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BANKING & FINANCE

SECURITISATION LEGAL FRAMEWORK

Law no. 69/2019, of 28 August (“**Law**”), was published yesterday in the Official Gazette of the Portuguese Republic. The Law provides for the execution in the Portuguese jurisdiction, of Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 (“**Regulation**”), which lays down a general framework for securitisation and creates a specific framework for simple, transparent and standardised securitisation (“**STS Securitisation**”).

The Law amends Decree-Law no. 453/99, of 5 November (“**Securitisation Legal Framework**”), as well as the Portuguese Securities Code.

Among the modifications introduced by the Law to the Securitisation Legal Framework, the following should be highlighted:

- I. **Definition of Securitisation** – Transaction or scheme whereby the credit risk associated with an exposure or a pool of exposures is tranching, having all of the following characteristics:
 - a) Payments with respect to the transaction or scheme are dependent upon the performance of the exposure or of the pool of exposures;
 - b) The subordination of the tranches determines the distribution of losses during the ongoing life of the transaction or scheme; and
 - c) The transaction or scheme does not create exposures with all characteristics listed in Article 147(8) of Regulation (EU) No. 575/2013.
- II. **Securitisation Types**
 - a) **Traditional securitisation** – involves the transfer, by way of assignment of credits, of the economic interest in the securitised exposures through the transfer of ownership of those exposures or through sub-participations, where the issued securities do not represent payment obligations of the originator;
 - b) **Synthetic securitisation** – involves the transfer of risk through the exchange of financial flows, rights and obligations or risks, associated with a pool of exposures, by way of credit derivatives or guarantees and without the transfer of such exposures;
 - c) **STS securitisation** – comprises securitisations which fulfil the requirements set forth in Articles:
 1. 20, 21 and 22 of the Regulation, concerning securitisations which are not asset-backed commercial paper securitisations,
 2. 24 of the Regulation, concerning stand-alone asset-backed commercial paper securitisations; and
 3. 25 and 26 of the Regulation, concerning asset-backed commercial paper securitisations issued within a programme.

- d) **Non-STS securitisation** – comprises the transfer of risks and assignment of exposures, overdue or not, in relation to which the following requirements are cumulatively verified:
- i. The transfer of the exposures is not subject to legal or contractual restrictions;
 - ii. The exposures convey stable, quantifiable or predictable monetary flows, namely based on statistical models;
 - iii. The existence and enforceability of the exposures is warranted by the assignor; and
 - iv. The exposures are not litigious and are not pledged as security or judicially attached or seized.
- III. **Transferability of Underlying Exposures** – The Law contains two new provisions regulating the circumstances under which *Sociedades de Titularização de Créditos* (“STCs”) may transfer underlying exposures. As such:
- a) Concerning underlying exposures which are deemed performing, these may now be transferred by STCs to credit institutions and financial companies authorised to underwrite loans on a professional basis (new no. 1 of Article 45 of the Securitisation Legal Framework).
 - b) Regarding underlying exposures deemed to be non performing, the new no. 2 of Article 45 of the Securitisation Legal Framework confirms these may be transferred to any type of entity (and not just the entities referred to in no. 1 of the same Article).
- IV. **Real Estate Holding** – According to the new no. 6 of Article 45 of the Securitisation Legal Framework, it is legally enshrined that STCs may acquire and hold real estate assets for the benefit of their ring fenced silos (*patrimónios autónomos*), where those are acquired in the context of a lieu in payment (*dação em pagamento*) or in the context of the enforcement of security (*garantias reais*) granted in connection with its assets, provided that the real estate assets are sold within two years from the date on which they were included in the aforementioned silos, such deadline being able to be extended in accordance with the terms and conditions to be set by the Portuguese Securities Market Commission (“CMVM”).
- V. **Early Redemption** – STCs are now permitted, under the new no. 2 of Article 61 of the Securitisation Legal Framework, to redeem, in whole or in part, the securitised bonds/notes, provided that the equal treatment of bond/noteholders of the same class is ensured, a possibility already granted to the SGFTC prior to the Law amendments.
- VI. **Sanctions** – The Law establishes a sanctions framework for the violation of provisions applicable to securitisation by adding Articles 66-D to 66-H to the Securitisation Legal Framework. Fines may be imposed in addition to ancillary sanctions, among which the perpetrator’s temporary interdiction from performing its activity should be highlighted. Specific sanctions are provided for the wrongful qualification of a securitisation as a STS Securitisation.
- VII. **Supervision** – The Law also provides for a redistribution of supervision competences among the Bank of Portugal, the CMVM and the Insurance and Pension Fund Supervision Authority.

The Law enters into force on 29 August 2019, but securitisations dated prior to its entry into force remain subject to the previous framework.

VdA is available to provide any further clarifications on the Law.