Structured Finance & Securitisation

Contributing editor
Patrick D Dolan

2018

GETTING THE DEAL THROUGH

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CONTENTS

Preface

Structured Finance & Securitisation 2018

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Structured Finance & Securitisation*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Luxembourg, Spain and Turkey.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick D Dolan of Norton Rose Fulbright US LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
February 2018

Portugal

Paula Gomes Freire and Beatriz Pereira da Silva
VdA

General

1 What legislation governs securitisation in your jurisdiction? Has your jurisdiction enacted a specific securitisation law?

In the context of securitisation, a general legal framework applicable to securitisation transactions was approved by Decree-Law No. 453/99 of 5 November, as amended from time to time (the Securitisation Law).

The Securitisation Law has implemented a specific securitisation legal framework in Portugal, which contains a simplified process for the assignment of credits for securitisation purposes. In fact, the sale of credits for securitisation is effected by way of assignment of credits, such being the customary terminology, consisting in a true sale of receivables under the Securitisation Law as the purchaser is the new legal owner of the receivables. It corresponds to a perfected sale of receivables; although there are some specifics relating to exercise of means of defence and set-off rights against the securitisation vehicle, described below.

In particular, the Securitisation Law regulates, among other things:

- securitisation vehicles;
- receivables eligibility criteria;
- types of assignors;
- licensing, authorisation, and assignment requirements;
- notification of borrowers;
- servicing of the assigned credits; and
- segregation of assets and bankruptcy-remoteness.

Additionally, the Portuguese jurisdiction has several sets of rules governing the following subjects on securitisation transactions:

- the Securitisation Tax Law and general debt issuance tax legal framework, governing all tax matters on securitisation transactions (see question 29);
- offers and listing of securitisation bonds are governed by the Securities Code (approved by Decree-Law No. 486/99, as amended from time to time);
- specific regulation issued by the Portuguese Securities Commission (CMVM), which is the Portuguese markets and securities regulatory body in charge of supervising the securities market and, in particular, of securitisation transactions and relevant players, establishing rules on accounting and own funds requirements of securitisation vehicles; and
- specific regulation issued by the Bank of Portugal applicable to originators assigning credits or loans for securitisation purposes to securitisation vehicles under the Securitisation Law.

It is also important to highlight the recent publication of Regulation (EU) 2017/2402, which lays down a general framework for:

- securitisation;
- defines securitisation and establishes due-diligence requirements;
- risk retention and transparency requirements for parties involved;
- criteria for credit granting;
- requirements for selling securitisations to retail clients;
- a ban on re-securitisation;
- requirements for securitisation special purpose entities; and
- conditions and procedures for securitisation repositories.

It also creates a specific framework for simple, transparent and standardised securitisation. This new legal framework shall apply directly in all member states from 1 January 2019.

2 Does your jurisdiction define which types of transactions constitute securitisations?

Yes. An assignment of credits is deemed to be for securitisation purposes when the assignee is a securitisation vehicle (ie, a securitisation company (STC) or a securitisation fund (FTC)). This means that synthetic securitisations, as standard market transactions whereby a bank (originator) buys credit protection on a portfolio of loans from an investor by the execution of a derivative contract or hedging agreement, do not qualify as securitisation transactions under the Securitisation Law – even if these structures can be put in place in Portugal.

Consequently, the Securitisation Law regulates a simplified and tax-neutral process for securitisation transactions through a two-step approach:

- transfer of receivables to a securitisation vehicle; and
- subsequent issue of securities or units, subscribed for by one or more investors, using the proceeds to fund the purchase of the receivables.

Once transferred, the assigned portfolio is ring-fenced and fully allocated to the issue of the securities.

3 How large is the market for securitisations in your jurisdiction?

The securitisation market in Portugal has been very active in the past few years and securitisation transactions involving receivables originating from several industries have been successfully put together. The banking and finance industry has been, and still is, the most significant, originating both performing or non-performing loans, and secured or unsecured portfolios. Most securitisation transactions have used residential mortgages and corporate and small and medium-sized enterprise (SME) loans, and leasing receivables. Other asset classes have also often been securitised in the Portuguese market, namely tax and social security credits, regulatory credits arising from the tariff-deficit in the electricity sector, non-performing loans, highway toll receivables and future receivables.

Throughout the financial crisis, securitisation mechanics and features continued to be used as an important financing tool, allowing access to European Central Bank (ECB) liquidity lines by using eligible collateral such as rated asset-backed securities in the Eurosystem monetary policy transactions. This trend only really slowed due to the Bank of Portugal's programme, whereby loans could be directly posted with the Bank of Portugal as collateral against liquidity, even though the Eurosystem operations were still an open option.

In November 2017, a key milestone was achieved with the first securitisation in the national market of non-performing loans with ratings attributed to the issued notes.

Regulation

4 Which body has responsibility for the regulation of securitisation?

The CMVM regulates and supervises securitisations in Portugal (see www.cmvm.pt). The CMVM:

- analyses the relevant securitisation documents and regulatory requirements;
- analyses and signs off on the receivables pool of assets to be collateralised by way of the assignment for securitisation purposes;
- approves the assignment of receivables and incorporation of the securitisation fund (where an FTC is used as the securitisation vehicle), or the granting of an identification asset-code to the bulk of receivables in the asset securitised portfolio (where an STC is used as the securitisation vehicle); and
- approves the prospectuses for admission to trading of securitisation notes issued by STCs in Portugal.

Also, the Bank of Portugal, the Portuguese central bank, must be notified by the originators of the securitisation transactions being executed and approved by the CMVM (see www.bportugal.pt).

5 Must originators, servicers or issuers be licensed?

Securitisation vehicles (STCs and FTCs) as issuers of securitisation securities are subject to registration with the CMVM and subject to supervision of both the CMVM and the Bank of Portugal.

The Securitisation Law defines which entities may qualify as originators of receivables to be assigned for securitisation purposes, although no specific licence is required for this specific purpose. Under the Securitisation Law, the Portuguese state and other public legal persons, as well as credit institutions, financial companies, insurance firms, pension funds and pension fund management companies, are allowed to assign loans for securitisation purposes, as well as other legal persons that had their accounts legally certified by an auditor registered with the CMVM for the previous three years. In duly justified cases (such as an originator subject to foreign law), the CMVM may authorise the substitution of the account certification with an equivalent document, provided that the interests of the investors are protected.

As to servicing of the securitised assets, the mere purchase and management of a certain portfolio of receivables does not, in itself, qualify as a banking or financial activity – unless it is to be carried out on a professional and regular basis or includes any form of credit granting – and should therefore not give rise to the need for any kind of authorisation or licence being obtained.

Even when the assignor or seller of the securitised pool of assets remains in charge of the collection of receivables, as, in fact, it is foreseen in the Securitisation Law, for example, when the seller is a bank, credit institution or other financial company, no licence or authorisation is required for the seller to continue to enforce and collect receivables, including to appear before a court, assuming the debtors are not aware of the assignment. However, should the assignment of the receivables have been notified to the debtors, then the servicer will need to show good and sufficient title to appear in court (such as power of attorney) in the event its legitimacy is challenged by the relevant debtor. Only a qualified creditor has the relevant legitimacy to claim credit in court.

If another entity is chosen to perform the role of servicer, a third-party replacement servicer is appointed to replace the seller as the original servicer, or a back-up servicer needs to be put in place, the CMVM's prior approval to this effect is required under article 5 of the Securitisation Law.

6 What will the regulator consider before granting, refusing or withdrawing authorisation?

See question 4.

7 What sanctions can the regulator impose?

The Securitisation Law does not impose specific sanctions for the purposes of the breach of securitisation transactions requirements.

In fact, the CMVM may impose the general sanctions foreseen in the Portuguese Securities Code by acting as supervisor of the securities market and, in particular, within the context of securitisation, of securitisation vehicles (STCs and FTCs), for the breach of specific rules applicable to securitisation and financial intermediation activities, and market transparency.

8 What are the public disclosure requirements for issuance of a securitisation?

There are no specific public disclosure requirements for issuance of securitisation instruments. In fact, several elements need to be submitted to the CMVM for appreciation and analysis prior to the relevant securitisation transaction approval (in the case of FTCs) or granting of the asset-identification code to the asset pool (in the case of STCs) by the CMVM, such as the securitisation vehicle board approval, own funds statement or due diligence statement confirming asset eligibility for securitisation purposes in accordance with the requirements of the Securitisation Law. However, public disclosure requirements being applicable within the context of securitisation are those applicable to private or public offers, or the admission to trading of the relevant securitisation instruments being issued, to which the general rules of the Portuguese Securities Code (generically corresponding to the implementation of the Prospectus Directive (Directive 2003/71/EC), as amended and currently in force) are applicable.

In addition, other information is required to be disclosed by the relevant securitisation vehicles, namely annual and biannual financial accounts and information regarding securities admitted to trading. Alternatively, the general anti-money laundering requirements under Law No. 83/2017 of 18 August, such as, among others, the communication and the reporting requirements in relation to transactions deemed suspicious, may be applicable not only to securitisation vehicles but also in relation to several entities involved in securitisation transactions, such as paying agents and banks holding the relevant transaction accounts being credit institutions that fall within the scope of the definition of 'financial entities' and are therefore bound to comply with such requirements. This information, however, is not a specific requirement of the Securitisation Law and its disclosure corresponds to general disclosure obligations applicable to financial entities.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

See question 8.

Eligibility

10 Outside licensing considerations, are there any restrictions on which entities can be originators?

Yes. See question 5, in particular the second paragraph.

11 What types of receivables or other assets can be securitised?

Under article 4(1) of the Securitisation Law, only the assets or loans meeting the following requirements may be assigned for securitisation purposes:

- their transfer is not subject to legal or conventional restrictions;
- they must be of a pecuniary nature;
- they are not subject to any condition; and
- they are not subject to litigation, and are not given as a guarantee or judicially pledged or seized.

Altogether, these are the eligibility criteria under the Securitisation Law.

Under article 4(3) of the Securitisation Law, securitisation of future receivables is expressly allowed, provided they both:

- arise from existing relationships; and
- are quantifiable (the originator confirms the quantum of the future receivables).

For the purpose of assigning future receivables, the originator or assignor assigns to the SPV certain rights over future assets, equivalent to an amount exceeding the debt service due (over-collateralisation).

The originator or assignor of the receivables will then confirm that the future receivables generated during each collection period will be sufficient to cover the agreed debt service. For each interest period, the originator or assignor will transfer to the buyer an amount equivalent to 100 per cent of the debt service in respect of the interest period. Furthermore, if the originator or assignor is unable to originate

sufficient future receivables to meet their obligations for a given interest period, they will pay to the buyer an amount equal to the shortfall of future receivables, to ensure all the relevant debt service.

Subject to these limitations, continuous sales are possible under the Securitisation Law, subject to certain restrictions.

12 Are there any limitations on the classes of investors that can participate in an offering in a securitisation transaction?

There are no specific limitations on the classes of investors that can participate in a securitisation offer, the general rules on offering being applicable in this situation. However, we may say that professional and institutional investors usually have interest and invest in securitisation securities issued in Portugal under the Securitisation Law general framework, and offers of securitisation securities are not directed to retail investors in the Portuguese market.

13 Who may act as custodian, account bank and portfolio administrator or servicer for the securitised assets and the securities?

The entities that may act as custodian for the securitisation units or securitisation notes depend on the transaction structure and securitisation vehicle used in each relevant securitisation transaction (STC or FTC). In this respect, see question 15.

Under the Securitisation Law, there are no specific requirements applicable to the accounts bank of a given securitisation transaction, and any bank duly authorised, licensed and registered with the bank of Portugal may act as an accounts bank on behalf of the issuer, upon mandate agreement (usually the 'accounts agreement') executed between the issuer and the relevant bank on which the transaction amounts shall remain deposited. It is nevertheless common that the relevant transaction documents, namely the accounts agreement, foresee minimum rating requirements applicable to the accounts bank (and a replacement procedure upon the occurrence of a rating downgrade), as other securitisation transactions in place in the EU market.

As to servicing of the securitised assets (in the case both of STCs or FTCs), the mere purchase and management of a certain portfolio of receivables does not, in itself, qualify as a banking or financial activity – unless it is to be carried out on a professional and regular basis or includes any form of credit granting – and should therefore not give rise to the need for any kind of authorisation or licence being obtained.

Even when the assignor or seller of the securitised pool of assets remains in charge of the collection of receivables – as, in fact, it is foreseen in the Securitisation Law, for example, when the seller is a bank, credit institution or other financial company – no licence or authorisation is required for the seller to continue to enforce and collect receivables, including to appear before a court, assuming the debtors are not aware of the assignment. However, should the assignment of the receivables have been notified to the debtors, then the servicer will need to show good and sufficient title to appear in court, (such as power of attorney) in the event its legitimacy is challenged by the relevant debtor. Only a qualified creditor has the relevant legitimacy to claim credit in court.

If another entity is chosen to perform the role of servicer, a third-party replacement servicer is appointed to replace the seller as the original servicer, or a back-up servicer needs to be put in place. The CMVM's prior approval to this effect is required under article 5(4) of the Securitisation Law.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

As mentioned in question 5, the Portuguese state and other public legal persons are expressly included in the group of entities authorised to assign loans for securitisation purposes. The Securitisation Law also permits that, subject to the legal requirements applicable to tax credits securitisation, the Portuguese state and the Portuguese social security may assign loans for securitisation purposes even where they are conditional or subject to litigation; in which case, such public entities as the originator may not represent and warrant in the relevant assignment agreement that the assigned credits exist or are enforceable.

Transactional issues

15 Which forms can special purpose vehicles take in a securitisation transaction?

The Securitisation Law regulates two different types of securitisation vehicles for the Portuguese market:

- FTCs; and
- STCs.

FTC

An FTC is a separate portfolio of receivables with no separate legal personality. An undivided ownership interest in the FTC is held jointly by the holders (individuals or corporate) of securitisation units in the FTC, with no liability regarding losses of the FTC.

An FTC structure consists of:

- the fund itself (FTC);
- a management company or fund manager, which manages the FTC under the terms of its fund regulation; and
- a custodian, qualifying as a credit institution, holding the assets on behalf of the FTC.

The fund manager must:

- be a limited liability financial company;
- be an entity approved by the Bank of Portugal;
- have its registered office in Portugal;
- have a minimum share capital of €250,000, represented by nominative shares;
- be exclusively allocated to the management of one or more funds on behalf of the unit holders; and
- include in its name 'SGFTC'.

Fund managers are subject to specific capital requirements and must have own funds that are equal to, or higher than:

- if they have up to €75 million of assets under management: 0.5 per cent net value of all funds managed; and
- if they have over €75 million of assets under management: 0.1 per cent of the amount exceeding €75 million.

Fund managers can have a number of different FTCs under management. They are responsible for obtaining approval of the incorporation of each new FTC from the CMVM. The incorporation of a fund is deemed to occur on payment of the subscription price of the relevant securitisation units, upon the CMVM's approval being obtained.

Additionally, a servicer must be appointed under the fund regulation to collect and manage the portfolio assigned to the FTC.

STC

An STC must:

- be a public limited liability company;
- be an entity approved by the CMVM;
- have a minimum share capital of €250,000, represented by nominative shares;
- include in its name 'STC'; and
- engage exclusively in the carrying out of securitisations, by acquiring, managing and transferring receivables, and issuing securities to fund these acquisitions.

The incorporation of STCs is subject to an approval process with the CMVM and, although they do not qualify as financial companies, this process imposes compliance with a number of requirements that are similar to those arising under all relevant Banking Law requirements.

These requirements may be said to have an impact in terms of the shareholding structure of STCs to the extent that full disclosure of both direct and indirect ownership is required for the purposes of allowing the CMVM to assess the reliability and soundness of the relevant shareholding structure. The same applies in respect of the members of corporate bodies, namely directors, who must be persons whose reliability and availability must ensure the capacity to run the STC business in a sound and prudent manner.

The shares in STCs can be held by one or more shareholders, although ownership is subject to certain requirements. To establish an STC, prospective shareholders must obtain approval from the CMVM,

which will only be granted when it is shown that it is capable of providing sound and prudent management.

STCs are also subject to capital requirements and must have own funds that are equal to:

- when it issues securities up to €75 million: 0.5 per cent of the issued amount; and
- when it issues securities worth over €75 million: 0.1 per cent of the excess amount.

In terms of legal attributes and benefits, we believe it is fair to say that both vehicles are quite similar as they both allow for a full segregation of the relevant portfolios and their full dedication to the issued securities. While in a fund structure, this is achieved through the structure itself, as the assets of each fund are only available to meet the liabilities of such fund. In a company structure, certain relevant legal provisions establish a full segregation principle and a creditor's privileged entitlement over the assets that are so segregated, and that collateralise a certain issue of notes.

This segregation principle means that the receivables and other related assets and amounts existing at a given moment for the benefit of an STC, and that are related to a certain issuance of notes, constitute an autonomous and ring-fenced pool of assets, which is exclusively allocated to such issuance of notes. It is not, however, available to creditors of the STC, other than the noteholders and to the services providers existing specifically in the context of such issuance of notes until all the amounts due in respect of the notes have been repaid in full. To this effect, the assets integrated in each autonomous and ring-fenced pool of assets are listed and filed with the CMVM and subject to an asset identification code that is also granted by the CMVM.

In addition to the above, and in order to render this segregation principle effective, the noteholders and the other creditors relating to each series of securitisation notes issued by the STC are further entitled to a legal creditor's privilege (equivalent to a security interest) over all of the assets allocated to the relevant issuance of securitisation notes, including assets located outside Portugal. In fact, according to article 63 of the Securitisation Law, this legal special creditor's privilege exists in respect of all assets forming part of the portfolio allocated to each transaction related to an issuance of notes. This has effect over those assets existing at any given time for the benefit of the STC that are allocated to the relevant issuance of securitisation notes.

16 What is involved in forming the different types of SPVs in your jurisdiction?

The Securitisation Law establishes two types of securitisation vehicle that are subject to different forms of incorporation, but are similar in legal attributes and benefits as they both allow for a full segregation of the relevant portfolios and their full dedication to the issued securities.

While in a fund structure this is achieved through the structure itself, as the assets of each fund are only available to meet the liabilities of such fund (see question 15), in a company structure, certain relevant legal provisions establish a full segregation principle and a creditor's privileged entitlement over the assets that are so segregated and that collateralise a certain issue of notes. Also, costs, timing and transaction documents to put together a securitisation transaction under the Securitisation Law are very similar (see question 15).

The choice of using an FTC or an STC structure in a given securitisation transaction is essentially left to investors, who will be more familiar with the pool separation concept provided by a fund, rather than a legal creditor's privilege (see question 25). Therefore, historically, securitisations in Portugal used FTCs because of market perception and the indirect link to a foreign jurisdiction being more usual for securitisation purposes.

Initially, in securitisations transactions in the Portuguese market:

- the FTC acquired the assets and issued securities (securitisation units); and
- an SPV (generally in Ireland or Luxembourg) subscribed for the securitisation units and issued notes, which were purchased by the final investors.

This was essentially investor-driven, as it was felt that it would be difficult to place units with investors (as they are not pure debt instruments but quasi-capital instruments).

Since the first Portuguese securitisation with an STC in 2004 under which tax claims and social security claims' credits were assigned by the Portuguese state to Sagres, STC, SA, the STC has spread in the market and has been generally accepted by institutional investors. In recent years, securitisations have essentially adopted the STC, with a direct issuance out of Portugal where the assignment of loans are fully governed by Portuguese law and subject to full supervision of the CMVM.

17 Is it possible to stipulate which jurisdiction's law applies to the assignment of receivables to the SPV?

When an assignment of credits for securitisation purposes is executed under the Securitisation Law, the securitisation vehicle is incorporated in Portugal under the Securitisation Law and the legal requirements and licences are requested to the CMVM – namely the attribution of the asset-identification code, which enables the full segregation of the asset pool – such assignment of credits shall be governed by Portuguese law. However, there is nothing preventing the remaining transaction documents of a given securitisation transaction from being governed by other laws, and it is usual that, for instance, the accounts agreement of a given securitisation transaction is governed by the law of incorporation of the relevant bank being mandated by the issuer to perform the role of accounts' bank.

Portuguese law does not generally require that an assignment of receivables is governed by the same law that governs the assigned receivables. However, our experience (and that of the Portuguese authorities) is that assignment agreements for Portuguese-originated receivables have usually been governed by Portuguese law.

In any case, given article 14 of EC Regulation No. 593/2008 (the Rome I Regulation) and, when the Rome I Regulation does not apply, the risk that a Portuguese court would attempt to enforce a solution similar to that which is set out therein, the parties to an assignment of Portuguese-originated receivables for securitisation purposes should comply with the obligor notification procedures or exemption of notification procedures set out in the Securitisation Law.

18 May an SPV acquire new assets or transfer its assets after issuance of its securities? Under what conditions?

As to the purchase of new assets by the issuer of the securitisation securities, and without prejudice to what is above mentioned as to the assignment of future receivables (see question 11), continuous sales would be possible under the Securitisation Law provided they are in compliance with the eligibility criteria required under the Securitisation Law and the original receivables agreement does not foresee any restrictions on the assignment. However, sellers have rather opted to carry out securitisation transactions with revolving periods for assignment of additional receivables on a periodic basis, against payment out of collections and additional funding by issuance of further notes, rather than continuous sales.

Also, the Securitisation Law imposes a restriction on the transfer of securitisation transaction assets, whereby the issuer may only assign receivables to FTCs or STCs pursuant to article 45(1) of the Securitisation Law. The issuer may further assign securitised receivables in accordance with article 45(2) of the Securitisation Law in the following cases:

- non-compliance with the obligations arising from the securitised receivables;
- retransfer to the assignor and acquisition of new loans in replacement, if there are changes to the receivables features when renegotiating the respective conditions between the relevant borrower and the assignor;
- reassignment to the originator whenever there are latent defects on the securitised receivables; and
- when the transfer is envisaged to all receivables in the segregated pool of assets of an issuance of securitisation notes being subject to redemption, to the extent that the principal outstanding balance of the relevant receivables is equal to or less than 10 per cent of their initial principal outstanding balance, as of the date of the assignment for securitisation purposes.

The Securitisation Law further requires that the receivables assigned by the Portuguese state and the Portuguese social security for securitisation purposes may be transferred by the relevant securitisation vehicle to STCs and FTCs only, subject to the relevant assignor's prior consent.

19 What are the registration requirements for a securitisation?

See the answer to question 5 on registration of STCs and FTCs.

There are no specific formality requirements for an assignment of credits under the Securitisation Law. A written private agreement between the parties is sufficient for a valid assignment to occur (including an assignment of loans with underlying mortgages or other guarantees subject to registration under Portuguese law). Transfer by means of a notarial deed is not required. In the case of an assignment of mortgage loans, the signatures to the assignment contract must be certified by a notary public, lawyer or the company secretary of each party under the terms of the Securitisation Law, such certification being required for the registration of the assignment at the relevant Portuguese Real Estate Registry Office.

Additionally, the assignment of any security over real estate or of an asset subject to registration in Portugal is only effective against third parties acting in good faith further to registration of such assignment with the competent registry by, or on behalf of, the assignee. The assignee is entitled under the Securitisation Law to effect such registration.

As mentioned above, in order to perfect an assignment of mortgage loans and ancillary mortgage rights, which are capable of registration at a public registry against third parties, the assignment must be followed by the corresponding registration of the transfer of such mortgage loans and ancillary mortgage rights in the relevant Real Estate Registry Office.

The Portuguese real estate registration provisions allow for the registration of the assignment of any mortgage loan at any Portuguese Real Estate Registry Office, even if the said Portuguese Real Estate Registry Office is not the office where such mortgage loan is registered.

The registration of the transfer of the mortgage loans requires the payment of a fee for each such mortgage loan.

Concerning promissory notes, the usual practice is for these to be blank promissory notes in relation to which the originator has obtained from a borrower a completion pact that grants the originator the power to complete the promissory note. In order to perfect the assignment of such promissory notes to the assignee, the assignor will have to endorse and deliver these instruments to the assignee.

The assignment of marketable debt instruments is perfected by the update of the corresponding registration entries in the relevant securities accounts, in accordance with the Portuguese Securities Code.

20 Must obligors be informed of the securitisation? How is notification effected?

Article 6(1) of the Securitisation Law establishes a general rule pursuant to which the assignment of the receivables becomes effective towards the obligors upon notification of the sale of the receivables. However, a relevant exception applies under article 6(4) of the Securitisation Law: the assignment of receivables becomes immediately valid and effective between the parties and towards the obligors upon the execution of the relevant assignment agreement, irrespective of the obligor's consent, notification or awareness, when the assignor is, inter alia, a credit institution or a financial company.

Note that notification to the obligors is generally required, even in the case of article 6(4) of the Securitisation Law (as described above), when the servicer of the receivables is not the assignor of the receivables. Also, in the case the relevant receivables contract expressly requires the consent or notification of the obligors, then such consent or notice is required in order for the assignment to be effective against such obligors.

Under article 6(6) of the Securitisation Law, any set-off rights or other means of defence exercisable by the obligors against the assignee are crystallised or cut off on the relevant date the assignment becomes effective:

- regardless of notification when such notice is dispensed as above; or
- upon notification or awareness of the debtor when such is required.

Under the Securitisation Law, when applicable as per the procedure described above, notification to the debtor is required to be made by means of a registered letter (to be sent to the debtor's address included in the relevant receivables contract), and such notification will be deemed to have occurred on the third business day following the date of posting of the registered letter.

There is no applicable time limit to the delivery of notice to the obligors, taking into account in any case that, if no exception applies, the assignment shall only be effective towards the obligors upon delivery of the relevant notice. The notice can be delivered after commencement of any insolvency proceedings against the obligor or against the seller, and the contractual documents for securitisation transactions usually include provisions to allow the assignee to be able to notify all the obligors in the event the seller or assignor does not do so. From our past experience, we may say that the CMVM usually requires that the notice of assignment to the borrowers is delivered within a period of three business days as from the relevant assignment, although there is no formal deadline required under the Securitisation Law.

When required, notice of assignment of credits must be given to each obligor, even though notice may be given for future credits.

21 What confidentiality and data protection measures are required to protect obligors in a securitisation? Is waiver of confidentiality possible?

Law 67/98, as amended (the Data Protection Law) protects consumer obligors (not enterprises) regarding the processing and transfer of personal data. The processing of personal data, and the transfer or assignment of personal data, requires express consent from the data subject under the Data Protection Law.

Before processing, the entity collecting and processing the personal data must obtain prior authorisation from the Data Protection Authority (CNPD).

Transfer of personal data to an entity in an EU member state does not require authorisation by the CNPD, but must be notified to the relevant data subjects.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

The Securitisation Law does not contain any specific provisions governing the relationship between credit rating agencies and issuers of securitisation securities.

Although no specific provisions exist within the context of securitisation transactions, we may say that rating of securitisation issues in Portugal has been severely affected by the banking sector crisis and the economic instability of the past four years in that country; in particular, the financial adjustment programme outlined and controlled by the International Monetary Fund, the ECB and the EU, as well as recent developments in the Portuguese banking sector. The rating of securitisation issues in Portugal is still affected by related caps on Portugal's national debt.

However, the recent growth of the Portuguese economy has positively impacted the ratings of Portugal's national debt, which may impact rating's attribution to securitisation issues.

23 What are the chief duties of directors and officers of SPVs? Must they be independent of the originator and owner of the SPV?

See question 15 as to board, administration and independence of FTCs and STCs.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Although the Securitisation Law does not foresee specific requirements as to retention obligations for securitisation transactions, Portugal, as an EU member state, is subject to the Basel III framework, through Directive 2013/36/EU (CRD IV) and Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms (the Capital Requirements Regulation), and therefore the originator, sponsor or original lender have a retention obligation, on an ongoing basis, on the material net economic interest in the securitisation of not less than 5 per cent of the nominal amount of the securitised exposures.

Security

25 What types of collateral/security are typically granted to investors in a securitisation in your jurisdiction?

As the Securitisation Law establishes itself a ring-fenced structure, whereby the assigned pool of assets is effectively segregated from the estates of the originator, the issuer and the servicer (as well as of any other transaction parties), it is not usual in Portuguese securitisation transactions to grant security or collateral to investors in securitisation

securities. As mentioned above, while in a fund structure this segregation is achieved through the structure itself, as the assets of each fund are only available to meet the liabilities of such fund, in a company structure certain relevant legal provisions establish a full segregation principle and a creditor's privileged entitlement over the assets that are so segregated and that collateralise a certain issue of notes.

This segregation principle means that the receivables and other related assets and amounts existing at a given moment for the benefit of an STC, and which are related to a certain issuance of notes, constitute an autonomous and ring-fenced pool of assets that is exclusively allocated to such issuance of notes and that is not, therefore, available to creditors of the STC other than the noteholders, and to the service providers existing specifically in the context of such issuance of notes until all the amounts due in respect of the notes have been repaid in full. To this effect, the assets integrated in each pool are listed and filed with the CMVM and subject to an asset identification code that is also granted by the CMVM.

In addition to the above, and in order to render this segregation principle effective, the noteholders and the other creditors relating to each series of securitisation notes issued by the STC are further entitled to a legal creditor's privilege (equivalent to a security interest) over all of the assets allocated to the relevant issuance of securitisation notes, including assets located outside Portugal. In fact, according to article 63 of the Securitisation Law, this legal special creditor's privilege exists in respect of all assets forming part of the portfolio allocated to each transaction related to an issuance of notes and therefore has effect over those assets existing at any given moment in time for the benefit of the STC that are allocated to the relevant issuance of securitisation notes.

Also, the provisions of article 60 et seq of the Securitisation Law specifically provides for limited recourse provisions that are valid and binding on the noteholders. Insofar as limited recourse arrangements are concerned, we would furthermore take the view that they correspond to an application in a specific context (that of securitisation) of a possibility of having a contractual limitation on the assets that are liable for certain obligations or debts, which is provided for by Portuguese law on general terms (namely article 602 of the Portuguese Civil Code). Once they result from the quoted provisions of the law, limited recourse shall not be affected by the issuer's insolvency, however remote, such event may be in the context of the Portuguese securitisation vehicles.

Therefore, other than obtaining the relevant approval for incorporation of the fund or asset digit code approval from the CMVM confirming the applicability of the legal creditor's privilege in respect of a given portfolio of receivables pertaining to certain notes issued, no additional formalities are required in order to perfect such legal creditor's privilege, given that it is not subject to registration, in accordance with the Securitisation Law. Additionally, in some transactions, namely those using a securitisation fund, it is usual to create security over the foreign bank accounts of the vehicle, such as escrow accounts or pledge over accounts as being qualified as financial pledge under Decree-Law No. 105/2004 of 8 May 2004 (as amended), in line with the financial collateral arrangements directive. The important characteristic of such financial pledges is that the collateral taker may have the possibility to use and dispose of financial collateral provided as the owner of it.

26 How is the interest of investors in a securitisation in the underlying security perfected in your jurisdiction?

See question 25.

27 How do investors enforce their security interest?

See question 25.

28 Is commingling risk relating to collections an issue in your jurisdiction?

In accordance with the Securitisation Law, in the event of the servicer becoming insolvent, all the amounts that the servicer may then hold in respect of the loans assigned by the originator to the issuer will not form part of the servicer's insolvency estate, and the replacement of servicer provisions in the agreement for the servicing of the receivables executed between the issuer and the servicer shall then apply. Such procedure separating the relevant estates of the servicer and the securitisation vehicles are a natural consequence of the segregation principle provided in the Securitisation Law, as described in question 25.

Update and trends

Taking into consideration the current low interest rate environment in Europe and the reduced appetite for investment in the banking sector (due to legal uncertainty resulting from the application of EU bail-in tools), we believe that securitisation transactions will continue to be seen as a viable and attractive source of liquidity and funding. This applies both for companies (including banks), seeking to 'clean' their relevant balance sheets by assigning to a securitisation vehicle credit portfolios that they originated and for investors seeking to subscribe securities with attractive profitability and high yield with the benefit of the segregation and bankruptcyremoteness features of the Securitisation Law.

Finally, we would just add that we expect to see an increase throughout 2017 of securitisation transactions backed by non-performing loan portfolios (NPLs), bearing in mind the level of exposure to NPLs of the Portuguese and European banking systems.

Taxation

29 What are the primary tax considerations for originators in your jurisdiction?

The Securitisation Tax Law has established the tax regime applicable to the securitisation transactions carried out under the Securitisation Law. Its main goal was to ensure a tax-neutral treatment to the securitisation transactions set up by each one of the securitisation vehicles provided for in the Securitisation Law. Therefore, under articles 2(5) and 3(4) of the Securitisation Tax Law, there is no withholding tax on:

- the payments made by the purchaser (an STC and FTC) to the seller in respect of the purchase of the receivables;
- the payments by the obligors under the loans; and
- the payments of collections by the servicer (who usually is also the seller) to the purchaser.

The nature or the characteristics of the receivables and the location of the seller have no influence on the tax regime referred to above.

However, the purchaser must be an STC or FTC resident in Portugal for tax purposes in order to benefit from the special tax regime. There is no recharacterisation risk of the deferred purchase price as payments of collections are not subject to withholding tax.

Alternatively, under article 4(1) of Securitisation Tax Law, income generated by the holding (distributions) or transfer (capital gains) of the notes and units is generally subject to the Portuguese tax regime established for debt securities.

According to Circular No. 4/2014 issued by the Portuguese Tax Authorities and to the Order issued by the Secretary of State for Tax Affairs, dated 14 July 2014, in connection with tax ruling No. 7949/2014 disclosed by the tax authorities, the general tax regime on debt securities (as established in Decree-Law No. 193/2005, of 7 November, as amended) also applies on income generated by the holding or the transfer of securitisation notes issued by STCs under securitisation transactions.

Decree-Law No. 193/2005, as amended, is therefore applicable to securitisation notes, notably regarding the requirements on registration of securitisation notes in the relevant clearing systems and on the exemption applicable to income obtained by non-resident holders of such securitisation notes. In this regard, payment of interest and principal on securitisation notes are exempt from Portuguese income tax, including withholding tax, provided the relevant noteholder qualifies as a non-Portuguese resident having no permanent establishment in Portugal. Such exemption does not apply to non-resident individuals or companies if the individual's or company's country of residence is any jurisdiction listed as a tax haven in Ministerial Order No. 150/2004, of 13 February 2004 (as amended from time to time) and with which Portugal does not have in force a double tax treaty or a tax information exchange agreement provided the requirements and procedures for evidencing the non-residence status are complied with. To qualify for the exemption, noteholders will be required to provide the direct registry entity with adequate evidence of non-residence status prior to the relevant interest payment date, according to procedures required under Decree-Law No. 193/2005.

No specific tax accounting requirements need to be complied with by the seller under the securitisation tax regime. However, CMVM

Regulation No. 1/2002, of 5 February 2002, sets forth the specific accountancy regime for FTCs, and CMVM Regulation No. 12/2002, of 18 July 2002, establishes specific accountancy rules for STCs (although the accounting procedure of this type of corporate entity follows the general Portuguese Accountancy Standards).

Pursuant to the Securitisation Tax Regime, no stamp duty is due on the sale of receivables being securitised or the fees and commissions that fall under article 5 (ie, referring to required acts to ensure good management of the receivables and, if applicable, of the respective guarantees, and to ensure collection services, the administrative services relating to the receivables, all relations with the debtors and also maintaining, modifying and extinguishing acts related to guarantees, if any), and under article 24 (ie, as to any of the described attributions of the depositary), both of the Securitisation Law, that may be charged by the servicer to the purchaser. In addition, no documentary taxes are due in Portugal.

The sale of receivables is VAT-exempt under article 9(27)(a) and (c) of the Portuguese VAT Code, which are in line with article 135(a) and (c) of the VAT Directive (EC Directive 2006/112/EC). Pursuant to the Securitisation Tax Regime, no value added tax is due on the administration or management of securitisation funds and also on the fees and commissions regarding management services falling under article 5 and transactions undertaken by depositary entities pursuant to article 24 of the Securitisation Law, as described above.

Considering the above, it is important to highlight that the purchase of the receivables is qualified as a true sale transaction under the Securitisation Law; the purchaser being the legal owner of the receivables and therefore the purchaser is subject to tax in Portugal (namely in respect of income arising from the receivables). However, despite being viewed as an ordinary taxpayer, in order to ensure a tax-neutral treatment on the securitisation transactions, the taxable income of the purchaser tends to be equivalent to zero for tax purposes since the income payments made to the noteholders are tax-deductible (STCs are not subject to the Portuguese interest barrier rule).

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

See question 29.

31 What are the primary tax considerations for investors?

See question 29.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

In Portugal, as mentioned above, full portfolio separation and insolvency remoteness is established under the Securitisation Law. This is partly achieved by FTCs and STCs being exclusively engaged in carrying out securitisations.

Generally, every receivable allocated to the SPV is locked into an autonomous ring-fenced pool of receivables. The receivables are exclusively allocated to the relevant issue of units or securities, and only available to holders of the units or securities, until all amounts due are fully repaid. Recourse is limited to the pool of receivables. The securities' holders cannot claim against the SPV's own funds or, in an STC, assets backing other securities issued by the STC. The pool of receivables is listed and filed with the CMVM, which grants an asset identification code to the pool.

In addition, the securities' holders and other creditors of each series of securities issued by an STC have a special creditor's privilege over the pool of receivables (granted by article 63 of the Securitisation Law). Therefore, the risk of insolvency of the pool of receivables can be said to correspond to the risk in the underlying assets.

Similarly, an FTC is only required to pay amounts to the extent it receives the corresponding cash flow as part of collection on the pool of receivables (under article 32(4) of the Securitisation Law). The FTC's recourse is limited to the receivables in the pool. Therefore, from a practical perspective, creditors cannot initiate insolvency proceedings against the FTC.

The FTC is also independent from the fund manager (see question 11), and is not consolidated with the fund manager if the fund manager becomes bankrupt. The FTC's assets are not available to the fund manager's creditors.

The application of the Securitisation Law by the courts and government or regulatory authorities is limited to a few cases. These relate to the effectiveness of the assignment of banking receivables against obligors. No specific decision regarding insolvency remoteness of an SPV has yet been issued by the courts or a governmental or regulatory authority.

33 What factors would a court in your jurisdiction consider in making a determination of true sale of the underlying assets to the SPV (eg, absence of recourse for credit losses, arm's length)?

We would say the court would consider the legal requirements and structure (ie, true sale of receivables effective upon assignment between the seller and the issuer and segregation procedure), arm's-length and good faith of negotiations.

34 What are the factors that a bankruptcy court would consider in deciding to consolidate the assets and liabilities of the originator and the SPV in your jurisdiction?

Apart from legal requirements and structure (ie, true sale of receivables effective on assignment between the seller and the issuer and segregation procedure), we believe that the court would carefully take into consideration the relevant pool of assets as segregated and identified in the assignment agreement, as well as the monies described in the relevant transaction reports and evidenced to be included in the transaction accounts.

We draw attention to the fact that no specific decision regarding insolvency remoteness of a securitisation vehicle has yet been issued by the courts or a governmental or regulatory authority.

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