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Securitisation

Portugal – Law and Practice

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2018

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Law and Practice

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Vieira de Almeida & Associados is an independent Portuguese law firm with 350 plus staff and a strong experience in various industries. Over the past 40 years, VdA has been involved in a significant number of pioneering securitisation transactions in Portugal and abroad, in some cases together with the most relevant international law firms, with whom it has a strong working relationship. the firm is recognized in the Portuguese landscape as a market leading and pioneering law firm. VdA has advised in most Portuguese securitizations, in many instances with the transaction counsel and drafting role, and engaged the most innovative deals, across a variety of asset classes, ranging from mortgage loans, consumer loans, leases and commercial loans and non-performing loans generally, to non-banking assets such as taxes and social security receivables, electricity receivables and future receivables in the aviation, infrastructure and telecommunications sectors.

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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

Under Decree-Law No 453/99, dated 5 November 1999, as amended from time to time (the Securitisation Law), there must always be a "true sale" (a non-recourse sale) of financial assets. Legally, this is construed as an assignment of receivables, whereby the assignee acquires full legal title over the receivables, not dependent on any condition or term, and whereby the assignor does not guarantee or accept any responsibility for the performance of the assigned receivables. These receivables may already exist (which is typically the case), but the Securitisation Law also allows the assignment of future receivables, provided they arise under existing or reasonably expected legal relationships and are in a determinable (known or estimated) amount.

To be eligible for a securitisation, the receivables must meet the following requirements:

- they must not be subject to legal or contractual assignment restrictions;
- they must have a monetary nature (cash receivables);
- they must not be subject to any conditions; and
- they must not be challenged in court, and must be free of any encumbrance or seizure.

As mentioned above, the assignment must be without recourse (or guarantee) to the originator or any group entity, and must not be subject to any conditions or terms.

Securitisation transactions have been conducted under the Securitisation Law for more than 17 years; before the Law's entry into force, they were conducted under the general Civil Code provisions, with no specific tax framework. It is not generally preferable to execute such transactions outside the legal securitisation framework (and respective tax regime, discussed below) so this analysis will focus only on securitisations carried out under the Securitisation Law, which corresponds to the established market practice.

As in other jurisdictions, a secured loan granted to a bank (or other entity) represents a liability of the bank (or other entity) as borrower. Accordingly, there is no detachment from the borrower's credit risk, subject to applicable credit enhancement achieved by the relevant security.

In a securitisation, there is a true sale of receivables from the bank and a detachment of such receivables from the bank's balance sheet. Accordingly, the assignee fully bears the credit risk of the underlying borrowers of such assigned receivables and, as such, there is no recourse to the originator/assignor, but there is a detachment from the assignor or originator's credit risk. The Securitisation Law awards specific protections to safeguard such detachment, including in case of assignor/originator insolvency.

The Securitisation Law provides specific protections vis-à-vis the general legal regime of insolvency, compared to both an ordinary assignment of receivables under the Portuguese Civil Code (enacted by Decree-Law No 47 344, dated 25 November 1966, as amended from time to time), and a secured loan, which can be exposed to general claw-back rights during the applicable hardening periods, foreseen in the Portuguese Insolvency Code (enacted by Decree-Law No 53/2004, dated 18 March 2004, as amended from time to time), in what concerns the transaction or the relevant security.

Upon an assignment of receivables made pursuant to the Securitisation Law, the relevant assigned receivables portfolio – which is no longer an asset of the originator – will not form part of the originator's insolvency estate, and the assignment is not generally subject to claw-back rights and hardening period provisions. Furthermore, any amounts held by the originator for any reason will not be part of its insolvency estate, but will rather belong to the assignee. The same applies to the entity performing the role of servicer of the assigned receivables (which may or may not be the originator, depending on the circumstances and regulatory approvals). The Securitisation Law clearly provides that, in an insolvency event, the amounts held by the servicer which pertain to the assigned receivables – ie, amounts relating to payments made under the assigned receivables – do not form part of the servicer's insolvency estate. The assignee fully bears the credit risk of the underlying borrowers of the assigned receivables, so there is no recourse to the originator, but rather a detachment from its credit risk.

The assignment of receivables for securitisation purposes may only be invalidated in case of fraud against creditors. This is subject to very demanding requirements, including fraudulent intent and bad faith on the part of both parties (assignor and assignee), which are extremely difficult to meet in the context of a market transaction that is carried out and executed with the approval and under the supervision of the regulatory authorities. Similarly, and in the absence of bad faith action by both parties, the transaction is also not subject to termination or revocation in the case of the insolvency of the originator (ie, there are no claw-back rights and no hardening periods in case of insolvency).

The Securitisation Law also provides specific protections with regard to the insolvency of the assignee (which is a regulated special purpose entity ("SPE") – see below), which would otherwise work to the detriment of the investors who have acquired the relevant asset-backed securities ("ABS").

Even though the SPE itself can be subject to insolvency (but bearing in mind that its limited corporate purpose and regulated nature make this highly unlikely to occur), in respect of rights and obligations within its general estate, such insolvency would not affect the relevant securitisation(s) undertaken by the SPE, and still outstanding, given that each securitisation corresponds to a segregated and autonomous pool of assets, comprised of the assigned receivables, and that each such pool of assets is only available to meet the liabilities arising from such securitisation transaction.

In fact, the pool of assets backing the relevant ABS issuance, including the relevant receivables portfolio, forms an autonomous pool of assets (segregated from other autonomous pools of assets pertaining to other securitisation transactions) that is only available to meet the liabilities due from the SPE (under Portuguese law, either a securitisation fund ("FTC") or a securitisation company ("STC")) to its security holders and other creditors (service-providers, swap counterparties, etc) in respect of that transaction only.

In the case of multi-transaction SPEs (which is the case for STCs), such parties are not entitled to claim payments from the SPE out of its general estate, nor to claim out of other autonomous and segregated pools of assets backing other securitisations. This means that each pool of assets is only available to meet the liabilities arising from the respective securitisation transaction and, moreover, that the liabilities of any given securitisation transaction can only be satisfied by its respective autonomous pool of assets. Additionally, there is a special creditor's privileged entitlement (the strongest possible form of security provided by law) protecting the interests and rights of payment of such parties in these situations, ie, securing the liabilities of the creditors of a given securitisation transaction.

Finally, it should be noted that the autonomous pool of assets is codified and granted an asset digit code by the competent regulator (the Portuguese Securities Market Commission – "CMVM"), which allows for the identification of such pool at any given time.

The insolvency analysis is a typical component of legal opinions issued in the context of securitisations, which details and analyses the above-discussed insolvency protections. This analysis should be (and normally is) carved out from the ordinary insolvency law qualification included in such legal opinions. Opinions normally also include a reference to searches undertaken in the relevant courts, and/or regulatory authorities' confirmation that at the time of assignment there were no insolvency proceedings pending against the originator in the relevant courts.

1.2 Special Purpose Entity

A regulated SPE is typically used, as noted above.

The Securitisation Law provides two possible SPEs, both under the supervision of the CMVM (*Comissão do Mercado de Valores Mobiliários*), which is the local securities market regulator.

Accordingly, the assignees (SPE) in a securitisation may be a securitisation fund ("FTC") or a securitisation company ("STC"). The creation of any such SPEs is subject to prior authorisation from the CMVM, and the securitisation (the transaction) itself is also subject to the CMVM's approval.

FTC

An FTC is an autonomous pool of assets without separate legal personality (ie, a unit-trust like form). For this reason, it is required to have a fund manager – ie, a securitisation funds management company (an SGFTC), which is authorised by the Bank of Portugal and jointly supervised by such regulator and the CMVM. It must also have a custodian (an authorised credit institution), which is mandated to hold its assets. Certain share capital and minimum own-funds requirements apply to both entities.

When a FTC structure is used, securitisation units are issued, which each represent a similar undivided ownership interest in the FTC. The legal rationale would be for these to be issued directly to investors. However, since the units are qualified as equity instruments, this would be detrimental for many investors (particularly for regulated investors, notably due to equity instruments consuming more regulatory capital than debt instruments). Accordingly, in the Portuguese market and in cases where these structures have been used in the past (some of which are still outstanding transactions), a double-SPE structure has been used. An orphan SPE would usually be set up in another jurisdiction (for tax reasons), normally Ireland, and would acquire all the units and then issue notes to investors backed by such units (and indirectly by all the FTC's assets). This type of structure also involved additional costs and normally entailed approval of the prospectus for offer of the Notes by a competent regulator outside Portugal.

For these reasons, since 2008, the Portuguese securitisation market has only seen transactions using the other type of SPE (the STC), which is considered in more detail below.

STC

STCs have the special and unique legal purpose of acquiring receivables and issuing notes (called securitisation notes), in the context of securitisation transactions carried out under the Securitisation Law. They are limited liability commercial companies, set up under Portuguese company law and legally framed under limited recourse principles set out in the Securitisation Law. They are supervised by the CMVM, which authorises their incorporation, undertakes a fit and proper assessment of their shareholders and corporate body members, and monitors their own funds requirements.

Besides a minimum share capital of EUR250,000, STCs must have additional own funds (typically ancillary capital contributions which count as equity of the STC) in order to ensure that their total own funds are no less than the following percentages of the net amount of the securitisation notes issued by them:

- 0.5% for up to EUR75 million of issued notes; and
- an additional 0.1% of the excess for any issued notes in excess of such amount.

Whenever a new securitisation is being entered into, the STC shall confirm in advance whether it will have sufficient own funds to cover the additional requirements stemming from the new transaction and new notes to be issued; if not, it must increase its own funds by the necessary amount.

STCs are multi-securitisation SPEs, operating on a silo-by-silo basis. Each securitisation transaction corresponds to a separate silo, without cross-contamination across silos. When entering into a transaction, the STC will acquire a receivables portfolio and fund it through the issuance of securitisation notes, normally tranched in two or more classes. Such receivables portfolio will be used to pay the liabilities under the issued securitisation notes, with such notes only being repaid by means of the cash flows generated by such receivables portfolio. Since these are notes, these asset-backed securities can be placed and held directly by the investors as debt instruments, without the need to employ a double structure, as is the case with the FTCs described above.

In light of the Securitisation Law, and notably the concept of autonomous estate exclusively allocated to the security holders and other creditors of the transaction assets of a given securitisation, any assets and liabilities pertaining to the securitisation will not be consolidated with the originator, the parent or an affiliate in case of the former's insolvency.

The insolvency analysis is a typical component of opinions issued in the context of securitisations. It normally includes a conflict of laws analysis, in order to determine that the SPE's insolvency will be governed by Portuguese law, and then details and analyses the above-discussed insolvency protections. This analysis should be (and normally is) carved out from the ordinary insolvency law qualification found at the end of opinions. Opinions normally also include a reference to searches undertaken in the relevant courts, confirming that there were no insolvency proceedings pending against the SPE at or around the time of assignment.

The key conclusions in opinions with regard to a possible insolvency of the SPE are as follows. The STC's activity may only be financed with equity or through the issuance of securitisation notes, as it is expressly forbidden for the STC to issue any other kind of debt securities or to otherwise borrow from other entities outside the securitisation transactions it conducts. However, STCs may enter into liquidity loans with third parties to secure liquidity for the purposes of the payment of interest on and principal in respect of the securitisation notes they issue. Accordingly, besides the noteholders and other series' creditors of each issue of securitisation notes, the only creditors the STC will have will be the general providers of corporate and other services required for the carrying out of the STC's activity, which are limited in type and number, and the tax authorities for amounts due for taxes. In respect of these, the noteholders and other series creditors of each issue of securitisation notes enjoy a privileged position, ie, a creditor's privilege over all the assets collateralising such issue, pursuant to Article 63.1 of the Securitisation Law.

In addition, the repayment of principal on the securitisation notes and the payments of the interest in respect of such notes are collateralised only by the credits and other assets allocated exclusively to them – ie, they are of limited recourse to the specific assets collateralising the relevant issuance of notes. This means that, in the case of an event of default in respect of the issuing of one series of securitisation notes, the relevant noteholders (or the common representative, if any, acting on their behalf) are not entitled to claim against the STC's own funds or the assets backing other issues of securitisation notes made by the STC.

Having regard to the above, the insolvency of the Issuer is a remote possibility which, considering the own-fund requirements established for the Issuer as an STC in the Securitisation Law and the system of legal rankings and preferences in terms of payments, should not prevent the noteholders from establishing their entitlement to the portfolio of assets comprising the corresponding receivables portfolio collateralising the issuance of the notes. Therefore, the risk of insolvency of this "autonomous estate" corresponds precisely to the risk of performance of the receivables portfolio itself that the noteholders and other transaction parties are admittedly acquiring.

1.3 Transfer of Financial Assets

The assignment of receivables between the assignor and the assignee (ie, the originator and the issuer) is effective upon execution of the assignment agreement, which is in line with general law. However, under the Securitisation Law, as a general rule (ie, covering most types of originators active in the market, including the State, the social security, credit institutions, financial companies, insurance companies and pension funds or pension funds management entities), the assignment is also effective towards the debtors (ie, the borrowers, who owe the receivables that have been assigned) upon execution of the receivables assignment (sale) agreement, whereas under general law the debtors would need to be notified in order for the assignment to become effective towards them.

This Securitisation Law framework endures even after the originator's insolvency, and the assignment can only be set aside under very exceptional circumstances of fraud and bad-faith action by the parties, as described in more detail above.

In many securitisations, the relevant receivables are secured. The relevant security can be of several types, depending on the deal in question and the underlying assets, with the most common being mortgages, pledges and personal guarantees. In an RMBS or CMBS deal, the security will be represented by mortgages over the relevant housing properties or commercial real estate, but in other deals there may be mortgages over other assets (such as cars, ships or aircrafts, seeing as these are subject to registration, as with real estate), pledges over shares, securities, bank accounts, or other forms of security. Security rights, and notably any mortgage or pledge, require perfection steps vis-à-vis third parties, even though the transfer of the security is fully effective between assignor and assignee. However, in most cases, the originator retains the servicing of the assets and the commercial relationship with the borrowers, and therefore the relevant security transfer is not registered immediately (also for cost-related reasons and reasons relating to the ongoing relationship between the originator and its clients, who do not know of the assignment).

The issuer holds the right to implement such registration but, due to the respective costs, the originator roles detailed above and the envisaged neutrality of the transaction towards the borrowers, the parties rely on the originator's good faith to avoid having to register immediately, accepting the risk of a bad-faith action by the originator, which could, in theory, assign the same receivables and security to unrelated third parties. In practice, that risk has thus far never materialised, having been accepted by rating agencies and discussed in legal opinions.

The exception to the above is non-performing loan (NPL) securitisations, where the originator normally does not retain – and is not willing to retain (also for full deconsolidation purposes) – the servicing of the assets upon the assignment (sale) agreement. In this case, borrowers are notified of the new creditor and respective payee bank account, and registration of the security assignment takes place after the closing date.

The above-mentioned exemption of not requiring borrower notification of the assignment does not apply to assignments of rights under secured loans that are not being securitised.

1.4 Construction of Bankruptcy Remote Transactions

A securitisation is the more typical way to detach a receivables assignment from the insolvency of the originator/transferor. If the assignment is done under general law, there may be exposure to general insolvency hardening periods and claw-back rights. This can include the retroactive termination of transactions that were not entered into on arm's-length terms or that were entered into in the year preceding the insolvency proceedings, or of security provided by the insolvent entity when it entered into the transaction, if this took place in the 60 days prior to the commencement of the insolvency proceedings.

2. Tax Law and Issues

2.1 Taxes and Tax Avoidance

Generally, the transfer of receivables generates potential exposure to corporate income tax ("CIT")/withholding tax ("WHT"), Stamp Duty and value added tax ("VAT"). However, provided that the transfer complies with the requirements set out in the Securitisation Law, under which transfers must occur exclusively from the originator to the SPEs, its tax treatment should be neutral from a CIT/WHT, Stamp Duty and VAT perspective, pursuant to the Securitisation Tax Law, as follows:

- no WHT applies to (i) payments made by the SPEs (purchasers) to the originator (seller) in respect of the purchase of the receivables, (ii) payments made by the obligors under the receivables, and (iii) the payment of collections by the servicer (who is usually also the originator) to the SPEs;
- no Stamp Duty applies to the transfer of receivables being securitised; and
- the transfer of receivables is VAT exempt under the Portuguese VAT Code.

Therefore, practitioners usually ensure that the transfer qualifies as a securitisation under the Securitisation Law.

2.2 Taxes on the SPEs

Interest income paid by the debtors should not be subject to WHT under the securitisation tax law, assuming that such SPEs are located in Portugal, pursuant to the requirements of the Securitisation Law.

SPEs are designed as pass-through vehicles, passing on the proceeds they receive under the receivables portfolio (and other transaction assets) to investors/transaction creditors. Thus, the taxable income arising for the issuer under a particular transaction will tend to be limited to the transaction fee it retains. In any case, this pass-through nature of the vehicle must be properly reflected in its respective accounts.

2.3 Taxes on Transfers Crossing Borders

When dealing with locally regulated SPEs, the nature or characteristics of the receivables and the location of the originator (seller) do not have any influence on the tax regime referred to above.

An important issue to consider is the WHT in respect of payments made under the securitisation notes. Payments of principal are not subject to any WHT. Interest payments are payments of income, which could generally be subject to WHT. Under both the securitisation tax law regime and the special debt securities tax regime, there are general exemptions for payments made to foreign investors, provided that certain requirements are met. The most important exemption applies to non-resident investors, where certain tax procedures are met through the custody chain, and provided that the noteholder (the ultimate beneficiary of the income) is not resident in a blacklisted (tax haven) jurisdiction with which Portugal has no double taxation treaty or exchange information in force. These requirements are normally described in the relevant prospectus.

2.4 Other Taxes

Pursuant to the securitisation tax law, no Stamp Duty or VAT is due on servicers' fees. In addition, no documentary taxes are due in Portugal.

When hedging instruments are entered into, typically in the form of swaps or cap agreements, and particularly where the hedging counterparty is a foreign bank (which is normally the case for rating purposes), it is prudent to detail certain tax form delivery obligations in the Schedule to the ISDA Master Agreement, in order to avoid WHT issues. In any case, it is advisable for the negotiation of the derivative documentation to also involve tax lawyers.

2.5 Obtaining Legal Opinion

The transaction legal opinion normally covers taxation matters, discussing some of the above issues, and also often addresses tax disclosure under the prospectus or offering memorandum.

3. Accounting Rules and Issues

3.1 Legal Issues with Securitisation Accounting Rules

Provided that the securitisation is a regulated securitisation, the accounting treatment will not affect the legal status of the assets or the rights of the SPE.

Under the Securitisation Law, any collections in the possession of the originator or the servicer that relate to receivables already assigned to the SPE will not form part of the insolvency estate of the originator or the servicer. In any case, in the event of the insolvency of the originator/servicer, the SPE may need to provide evidence (to the insolvency administrator) of its entitlement to such collections and receivables. This process is swifter if the collections are properly segregated in the originator/servicer's systems and accounts, which is usually the case.

3.2 Dealing with Legal Issues

Legal opinions do not cover accounting, but may include certain qualifications or assumptions related thereto, presented to sustain opinions or risk assessments.

4. Laws & Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

Investors' disclosure is not regulated by the Securitisation Law itself, nor specific to the Portuguese market context. Rather, it is governed by other statutes, in many cases with a European Union law source, and therefore the European framework is applicable.

The EU prospectus requirements are of a more general nature and will be addressed further on, but the following regulations should be highlighted.

Certain disclosures need to be made and documented, the absence of which prevents or makes it much more burdensome for regulated entities to invest in asset-backed securities. This is the case for the Capital Requirements Regulation ("CRR"; applicable, inter alia, to credit institutions), the Alternative Investment Fund Management Directive ("AIFMD") framework (applicable to alternative asset managers, including of hedge funds) and the Insolvency II Directive framework (applicable to insurance and reinsurance undertakings). This entails disclosure on exposure retention and ongoing information requirements.

The so-called CRA III RTS details requirements arising under the credit agency regulations and requiring the disclosure of certain information. This is not yet operative because it still requires a website to be set up by ESMA (European Securities Market Authority).

The material forms of disclosure are normally highlighted in the relevant prospectus or offering memorandum, including under the Risk Factors section.

The CRR, AIFMD framework and Insolvency II Directive framework requirements are typically supervised by the relevant banking, securities or insurance supervisor of the originator/investors. In Portugal, this would be the Bank of Portugal, the CMVM and the ASF (the Portuguese insurance authority).

In addition to the consequences resulting from a RWA/capital ratios perspective, disclosure violations may lead to regulatory action, including the application of fines.

During the years immediately following the 2007 and 2008 global financial crisis, there was no investor appetite for securitisations. Nevertheless, several transactions have been made in order for the ABS to be retained by originators, in a bid to generate collateral for liquidity transactions and be used as collateral in Eurosystem monetary operations. In more recent years, there has been an opening of the market and a re-emergence of public and private transactions. The Portuguese market has recently witnessed a stronger availability of NPL assets and therefore most of the current transactions have underlying NPL receivables. In November 2017 the first rated NPL securitisation was closed and more are expected to follow.

RMBS transactions typically have higher volumes, reaching billions of euros per transaction, but there have been no third-party placed transactions of this nature in the aftermath of the financial crisis. The market deals recently entered into relate to non-RMBS transactions (such as consumer or SME loans), normally reaching a few hundred million, but it is worth mentioning that the Portuguese market seems now to be opening again to RMBS transactions.

Legal opinions do not typically address disclosure compliance. What is often found is a confirmation that the legal and tax description of certain sections in the offering document is a fair summary of the laws in place.

Subsequently to the editing review of this article, on 28 December 2017, Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 was published, laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012. Such regulation will be applicable from 1 January 2019. The provisions of this regulation have not been taken into account herein.

4.2 General Disclosure Laws or Regulations

In the context of more general frameworks, the EU Prospectus Regulation (and its local implementation) should be highlighted when a prospectus is required (in particular, when the listing on regulated markets of more senior tranches is involved).

Note that a prospectus will only mandatorily apply to listings on regulated markets (ie, the primary trading venue of stock exchanges) or in cases where there is a public offer in place that is not exempt.

The securities issued are normally wholesale (ie, EUR100,000 minimum denomination), in which case there is a public offer exemption. However, there is no similar exemption for the listing of those securities on regulated markets, even if they are placed with sophisticated investors only.

In order to obtain ECB eligibility of the most senior notes (Class A) in accordance with the ECB Guidelines, these securities shall be listed on a regulated market.

The material forms of disclosure include a duly approved prospectus, unless the transaction is exempt (ie, no listing on a regulated market, or public offering). In this case (ie, private offerings, where there is no public visibility of the transaction through the means of a prospectus, normally available at the regulator or stock exchange's website, free of charge), certain transactions include an information memorandum, which may resemble a prospectus (but is not approved by a regulator), while others just rely on the contractual documentation, without the need for a fully fledged key information document.

Prospectuses are approved by a securities regulator. For Portuguese securitisations, this will normally be the CMVM, with listing on the Euronext Lisbon regulated market. It is also possible to request approval from another competent regulator in another EU Member State for listing on its market, such as the Central Bank of Ireland in Ireland, or the Commission de Surveillance du Secteur Financier in Luxembourg.

The listing jurisdiction will also determine the jurisdiction of the banking supervisor confirming ECB eligibility, if applicable.

Without a prospectus, it is not possible to list the relevant securitisation notes on a regulated market, which is normally a condition precedent in the subscription agreement. As such, a transaction requiring a prospectus will not close without a duly approved prospectus.

However, it is not the regulator but rather the issuer (and other named parties in the prospectus) who are liable for the information contained therein. Accordingly, in addition to civil liability, inaccurate or incomplete information in a prospectus may lead to the application of regulatory sanctions, including fines.

During the years immediately following the 2007 and 2008 global financial crisis, there was no investor appetite for securitisations. Nevertheless, several transactions have been made in order for the ABS to be retained by originators, in a bid to generate collateral for liquidity transactions and be used as collateral in Eurosystem monetary operations. In more recent years, there has been an opening of the market and a re-emergence of public and private transactions. The Portuguese market has recently witnessed a stronger availability of NPL assets and therefore most of the current transactions have underlying NPL receivables. In November 2017 the first rated NPL securitisation was closed and more are expected to follow.

A law firm is usually in charge of drafting the prospectus and liaising with the regulator. No Listing Agent is required in Portugal, unlike in other jurisdictions, such as Luxembourg or Ireland. It is commonplace for legal opinions to confirm that certain sections in the prospectus fairly summarise certain legal or tax laws, but no general opinion is provided with respect to the prospectus, given that this mainly depends on the accuracy of the factual (and not legal) information contained therein.

4.3 "Credit Risk Retention"

As is the case in other jurisdictions (the USA and others), the EU has credit risk retention obligations in place, which are framed to enhance the quality of the assets an originator securitises, from the outset. This applies from a regulated investors' perspective.

This is the case for the CRR (applicable, *inter alia*, to credit institutions), the AIFMD framework (applicable to alternative asset managers, including of hedge funds) and the Insolvency II Directive framework (applicable to insurance and reinsurance undertakings). This entails disclosure on exposure retention and ongoing information requirements.

Such investors are not allowed to invest in securitisations without such a retention obligation being ensured, or are heavily restricted from doing so. The retention obligation can be fulfilled in different ways, but the end result is the holding of no less than 5% of the risk position of the securitisation (ie, no less than 5% of a net economic interest in the securitisation). In most cases, the originator will hold 5% of the securities issued, starting from the more junior class, but it is also possible, for instance, to hold a similar position outside the securitisation (ie, an originator securitises 100 loans and commits to retaining five similar loans until the securitisation notes have been redeemed). The originator will be required not to hedge, sell or in any other way mitigate its credit risk in relation to such retained exposure.

The retention obligation (and the related disclosures) are described in the prospectus or other information memorandum, including in the Risk Factors section, and are then contractually undertaken by the originator and servicer, and by any other relevant parties (such as the transaction manager, who shall report this information in the periodical investor report), in the transaction agreements, notably the receivables sale agreement and the servicing agreement.

In addition to the consequences resulting from a RWA/capital ratios perspective, non-compliance may lead, inter alia, to fines.

The CRR, AIFMD and Insolvency II Directive requirements are typically supervised by the relevant banking, securities or insurance supervisor of the originator/investors. In Portugal, this would be the Bank of Portugal, the CMVM and the ASF (the insurance supervisor), respectively.

Foreign investors should look to the laws of their own jurisdiction to assess whether similar rules apply and whether it is possible to comply with those rules if the issuer or originator is subject to and complies with substantially similar rules.

4.4 Periodic Reporting

SPEs are regularly required to report information to the CMVM, including monthly information on the underlying receivables portfolio. Accordingly, the servicing agreements should contractually require the servicers to provide monthly servicing reports, in addition to the quarterly or semi-annual reports that serve as a basis for the investor report from the transaction manager, seeing as the interest payment dates do not tend to be monthly.

Where there is the intention of retaining ECB eligibility of the most senior class of notes, it is necessary to provide information on the portfolio periodically, stored in an accessible data warehouse.

More generally, the recent changes to the legal framework applicable to EU credit rating agencies will require the originator, sponsor or issuer to provide information periodically regarding rated structured financial instruments. However, this is dependent on ESMA (the EU securities regulator) setting up a website, which is not yet operative.

The CMVM, ECB and/or ESMA regulates such rules, as the case may be. Breaches or late compliance may lead to sanctions, including fines.

4.5 Activities of Rating Agencies (RA)

After the outbreak of the financial crisis, legislation was published at the EU level to regulate rating agencies, the first of which was Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies. This legislation applies to their activities in general, including their rating of securitisations.

The first Credit Rating Agency Regulation (CRA) was passed in 2009, and there have since been two substantial amendments. There is also the so-called CRA III framework, of which some provisions are still to be made operative, including regarding information disclosure, as discussed above.

Regulated investors may only rely on ratings issued by rating agencies registered with ESMA or endorsed by a rating agency registered with ESMA. The three big rating agencies all have registered entities in the EU, and there are a number of other registered agencies, including DBRS.

CRA III has introduced a requirement establishing that any issuer or related third party (such as sponsors and originators) that intends to solicit a credit rating of a structured finance instrument must appoint at least two credit rating agencies to provide independent ratings, and should also consider appointing at least one rating agency holding no more than a 10% total market share (a small credit rating agency), provided that a small CRA is capable of rating the relevant issuance or entity.

ESMA is ultimately in charge of registering and supervising rating agencies and their relevant rules, with any breaches possibly leading to sanctions, including fines. It should be noted that, if certain requirements are not complied with, this may also prevent or make it more burdensome for regulated investors to invest in securities not duly rated in accordance with the CRA.

4.6 Treatment of Securitisation in Financial Entities

Under the so-called CDR IV framework (Capital Requirements Directive IV, which includes the Capital Requirements Regulation or "CRR"), institutions are subject to the holding of regulatory capital against their risk-weighted assets ("RWAs"). In this context, the CRR specifically addresses securitisations (in addition to addressing them in other instances, such as the retention obligation discussed above). Similar concepts will be found under the AIFMD framework for other regulated entities, such as alternative asset managers, including of hedge funds, or under the Insolvency II Directive framework for insurance and reinsurance undertakings.

In respect of CRR in particular, the treatment of off-balance sheet securitised exposures assigned to the issuer (receivables), regarding the calculation of the originator's capital requirements, should be highlighted, as should the treatment of securitisation positions, regarding the calculation of the relevant owner's own funds, discussed in more detail below.

The originator institution of a traditional securitisation may exclude securitised exposures from the calculation of risk-weighted exposure amounts (RWAs) and expected loss amounts if either of the following conditions is fulfilled:

- significant credit risk associated with the securitised exposures is considered to have been transferred to third parties (Significant Risk Transfer – "SRT"); or
- the originator institution applies a 1,250% risk weight to all securitisation positions it holds in this securitisation, or deducts these securitisation positions from CET1 items.

A number of additional conditions also need to be met, aimed at ensuring the true sale and arm's-length nature of the securitisation.

Should the securitisation transaction fail to meet the relevant requirements, the originator shall include the off-balance sheet exposure in the calculation of its regulatory capital ratio. The exposure's weight in the RWAs will depend on a number of factors, including whether or not it is rated, and the respective rating.

The relevant rules are extensive and extremely detailed, and cannot be summarised in brief.

The own funds requirements to cover securitisation positions depend on the RWA calculation method used by the institution holding the securitisation instruments, notably if it uses the internal risk-based (IRB) approach or the standardised approach. In any case, where the instrument-holder is the originator of the securitisation position, it benefits from a cap limiting the calculated risk weight exposure amount to the amount that would be calculated for the securitised exposures had they not been securitised.

The CRD IV framework is, in essence, the implementation in the EU of the Basel III framework, even though the EU legislator has included certain adjustments as a result of political and technical discussions among the EU institutions. The same approach is expected to be taken in respect of the Basel 4 works.

In the context of the efforts put forward by the European Commission to foster the Capital Markets Union, there is also the intention to implement a revised simple, transparent and standardised securitisation framework in the EU, following the works developed by the Basel Committee on Banking Supervision, to be applied to certain EU regulated investors. One of these regulations (the "STS Regulation") also aims to create common foundation criteria for identifying "STS Securitisations". There are material differences between the legislative proposals and current requirements, including as regards the application approach under the retention requirements, and the entities that are eligible to retain the required interest.

The final agreement with respect to the STS Regulation was reached on 30 May 2017, but it is still not clear in what form and content all the relevant legislative proposals (and any corresponding technical standards) will be adopted. In addition, the compliance position under any adopted revised requirements of transactions entered into, and of activities undertaken by a party (including an investor), prior to adoption is uncertain.

On 26 October 2017, the European Parliament voted on and approved the new STS Regulation. The legislative process has still to be completed and the regulation published in the Official Journal of the EU. Additionally, a number of significant level II legislative measures will still need to be discussed and approved by the relevant EU authorities.

4.7 Use of Derivatives

Derivatives may be contracted for SPEs to hedge risks, notably currency and interest rate risk. It is also possible to enter into credit default swaps or other derivatives with a hedging purpose, on the side of the SPE.

The most typical hedging instruments are interest rate derivatives. Before the financial crisis, it was quite common to have an interest rate swap IRS in place for rated deals, in order to hedge the floating or fixed component of interest rates. Hedging was not used during the years when securitisations were generally retained deals. There is now a renewed increased use of derivatives, typically in the form of interest rate cap transactions.

The derivatives are contracted in the ISDA format, and SPEs do not normally place collateral, even though they may be receiving it from the swap counterparty, from inception or if certain rating triggers are met.

However, it should be noted that the EMIR EU derivatives regulation is currently under review by the European Commission as regards certain features, and that securitisation vehicles may become "financial counterparties", in which case they will also be required to post collateral, unless an exception applies.

The CMVM supervises the use of derivatives in Portugal by SPEs under the Securitisation Law and EMIR.

4.8 Specific Accounting Rules

The parties engaged in a securitisation shall account for the relevant transactions in accordance with the accounting rules applicable to them. These are not matters typically followed in detail by lawyers in charge of advising on the legal side of the transaction, or of drafting or reviewing the relevant documents.

4.9 Activities Avoided by SPEs or Other Securitisation Entities

Portuguese securitisations are conducted using regulated SPEs. However, regulatory issues often arise, stemming from other jurisdictions, notably the US, including whether or not the SPE can be considered an investment company under the Securities Act or a covered fund under the Volcker Rule. This depends on a US law analysis, but the answers have typically been negative. The analysis of the second matter is more complex, and issuers sometimes require a US legal opinion confirming that they fall outside the scope of a covered fund. Such matters are addressed in the prospectus and also in the relevant subscription agreement and/or master framework agreement.

4.10 Material Forms of Credit Enhancement

The same types of credit-enhancement forms are typically found in Portuguese securitisations as in other jurisdictions – more specifically, tranching of the notes, subordination of the claims of the different noteholders and transaction creditors in the payment waterfalls, various types of cash reserves held in a specified cash reserve account, over-collateralisation, and hedging instruments (more commonly IRS or interest rate cap agreements). Guarantees and letters of credit (which can only come from unrelated parties under the Securitisation Law) are not common and may trigger unintended tax consequences.

4.11 Participation of Government Sponsored Entities

So far, there are no Government-Sponsored Entities actively participating in the Portuguese securitisation market, even though there has been one significant transaction with tax and social security credits securitised by the Portuguese tax authorities and social security.

4.12 Entities Investing in Securitisation

Following the financial crisis, during which there was no real investor appetite (other than for private deals in the NPLs market), new transactions are now coming to the market. Placement is conducted by the relevant arranger lead manager or placement agent, so there is limited visibility of the actual investor base. In any case, investors can include institutional investors, family offices, private equities, funds and others. EU-regulated entities are subject to certain constraints, as noted above.

5. Documentation

5.1 Bankruptcy Remote Transfers

The receivables are assigned (sold) under a certain type of specific Receivables Sale Agreement (or a transfer document with a similar name and purpose). This agreement essentially mirrors the terms and structure found in other jurisdictions, including the identification of the assets, a package of representations and warranties on the relevant receivables portfolio and their origination, given as of the relevant collateral determination date (and sometimes repeated on the closing date).

5.2 Principal Warranties

Again, the warranties package is much in line with other jurisdictions, considering that the relevant concerns are essentially the same. In light of the Securitisation Law, the originator will represent and warrant that the legal requirements applicable to securitised receivables are met, that the receivables have been duly originated and serviced, that the relevant consumer and data protection laws (where applicable) have been respected, that there are no defaults at all or in excess of a given number of days (except for NPLs), and that the relevant security is in force and perfected, etc.

The typical remedy under Portuguese law for a breach of contract, including incorrect representations, is the indemnification of the other party, even if the contract does not expressly provide for this. In any case, indemnities are always provided for in receivables sale agreements. For breach of reps in respect of the receivables portfolio, the originator may also have to repurchase the relevant receivables and/or (as is more common) substitute them for other eligible receivables, as an alternative to indemnification.

5.3 Principal Perfection Provisions

The assignment of the receivables takes place once the parties have entered into the receivables sale agreement and all conditions precedent are met. A specific formality applies in cases where there is security subject to public registration (such as mortgages), as the parties' signatures shall be notarised or certified by a lawyer or the company secretary.

As discussed above, except in the NPLs market, the perfection of security vis-à-vis third parties is usually not conducted immediately by the issuer (in order to avoid costs in a context where the originator retains the servicing), even though it holds the right to do so. Thus far, there have been no performing securitisations where the issuer actually followed these steps.

5.4 Other Principal Matters
With respect to all of the above, and even though there are always particular specificities to be considered in light of local law, the contractual package and protections and remedies are much in line with international standards. Please note that the first securitisations in the Portuguese market were directly inspired by English law concepts and securitisation documentation, and that these have been the precedents for the transactions carried out to date.

6. Enforcement

6.1 Other Enforcements
Please note that securitisations carried out in Portugal have not led to court disputes between the transaction parties, and that transactions have been performed and managed under the pre-enforcement waterfall scenario only. This clearly indicates that the established documentation has successfully worked out any issues that may arise from time to time in a transaction but, on the other hand, there have been no actual transaction document enforcements before a court to discuss.

7. Roles and Responsibilities of the Parties

7.1 Sponsors
No parties have exclusively taken on the role of sponsor, which is normally split between the originator (for the retention obligation, for instance) and the relevant arranger lead manager.

7.2 Underwriters and Placement Agents
The roles are the same as those found in other jurisdicitons. Underwriters have typically been investment banks, but in more recent years other parties (eg, financial boutiques) have stepped into the market. Although these parties are not banks, they are typically regulated, they arrange the transaction, source investors and place the notes (but do not subscribe them, in the sense that the risk of lack of placement remains with the issuer/originator and not the placement agent).

7.3 Servicers
These are generally the same as those found in other jurisdictions. As regards performing assets, the servicers will normally be the originators but can be other entities, as provided for in the Securitisation Law, provided that the entity has obtained the approval of the CMVM. The mandated servicer is expected to act with a degree of diligence as a prudent lender of the specific type of assets, and the law expressly sets out that the servicer will carry out the role of practising all the acts necessary or adequate to the proper management of the assets and their respective guarantees, on behalf of the assigning entity, including collection services, administrative services and ensuring all relationships with the debtors. In the NPLs segment, and also for deconsolidation purposes, the servicers tend to be independent specialised third parties instead of the originator.

Subsequent to the editing review of this article, a project decree law on the activity of servicing companies is being discussed for approval in Portugal. The contents thereof are not taken into account herein.

7.4 Investors
Please refer to the above considerations regarding the market and the types of investors available.

7.5 Trustees
Portuguese law does not recognise the concept of a common law trustee, but it does have the concept of the bondholders' common representative, which performs a similar role of representing the interests of the noteholders. Even though the common representative legally enjoys less discretion and more limited powers than a trustee, in practice the difference is mitigated, given that trustees under English law usually tend to avoid taking material action without a noteholder direction.

The common representative's role is documented in the Terms & Conditions of the Notes and in a Common Representative Appointment Agreement, which follows the structure and contents applicable to trustees under English law, to the extent possible.

The role of common representative can be performed by, inter alia, credit institutions and entities specifically set up for the trustee business. In any case, it is advisable that trustees obtain Portuguese law advice on their role and responsibilities, particularly a trustee entering this business in Portugal for the first time.

According to Article 65 of the Securitisation Law and Article 359 of the Portuguese Commercial Companies Code, the Common Representative is generally entitled to perform all the necessary acts and operations in order to ensure the protection of the interests and rights of the Noteholders in the context of the issuance of the Notes, acting as a representative or "spokesman" of the Noteholders, and namely:

- to represent the Noteholders in respect of all matters arising from the issuance of the Notes and to exercise their legal or contractual entitlements on their behalf, on the terms set forth in the Documents;

- to enforce any decision taken by the Noteholders' meetings calling for the delivery of an Enforcement Notice declaring the Notes capable of being accelerated;
- to represent the Noteholders in any judicial proceedings, including in judicial proceedings against the Issuer and, in particular, in the context of any execution proceedings and insolvency proceedings commenced against the Issuer;
- to collect and examine all the relevant documentation in respect of the Issuer which is provided to the shareholder(s) of the Issuer; and
- to provide the Noteholders with all the relevant information of which it may become aware regarding the issuance of the Notes.

The rights of the Common Representative under the Documents will be enforceable in Portuguese courts by the Common Representative against the Purchaser, the Originator and the Servicer (in these latter two cases on the terms set forth in the Co-ordination Agreement), by virtue of the applicable legal regime and further to the provisions in this respect contained in the Documents, being the Common Representative entitled to enforce the Noteholders' rights thereunder acting on their behalf. On enforcement of any given right, Portuguese courts will require that the relevant entity provides enough evidence of its right to claim. The duties and obligations of the Common Representative under the Documents that are expressed to be governed by Portuguese law (including the Co-ordination Agreement) will be enforceable in Portuguese courts.

As a matter of Portuguese law, the Common Representative would also be entitled to give notice to CMVM of any event that could give rise to CMVM revoking the authorisation granted to the Issuer to operate as a credits securitisation company, without incurring any costs. However, as this matter is subject to the discretion of the regulators and may only be ascertained in specific contexts, no assurance can be given as to the position the CMVM would ultimately take in this respect.

As regards the appointment of a Common Representative of the Noteholders, it is important to stress that, in similar terms to those that have been provided for in the Italian context, the assets segregation principle and the legal creditor's privilege over the assets exclusively allocated to a given issue of securitisation notes, which are clearly established in the Securitisation Law, seem to dispense with the need for the function of a "security trustee" in connection with this transaction, with the Common Representative of the Noteholders acting rather like a "spokesman" or co-ordinator of the Noteholders in respect of certain matters, performing the type of role that is usually played by "trustees" in transactions designed under common-law jurisdictions. In the case of insolvency, infringement of contractual duties and obligations or any other default situation occurring in respect of the Common Representative, the retirement thereof and the corresponding appointment of a substitute common representative would happen simply following a decision by the Meeting of Noteholders, as provided for in Article 65.3 of the Securitisation Law.

According to Article 65.6 of the Securitisation Law, the isolated enforcement of the Noteholders' entitlements whenever in contradiction with the valid decisions taken at the Meeting of Noteholders may be restricted by the Documents.

8. Synthetic Securitisations

8.1 Synthetic Securitisation

Synthetic securitisation is generally permitted, but remains fairly uncommon. Such transactions are not defined as securitisations under the Securitisation Law, given that there are no receivables actually being assigned, but only a transfer of credit risk on a bilateral basis. However, they are provided for as securitisation transactions in the banking laws and regulations, which provide the framework thereof in terms of capital treatment. They serve the same type of purpose as a credit default swap, with the relevant assets remaining in the originator's balance sheet.

8.2 Engagement of Issuers/Originators

These transactions allow for the transfer of the credit risk of the underlying portfolio (even though there may then be exposure to the credit risk of the originator's counterparties in the synthetic securitisation), which is why there is still interest in this sort of transaction among originators.

8.3 Regulation

Given that the originators are credit institutions, they are supervised by the relevant banking supervisors (and if a prospectus is required, by the relevant securities regulator).

8.4 Principal Structures

As noted above, this sort of transaction is fairly limited in the Portuguese market and, as such, no substantiated trend can be identified. Interested parties may look into the structures commonly used in other jursdictions for guidance.

In any case, in light of the momentum of the Portuguese banking market, it is more likely for credit institutions to enter into balance sheet transactions (which have a similar purpose to a traditional securitisation, in order to manage credit risk in the loan book) than arbitrage synthetic securitisations, which serve a different purpose and are rather speculative.

8.5 Regulatory Capital Effect

The originator institution of a synthetic securitisation may calculate risk-weighted exposure amounts and, as relevant, expected loss amounts for the securitised exposures if either of the following conditions is fulfilled:

- significant credit risk associated with the securitised exposures is considered to have been transferred to third parties (Significant Risk Transfer – "SRT"), through either funded or unfunded credit protection; or
- the originator institution applies a 1,250% risk weight to all securitisation positions it holds in this securitisation, or deducts these securitisation positions from CET1 items. A number of additional conditions also need to be met, aimed at ensuring the arm's-length nature of the securitisation. Should all these requirements be met, the originator may benefit from the synthetic securitisation exposure calculation method provided in the CRR. The relevant rules are extensive and extremely detailed.

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9. Specific Asset Types

9.1 Common Financial Assets

In more recent years, the most common securitised performing assets among financial institutions have been mortgage loans (both retained and market deals), commercial mortgage loans (for private market deals), consumer loans (secure and unsecured, including auto loans), and SME loans. As regards non-financial institutions, electricity receivables (tariff deficits and alike) have been the most commonly securitised asset, along with highway toll receivables, tax and social security credits.

In the NPLs segment, the most significant have been secured loans from banks (in particular, non-performing mortgage loans), without prejudice to unsecure loan transactions. In fact, given that NPLs are still the most significant issue to be solved in the Portuguese financial system, this is a market segment which is expected to grow in volume and innovation, including with rated transactions being brought to the market. In November 2017 the first rated NPL securitisation was closed and more are expected to follow.

9.2 Common Structures

The applicable legal framework is the same irrespective of the asset class. The documentation package is essentially also the same, with the relevant adjustments dictated by type of assets.