transaction to be structured on the Receivables, it is preferable to have an AHS' risk rather than a Management Company's risk, then the Receivables arising out of AHS Direct Agreements and out of AHS Indirect Agreements shall be looked at.

4. *Transfer of the healthcare receivables: formalities for the validity and effectiveness*

(a) **AHS Direct Agreements**: when the AHS enters into an agreement with a Healthcare Provider, it is, for any purposes, the direct debtor of the latter. The Receivables owed by the AHS may be assigned to a third party without any prior consent from the AHS itself unless otherwise provided in the relevant agreement. Although not a requirement for the validity or perfection of the assignment between the parties, the enforceability of the assignment against the debtor (*i.e.* the AHS) is given by the notice of the assignment to the latter.

Otherwise, the debtor would legally perform its payment obligation by paying the assignor, rather than the assignee. In order to make such assignment enforceable against the AHS, notice of the assignment shall be made reliably ("*fehacientemente*") to the AHS, so that the latter is made aware of the assignment. Once such notice is received by the AHS, the AHS shall pay directly to the assignee in order to duly perform its payment obligation. In addition, it should be noted that the transfer agreement is usually entered into in the form of a notary public deed ("*escritura pública*"). This formality has the advantage of constituting *prima facie* evidence of the date of the agreement and its content.

(b) **AHS Indirect Agreements**: what stated under (i) above shall apply in this case as well.

(c) **Management Companies' Agreements**: when the Receivables are owed by Management Companies to Healthcare Providers, the Spanish Civil and Commercial Codes general rules for the assignment of receivables will apply. Such receivables would be **assignable to a third party without the prior consent of the relevant Management Company, unless otherwise provided in the agreement between the assignor and the Management Company**. **Notice of the transfer** to the relevant Management Company, as debtor, shall be made in order to ensure that the latter can only perform its payment obligation by paying the assignee.

5. *Guarantees on the receivables*

As a matter of law, there are **no specific guarantees** set forth in case of assignment of the Receivables. Nevertheless, the following issues should be taken into account:

(i) the Healthcare Providers and the Management Companies – when they are creditors of the AHS, respectively under an AHS Direct Agreement and under an AHS Indirect Agreement – deliver the relevant supplies, services or works to the AHS for acceptance by the latter. Even though such an acceptance is not, under a strictly legal point of view, a "guarantee", it gives

the creditor a grounded evidence of its claims towards the AHS. Further to the acceptance of the performance, it is unlikely that the AHS rejects requests for payments (which, in any case, does not mean that the AHS will pay with no delay). Each contract can define a time-limit for the acceptance of performance;

(ii) the Regions may issue guarantees for payments due by public entities (like AHS). Such guarantees do not strictly qualify as a first demand guarantee but they give the creditor the possibility to claim the payment due by the public entity (like an AHS) directly to the Region. These guarantees may be issued only further to a specific regional legislative procedure through the following steps: (a) the regional parliament authorizes the regional government to issue a guarantee for certain specific exigencies; (b) the regional government must issue the guarantee within one year (otherwise an additional authorization from the regional parliament will be necessary); (c) the guarantee issued by the regional government can cover more than one year based on the specific exigencies for which the guarantee has been requested. The issue of guarantee from the Regions is a case-by-case choice of the regional bodies therefore it would be necessary to talk with the relevant AHS and the Region it belongs to, in order to understand if there is any possibility to get such guarantee from the Region.

6. *Recovery procedure*

The following sections of this memorandum address the issues of how the recovery procedure of the Receivables against an AHS.

Preliminarily, it is to be stressed that, according to article 99.4 of the Spanish law on public contracts, the AHS is obligated to comply with its payment obligations within 60 days from the date in which the creditor performed its contractual obligations, or the subsequent date when such performance was documented, if it is the case, either through certifications issued by the AHS (in the case of the execution of works for the AHS) or through invoices issued by the creditor (when supplies and services are rendered to the AHS). In

addition, law 3/2004 implemented in Spain the EU Directive on late payment, providing for his automatic accrual of delay interest from the day following the date of, or the end of the period for, payment agreed in the relevant agreement. The interest rate which shall apply to the AHS will be the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, plus at least seven percentage points, unless otherwise specified in the contract.

We have briefly summarized here below the steps for recovery of the Receivables due by the AHS to the Healthcare Providers or the Management Companies, as the case may be:

- Suspension of the contract by the creditor: if the AHS delays its payment for 4 months, the creditor may suspend the execution of the relevant agreement. The suspension must be communicated within 1 month to the AHS by means of a notice. If the AHS delays its payment for 8 months, the creditor may terminate the agreement and sue the AHS for damages;

- Enforcement procedure: if the AHS does not pay its creditors on time, the latter has no less than a 1 year period to file a claim against the AHS demanding what due under the agreement entered into with the AHS (plus any accrued interest and related costs) [26]. The AHS must reply within 3 months.

If the AHS rejects the claim or does not reply within 3 months, the creditors have 2 months (if the refusal is express) or 6 months (if the refusal is inferred by silence) to file a request before the contentious-administrative courts.

If the court condemns the AHS to make payment, the AHS is supposed to pay on the basis of the authorizations of payment fixed

[26] It should be noted that the commencing of a recovery procedure is independent from the timing for the suspension or termination of the agreement given to the creditor.

on the budget of the relevant Region which may also be increased by the regional parliament for this purpose, if needed. If it is necessary to change the budget in order to make payment, AHS will have a 3 month period to do that. On the credit ascertained in the ruling, legal interest from the date of the ruling will accrue. Legal interest rate is fixed on the annual act that approves the Spanish budget. The legal interest rate for 2010 is 4 percent.

If the AHS does not pay within 3 months from the date of the ruling upholding the obligation to make payment, creditors may request the court to force the AHS to make such payment.

The court will order the AHS to make payment and if it considers that the AHS has been negligent, the court may increase the interest rate in 2 points. Furthermore the court may impose coercive fines ranging between €150.25 and €1,502.53 every 20 days as an incentive for the AHS to pay. However, these amounts do not belong to the creditor.

There is no possibility to attach AHS' assets devoted to provide healthcare services when they are deemed to serve a public interest aim. Only the attachment of the AHS' assets not devoted to a public interest aim would be legally feasible. It is to be highlighted that it is unlikely to find assets which can be attached, including AHS' bank accounts which may not be subject to attachment procedures. Nevertheless, it should be noted that, even though the AHS may incur in delay payment, it normally pays what due to its creditors (including any accrued interest) because otherwise, after the third coercive fine imposed by the court, the court may inform the criminal courts of a crime of disobedience to a public authority committed by the authorities or functionaries that hindered the payment.

When the recovery of a claim involves as debtor a public entity, like an AHS, there is no possibility of commencing any injunction procedure (like the *ricorso per decreto ingiuntivo* often used to recover Italian healthcare receivables).

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Juan Carlos Hernanz
CUATRECASAS, CONÇALVES PEREIRA

7. *Securitization of healthcare receivables under Portuguese law*

This article covers the possibility of structuring a securitisation of healthcare receivables under Portuguese applicable law.

By structuring a securitisation of healthcare receivables (off balance sheet transaction), healthcare providers may obtain a source of funding by means of converting future receivables into cash, being entitled to receive an amount opposite to receiving the respective receivables in accordance with their respective ordinary course of business. For this purpose, a sale of receivables is made to a special purpose entity.

Two main advantages arise from this true sale: one the one hand, it naturally improves cash flows of the healthcare provider and on the other hand it is a means of maximizing the recovery of the respective receivables.

Although under Portuguese law there is no specific legal definition of healthcare receivables one may sustain that healthcare receivables are those credits arising from the execution of agreements in connection with the acquisition of goods by and the rendering of services to healthcare entities under the Portuguese Healthcare System ("Sistema de Saúde" or "Rede de Prestação de Cuidados de Saúde").

Portuguese Constitution sets forth that the right to health protection is performed by a universal and general national healthcare system taking into consideration the economic and social status of the Portuguese citizens.

Law 48/90 of 24 August ("Lei de Bases da Saúde", as amended) sets forth the main principles and general provisions regarding public health in Portugal.

The promotion and protection of public health shall be performed by the State and other public entities, being that other organisation may be associated to said activity. Moreover, healthcare services are rendered by services and establishments belonging to the State or by other public or private entities under its supervision, with or without profitable purposes.

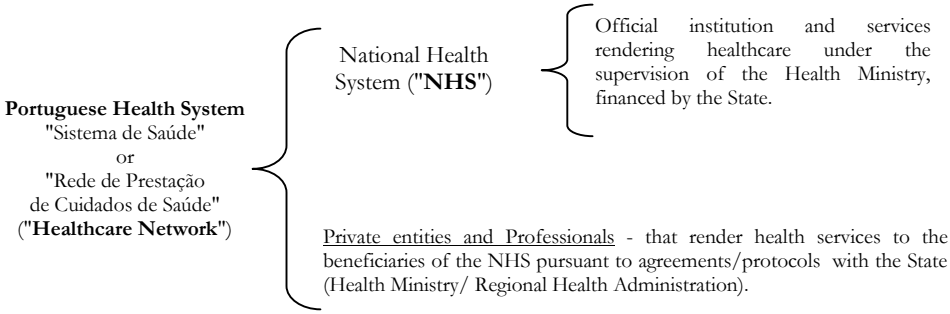
In order to effectively promote the right to health protection, the State acts through its services, executes agreements with private entities for the rendering of healthcare services and supervises the remaining activity carried out by the healthcare private sector.

8. *The National Healthcare System (NHS)*

The NHS, which by-laws were approved by Decree-law 11/93 of 15 January (as amended), comprises the institutions and official services rendering healthcare services. The purpose of the NHS is the pursuit of the compromise attributable to the State in terms of individual and collective health protection.

The NHS is supervised by the Health Ministry and is financed by the State Budget (allocated to the entities which integrate the NHS) through the payment of acts and activities effectively performed according to the applicable prices[27].

In order to identify potential debtors whose healthcare receivables could be assigned one must take into consideration the complete structure of the Portuguese Healthcare System, as follows:



[27] Moreover, other resources of the NHS include inter alia fees ("taxas") for rendered services or use of facilities or equipment in accordance with the applicable law, donations and self income.

Therefore, from the agreements executed with third parties by the healthcare entities comprised in the NHS arise healthcare receivables, which include credits, which source shall depend on the variety of the underlying contractual relationship (e.g., rendering of services, construction agreements, supply agreements).

Moreover, under the Healthcare Network, private entities and professionals may also render healthcare services to the beneficiaries of the NHS by means of agreements and protocols executed with the State (Health Ministry and Regional Health Administration), in which case healthcare receivables may also arise from this contractual relationship.

9. *The Portuguese health system*

The Portuguese Health System has been reorganized through the years, mainly since 2002 onwards specifically in what respects the nature of the hospitals integrated in the NHS.

In 2002 was approved the law that clarified the provisions applicable to each type of hospital integrated in the Health System - Law 27/2002 of 8 November- "Regime Jurídico da Gestão Hospitalar" (Law of the Hospitals Management).

Furthermore, in that same year it was also approved the legal regime in respect to Health Public-Private Partnerships - Decree Law no. 185/2002, of 20 August (as amended). This legal framework establishes the legal regime of the Health Partnerships with private management and financing entered into between the State or institutions and services integrated in the NHS and private investors.

The types of hospitals comprised in the NHS are as follows:

(i) Public Hospitals ("**Hospitais Públicos**");

(ii) Public Corporate Entities ("EPE") – "EPE" hospitals are now subject to more restrictive rules in what respects the instructions of the Ministry of Finance and the Ministry of Health with a view of obtaining more efficiency in operational and economical terms.

(iii) Public Private Partnerships –Provide healthcare services to the beneficiaries of the NHS in accordance with a partnership entered into with the State.

In order to have the complete list of all types of hospitals in Portugal, we would have to add the Private Hospitals, which do not render services under the NHS, i.e., Private Hospitals render services under a private healthcare system.

Hospitals constitute a strategic sector as far as the healthcare services network is concerned (generating significant healthcare receivables) and therefore we shall particularly focus our analysis in each type of hospital within the Portuguese Health System providing below a general overview.

(A) Public hospitals ("hospitais públicos")

Public hospitals, incorporated by means of a state decision, are included in the Public Administration, being dependent of the Government, including financially, as they are financed by the State Budget.[28]

The internal organisation of public hospitals is established by regulation approved by the Government. Please note that the provisions of insolvency are not applicable to public hospitals.

[28] Apart from the State powers over the hospitals included in the Health Care Network, public hospitals with the legal nature of public institutions are subject to the following intervention of the Health Ministry:

- Approval of the activity and financial plans;
- Approval of the activity annual plans, of the annual exploitation budget and of the investment plans, and respective amendments.
- Approval of the accounts documents;
- Approval of the price tables, in accordance with the relevant law;
- Homologation of programme -contracts;
- Authorization of agreements for the assignment of exploitation and others;
- Power to create, extinguish or modify the departments, services and units of the hospital.

(B) Public Corporate Hospitals "EPE"

Public Corporate Hospital "EPE" are public entities with a corporate nature and have patrimonial, financial and administrative autonomy.[29] The business plans, the budgets, the annual accounts as well as the presentation of accounts must be submitted to the approval of the Ministers of Health and Finance. The financial control is carried out by the Portuguese tax authority.

Public Corporate Hospital "EPE" are not allowed to incur in debts that exceed 30% of the statutory capital due to equity requirement purposes. The respective share capital is held by the State and these hospitals are financed by the State budget and are subject to the supervision and control of the Ministry of Health and the Ministry of Finance.

The government has considered that health units integrated in the NHS should be subject to a legal regime that, taking into account the public service that is rendered, allows a higher intervention of the Ministers of Health and Finance in the supervision and management of these hospitals, which is necessary to an adequate functioning of the institutions of the NHS both at an operative level as well as far as investment decisions are concerned.

Both Public Hospitals and EPE's are public entities; nevertheless, the latter integrates the state corporate sector as an autonomous type of institutional organisation of the public sector.

Please note that the provisions of insolvency are not applicable to "EPE".

[29] The organization and way of functioning of the "EPE" hospitals are governed by (i) the respective legal Statute approved by Decree Law no. 233/2005 of 29 December, as amended by Decree law no. 176/2009 of 4 August (ii) the legal Statute of "EPE" approved by the Decree Law no. 558/99 of December 17 , as amended by Decree Law 300/2007 of 23 August and by Law 64-A/2008 of 31 December (iii) by the provisions applicable to the Hospitals comprised in the NHS, as well as by (iv) the specific provisions foreseen in the internal regulations.

(C) Public-Private partnership ("Parcerias Pùblico-Privadas")

The Portuguese Government launched the PPP's initiative for the health sector in 2002 by means of Decree-Law no. 185/2002, of 20 August (as amended). The PPP's consist in an agreement between the State and the private investors.[30]

Pursuant to the above referred Decree-Law under the PPP's initiative the conception, construction, financing, maintenance and operation of NHS hospitals can be conferred to private entities:

(i) Which will enter into a long lasting relation with the public entities and directly perform health related services; or

(ii) Which will grant support (directly or indirectly) to the performance of health services by the NHS.

The health PPP's involve the transfer and risk sharing to private third entities as well as the financing of the health related services.

The legal instruments that the parties can use in order to enter into health PPP's are, among others [31]:

– *Management Agreements*

The management agreements are the most important legal instruments in PPP's. The terms and conditions of these agreements foreseeing

[30] The public contracting party should supervise the execution of the managing agreement so as to assure the regularity, continuity and quality of the health services rendered. In this context, the management agreement shall determine (i) the supervision powers; and (ii) the actions of the managing party that are subject to the public contracting entity's authorisation, approval or homologation.

[31] Please note that the applicable law only sets forth the management agreement, the services agreement and the co-operation agreement as the legal instruments that the parties can use in order to enter into health PPP; nevertheless, under the contractual freedom principle the parties may enter into mixed agreements ("contratos mistos") or unions of agreements ("união de contratos").

each parties' rights and duties are set forth in Regulatory Decree no. 14/2003, of 30 June.

Management agreements have a double purpose:

(i) Healthcare pursuant to which the health services shall be carried out by the private entity at an existing establishment included in the NHS or an establishment to be built, created and included in the NHS;

(ii) Managing the building and the equipment pursuant to which the conception, construction, financing, maintenance and operation of the health establishment shall be carried out by the private entity.

The private entity shall be selected by the State under a public tender. The two parties engaged in the management agreement are the public contracting party (the State) and the private contracting party (the awarded party of the tender) [32]. The State has generic powers to supervise the activity of the managing party that shall be specified in the management agreement. The managing party is responsible for the financing concerning all of the activities foreseen in the management agreement, being entitled to the payment of a fee by the State as a remuneration of the services rendered.

The managing party is responsible for all debt incurred during the duration of the Management Agreement necessary to fully comply with the undertaken obligations, notably the one related with obtaining the necessary funding to carry out the activities comprised in the Management Agreement.

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[32] According to the Regulatory Decree no. 14/2003 of 30 June, the private contracting party shall consist in two separate share companies ("sociedades anónimas"), with head office located in Portugal, being that each one shall have one of the following corporate object: (i) responsible for the management the hospital establishment ("estabelecimento hospitalar") and (ii) responsible for the management of the hospital facility (i.e., the building) in order to separate the risk and to guarantee the articulation and harmonization between the two entities.

– ***Services Agreements***

Pursuant to these agreements the private party renders health related services to support the public party. The services agreements may comprise the conception, construction, financing, maintenance and exploitation of entities comprised in the NHS. The main principles of the management agreements apply mutatis mutandis to the Services Agreement.

– ***Co-operation agreements***

The aim of this agreement is to allow that existing private health establishments are included, by means of the execution of a co-operation agreement, in the NHS. To these agreements apply, mutatis mutandis, the principles of the Management Agreements.

Being the managing party a private law legal entity, the Portuguese Companies' Code and the provisions on insolvency shall apply.

(D) <u>Private Hospital (Hospitais Privados)</u>

The Private Hospitals are healthcare establishments, which are not integrated in the NHS, and have as purpose the rendering of medical or nursing services as per Decree Law no. 279/2009 of 6 October.

Private Hospitals may be included in the Health System and render health services to beneficiaries of the NHS pursuant to an agreement with the State, or not.

Private Hospitals are governed by the Portuguese Companies' Law and are subject to private law and all the rules applicable to the economic agents. In what concerns responsibility for debts the Private Hospital is responsible for all their debts towards the service providers.

Private Hospitals are subject to insolvency proceedings.

10. *The recovery of healthcare receivables*

EU Directive 2000/35 dated of 19 June was implemented by means of Decree law no. 32/2003 dated as of 17 February (as amended by Decree law no. 107/2005 of 1 July) related to payments executed as a remuneration of commercial transactions.

The default interest regarding late payment is according to this Decree Law the one set forth in the Portuguese Commercial Code, being that the creditor may demand an additional indemnification should the delay payment cause higher damage when comparing with the applicable default rate.

The applicable rate in relation to the default interest (in the absence of agreement between the parties) is the one set forth by joint regulatory decree of the Ministry of Finance and Justice. Nevertheless, such rate may not be less than the interest rate applied by the European Central Bank to its latest refinancing operation carried out before the first day of January of July, depending on whether one should consider the first or second semester of the year, plus seven percentage points.

– ***Claims before the healthcare entity comprised in the NHS***

A lawsuit before a Portuguese court may be filed against an entity comprised in the NHS at any time without prejudice of the statute of limitations ("prescrição") of the underlying credits. After said submission, the relevant entity comprised in the NHS may file an opposition regarding the claimed credit providing evidence of its procedural position. A final decision of the court regarding the existence of the relevant credit is issued and in case it is recognised the court shall condemn the public entity to proceed with the payment.

– ***Enforcement Procedure***

Should the relevant entity of the NHS not comply with the payment obligations arising from a court decision the creditor(s) may file a writ of execution ("acção executive") and ultimately may lead to the extent possible to the seizure and judicial sale of assets belonging to the debtor.

11. *The Portuguese securitisation regime*

Decree-Law No. 453/99, of 5 November [33] (hereinafter the "**Securitisation Law**") has implemented a specific securitisation legal framework in Portugal regulating:

(a) the incorporation and functioning of securitisation vehicles (credit securitisation funds (*Fundos de Titularização de Créditos*- "**FTC**") and credit securitisation companies (*Sociedades de Titularização de Créditos*- "**STC**");

(b) the types of credits that may be securitised; and

(c) the entities which may assign credits for securitisation purposes (the "Originators"/ "Assignors").

A securitization transaction falls under the supervision of the Portuguese Securities Commission ("*Comissão do Mercado de Valores Mobiliários*", hereinafter "CMVM") and also of the Central Bank ("*Banco de Portugal*") should the special purpose vehicle be a FTC.

Under the Securitisation Law Originators for securitisation purposes include the Portuguese Government and public corporate entities, credit institutions, financial companies, insurance companies, pension funds and pension funds managing companies and as general rule, any other corporate entities whose accounts have been audited by an auditor registered with the Portuguese Securities Market Commission (CMVM) for the previous three years.

The quality of the Assignee (FTC or STC duly incorporated in Portugal) is a determinant criteria for the application of Securitisation Law, otherwise, the general civil law regime shall apply. Both entities have the nature of bankruptcy remote vehicles.

– ***Sociedades de Titularização de Créditos- "STC"***

[33] Amended by Decree-Law No. 82/2002 of 5 April, Decree-Law No. 303/2003 of 5 December, Decree-Law No. 52/2006 of 15 March and Decree-Law No. 211-A/2008, of 3 November.

STCs are share companies (*Sociedade Anónima*) incorporated with limited liability, with a minimum share capital of Euro 250,000. STCs can only be incorporated for the purpose of carrying out one or more securitisation transactions by issuing securitisation notes for payment of the purchase price of the acquired receivables. STCs are subject to the supervision of the CMVM and their incorporation is subject to prior authorization of CMVM. STCs are subject to ownership requirements. The members of the board of directors and the members of the board of auditors have to be registered with the CMVM.

– ***Fundos de Titularização de Créditos- "FTC"***

The incorporation of an FTC must be duly authorised by CMVM and will create an undivided ownership interest in respect of its assets in favour of the respective unit holders, whose entitlement to the Fund's assets is at all times limited to the nominal amount of the relevant subscribed units. The FTC is only allowed to issue securitisation units as funding for the acquisition of assets. The FTC is administered, managed and represented by the Fund Manager in accordance with the terms of the Securitisation Law and the fund regulation. The Fund Manager is a financial company (incorporated as a share company with a minimum share capital of Euro 250,000) under the supervision of the Central Bank. The Central Bank has the power to revoke the Fund's manager's license.

12. *Transferability of the healthcare receivables*

– ***Nature of the credits***

Not all types of credits or creditor's position under a contractual relation may be assigned for securitisation purposes.

According to the applicable law, the credits for securitization purposes:

(i) must not be subject to legal or conventional restrictions;

(ii) must have a pecuniary nature;

(iii) must not be subject to any conditions;

(iv) must not be subject to litigation, be given as a guarantee nor judicially pledged or apprehended.

The above mentioned pre-requisites of the credits must be jointly verified in order to qualify a certain credit eligible for securitization purposes. Therefore, Healthcare receivables for securitisation purposes must also comply with these requisites.

The "cherry picking" process related to healthcare receivables implies understanding the nature of the receivables to be securitised and assessing whether they are eligible for the true sale.

As described above, the special purpose vehicle (FTC or STC) shall purchase receivables, which may be originated by distinguish healthcare providers, and a case by case analysis should be undertaken.

From a commercial standpoint it is important to assess the net value of such receivables for the purpose of determining the relevant purchase price (valuation process of the receivables), which in the case of healthcare receivables requires conducting an even more specific due diligence, taking into account that the role played by third party payors (and their respective payment to the healthcare providers) assumes a significant relevance when compared with the purchase of goods and services by the patients, which receivables should not be considered for securitisation purposes.

The nature and quality of the assets must be duly considered, i.e., one should evaluate the assets to securitize and the future streams of flows that will collateralise the issuance of the relevant securitisation units/securitisation notes. On this regard please note that only upon the execution of a due diligence it will be possible to determine whether the credits envisaged to be assigned gather the above mentioned requisites.

– ***Legal and contractual limitations on the assignment of credits***

Under the general legal regime of the Portuguese Civil Code a creditor may transfer (totally or in part) his credits to a third party, irrespectively of the consent of the debtor, so long the assignment is not prohibited by law or by an agreement between the parties. Generally speaking, the latter is the most common restriction as far as assignment of credits is concerned.

As a matter of practice, securitization of healthcare receivables must be structured to conform to each debtor's distinct legal relationship with

suppliers. Reimbursements for healthcare services are made by a variety of payers and may be subject to limitations that must be duly assessed on a case by case basis.

A due diligence should be carried out in order to duly identify the relevant legal/contractual limitation to the assignment of credits, for instance, antiassignment provisions. Moreover, it would be advisable to previously address (even though informally, as a matter of practice) the entities which integrate the Portuguese Healthcare System in respect to the envisaged assignment of credits.

– ***Tax matters on the assignment of credits***

The transfer of credits is VAT exempt, under the general VAT regime, which means that the transfer of healthcare receivables will be VAT exempt, whether the same is made under the Securitisation Law, or not.

Being the transfer of the healthcare receivables definitive/"true sale" (meaning that, in case of default of the debtors, the assignee would have no recourse against the assignor), no Portuguese Stamp Tax is due on such transfer, either.

Furthermore, provided the transfer of the healthcare receivables is definitive/"true sale", no Portuguese withholding tax is due on the difference between the consideration paid for their assignment and the nominal value of the receivables.

Interest on delay arising from such healthcare receivables is, however, subject to Portuguese income tax, at a 15% rate, where the assignor is a Portuguese resident-company (case where the withholding tax is simply a payment on account of the final tax liability) or at a 20% rate, where the assignor is a non-Portuguese resident company (if the assignor is resident in a country who signed a Double Tax Treaty with Portugal, such 20% withholding tax rate may, however, be waived or reduced – to 15%, 12% or 10% - under the corresponding treaty). It should be noted that if the transfer of the healthcare receivables is made under the Securitisation Law, such interest on delay would be exempt from Portuguese withholding tax.

13. *Formalities for the transferability of the receivables*

The assignment of receivables must be notified or accepted by the debtor in order to be enforceable against it. As a result of this notification the payment obligations should be made to the assignee as the new owner of the receivables.

The Securitisation Law only exempts the assignor from notifying the debtors of said assignment in some specific situations, i.e., in case of assignment of credits by the State, the Social Security, credit institutions, financial companies, insurance companies, pension funds and pension fund managers, which would become effective against the debtor on the date of assignment of such credits without a notification to the debtor being required.

Therefore, in case the assignor of the receivables is not one of the above mentioned entities the notification to the debtors shall be required. However, in cases which are duly justified, CMVM may authorise the application of the exemption when the entity responsible for liaising with the debtors, even if this is not the originator, takes over the management of the debt.

In order to assure the collection of the healthcare receivables, which complexity should not be underestimated, it is advisable that the servicer (if not the originator) should detain the necessary qualities and competence in order to undertake such management task.

14. *Insolvency matters*

– ***General applicable regime***

Under the Insolvency Code and Corporate Recovery ("CIRE", as amended) which was approved by Decree Law no. 53/2004 dated as of 14 March:

(i) any company that is in a difficult economic situation (the "Insolvent") -i.e., unable to meet its obligations because their available assets are insufficient to satisfy its

liabilities- must file before the court an insolvency declaration within 60 days following the date it becomes aware of the insolvency status (the filing of an insolvency declaration may also be filed by third parties, notably creditors and Public Prosecutor);

(ii) the prejudicial actions (acts that diminish, frustrate, difficult, jeopardise or delay the satisfaction of the creditors) performed by the debtor during the period of 4 (four) years prior to the date of beginning of the Insolvency procedure, may be challenged for the benefit of the Insolvency estate;

(iii) there are certain actions which are deemed as prejudicial (assumption iuris et de iure), notably (even if executed beyond the specified timeframes): (i) non onerous acts executed by the Insolvent during the period of two years prior to the date of beginning of the Insolvency proceeding; (ii) granting by the Insolvent of guarantees in rem in relation to pre-existent obligations or other guarantees which have replaced them, during the period of six months prior to the date of beginning of the Insolvency proceeding; (iii) personal guarantees (e.g. sureties) which the Insolvent has granted during the six months prior to the date of beginning of the Insolvency proceeding and which do not relate to transactions with a real interest for the Insolvent;

(iv) it is deemed an act of bad faith of the creditor, when there is knowledge (at the date the action is performed) that (a) the debtor was facing an insolvency situation; or (b) the action is prejudicial and the debtor was under an imminent insolvency situation; or (c) the insolvency proceeding had started.

– ***Special Securitisation applicable regime***

The Securitisation Law sets forth a special regime as far as the insolvency of the Originator is concerned.

In case of insolvency of the Originator the assignment of credits for securitisation purposes shall not be part of the insolvency estate, unless the interested party makes evidence that the parties have acted in bad faith.

In case of insolvency of the debtors, unless there is a replacement mechanism of the receivables contractually established, the autonomous patrimony allocated to the satisfaction of the payments to the unitholders or the holders of the securitisation notes shall become liable.

In addition, Securitisation Law sets forth another specific provision according to which in case of insolvency of the Originator it shall not be part of the insolvency estate of the Assignor (originator) any sums which are paid by the Purchaser in relation to the credits assigned for securitisation purposes prior to the insolvency and which will only mature after the insolvency.

15. *Separation of securitized assets and commingling risk*

Despite the segregation principle, in order to avoid or at least mitigate any potential commingling risk in case the assignor is the servicer of the assigned credits the possible solutions for this matter can be described as follows:

(i) The opening of an ad hoc bank account for the purpose of collection of the receivables in the name of the Assignee (this solution would imply notifying the debtors of the existence of this new account);

(ii) Automatic and immediate transfers (pursuant to an irrevocable order given by the Assignor) of the amount

of the receivables paid by the debtors to a separate bank account owned by the Assignee (which implies the administrative burden of said transfers);

(iii) The creation of a pledge of bank account for the benefit of the Assignee over the Assignor's bank account where the income earned from servicing the receivables would be deposited. Therefore, an already existing bank account would be transformed into a special dedicated account. The creation of this pledge would levy Stamp Duty Tax at a rate that varies according to the duration of the guarantee.

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GREECE

16. *The Greek healthcare system*

In accordance with article 20 paragraph 3 of the Greek Constitution "*The State looks after the health of its citizens…*". This constitutional provision is a statement of principles rather than a direct enforceable obligation of the State and should be construed as moral duty of the State rather that an obligation creating enforceable rights of the beneficiary being the citizens. Therefore the State cannot be considered as guarantor or undertaker of liability for claims created by independent public law entities such as Hospitals.

Law 1397/1983 introduced the term "**National Healthcare System**" referring to the structure formed for the provision of healthcare services to the citizens of the Greek State, the so-called "**ESY**" ("***E****thniko* ***S****istima* ***Y****gias*"). Public hospitals were incorporated and consolidated in this structure by virtue of the provisions of this law (the "**Hospitals**") and thus constitute the primary healthcare units of the Greek public domain of health.

The structure of the National Healthcare System has been amended by several laws, the latest being *Law* 3329/2005 as amended and in force[34]. The basic changes in the National Healthcare System made by this law compared with the old regime, are the following:

- a new administrative body, a separate public entity, is established in each of the seventeen regions of Greece, called the Regional Healthcare Administration ("**D.Y.PE**") having consulting and supervisory powers;
- the Hospitals, which were previously formed as non-separate entities and decentralized units of their supervisory public law entity (PeSyP) by way of the provision of article 1 of Law 2889/2001, are now reformed as separate public law legal entities[35] (article 7).

D.Y.PEs are individual public law entities, capable of suing and being sued and their scope is, among others, the programming, coordination, supervision and audit of all health services providers subject to each DYPE's jurisdiction. They form part of the Greek public entities. In accordance with article 2 of Law 3329/2005, D.Y.PEs are entrusted with the organization, supervision and coordination of the provision of healthcare services, by all units of the National Healthcare System (as

[34] It is worth referring to the regime as previously in force, as any receivables created at that period cannot be enforced individually against the hospitals but are enforceable against the DYPE's. In particular, before the adoption of the Law 3329/2005, the provisions of Law 2889/2001 regulated the National Healthcare System. Law 2889/2001 provided for the foundation of 17 public law legal entities called PeSYPs ("**PeSYPs**"), each one of them aiming to develop all-inclusive systems in its Region for the provision of high quality health services and coordinate activities and policies ensuring the efficient organization and management of the various operational units of the National Healthcare System (e.g. Hospitals, health centres etc.) operating within its Region. Thus the Hospitals did not have separate legal personality under the old regime but formed an operating unit of the PeSYPs.

[35] Law 1232/1982 (article 9 paragraph 1, as originally interpreted by article 1 par. 6 of Law 1256/1982) and amended by article 51 of Law 1892/1990, introduced to the Greek legal system the term "*public sector*". This term includes, among others, the following independent legal entities: the State and the public legal entities of special purposes, some ruled primarily by administrative law which are called Public Law Legal Entities (NPDD). Public Law Legal Entities have a legal personality, are capable of suing and being sued and enjoy the benefits and immunity of the Greek State.

are the public hospitals), smaller healthcare centres etc. operating within their respective region of competence. Within this context, a DYPE approves the consolidated procurement program for all the hospitals under its supervision, as well as the financing thereof, and submits it to the Ministry of health (the supervising ministry) for final approval.

D.Y.PEs are funded through subsidies from the State Budget, subsidies from the Budget for Public Investments (which constitutes a part of the State Budget), donations, income from their activities, and proceeds deriving out of co-financing programs of European Union or other Greek or international organizations, or from non profit organizations or from other research activities (article 5 of Law 3329/2005). All D.Y.PEs are subject to the control and the supervision of the Minister of the Health and Welfare.

Public hospitals within the national health system constitute entirely self-standing public law legal entities, are financially and administratively independent and are basically funded by the Greek State, they have legal personality, they can sue and may be sued and enjoy the benefits and immunity of the public sector. As Public law legal entities they form part of public entities they are subject to the Greek State supervision and are supervised by the competent DYPE and the Ministry of Health.

The financing of the public hospitals is effected through general and specific state funding, as well as private means, which include: (a) subsidies directly granted by the State Budget to cover regular personnel expenses; (b) subsidies contributed indirectly through the State Budget via the funds allocated to the Ministry of Health and Welfare; (c) subsidies granted indirectly by the State Budget, via the funds of the Ministry of Economy and Finance for special needs, and d) grants and donations from private individuals and entities and income.

Although in the past the Greek State has adopted settlement laws as to the financial obligations of the public hospitals to their suppliers and in most cases it has undertook the obligation to repay such debt, there is not a special legal provision by which the Greek State may be held liable for the financial obligations of a hospital. As already explained

above, the rather general and abstract constitutional responsibility as set by Greek Constitution to take care of the citizens' health does not provide sufficient grounds to argue that Greek State is obliged to fulfil, undertake and/or guarantee the public hospitals financial obligations.

The supervisory powers of the D.Y.PEs do not affect the legal, financial and administrative independency of the Hospitals which operate through their Board of Directors and various scientific and managerial committees.

A distinction should be made between Hospitals' supplies for pharmaceutical products (medication) and for medical material, equipment and consumables.

17. *Healthcare receivables*

- Drugs

By virtue of law 784/1978 supplies of drugs to public Hospitals are exempted from public procurement and tender procedures. The prices of drugs are regulated, thus a pricelist is issued by the Minister of Development setting the maximum price per approved drug. The Hospitals are supplied with different prices than those offered to the private sector and pharmacies.

In almost any Hospital, a special medicines department is organized which is responsible for ordering and maintain a stock of the product and submits the orders to the pharmaceutical companies, which then invoices the Hospital for the relevant order and delivery.

- Medical material, equipment and consumables

Supplies to Hospital are subject to tendering procedures in accordance with the various provisions of Greek law and EU public procurement rules and directives as applicable in accordance with the thresholds provided therein and the procedures are in both cases similar: invitations are published and the awarding Hospital follows a procedure of evaluating and selecting the preferred bidder. The selection and the acceptance of delivery of goods or supplies are effected by competent committees constituted in each Hospital. It should be mentioned that in an attempt to organize in an efficient way

the needs and orders of supplies of the various Hospitals, Greek law provided for a more quick and efficient public tender procedure under law 2955/2001 and has established the Health Supplies Committee competent for the monitoring and management in general of the health procurement procedures (law 3580/2007)[36]. To that effect tenders were assigned to the PeSYPs – now D.Y.PEs – and were allocated by explicit authorizations to the individual Hospitals.

Moreover in accordance with the provisions of presidential decree 774/1980 "on the Organization of the Council of Auditors" as currently in force, a three members committee of the Council of Auditors is obliged to examine the particular contents of any supply agreement before it is signed, and approve the terms and conditions thereof, in case the value of the tender exceeds the amount of 1,500,000.00 Euros.

Payment of invoices concerning either pharmaceutical products or medical material and consumables is effected following and audit of the expense by the Council of Auditors. In particular an appointed counsel of the Council of Auditors has to examine and verify the existence of the relevant monetary obligation of the Hospital and approve the expense. In case he objects the payment of an invoice, he has to give a fully reasoned opinion for the rejection of the relevant expense. If the counsel finds the documentation in place and accepts the amount due, the hospital will issue a payment order immediately payable to the supplier.

18. *Recovery procedure*

If a Hospital is in breach of its payment obligations against its suppliers, a supplier can claim the amount due by filing a lawsuit with the Administrative Court of Appeals, as claims of Hospitals against their suppliers have been characterized as disputes related to public law contracts[37].

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[36] Kindly note that as a matter of common practice it has been identified that the procurement obligations are not always respected or monitored by the Hospitals.

[37] It has been argued that such contracts are private law contracts that fall within the competency of the civil courts and thus a lawsuit must be filed before the First Instance Court which then is appealable and will become final and enforceable after a decision

A lawsuit filed before the Administrative Court of Appeals shall be scheduled for hearing within twelve months, from the date of its filing. However, we have been informed about cases where in accordance with article 7 of presidential decree 166/2003 (which implemented EU Directive 2000/35) the hearing was scheduled within six months from the filing of the lawsuit. Article 7 of the said decree provides that courts can schedule a shorter time for hearing but this is subject to their availability and only if the claim is undisputed and falls within the scope of the above p.d. However the dockets of the courts are already heavily loaded and in the procedure before the administrative courts it is very common that in the first hearing the State or Public Entity requests a continuance as they usually do not submit the documents relating to the case on time.

Regarding the costs involved in judicial recourse for the collections of the amounts due from the Hospitals, we note that the litigation costs consist from the following amounts: (a) lawyers fees for the submission of the relevant applications and the hearing thereof in Athens or in other competent jurisdiction, (b) expenses payable to the bailiff serving these applications, although service is not mandatory under Greek Administrative Procedure, (c) court expenses, including judicial stamp duty [38], which amounts to approximately 0,8% calculated on the aggregate claimed capital amount (excluding interest) and (d) various, insignificant amounts for stamps.

A final court decision issued in favour of the creditor will order the defeated Hospital to pay, in addition to the confirmed debt and interest, an additional amount of judicial expenses which in most cases corresponds only to a small part of the total expenses of the winning party, with the exception of the pre-paid stamp duty which will not be recovered from the Hospital.

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of the civil Court of Appeals. The prevailing though theory and jurisprudence is that supply contracts with Hospitals, and especially those awarded or purported to be awarded through public tender procedures are of a public nature and thus are tried before the three member Administrative Court of Appeals in first and last instance and are subject to a cassation before the Council of State, which have no suspension of enforcement effect.

[38] This judicial stamp duty has to be paid on the hearing date.

The decision from the court of Appeals will be issued in three to four months time and constitutes an enforceable deed against the defendant hospital.

It has been heavily argued that the issue of a payment order would be another way of recourse against debts of the Hospitals[39]. However, that it is still open to discussion and it is dubious (i) whether a payment order can be (legally) issued against the State and the State entities including Hospitals and (ii) whether enforcement against a Hospital can be effected on the basis of a payment order given that by article 20 of law 3301/2004 the orders of payment and court settlements were excluded as eligible means of enforcement against the public sector. Pursuant, though, to recent case law (decision 2347/2009 of the Supreme Court, decisions 2006/2010 and 3364/2007 of the Court of First Instance of Athens, decision 2913/2005 of the Court of First Instance of Athens and decision 3878/2005 of court of First Instance of Iraklion) the judges held that the enforcement against the Hellenic Republic on the basis of a payment order is legal and admissible, since the exempting provision of law 3301/2004 is anti-constitutional and against the European Human Rights Convention and therefore null and void. Moreover in the decision of the Highest Special Court 18/2005 opinions of two members of the courts were registered sustaining the opinion that a payment order can be issued and enforced against the public sector while the opposing opinion was also registered.

Assuming that an order of payment is admissible as a deed of enforcement against the Hospital, the defendant has the right to exercise an opposition (article 632 paragraph 1 of the GCCP) within fifteen (15) working days following the date of the payments order's service, and request the cancellation of the payment order. The Hospital can simultaneously request, by means of a separate petition the suspension of the enforcement of the payment order. The Hospital can also request a preliminary suspension order until the hearing of the suspension application. If the court rejects the request for the preliminary suspension order then the enforcement can continue

[39] The order of payment is a special civil courts procedure whereby invoices and official documents proving conclusively a claim are submitted to a Judge who issues an order of payment against the debtor. This order of payment is issued in a very short time without a hearing and is a deed of enforcement against the debtor.

whereas, in case it accepts it, the enforcement will freeze until the issue of the decision on the petition for the suspension. The petition for freezing permanently the enforcement proceedings will be normally heard within a period of forty – five days starting from its filing and if accepted the enforcement will pause until the issuance of a definite ruling with respect to the opposition. If the petition is rejected, then enforcement can proceed immediately.

According to the provision of article 724 paragraph 1 of the Code of Civil Procedure, a creditor holding an order for payment, may either ask for the registration of a future mortgage into the real estate of the debtor or impose a conservatory seizure against either the property of the Hospital or on any receivables the debtor has against a third party. The above measures may be enforced within 24 hours from the service of the payment order and are not suspended even if enforcement is suspended.

Having obtained a deed of enforcement (i.e. a positive court decision on a lawsuit or, if acceptable, an order of payment) against the Hospital, the creditor shall become entitled to enforce[40] against the Hospital's property to collect its claims, i.e. by attaching the attachable private property of the Hospital (as defined below), auctioning this property and satisfying its claim from the proceeds of this auction (as per the provisions of article 904 *et seq.* of GCCP). We have not encountered any litigation before the Greek courts, relating to cases where a Hospital's property has been attached and auctioned, as it seems that the Hospital pays the awarded amounts.

A creditor's right to enforce court orders against the Greek State and public law legal entities (such as the Hospitals), which was gradually acknowledged by the courts jurisprudence[41], was, as of April 2001,

[40] In order for such a court decision to become enforceable, according to article 904 of the GCCP, it shall have to be final and affirmative decision one, i.e. a decision which (a) orders the conduct of specific performance or the payment of money and (b) is no longer subject to any kind of judicial remedy or appeal. The judgment of the Administrative Court of Appeals is an enforceable decision. The order of payment is not a judgment but an act of the Judge "covering" the claim with an enforceable deed.

[41] The following decisions were rather pioneering to this end: a) Decision of the Plenary Session of the Court of Auditors (Ελεγκτικό Συνέδριο) dated the 25.5.1998, b) Supreme Court's decision no 21/2001 (in plenary session) and c) Supreme Court's decision no 17/2002 (in plenary session).

constitutionally ascertained following the amendment of the Constitution and the adoption of section c of paragraph 4, of article 94 thereof. Section c of paragraph 4 of article 94 of the Greek Constitution provides that *"court decisions are also executed against the State, … and the public law legal entities"*. Article 4 of executive law 3068/2002, which was adopted following the aforesaid amendment, provides that court decisions may be enforced only against the attachable private property of the State and of public law legal entities etc. The same article explicitly provides that claims deriving from a public law relationship, monetary claims and non-monetary claims that are related with the direct service/fulfilment of a special public purpose of a public entity – thus a Hospital- as well as assets that intend to directly serve special public purposes cannot be seized.

Following the recent legislative developments, jurisprudence and legal writing have elaborated quite a lot on the actual distinction of what belongs to either the attachable private property or the non-attachable public property of both the Greek State and of the public law legal entities. The wording of article 4 of Law 3068/2002 leaves room for interpretation as to the distinction between 'public' and 'private' property of the State as it allows an *ad hoc* interpretation. Given the actual prevailing position of legal writing on the matter as well as case law, it is seems that the approach is narrow, i.e. that the courts are quite reluctant to adopt an interpretation that would directly, partly or completely annul the substance of the creditor's right to enforce and collect its claims against the State, or public law legal entities, by disproportionately broadening the scope of their non-attachable public property and narrowing the contents of their attachable private property.

Enforcement proceedings would start by receiving, from the competent court, a certified copy of the court decision (article 918 of the GCCP) ratified as enforceable deed ("απόγραφο"). The creditor pays a duty[42] according to article 12 of the Code of Stamp Duties, estimated as a percentage of the claimed capital, plus interest accrued until that date. Having obtained the deed, the creditor must serve the relevant Hospital and the competent Minister of Health and Welfare with said certified

[42] The relevant duty amounts to 2,4% on the awarded amount and it is recovered through the execution and auction proceeds.

copy of the court decision (article 924 of GCCP). After sixty (60) days the creditor must serve the Hospital with a formal notice whereby the creditor shall invite the Hospital to pay the awarded amounts or enforcement procedures shall commence. If the Hospital takes no further action to pay the claim, the creditor shall be able to proceed with the enforcement of the court decision (article 927 of GCCP), by giving the bailiff an order for the seizure of property ("εντολή προς εκτέλεση").

The creditor, exercising its right pursuant to article 951 of GCCP, shall then be entitled to proceed with the attachment of the Hospital's *attachable private* property, up to a value equal to the awarded amount plus the recoverable Judicial Expenses and Enforcement Expenses. Assets belonging to the attachable private property of a Hospital may be found either directly in possession of the Hospital, such as donated real estate, pecuniary donations to the Hospital not directly intended to serve a special public purpose, vehicles used by the Hospital for the transportation of Board members, or in the possession of third parties[43], such as money deposited in the Hospital banks accounts[44], or pecuniary claims of the Hospital against its debtors (e.g. the Social Insurance Organizations such as OGA, IKA, TEBE, *etc.* [45]).

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[43] In case of seizure in the hands of third parties, article 982 paragraph 1 of the GCCP will be applicable. In order for money claims of Hospital against its debtors to be attachable, these should not relate with Hospital's specific obligation to counter perform (article 982 of GCCP).

[44] The possibility of attaching debtor's bank account to satisfy creditor's pecuniary claims is long recognized by case law. In this direction article 24 of the Law 2915/2001 provides that the creditor has the right to overcome the banking secrecy in order to have access to its debtor's bank account, always up to the due amount, See indicatively One-Member Court of First Instance of Trikala 738/2002 DEE 2002, p. 1006, One-Member Court of First Instance of Thessaloniki 367/2002 NoB 2002, p. 1893. Such case law, though, refers to non-public entities. There are conflicting opinions as to whether after deposit of public income of Hospitals – such as regular financing from the State's budget - which is not attachable in its source as being part of the public property, when deposited in the bank accounts of public entities, due to co-mingling of the amounts already exiting and the nature of a bank deposit itself will be characterized as private property of the public entity and thus attachable.

[45] Services relating to social insurance are provided by independent organizations under public law, and aim to protect the individuals of certain communities (formed on the basis of profession, enterprise, Region etc.) against risk, like the treatment of health problems and income at the stage of retirement. Social Insurance Organizations are, as

The attachment of the property is perfected when the notice of attachment has been served to the Hospital and the third party if the attachment is on third party claims. An auction of the aforesaid attached property shall follow in accordance with the provisions of article 959 et seq. of the GCCP or a collection of the amount seized in the case of third party claims attachment.

There is an argument, supported by a part of the Greek legal writing, that monies owed to the suppliers by the Hospitals, could potentially be collected through enforcing against the Social Insurance Organizations, which regularly owe money to the Hospitals against treatment and hospitalization of their insured members, through the procedure described above as an enforcement against third party. However, given the fact that no precedents exist we would like to express our reservations whether these claims (especially against IKA) can be seized. Such claims could respectively either be deemed as "public property" on the basis of an argument that they are paid in return to the public services provided by the hospital or they could be arguably considered as falling with in the scope of application of article 4 of law 3068/2002, that explicitly excludes from seizure claims deriving from a public law relationship, monetary claims and non-monetary claims that are related with the direct service/fulfilment of a special public purpose.

19. *Greek securitisation law*

(a) Definition of securitisation under Greek law

Securitisation is defined by article 10, paragraph 1 of the Securitisation Law (3156/2000), as a transfer of business claims by way of sale, by means of a written agreement between a party (the **"Transferor"** or

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a rule, Public law legal entities, which have legal personality and are financial and administratively independent. There are a number of public Social Insurance Organizations, the larger ones being IKA, OGA, TEBE and TSAY. The financing of Social Insurance Organizations is effected primarily by contributions made by the insured members of each organization, grants and transfers provided by the Greek State through subsidies made by the Ministry of Health and Welfare and the Ministry of Labour. Article 53 of the legislative decree 496 of 17/19.7.1974 on «Public Accounting of public legal entities» explicitly provides for both the right as well as the procedure to seize money claims in the hands of legal entities of the public sector as third parties

"**Originator**") and another party (the "**Transferee**") in combination with the issue and offer, by private placement only, of any kind of bonds, the repayment of which is funded by (a) the proceeds of the transferred business claims or (b) loans, credits or financial derivative agreements.

Under Greek law, as a bond qualifies any negotiable and transferable instrument, whose bearer/holder is considered as the beneficiary of the capital and interest.

According to the Securitisation Law the bonds can be offered in any and all jurisdictions. In particular as regards Greece, the term private placement is defined to mean the offer of bonds in Greece to a limited number of persons not exceeding 150.

The Transferor (or Originator) must be a commercial person resident or having a permanent establishment in Greece. The transferee must be an entity of Greek or other origin, established solely for the purpose of acquiring the business claims (Special Purpose Vehicle or "**SPV**") and must be the Issuer of the bonds to be repaid through collection of receivables.

(b) Securitised Receivables

The receivables transferred for securitisation purposes may be receivables against any third party, including receivables by consumers, existing or future, provided that the latter are defined or can be defined in any way. Furthermore, conditional receivables may be transferred. Any formative (*diaplastiko*)[46] or other right, even if not considered as ancillary in the meaning of the article 458 of the Civil Code, if related to the transferred receivables, may also be transferred along with the receivables. The sale of the transferred receivables is ruled by the provisions of articles 513 *et seq.* of the Civil Code, and the transfer thereof by the provisions of articles 455 *et seq.* of the Civil Code provided that these provisions do not conflict with the provisions of this law.

[46] A "*formative*" right is, in general terms, a right to terminate, amend or create unilaterally a legal relationship.

The sale and the transfer of receivables, including claims from services, consumable [47] and pharmaceutical [48] receivables of suppliers against public (and/or private) healthcare system and others "Receivables", does not alter the substantial, procedural and tax treatment of the transferred receivables and the relevant rights, as these were valid before the transfer according to the relevant applicable provisions. Any special privileges in favour of the transferor are retained in favour of the SPV. Among the special privileges mentioned above are those regarding enforcement and any possible reductions and exemptions from taxes and fees of any kind having effect according to the applicable provisions in favour of the transferor and concerning the enforcement of the transferred receivables and the exercise of every relevant right.

To this end, services, consumable and pharmaceutical receivables sold by a supplier as transferor to an SPV constitute claims arising in the course of the business of the transferor, constitute "business claims" notwithstanding that the underlying obligors are public law entities (hospitals or public security funds).

According to the Securitisation Law, all ancillary rights and securities (collateral of any kind) securing the transferred receivables are automatically transferred to the SPV upon perfection of the receivables sale and transfer agreement.

(c) <u>True Sale</u>

As already mentioned under item (b), condition for the transaction to be deemed as securitisation is the transfer or the securitised receivables

[47] The term "Consumable receivables" defined herein as the receivables relating to the supply of consumable equipment and products pursuant to a contract and which are subject to the tender procurement procedures provided for under the provisions of the Presidential Decrees 60/2007, 394/1996 and 118/2007 and are not pharmaceutical receivables.

[48] Pharmaceutical receivables is used in this memo to define a receivable relating to the supply of pharmaceutical goods, materials and products of mass production dedicated to medical use and distributed in the Greek market pursuant to Presidential Decree 194/1995 the price of which is confirmed, as of the date of the invoice's issuance, in the price list provided by the General Secretariat of Commerce (department of the Ministry of Development) pursuant to the provisions of the Law 96/1973 art. 17 as amended and in force or any other official price source provided by the competent authorities.

to constitute a **"true sale"**, namely the sale is ruled by the provisions of articles 513 *et seq.* of the Civil Code, and the transfer thereof by the provisions of articles 455 *et seq.* of the Civil Code.

Transfer of receivables by way of security (*katapistefsi)* is not permitted and any such condition is not valid. It is permitted to adjust or defer the consideration for the sale and to rescind the sale agreement according to the conditions of the relevant agreement and the provisions of articles 513 *et seq.* of the Civil Code, as well as to enter into a subsequent agreement for the re-purchase to the transferor of the receivables transferred already for the purposes of securitisation. The refinancing of an existing loan or the readjustment of its terms is not allowed to impair the rights of the existing note-holders neither to cause the bond loan's credit downgrading.

(d) Other formalities, restrictions and special provisions related to the affection of the transfer and the materialization of the sale and assignment of the securitized receivables under Greek Securitisation Law

The transfer agreement of the receivables to be securitized is registered, in summary which includes its major provisions, according to article 3 of law 2844/00 and overrides any agreements between transferor and third parties as to the non-assignability of receivables between them. The transfer of additional receivables to the issuer and their addition to those receivables already applied for the payment of receivables relating to securitisation is allowed, provided that the transfer does not cause the downgrading of the credit rating of the bond loan repaid by the receivables.

The transfer of the receivables to be securitised occurs at the time of the registration of the relevant agreement according to the preceding paragraph, unless otherwise provided in the agreement, and the transfer is notified in written form by the transferor or the SPV to the debtor. The notification must refer and specify the receivables being transferred.

As notification is considered the registration of the agreement with the public registry of article 3 of law 2844/00; no rights against third persons that arise from the transfer due to the sale are acquired before the notification. Payment to the SPV before the announcement releases

the debtor against the transferor and those acquiring rights from the application of the provisions of this article.

The procedure set by article 95 of law 2362/1995 as to the announcements that should occur in case those receivables against the State are assigned to third parties. Moreover as the wording provides for the general term (the State) it should be considered as including public law entities and should concurrently be applied with the provisions of article 53 of the p.d. 496/74 that refers to public law entities. These are special provisions in relation to the securitisation law and since there is no specific reference in the Securitisation law that the assignment perfection provisions overrides any provisions relating to assignment of public law, we would suggest to apply, as a matter of precaution the procedures set therein.

Pursuant to paragraph 3 of article 95 of law 2362/1995 the assignment to third parties of the receivables against Hellenic Republic has to be served accumulative to the following:

(a) to the Minister that is materially competent judging by the nature of the assigned receivables;

(b) to the competent office of the Internal Revenue Service (meaning the competent public office in charge to repay the receivables);

(c) to the competent public fiscal/financial audit authority;

(d) both to the competent offices of the internal revenue service of the assignor and the assignee.

The announcement is deemed as effective upon the service to the competent Minister. This service has to be the last one.

In case the debtors are public entities the provisions of Legislative Decree 496/1974 are applicable. In particular article 53 of said decree provides that assignment of claims against public law legal entities should be announced: (a) at the department, of the respective public law legal entity, responsible for effecting payments (b) at the department, of the respective public law legal entity, responsible for the acknowledgement of the relevant expense (c) the Court of Auditors and (d) the supervising ministry being the Minister of Health and Welfare.

As a result, given that Hospitals constitute public law legal entities of the Public Sector, an additional notification of the assignment of the claims should be effected combining the two previous provisions. A bailiff should therefore be instructed to give notice of the relevant assignment to the aforesaid departments.

The Hospital is not entitled to raise any objections concerning its obligation to satisfy the claims, based on facts that arose after the transfer of these claims. The Hospital may only invoke counterarguments based of laws and facts that have existed only before the sale of the claims and are relevant to the transaction concluded between the supplier and the Hospital (article 463 of GCC).

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KYRIAKIDES GEORGOPOULOS & DANIOLOS ISSAIAS

Law 130/99

Article 1: scope and definitions

1 This law shall apply to securitisation transactions involving assignment for consideration of existing or future monetary claims, where those claims are homogenous in the case of multiple claims, and where the following requirements are satisfied:

a) the assignee is a company of the type set out in article 3 below; and

b) the sums paid by the assigned debtor or debtors are applied by the assignee exclusively to satisfy rights attaching to securities issued by it or another company to finance the acquisition of such claims and the costs of the transaction.

2 In this law references to 'consolidated banking act' are to legislative decree 385 of 1 September 1993, as amended, which is a consolidating law in banking and credit matters.

Article 2: transaction programme

1 The securities referred to in article 1 above are financial instruments and are regulated by legislative decree 58 of 24 February 1998, which is a consolidating law in matters of financial brokerage.

2 The assignee company or, where different from the assignee company, the company issuing the securities shall prepare an information memorandum.

3 Where the securities subject to the securitisation transactions are placed with professional investors, the information memorandum shall contain the following information:

a) the assignor, the assignee company and a description of the transaction, both as regards the claims and the securities issued to finance the transaction;

b) the persons responsible for managing the issue and the placement of the securities;

c) the persons responsible for the recovery of the assigned claims and the cash flow and payment services;

d) the conditions upon which the assignee company may assign the purchased claims for the benefit of the holders of the securities;

e) the conditions upon which the assignee company may reinvest in other financial activities the amounts arising from the management of the assigned claims which are not immediately used to satisfy the obligations arising in connection with the securities;

f) any secondary finance transactions entered into in the context of the securitisation transaction;

g) the minimum essential content of the securities issued and details of the publication of the information memorandum which shall be adequate to make it easily available to holders of securities;

h) the costs of the transaction and the terms upon which the assignee company may deduct the same from sums paid to it by the assigned debtor or debtors, as well as details of the forecast in relation to the transaction and the identity of the person receiving the same; and

i) any shareholding relationship between the assignor and the assignee company.

4 Where the securities relating to the securitisation transactions are offered to persons other than professional investors, the transaction shall be subject to credit rating by qualified third parties.

5 The Italian securities authority (Consob) shall, by way of a regulation to be published in the official gazette of the Republic of Italy, set out the professional qualifications and the criteria to ensure the independence of the entities that carry out the credit rating as to the quality of the claim and the information concerning any relationship between them and the persons who, in their respective capacities, are party to the transaction, including where the credit rating is not required.

6 The services referred to above under paragraph 3(c) of this article shall be provided by banks or financial intermediaries which are recorded in a special register pursuant to article 107 of the consolidated banking act, who shall ensure that the transactions comply with the law and the information memorandum.

7 The information memorandum shall be delivered, upon request, to the holders of the securities.

Article 3: companies involved in securitisation transactions

1 The assignee company or, where different from the assignee company, the company issuing the securities, shall have as its sole corporate object the undertaking of one or more securitisation transactions.

2 The claims relating to each transaction shall constitute assets segregated for all purposes from the assets of the company and from assets relating to other transactions. No creditor other than the holders of the securities issued to finance the acquisition of the claims themselves shall be able to commence proceedings in relation to each asset pool.

3 With the exception of article 106(2) and article 106(3) (b) and (c), the provisions contained in title V of the consolidated banking act, together with the sanctions contained in title VIII of the consolidated banking act, shall apply to the assignee company and the issuer.

Article 4: conditions and enforceability of the assignment

1 The provisions contained in article 58(2), (3) and (4) of the consolidated banking act will apply to assignments of claims made pursuant to this law.

2 From the date of publication of the notice of the assignment in the official gazette of the Republic of Italy, proceedings may only be commenced in relation to the purchased claims and to amounts paid by the assigned debtors in order to protect the rights referred to above in article 1(1) (b). From such date, the assignment of the claims shall be enforceable against:

a) persons asserting rights against the assignor who have not satisfied the formalities required to ensure the effectiveness of their title as against third parties before that date; and

b) creditors of the assignor who have not secured the claim before the publication of the notice of assignment.

3 Article 67 of the royal decree 267 of 16 March 1942, as amended, shall not apply to payments made by the assigned debtors.

4 For the purposes of securitisation transactions governed by this law, the time limits of two years and one year contained in article 67 of royal decree 267 of 16 March 1942, as amended, are hereby reduced to six months and three months, respectively.

Article 5: securities issued in relation to the purchased claims

1 Articles 129 and 143 of the consolidated banking act shall apply to securities issued by the assignee company or by the company issuing the securities for the purposes of financing the acquisition of the claims.

2 Neither article 11(2) of the consolidated banking act, prohibiting the solicitation of public savings, nor quantitative limits to the raising of funds set by current law shall apply to the issue of the aforementioned securities. Articles 2410 to 2420 of the Italian civil code shall not apply either.

Article 6: taxation and accounting provisions

1 For income tax purposes, the same regime established for debentures issued by public limited companies whose shares are traded in regulated Italian markets as well as the regime established for similar securities, including the regime set out in legislative decree 239 of 1 April 1996, shall apply to the securities referred to in article 5.

2 The benefits set out in article 15 of presidential decree 601 of 29 September 1973 shall continue to apply to assignments concerning claims arising from the transactions indicated in articles 15, 16 and 19 of the same presidential decree.

3 Where they relate to securitisation contracts entered into within two years of the entry into force of this law, any depreciation in the value of the assigned assets, the security and guarantees given in favour of the assignee, and the assets (other than those assigned) used as collateral or security in the context of the securitisation transaction, as well as accounting provisions (accantonamenti) effected in connection with the security and guarantees given to the assignor, may be accounted for directly in the asset reserves; they shall be recorded in the profit and loss account in equal portions for each of the accounting periods in which they are first recorded and the following four accounting periods. References to securitisation transactions and any depreciations

and accounting provisions not yet made in the profit and loss statement must be made in the notes accompanying the financial statements.

4 In the case of events referred to in paragraph 3 above of this article, the depreciations in the assets referred to therein shall be taken into account in the assessment of the income for the accounting periods in which the same are recorded in the profit and loss statement.

5 In relation to lower revenues arising pursuant to this article, equal to L300m per year for every year from 1999 to 2005, a corresponding reduction in the accounting provision for the years 1999, 2000 and 2001 shall apply for the purpose of the triennial financial statement 1999-2001, within the 'special fund' of the Treasury budget for the financial year 1999, partially utilising for this purpose the accounting provisions made in relation to the same ministry.

6 Where necessary, the Treasury is authorised to make amendments to the budget by way of decree.

Article 7: other transactions

1 To the extent that they are not inconsistent, the provisions of this law shall apply to:

a) securitisation transactions effected by way of the granting of a loan to the assignor by the company issuing the notes in connection with the securitisation transaction; and

b) assignments of claims to investment funds relating to legislative decree 58 of 24 February 1998.

2 When transactions are effected by way of the granting of a loan, references to the 'assignor' and the 'assignee' shall be deemed to be references to the 'borrower' and the 'lender', respectively.

Article 7-bis: covered bonds (obbligazioni bancarie garantite)

1 Subject to provisions set out in paragraphs 2 and 3 of this article, the provisions of article 3(2) and (3), article 4 and article 6(2) apply to transactions regarding transfers of mortgage claims (crediti fondiari e ipotecari); claims vis-à-vis or guaranteed by public entities, which can also be identified in pools (in blocco); and notes issued in the context of securitisation transactions [by way of assignment] regarding claims of the same kind, effected by banks in favour of companies whose

exclusive purpose is the purchase of such claims and notes, funded by loans granted or secured also by the banks/transferors [of the above claims and title] and providing for guarantees for the bonds issued by those banks or different ones.

2 The claims and the notes purchased by the company referred to in paragraph 1 above and the amounts paid by the related debtors are reserved to satisfy the rights of the bondholders referred to in paragraph 1 (also pursuant to article 1180 of the Italian civil code), the counterparties to the derivative agreements for the hedging of the risk inherent to the transferred claims and notes and to the other ancillary agreements, and the payment of the other transaction costs, with priority in respect of the repayment of the loans referred to in paragraph 1.

3 The provisions set out in article 3(2) and article 4(2) apply for the benefit of the parties referred to in paragraph 2 of this article. For these purposes 'note holders' (*portatori dei titoli*) shall be understood to be a reference to the bondholders referred to in paragraph 1.

4 Articles 69 and 70 of royal decree 2440 of 18 November 1923 do not apply to the transfers referred to in paragraph 1. The entrusting or transfer of the functions referred to in article 2(3)(c) to entities other than the bank/transferor is notified by way of publication in the official gazette and, for public entities, also by registered letter with return receipt. Paragraph 3 of article 67 of royal decree 267 of 16 March 1942 as further amended applies to the loans granted to the companies referred to in paragraph 1 and the guarantees given by those same companies.

5 In a regulation adopted pursuant to law 400 of 23 August 1988 and after consulting the Bank of Italy, the minister of the economy and finance shall establish the rules implementing the provisions of this article, establishing in particular the maximum ratio between the bonds and the transferred assets, the type of such assets and of those (with equivalent risk profiles) which can be used for their successive integration, and the characteristics of the guarantee referred to in paragraph 1.

6 Rules implementing the provisions of this article shall be issued pursuant to article 53 of legislative decree 385 of 1 September 1993, as

further amended. Those rules shall also lay down the requirements for the issuing banks, the criteria that the banks adopt for evaluating the assigned claims and notes and the procedure for their integration, and the checks that the banks make in order to verify compliance with the obligations set out in this article, also through an auditing company appointed for this purpose.

7 Duties or taxes are levied as if the transactions set out in paragraph 1 are not made with the claims and notes which have been transferred as accounted for in the financial statements of the bank/transferor in the event that consideration for the transfers equal to the last registration amount in the financial statements of the claims and notes has been given, and the loan referred to in paragraph 1 has been granted or secured by the same bank.

Article 7-ter: applicable provisions

The provisions set out in article 7-bis(5) and (6) will apply to both the creation of dedicated assets (*patrimoni destinati*) related to the claims and notes described in article 7-bis(1) and the destination of the relevant proceeds, effected pursuant to article 2447-bis of the Italian civil code, in order to secure the rights of the holders of the bonds issued by the banks under article 7-bis.

This handbook offers an overview of the main characteristics of the so called "healthcare receivables" considered as potential assets for an investment opportunity, with particular regard to securitisation transactions, pursuant to Law No. 130 of 1999.

The study has been carried out by Patrizio Messina, in cooperation with Andrea Cicia, Alessia Frisina and Vanessa Solimeno, lawyers at Orrick Herrington & Sutcliffe. Special thanks for their precious contributions go to, respectively, CUATRECASAS, GONÇALVES PEREIRA, S.L.P. for the parts related to the Spanish and Portuguese legal systems, and to KYRIAKIDES GEORGOPOULOS & DANIOLOS ISSAIS LAW FIRM for the parts related to the Greek legal system.

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