Structured Finance & Securitisation 2020

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Getting The Deal Through

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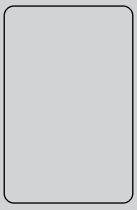

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Structured Finance & Securitisation*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 Greece and Ireland.

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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.

Lexology 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.

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For further information please contact editorial@gettingthedealthrough.com

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Portugal

Paula Gomes Freire, Benedita Aires and Maria Carolina Centeno

VdA

GENERAL FRAMEWORK

Legislation

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 1999, as amended from time to time, notably by Law No. 69/2019 of 28 August 2019 and Decree-Law No. 144/2019 of 23 September 2019 (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;
- 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 entry into force of Regulation (EU) 2017/2402 (the Securitisation Regulation), 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 (STS) securitisation. This new legal framework became directly applicable, in all member states, to securitisations the securities of which are issued on or after 1 January 2019.

Applicable transactions

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

Yes. The Securitisation Law defines securitisation by reference to article 2(1) of the Securitisation Regulation. It includes:

- traditional securitisation – an assignment of credits where the assignee is a securitisation vehicle (ie, a securitisation company (STC) or a securitisation fund (FTC));
- synthetic securitisation – a securitisation 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;
- STS securitisation – credit assignments that meet the criteria set out in articles 20 or 24 of the Securitisation Regulation; and
- non-STS securitisation – risk transfers and credit assignments that meet the requirements in Article 4 of the Securitisation Law.

The Securitisation Law regulates a simplified and tax-neutral process for securitisation transactions, which, other than synthetic securitisations, follow 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.

Market climate

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.

Key milestones were achieved with the first two securitisations in the national market of non-performing loans with ratings attributed to the issued notes, the first in 2017 and the second in 2018. Up to this date, securitisations of non-performing loans continue to be arranged.

REGULATION

Regulatory authorities

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, without prejudice to the disclosure requirements set out in article 7 of the Securitisation Regulation, the Bank of Portugal (the Portuguese central bank) and, where applicable, the European Central Bank, with respect to certain entities, must be notified by the originators of the securitisation transactions being executed and approved by the CMVM (see www.bportugal.pt).

Licensing and authorisation requirements

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 the CMVM.

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 entities referred to in article 2(3) of the Securitisation Regulation and the Portuguese state and other public legal persons, credit institutions, financial companies, insurance firms, pension funds and pension fund managers are allowed to assign loans for securitisation purposes.

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.

When the assignor or seller of the securitised pool of assets remains in charge of the collection of receivables, as is foreseen in the Securitisation Law, for example, when a sponsor (as defined in the Securitisation Law) intervenes in the securitisation and the seller is a credit institution, financial company, insurance firm, pension fund or pension fund manager, 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 in accordance with article 5 of the Securitisation Law, 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.

Sanctions

7 | What sanctions can the regulator impose?

The Securitisation Law imposes a specific sanctions framework for the breach of securitisation transactions requirements. Ancillary sanctions include temporary prohibitions on performance of activities. Specific sanctions are provided for the inappropriate labelling of a securitisation as an STS securitisation.

Public disclosure requirements

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

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. Although the Securitisation Law does not foresee specific requirements, disclosure obligations for securitisation transactions are directly applicable via European regulations. As such, the entering into force of the Securitisation Regulation, applicable to securitisations the securities of which are issued on or after 1 January 2019, sets out a new set of disclosure requirements under its article 7 commonly applicable across EU member states. Also, 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.

Moreover, general anti-money laundering requirements under Law No. 83/2017 of 18 August 2017, such as, among others, communication and 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

Originators

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

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

Receivables

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

For STS securitisations, articles 20, 21, and 22 of the Securitisation Regulation set out which receivables or other assets may be securitised. In broad terms, these should respect the principles of simplicity, standardisation and transparency.

For non-STS securitisations, article 4(1) of the Securitisation Law determines that only credits meeting the following requirements may be assigned for securitisation purposes:

- their transfer is not subject to legal or conventional restrictions;
- they convey stable, quantifiable or predictable monetary flows, based on statistical models;
- their existence and enforceability is guaranteed by the originator; 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
- their amounts are known or quantifiable.

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.

Investors

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 an interest and invest in securitisation securities issued in Portugal under the Securitisation Law general framework. Offers of securitisation securities are not directed to retail investors in the Portuguese market.

Custodians/servicers

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

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.

When the assignor or seller of the securitised pool of assets remains in charge of the collection of receivables – as is foreseen in the Securitisation Law, for example, when a sponsor (as defined in the Securitisation Law) intervenes in the securitisation and the seller is a credit institution, financial company, insurance firm, pension fund or pension fund manager, 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 in accordance with article 5 of the Securitisation Law, 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.

Public-sector involvement

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

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

SPV forms

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.

The fund manager must:

- be a limited liability financial company;
- be an entity approved by the CMVM;
- have its registered office in Portugal;
- have their share capital fully represented by book-entry, nominative shares;
- have a minimum initial capital of €125,000;
- be exclusively allocated to the management of one or more funds on behalf of the unit holders; and
- include in its name 'Sociedade Gestora de Fundos de Titularização de Créditos' or 'SGFTC'.

Fund managers are subject to specific capital requirements and must meet the minimum levels of own funds, which article 19 of the Securitisation Law prescribes by reference to article 71.º-M of Law No. 16/2015 of 24 February 2015.

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 their share capital fully represented by book-entry, nominative shares;
- have a minimum initial capital (capital inicial mínimo) of €125,000;
- include in its name 'Sociedade de Titularização de Créditos' or 'STC'; and
- engage exclusively in the carrying out of securitisations, namely 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 they meet the Securitisation Law's 'fit and proper' requirements (which have been recently updated); namely that they are capable of providing sound and prudent management.

STCs are also subject to capital requirements and must meet the minimum levels of own funds, which article 43 the Securitisation Law prescribes by reference to article 71.º-M of Law No. 16/2015 of 24 February 2015.

In terms of legal attributes and benefits, 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 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.

SPV formation process

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 which 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, 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.

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. 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.

Governing law

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 be 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.

Asset acquisition and transfer

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 mentioned above as to the assignment of future receivables, 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, other STCs, credit institutions and financial companies authorised to grant credit pursuant to article 45(1) of the Securitisation Law. The issuer may further assign securitised receivables in accordance with article 45(2) and 45(3) of the Securitisation Law in the following cases:

- the securitised receivables correspond to non-performing loans;
- 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; or
  - under the terms of the Securitisation Regulation;
- reassignment to the originator whenever there are latent defects on the securitised receivables.

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.

Registration

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 the mortgage loan is registered.

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

Obligor notification

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 between the parties:

- 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 may be given by means of a registered letter. Such notification will be deemed to have occurred:

- on the third business day following the date of posting of the registered letter; or
- in relation to debtors who have given their prior consent via email with notification of receipt to the email address in the relevant receivables contract.

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. The CMVM usually requires that the notice of assignment to the borrowers be 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?

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (the General Data Protection Regulation, GDPR) and Law No. 58/2019 of 8 August 2019 (Data Protection Act) supplementing the GDPR provide for the protection of natural persons with regard to the controlling or processing of personal data and on the free movement of such data.

Pursuant to the GDPR, any controlling or processing of personal data requires express consent from the data subject, unless the controlling or processing is necessary in certain specific circumstances as provided under the relevant laws. Transfer of personal data to an entity within an EU member state must be notified to the relevant data subjects and, depending on the intended terms and purposes, must be authorised by said data subjects.

Credit rating agencies

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 a rating's attribution to securitisation issues.

Directors' and officers' duties

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 the board, administration and independence of FTCs and STCs.

Risk exposure

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 European rules and regulations and, in particular, with the entering into force of the Securitisation Regulation, to the risk retention rules laid down in its article 6.

In itself, the originator, sponsor or original lender of a securitisation shall retain on an ongoing basis a material net economic interest in the securitisation of not less than 5 per cent – interest being measured at the origination and determined by the notional value for off-balance-sheet

items. Where the originator, sponsor or original lender have not agreed between them who will retain the material net economic interest, the originator shall retain the material net economic interest. Multiple applications of the retention requirements for any given securitisation are not allowed and neither the material net economic interest may be split among different types of retainers (nor, likewise, subject to credit-risk mitigation or hedging).

SECURITY

Types

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 provide 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.

Perfection

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

See question 25.

Enforcement

27 | How do investors enforce their security interest?

See question 25.

Commingling risk

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. The procedure separating the relevant estates of the servicer and the securitisation vehicles is a natural consequence of the segregation principle provided in the Securitisation Law.

TAXATION

Originators

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

Decree-Law No. 219/2001 of 4 August 2001, as amended by Law No. 109-B/2001 of 27 December 2001, Decree-Law No. 303/2003 of 5 December 2003, Law No. 107-B/2003 of 31 December 2003 and Law No. 53-A/2006 of 29 December 2006 (the Securitisation Tax Law), establishes the tax regime applicable to the securitisation transactions carried out under the Securitisation Law. Its main goal was to ensure a tax-neutral treatment of 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 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.

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 2005, 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 is 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).

Issuers

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.

Investors

31 | What are the primary tax considerations for investors?

See question 29.

BANKRUPTCY

Bankruptcy remoteness

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.

True sale

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)?

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.

Consolidation of assets and liabilities

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.

No specific decision regarding insolvency remoteness of a securitisation vehicle has yet been issued by the courts or a governmental or regulatory authority.

UPDATE AND TRENDS

Key developments of the past year

35 Are there any rules governing securitisations pending in your jurisdiction or reforms under way, such as prohibitions on financial firms betting against the securities they package, improved disclosure and oversight of the asset-backed securities market, rules limiting bank compensation structures that incentivise risk, etc?

Refer to the legislation and regulations referred to above that have recently been enacted.

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