Securitisation Comparative Guide

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Securitisation Comparative Guide

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1.Legal and regulatory framework

1. 1. Which laws typically govern securitisations in your jurisdiction?

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Decree-Law No. 453/99 of 5 November 1999, as amended from time to time, most recently in 7 July 2020 ("**Securitisation Law**"), is the general legal framework applicable to securitisation transactions carried out under Portuguese 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 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 matters in securitisation transactions:

- Decree-Law No. 219/2001 of 4 August 2001, as amended from time to time ("**Securitisation Tax Law**"), and general debt issuance tax legal framework, governing all tax matters in securitisation transactions;
- the Portuguese Securities Code (approved by Decree-Law No. 486/99, as amended from time to time), governing offers and listing of securitisation notes;
- specific regulation issued by the Portuguese Securities Market Commission ("**CMVM**") – the Portuguese markets and securities regulatory body in charge of supervising the securities market and, in particular, 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 Regulation (EU) 2017/2402 ("**Securitisation Regulation**"), which lays down a general framework for securitisation and is also applicable in our jurisdiction.

Finally, securitisation transactions can also be established under the Portuguese Civil Code (as was the case before the Securitisation Law came into force in 1999) but such transactions shall not be able to benefit from the specific rules set forth under the Securitisation Law.

1. 2. Which bodies are responsible for regulating securitisations in your jurisdiction? What powers do they have?

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The CMVM regulates and supervises securitisations in Portugal. In this regard, the CMVM:

- approves the incorporation of securitisation vehicles;
- supervises and monitors the activity of securitisation vehicles;
- 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 a securitisation fund 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 a securitisation company is used as the securitisation vehicle); and
- approves the prospectuses for admission to trading of securitisation notes issued by securitisation companies in Portugal.

The Bank of Portugal (the Portuguese central bank) and, where applicable, the European Central Bank, with respect to certain entities, must be notified by certain originators of the securitisation transactions being executed and approved by the CMVM.

1. 3. What is the regulators' general approach in regulating securitisations?

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The CMVM acknowledges that securitisation is an important element of well-functioning financial markets. It can improve efficiencies in the financial system and provide additional investment opportunities, while also creating a bridge between credit institutions and capital markets with indirect benefits for businesses and citizens.

Nevertheless, the regulator also recognises the risks of increased interconnectedness and excessive leverage that securitisation raises.

In Portugal, the implementation of securitisation transactions is subject to prior rigorous legality checks by the CMVM, which must be carried out before the issue of the securities. The CMVM also carries out ongoing supervision of SPVs, including periodic reporting by the SPV to the CMVM, in order to ensure compliance with all legal and regulatory requirements.

Overall, the Portuguese regulator's approach in regulating securitisations is mainly aimed at promoting an efficient securitisation market without compromising the transparency and safety of securitisation transactions.

1. 4. What role, if any, does the central bank play in the securitisation market in your jurisdiction?

Portugal
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As referred to in our answer to question 1.2, the entity responsible for the regulation and supervision of securitisations in Portugal is the CMVM.

However, the Bank of Portugal (the Portuguese central bank) and, where applicable, the European Central Bank, with respect to certain entities, must be notified by certain originators of the securitisation transactions being executed and approved by the CMVM.

2.Market and motivations

2. 1. How sophisticated is the securitisation market in your jurisdiction and how has it evolved thus far?

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The securitisation market in Portugal has been very active over the years, with securitisation transactions backed by receivables originating from several industries having been successfully put together. The banking and finance industry has been, and still is, the most significant industry, originating both performing and non-performing loans, and secured or unsecured portfolios.

The majority of securitisation transactions have used residential mortgages, 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, future receivables, tv broadcasting rights receivables, advertising rights and sponsorship rights 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 slowed down 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.

Up to this date, and even with the COVID-19 pandemic situation and the war in Europe, securitisation transactions have continued to thrive.

2. 2. In which industry sectors, if any, is securitisation most common in your jurisdiction? What major securitisations have been effected thus far?

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

In the NPL segment, the most significant assets have been secured loans from banks (in particular, non-performing mortgage loans). In fact, given that NPLs are still the most significant issue to be solved in the Portuguese financial system, this market segment is expected to grow in volume and innovation, including with rated transactions being brought to the market. In 2017 and 2018, key milestones were achieved with the first two securitisations in the national market of non-performing loans with ratings attributed to the issued notes.

Finally, as the sustainable finance trend progresses swiftly, sustainable securitisation is expected to become a trend, noting that the first Iberian green RMBS was originated and issued out of Portugal in 2020.

For more information on the major securitisations effected thus far, please refer to our answer to question 11.1.

2. 3. What are the benefits of securitisation, for both originators and investors?

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For originators, we would highlight the following benefits:

- Provides efficient access to capital markets;
- Minimises issuer-specific limitations on the ability to raise capital;
- Converts illiquid assets into cash: assets that are not readily sellable may be combined to create a diversified collateral pool funded by notes issued by a securitisation vehicle;
- Diversifies and targets funding sources, investor base and transaction structures;
- Raises capital to generate additional assets or apply to other more valuable uses;
- Raises capital without prospectus-type disclosure;
- Generates earnings;
- Transfers risk to third parties; and
- Lower capital requirements for banks and insurance companies.

As for investors, securitisation provides new opportunities to diversify their portfolios, with a special emphasis on institutional investors, given the sophistication of this financing technique.

The subscription of securitised notes has benefits in terms of the redemption and default risk involved and the attractiveness of the investment increases to the extent that its return tends to be relatively higher than the risk of the assumed credit default.

Also, securitised instruments cater to the needs of both conservative (which lean towards safer investments, with lower but more stable returns) and less risk-averse investors, since they provide a wide variety of product choices, offer interesting yield premiums over securities of comparable ratings and maturities (such as AAA sovereign or corporate bonds), and can be tailored in a manner that responds to specific, and sometimes unique, investor needs.

Finally, investors in securitisations are exposed to credit risk without effectively holding the underlying assets. Instead, investors hold securities, which from a legal standpoint are more easily traded in financial markets than the underlying assets.

2. 4. What are the risks of securitisation, for both originators and investors?

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We would highlight the following risks of securitisation for both originators and investors:

- Credit risk: Credit risk is a critical element in the analysis of securitisation transactions. Shortfalls in pool collections, primarily on account of defaults by the underlying pool borrowers, may lead to the underperformance of the securitisation and have a negative impact on the payments owed to investors.
- Counterparty risk: Several counterparties are involved in a securitisation transaction and their steady performance is crucial for the smooth functioning of the transaction; the performance of the servicer is probably the most important to consider in this context.
- Market risks: These are risks extraneous to the transaction and include market-related factors with an impact on the performance of the transaction. For instance, a change in interest rates could impact the prepayment rates for assets.
- Interest rate risks: Whenever the loans in the pool are based on a floating rate while investor payouts are based on a fixed rate, or vice versa, there is the risk of an interest rate mismatch that can lead to a situation where the pool cash inflow, even at 100% collection efficiency, is not sufficient to make investor payouts.
- Macroeconomic risks: The performance of the borrowers of the underlying loan agreements is dependent on macroeconomic factors, such as industry downturns or adverse price movements of the underlying assets.
- Legal risks: The key legal issue in any securitisation transaction is ascertaining whether the transfer of receivables constitutes a true sale, whereby the originator cannot retain any control or claim over receivables that could override the claims of investors. A true sale makes the securitised assets' bankruptcy remote from the originator. This means that the bankruptcy of the originator will not impact investors' claim on the cash flow of the securitised pool. The assessment of the legal risk entails a detailed study of the relevant transaction-related legal documents and is usually covered by a legal opinion which typically opines that: (i) the transfer of the assets is not in contravention of the underlying loan documents; (ii) the transfer of the assets to the securitisation vehicle constitutes a true sale; (iii) the transaction is bankruptcy-remote; (iv) the transaction documents are valid and enforceable and not in contravention of any prevailing applicable law; and (v) all transaction documents have been duly executed in accordance with the applicable law.

2. 5. Is there a developed covered bond market in your jurisdiction and how does it compare and compete with securitisation as means of disintermediation and recycling bank capital?

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Covered bonds do play a role in the Portuguese capital markets, with some issuances on the banking side, including syndicate issuances. Pass-through covered bonds programmes have also been set up by Portuguese issuers. In October 2017, the first issue of pass-through covered bonds (i.e., covered bonds that in certain events convert the redemption structure into a product more similar to asset-backed securities) was placed in the market by a Portuguese issuer.

Covered bonds are increasingly used in the marketplace as a funding instrument, in addition to savings deposits, senior issuances, mortgage-backed securities, etc. The issuance of covered bonds enables credit institutions to obtain lower cost of funding in order to grant mortgage loans for housing and non-residential property. The portfolio investor has the advantage of investing in safe bonds with a relatively high return. Thus, covered bonds play an important role in the Portuguese financial system.

Yet, covered bonds should be seen as a complement to securitisations and vice-versa. Securitised asset-backed securities are structured financial instruments that seek to isolate themselves completely from the issuer's rating and rely entirely on the quality of the underlying pool of assets and on the various structural credit and liquidity enhancement techniques involved in order to achieve the highest ratings. On the other hand, covered bonds are alternative investment instruments that could be identified as being halfway between corporate bonds and mortgage-backed securities, since they depend both on the quality of the issuer and on the quality of the pooled assets underlying the funding.

Both attend to different needs and are financing tools available to market players, depending on the results intended.

2. 6. To what extent does the government intervene as a state actor in securitisation (eg, by guaranteeing certain securitised assets, providing credit enhancement to impact transactions or sponsoring public bodies to act as originator of or investor in asset-backed securities issues)?

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The Portuguese government does not currently intervene as a state actor in securitisation by guaranteeing certain securitised assets, providing credit enhancement to impact transactions or sponsoring public bodies to act as originator of, or investor in, asset-backed securities issues.

3.Structures

3. 1. What securitisation structures are most commonly used in your jurisdiction?

The Securitisation Law provides for two possible structures, depending on the type of securitisation vehicle to be used.

Under the Securitisation Law, the assignee's securitisation vehicle in a securitisation may be a securitisation fund ("**FTC**") or a securitisation company ("**STC**"). The creation of any such securitisation vehicle is subject to prior authorisation from the CMVM, as is the securitisation (transaction) itself.

An FTC is an autonomous pool of assets without separate legal personality (i.e., a unit trust-like format). For this reason, it is required to have a fund manager (i.e., a securitisation funds management company – an "**SGFTC**"). It must also have a custodian (an authorised credit institution), which is mandated to hold its assets.

When an FTC structure is used, securitisation units are issued, each representing a similar undivided ownership interest in the FTC.

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

STCs are multi-securitisation SPVs, operating on a silo-by-silo basis. Each securitisation transaction corresponds to a separate silo, without cross-contamination across silos. When entering into a transaction, the STC will acquire a receivables portfolio and fund it through the issuance of securitisation notes, normally tranched in two or more classes. This receivables portfolio will be used to pay the liabilities under the issued securitisation notes, with the notes only being repaid by means of cash flows generated by the receivables portfolio.

In respect of securitisation modalities that can be used after deciding on a structure, article 1(3) of the Securitisation Law provides for the following modalities:

- traditional securitisation;
- synthetic securitisation;
- STS securitisation; and
- non-STS securitisation.

3. 2. What is the split between 'term' and asset-backed commercial paper transactions?

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In Portugal, the split between 'term' and asset-backed commercial paper transactions is defined by the Securitisation Regulation, which is directly applicable in Portugal.

According to article 2(8) of the Securitisation Regulation, an asset-backed commercial paper transaction is a securitisation within an ABCP programme, which in turn is a programme of securitisations issuing securities predominantly in the form of asset-backed commercial paper with an original maturity of one year or less. Term securitisations thus have an original maturity of more than one year.

3. 3. What are the advantages and disadvantages of these different types of structures?

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As referred to in question 3.1 above, when an FTC structure is used, securitisation units are issued, each representing a similar undivided ownership interest in the FTC. The legal rationale would be for these to be issued directly to investors. However, since the units are qualified as equity instruments, this would be detrimental for many investors (particularly for regulated investors, notably due to equity instruments consuming more regulatory capital than debt instruments). Accordingly, in the Portuguese market, and in cases where these structures have been used in the past (some of which are still outstanding transactions), a double-SPV structure has been used. An orphan SPV is usually set up in another jurisdiction (for tax reasons), normally Ireland or Luxembourg, and acquires all the units and then issues notes to investors backed by such units (and indirectly by all the FTC's assets). This type of structure involves additional costs and normally entails obtaining approval of the prospectus for offer of the notes from a competent regulator outside Portugal.

Since the asset-backed securities issued by STCs are notes and not units, they can be placed and held directly by investors as debt instruments, without the need to employ a double structure. For this reason, since 2008 the Portuguese securitisation market has generally only seen transactions using the other type of SPV (the STC).

3. 4. What other factors should originators consider when deciding on a structure?

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Other than considering the risks highlighted in our answer to question 2.4 and deciding on the securitisation structure to be used, as described in our answer to question 3.1, originators should also consider, *inter alia*, the following:

- Tax matters: originators should consider the tax related aspects of the transaction. In relation to tax matters relating to the originator, please refer to our answer to question 10.1;
- Tranching: orginators should decide whether the credit risk associated with the exposures or the pool of exposures will be tranched for the purposes of articles 2(1) and 2(6) of the Securitisation Regulation. If the transaction is tranched and the remaining requirements of article 2(1) of the Securitisation Regulation are complied with, the transaction will fall under the scope of the Securitisation Regulation and will have to comply with additional provisions of the Securitisation Regulation. By using the split of credit risk into tranches as an essential criterion for the qualification of a transaction as a securitisation, the definition of securitisation provided for in the Securitisation Regulation has the particularity of excluding from the scope of application of the European regime those securitisations in which there is

only a single tranche. Therefore, in single tranche securitisation transactions, only the Securitisation Law applies, with its broader definition of securitisation capturing both tranched and non-trached transactions and being less burdensome in terms of regulatory requirements;

- Risk retention: if the transaction is subject to the Securitisation Regulation, risk retention requirements will apply (the Securitisation Law does not contain specific requirements regarding retention obligations for securitisation transactions). The parties shall agree on who will retain the material net economic interest and how such retention shall be complied with;
- Placement of the notes: originators should consider whether the notes will be admitted to trading on a regulated market. If so, a prospectus for admission to trading on a regulated market will have to be drafted, adding costs and another layer of complexity to the transaction; and
- Adding a ReoCo to the structure: in NPL securitisations, namely when the underlying assets are mortgage loans, originators should consider incorporating a ReoCo within the structure, to deal with tax matters related to the sale and purchase of real estate assets by STCs.

4.Eligibility

4. 1. What requirements and restrictions apply to prospective originators in your jurisdiction?

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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 purpose. Under the Securitisation Law, all entities referred to in article 2(3) of the Securitisation Regulation, together with 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.

4. 2. What requirements and restrictions apply to prospective investors in your jurisdiction and how are retail and wholesale/professional investors distinguished?

Portugal
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Under the Portuguese Securities Code, the following entities are considered professional investors:

- Credit institutions;
- Investment firms;
- Insurance companies;
- Collective investment institutions and their respective management companies;
- Pension funds and their respective management companies;
- Other authorised or regulated financial institutions, namely securitisation-specific entities, their management companies, if applicable, and other financial companies provided for by law, venture capital companies, venture capital funds and their management companies;
- Financial institutions of non-EU Member States that carry out businesses similar to any business referred to in the preceding subparagraphs;

- Entities that trade in commodity based financial instruments;
- National and regional governments, central banks and national or regional level public entities that manage public debt or manage funds aimed at financing social security systems, or retirement pension or employee protection plans, and supranational or international institutions such as the European Central Bank, the European Investment Bank, the International Monetary Fund and the World Bank;
- Persons that provide investment services or carry out investment activities that consist exclusively of trading on their own account on future or spot markets and, in this case, with the sole purpose of covering positions in the derivatives markets or trading or participating in price formation on behalf of other members of the aforementioned markets and that are secured by a clearing member that acts in the markets, whenever responsibility for contract settlement is taken on by one of these members;
- Legal persons whose dimension, according to their last individual annual accounts, meets two of the following criteria: i) own capital of €2 million; ii) total assets of €20 million; iii) net turnover of €40 million; and
- Retail investors who request that financial intermediaries categorise them as professional investors.

Investors in securitisations can either be regulated or non-regulated investors. Typically, there is a wholesale denomination of the securitisation notes (EUR 100,000) and no Key Investor Information Document ("**KIID**") under Regulation (EU) 1286/2014 of 26 November 2014 (the "**PRIIPs Regulation**") is expected to be produced, so the target market of the securitisation notes does not comprise retail investors.

Regulated investors will need to ensure that they perform proper diligence for the transaction, including by confirming that the originator (or another eligible entity) has agreed to retain a relevant economic net exposure (under the applicable EU, US or other laws).

4. 3. What requirements and restrictions apply to custodians and servicers in your jurisdiction?

Portugal
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What entities may act as custodian for the securitisation units or the securitisation notes will depend on the transaction structure and securitisation vehicle used in each relevant securitisation transaction.

As to servicing of the securitised assets, in Portugal the mere purchase and management of a certain portfolio of receivables does not, in itself and up to this date, qualify as a banking or financial activity 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 servicing 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 that its legitimacy is challenged by the relevant debtor. Only a qualified creditor has the relevant legitimacy to claim credits 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 must be appointed to replace the seller as the original servicer, or a back-up servicer must be put in place. The CMVM's prior approval to this effect is required under article 5 of the Securitisation Law.

Additionally, a new directive (Directive 2021/2167 of 24 November 2021 on credit servicers and credit purchasers, amending Directives 2008/48/EC and 2014/17/EU) regarding, *inter alia*, credit servicing was published in the Official Journal of the European Union on 8 December 2021 and entered into force on 28 December 2021. New national rules transposing this Directive, which will have an impact on credit servicers, are expected to be implemented in Portugal until 30 December 2023. For more information on this directive, please refer to our answer to question 11.1.

4. 4. What classes of receivables and other assets may be securitised in your jurisdiction? What requirements and restrictions apply in this regard?

Portugal
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For non-STS securitisations, under article 4(1) of the Securitisation Law 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 guarantee or judicially pledged or seized.

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

In addition, under article 4(3) of the Securitisation Law, the securitisation of future receivables is expressly allowed, provided that 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 purchaser an amount equivalent to 100% 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 the entire relevant debt service.

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

4. 5. What measures, if any, have been taken in your jurisdiction to promote investor involvement in securitisations?

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The CMVM has actively sought to meet with investors with a view to remaining updated on market trends and concerns among market players, which has resulted in a number of legislative changes improving the overall attractiveness of the Portuguese securitisation market.

5.Special purpose vehicles

5. 1. What forms do special purpose vehicles (SPVs) typically take in your jurisdiction and how are they established?

Portugal
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The Securitisation Law provides for two possible types of special purpose vehicles, both of which come under the supervision of the CMVM.

The assignee's SPVs in a securitisation may be a securitisation fund (FTC) or a securitisation company (STC). The creation of any such SPV is subject to prior authorisation from the CMVM, as is the securitisation (transaction) itself.

An FTC is an autonomous pool of assets without separate legal personality (i.e., a unit trust-like format). For this reason, it is required to have a fund manager (i.e., a securitisation funds management company – an SGFTC). It must also have a custodian (an authorised credit institution), which is mandated to hold its assets. Certain share capital and minimum own funds requirements apply to both entities. When an FTC structure is used, securitisation units are issued, each representing a similar undivided ownership interest in the FTC.

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

STCs are multi-securitisation SPVs, operating on a silo-by-silo basis. Each securitisation transaction corresponds to a separate silo, without cross-contamination across silos. When entering into a transaction, the STC will acquire a receivables portfolio and fund it through the issuance of securitisation notes, normally tranched in two or more classes. This receivables portfolio will be used to pay the liabilities under the issued securitisation notes, with the notes only being repaid by means of the cash flows generated by the receivables portfolio.

5. 2. Are SPVs typically established locally or offshore? What are the benefits and risks of each?

Portugal
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The Securitisation Law establishes two types of securitisation vehicles, as set out in our answer to question 5.1 above, subject to different forms of incorporation but very similar in terms of legal attributes and benefits, as they both allow for full segregation of the relevant portfolios and their exclusive allocation to the issued securities. On the one hand, in a fund structure, this is achieved through the structure itself, as the assets of each fund are only available to meet the fund's own liabilities. On the other hand, in a company structure (which works as a multi-compartment entity), certain relevant legal provisions establish a full segregation principle and a creditor's privileged entitlement over the assets so segregated and that collateralise each transaction and the corresponding issue of notes.

The choice of using an FTC or an STC structure in a securitisation transaction is essentially the investor's, being historically, and initially, more familiar with the fund structure (which then uses a foreign SPV to issue the notes to market investors).

In any case, when using STCs or FTCs, Portuguese securitisations are subject to the Securitisation Law, whereby the relevant SPV is required to be incorporated in Portugal and subject to the supervision of the CMVM.

In the first securitisation transactions in the Portuguese market:

- an FTC acquired the assets and issued securities (securitisation units); and
- an SPV (generally in Ireland or Luxembourg) subscribed the securitisation units and issued notes, which were then 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 rather quasi-capital instruments).

Since the first Portuguese securitisation using an STC in 2004, under which tax claims and social security claims credits were assigned by the Portuguese state to Sagres STC, S.A., STCs have spread in the market and are now generally accepted by institutional investors.

In recent years, securitisation transactions have essentially used STCs, with a direct issuance out of Portugal.

One of the benefits of this structure is the tax neutrality regime applicable to securitisations.

5. 3. How is the SPV typically owned?

Portugal
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As referred to in our answer to question 5.1, the Securitisation Law provides for two possible types of special purpose vehicles, both of which come under the supervision of the CMVM: the STC and the FTC.

An FTC is an autonomous pool of assets without separate legal personality (i.e., a unit trust-like format). When an FTC structure is used, securitisation units are issued, each representing a similar undivided ownership interest in the FTC. Thus, an undivided ownership interest in the FTC is held jointly by the holders (individuals or corporates) of securitisation units in the FTC, with no liability regarding losses of the FTC. Considering the nature of the FTC, it is also required to have a fund manager: the SGFTC.

Under the Securitisation Law, both the STC and SGFTC must be incorporated as limited liability companies by shares (*sociedade anónima*), i.e., they must be owned by shareholders in accordance with the general regime of the Portuguese Commercial Companies Code. 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 once it has been shown that it is capable of ensuring sound and prudent management.

5. 4. What requirements and restrictions apply to SPVs in your jurisdiction?

Portugal
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As mentioned above in our answer to question 5.1, the Securitisation Law provides for two possible types of SPVs, both of which come under the supervision of the CMVM: the STC and the FTC.

As the FTC itself has no legal personality (it is an autonomous pool of assets jointly held by several entities), its management is entrusted to the SGFTC, which must manage the fund in accordance with the fund regulation and certain legal limitations on the management of FTCs, such as the requirement that the FTC's funds are used for the initial or subsequent acquisition of credits (for securitisation purposes) and that such credits represent at least 75% of the FTC's assets.

SGFTCs are financial companies required to: (i) hold registered offices and effective management in Portugal; (ii) qualify as a *sociedade anónima* (public limited liability company) whose share capital is represented by nominative book-entry shares; (iii) be exclusively engaged in the management of one or more funds on behalf of the holders of securitisation units; (iv) be an entity approved by the CMVM; (v) have a minimum initial capital of EUR 125,000; and (vi) include in their name the designation "*Sociedade Gestora de Fundos de Titularização de Créditos*" or "SGFTC".

As also referred to in our answer to question 5.1 above, as from 1 January 2020, the incorporation of SGFTCs is subject to approval by the CMVM and their activity is also subject to supervision by this regulatory authority.

One SGFTC may have a number of different funds under management and it is the SGFTC who is responsible for applying for approval of the incorporation of each new fund, by filing the relevant approval request with the CMVM. A fund is deemed to be set-up upon payment of the subscription price for the relevant securitisation units, which can only occur once the CMVM's approval has been obtained.

SGFTCs are subject to specific capital adequacy requirements. A minimum share capital requirement of EUR 125,000 applies and they must have own funds equal to, or higher than, a certain percentage of the net value of all funds managed.

STCs are required to: (i) qualify as a public limited liability company whose share capital is represented by nominative book-entry shares; (ii) include in their name the designation "*Sociedade de Titularização de Créditos*" or "STC"; and (iii) be exclusively engaged in the carrying out of securitisation transactions by means of acquiring, managing and transferring receivables and issuing notes to finance such acquisitions.

The incorporation of STCs is subject to the CMVM's approval and, although they do not qualify as financial companies, this approval requires compliance with a number of requirements similar to those arising under all relevant banking law requirements. These requirements have an impact on an STC's shareholding structure, to the extent that full disclosure of both direct and indirect ownership is required in order to allow the CMVM to assess the reliability and soundness of the relevant shareholding structure. The same applies in respect of the members of its corporate bodies, namely, directors' reliability and availability must ensure that the STC's business is run in a sound and prudent manner.

STCs are also subject to specific capital adequacy requirements. A minimum share capital requirement of EUR 125,000 applies and they must have own funds equal to, or higher than, a certain percentage of the net value of issued outstanding securitisation notes.

STCs have the sole corporate purpose of establishing securtisation transactions, through the acquisition of credits and/or exposures and the issuance of securitised notes for the purposes of financing such acquisitions. Given their limited corporate purpose, STCs are forbidden to carry out any commercial activity other than the establishment of securitisation transactions.

5. 5. What requirements and restrictions apply to the directors of the SPV? What are their primary duties?

Portugal
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The CMVM analyses director's suitability for the exercise of regulated functions, which translates into compliance, at all times, with the suitability requirements envisaged in the specific regulatory framework, subject to continuous supervision by the CMVM.

The CMVM's assessment of directors' suitability is subject to a non-opposition regime: for each member of the board, forms and questionnaires made available by the regulator must be filled in and then submitted to the CMVM for appraisal. The CMVM has 30 business days to appraise the appointment, during which period it may request further clarifications. At the end of this period, if the CMVM has not lodged any opposition to the appointment, such appointment may be registered in the commercial registry.

The CMVM's assessment of directors' suitability entails the analysis of the following requirements: reputation, experience, availability and independence.

In accordance with CMVM's Guidelines on assessment of suitability for the exercise of regulated functions:

- reputation refers to a director's aptitude to carry out a specific regulated function, as revealed by his or her personality, behavioural characteristics, way of acting and personal, professional and financial situation;
- experience is understood in a broad sense, covering both professional experience and requirements

related to qualifications, knowledge, competence and equivalents, as provided for in the specific regulatory framework. Both the professional and practical experience acquired in previously held positions and the theoretical experience gained through education and training are relevant to this assessment;

- availability refers to a director's aptitude to exercise a specific regulated function, as revealed by the amount of time to be dedicated to the effective exercise of that function; and
- independence refers to a director's ability to exercise a specific regulated function, as revealed by his or her personal, professional, economic and political interests, relations and connections, both past and present.

The CMVM's Guidelines on assessment of suitability for the exercise of regulated functions then further detail each such requirement.

As referred to in our answer to question 5.1, under Portuguese law, both STCs and SGFTCs shall be incorporated as a limited liability company by shares (*sociedade anónima*) and set-up under the Portuguese Commercial Companies Code (together with specific requirements established under specific legislation governing their activity). As such, the primary duties of the directors of STCs and SGFTCs are those established in the Portuguese Commercial Companies Code for the directors of limited liability companies by shares, namely the duty of care, which implies availability for the exercise of the office, as well as technical competence and knowledge of the company's activity, and the duty of loyalty, which implies acting in accordance with the interests of the company, the long-term interests of the shareholders and the interests of other stakeholders.

5. 6. What measures can be implemented to ensure, as far as possible, the insolvency remoteness of the SPV?

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

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

The Securitisation Law also provides specific protections with regard to the insolvency of the assignee (which, as referred to in our answer to question 5.1 above, is a regulated SPV), which would otherwise work to the detriment of the investors who have acquired the relevant asset-backed securities.

Even though the SPV itself can be subject to insolvency (but bearing in mind that its limited corporate purpose and regulated nature make this highly unlikely to occur), in respect of rights and obligations within its general estate, such insolvency would not affect the relevant securitisation(s) undertaken by the SPV, given that each securitisation corresponds to a segregated and autonomous pool of assets, comprised of the assigned receivables, and that each such pool of assets is only available to meet the liabilities arising from that securitisation transaction. In this regard, it should be noted that the autonomous pool of assets is codified and granted an asset digit code by the competent regulator (the CMVM), which allows for the identification of the pool at any given time by the respective creditors.

In fact, the pool of assets backing the relevant ABS issuance, including the relevant receivables portfolio, forms an autonomous pool of assets (segregated from other autonomous pools of assets pertaining to other securitisation transactions) that is only available to meet the liabilities due from the SPV (either an FTC or an STC, as defined in 5.1) to its security holders and other creditors (service providers, swap counterparties, etc.) in respect of that transaction only.

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

Similarly, an FTC is only required to pay amounts to the extent that it receives the corresponding cash flow as part of collection on the pool of receivables. 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 of the SGFTC and is not consolidated with it in the event that the SGFTC becomes bankrupt. The FTC's assets are not available to the SGFTC's creditors.

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

Finally, it should also be noted that the application of the Securitisation Law by the courts and by 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 the insolvency remoteness of an SPV has yet been issued by the courts or by a governmental or regulatory authority.

5. 7. If the originator becomes insolvent, is there a risk that the assets of the SPV may be consolidated with its own by the courts? If so, how can this be mitigated?

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

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

For a more detailed analysis of the construction of bankruptcy-remote securitisation transactions, please refer to our answer to question 5.6 above.

6.Transfer of receivables

6. 1. Can the transfer of receivables to the SPV be governed by laws other than your local law? If so, what laws are typically chosen?

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Pursuant to article 3 of Regulation (EC) no. 593/2008 (the "**Rome I Regulation**"), agreements shall be governed by the law chosen by the parties and, in accordance with article 14(1) of the same Regulation, the relationship between assignor and assignee shall be governed by the law that applies to the agreement between the assignor and the assignee under the Rome I Regulation. Accordingly, the sale and purchase agreement to be entered into by the assignor and the SPV, as well as their relationship, can be governed by laws other than Portuguese law. However, in accordance with article 14(2) of the Rome I Regulation, the law governing the assigned receivables shall determine their assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged. As such, if the receivables were originated under Portuguese law, their transfer shall also be governed by Portuguese law, even though the sale and purchase agreement may be governed by foreign law. This means that the parties to an assignment of Portuguese-originated receivables should comply with certain local law requirements.

As mentioned above, the Securitisation Law establishes two types of securitisation vehicles, subject to different forms of incorporation – FTCs and STCs – which act as issuers and purchasers. When using any one of these entities or vehicles, securitisation transactions are subject to the Securitisation Law, whereby the relevant SPV is incorporated in Portugal and the sale and purchase agreement is usually governed by Portuguese law.

6. 2. What local law requirements (documentary and procedural) are required to ensure that foreign law documents are recognised and enforceable locally?

Portugal
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A judgement duly obtained in the courts of an EU Member Sate in respect of a foreign law transaction document will be enforceable in Portugal provided that there has been compliance with the requirements established in Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, as amended.

A judgment duly obtained in the courts of a non-EU Member Sate in respect of a foreign law transaction document will be enforceable in Portugal pursuant to the Portuguese Code on Civil Procedure, save where other specific Treaties and Conventions apply. In cases where the Portuguese Code on Civil Procedure is applied, the relevant Portuguese court will not re-examine the merits of the case, but will confirm the foreign judgment if the following requirements are met:

- No doubts arise as to the authenticity of the document and the intelligibility of the decision;
- The decision is final and unappealable, i.e., no longer subject to ordinary forms of review where the judgment was rendered;
- The decision was rendered by a court whose jurisdiction was not based on fraudulent evasion of the law and the decision does not respect subject matters regarding which Portuguese law confers upon its courts exclusive jurisdiction;
- *Lis pendens* (i.e., pending proceedings between the same parties, based on the same facts and having the same purpose) or *res judicata* (i.e., proceedings between the same parties, based on the same facts and having the same purpose already decided by a final decision no longer subject to ordinary forms of review) situations cannot be invoked;
- The defendant received regular notice of the proceedings in accordance with the law of where the judgment was rendered and the proceedings observed the adversarial principle and the principle of equal treatment of the parties;
- Recognition of the foreign decision is not manifestly incompatible with the international public policy principles of the Portuguese State.

The request for recognition of a foreign judgment obtained in a non-EU Member State court of competent jurisdiction may be challenged:

- on the basis of the absence of any of the aforementioned requirements;
- when a different judgment not subject to appeal considered that the foreign judgment results from a crime committed by the judge while in the exercise of his or her functions;
- when a document that the party was not aware of or that the party could not use in the proceedings

where the judgment was rendered is submitted and is sufficient to modify the decision in a more favourable way to the losing party;

- when the dispute was founded on simulation by the parties and the court that rendered the judgment was aware of this fact;
- when the judgment was rendered against a Portuguese person who could have obtained a more advantageous result if the foreign court had applied Portuguese substantive law and the dispute had been decided under Portuguese substantive law according to Portuguese conflict of law rules. If deemed necessary, and notwithstanding the evidence lodged by the parties, the Portuguese Court of Appeal may request additional evidence.

6. 3. How does the transfer of receivables from the originator to the SPV typically take place? What are the formal, documentary and procedural requirements for perfecting the transfer?

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The assignment of receivables between the assignor and the assignee is effective upon execution of the assignment agreement, in line with general law, and is effective against the obligors upon notification.

However, under the Securitisation Law, as a general rule (i.e., covering most types of originators active in the market, including the State, the social security authority, credit institutions, financial companies, insurance companies and pension funds or pension fund management entities), the assignment is also effective towards the debtors (i.e., the borrowers, who owe the receivables that have been assigned) upon execution of the receivables assignment (sale) agreement without notice to the debtors, whereas under general law the debtors would need to be notified in order for the assignment to become effective towards them.

In many securitisations, the receivables being assigned are secured. The relevant security can be of several types, with the most common being mortgages, pledges and personal guarantees. In a residential mortgage-backed security ("**RMBS**") or a commercial mortgage-backed security ("**CMBS**") deal, the security will be represented by mortgages over the relevant housing properties or commercial real estate, but in other deals there may be mortgages over other assets (such as cars, ships or aircrafts, seeing as these are subject to registration, as with real estate), or pledges over shares, securities, bank accounts or other forms of security. Security rights, and notably any mortgage or pledge, require perfection steps vis-à-vis third parties, even though the transfer of the security is fully effective between assignor and assignee.

However, in most cases, the originator retains the servicing of the assets and the commercial relationship with the borrowers and, therefore, the relevant security transfer is not registered immediately (also for cost-related reasons and reasons relating to the ongoing relationship between the originator and its clients, who do not know of the assignment). The issuer holds the right to implement this registration but, due to the respective costs, the originator roles detailed above and the envisaged neutrality of the transaction towards the borrowers, the parties rely on the originator's good faith to avoid having to register immediately, accepting the risk of a bad-faith action by the originator, which could, in theory, assign the same receivables and security to unrelated third parties. In practice, that risk has thus far never materialised, having been accepted by rating agencies and discussed in legal opinions.

The exception to the above is NPL securitisations, where the originator normally does not retain – and is not willing to retain (also for full deconsolidation purposes) – the servicing of the assets upon execution of the assignment (sale) agreement. In this case, borrowers are notified of the new creditor and respective payee bank account, and registration of the security assignment takes place after the closing date. The above-mentioned exemption from the requirement to notify the borrower of the assignment does not apply to assignments of rights under secured loans that are not being securitised.

6. 4. What other requirements and restrictions apply to the transfer of receivables?

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Please refer to our answer to question 4.4.

6. 5. Is there a doctrine under which a transaction describing itself as a sale can be recharacterised by the courts as a financing secured by assets which are the subject of the purported transfer? How can the application of this doctrine be overcome?

Portugal
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Pursuant to the Securitisation Law, the assignment of receivables under a receivables sale agreement is generally construed to constitute a valid and true assignment of receivables from an originator to the assignee, effective between the parties as from the envisaged effective date, whereby the seller is discharged of all its obligations with respect to the receivables comprised in the securitisation pool. We note that the Securitisation Law requires a true and complete assignment, not being subject to any term or condition. In this sense, an assignment under the Securitisation Law will typically be a perfected assignment. Furthermore, as referred to in question 1.2, the securitisation and all related transaction documents are subject to approval from the CMVM (the local securities market regulator).

6. 6. If the originator becomes insolvent, is there a risk that the transfer of receivables may be unwound? If so, how can this be mitigated?

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Please refer to our answer to question 5.6.

7.Security

7. 1. What types of security interests can be taken over the assets of the SPV in your jurisdiction? Which are most commonly used?

Portugal

As the Securitisation Law establishes 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 that of any other transaction parties), it is not usual in Portuguese securitisation transactions to grant security or collateral to investors in securitisation securities.

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 of the Securitisation Law establish a full segregation principle and a creditor's privileged entitlement over the assets 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 a securitisation company, and which are related to a certain issuance of notes, constitute an autonomous and ring-fenced pool of assets exclusively allocated to such issuance of notes and 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 are subject to an asset identification code also granted by the CMVM.

In addition to the above, and to render this segregation principle effective, the noteholders and other creditors relating to each series of securitisation notes issued by the STC are further entitled to a legal creditor's privilege (*privilégio creditório especial*) (equivalent to a security interest) over all of the assets allocated to the relevant issuance of 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 take the view that they correspond to an application in a specific context (that of securitisation) of the possibility of having a contractual limitation on the assets 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 such limitations result from the quoted provisions of the law, limited recourse shall not be affected by the issuer's insolvency, however remote such an event may be in the context of Portuguese securitisation vehicles.

Therefore, other than obtaining the relevant approval from the CMVM for incorporation of the fund or attribution of the asset alphanumeric code, 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 to perfect such legal creditor's privilege given that 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 qualified as a financial pledge under Decree-Law No. 105/2004 of 8 May 2004 (as amended), in line with the financial collateral arrangements directive. The important feature of such financial pledges is that the collateral taker may have the possibility of using and disposing of the financial collateral provided as the owner of it.

In light of the above, securitisation transactions established in Portugal do not entail the creation of additional security over the assets of the SPV.

7. 2. What are the formal, documentary and procedural requirements for perfecting a security interest?

Portugal
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Please refer to our answer to question 7.1.

7. 3. What charges, fees or taxes arise from the perfection of a security interest?

Portugal
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Please refer to our answer to question 7.1.

7. 4. What other considerations should be borne in mind when perfecting a security interest in your jurisdiction?

Portugal
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Please refer to our answer to question 7.1.

7. 5. What are the respective obligations and liabilities of the parties under the security interest?

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Please refer to our answer to question 7.1.

7. 6. In the event of default, what options are available to enforce the security interest? Is self-help available in your jurisdiction or must enforcement action go through the courts? Are there insolvency regimes such as conservatorship or examinership that impose an automatic stay on the exercise of self-help remedies?

Portugal
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The Securitisation Law establishes a ring-fenced structure whereby the assigned pool of assets is effectively segregated from any transaction parties. No specific or autonomous security is usually required as, in fact, Portuguese securitisation transactions have the benefit of a legal special creditor's privilege existing in respect of all assets forming part of the portfolio allocated to each transaction related to an issuance of notes (including the transaction bank accounts) and, therefore, having effect over those assets existing at any given moment in time for the benefit of the credit securitisation company and being allocated to the relevant issuance of securitisation notes.

Upon enforcement, the common representative of the noteholders or the trustee will control the cash flowing into the bank accounts on behalf of the secured creditors and noteholders and will ensure that they are repaid in full (to the extent that there are sufficient available funds in the transaction accounts for full payment of the notes).

7. 7. Will local courts recognise a foreign court judgment in favour of an investor?

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Please refer to our answer to question 6.2.

7. 8. If the servicer becomes insolvent, will an enduring power of attorney/mandate granted by the servicer in favour of the secured parties be recognised and enforceable post-insolvency of the servicer?

Portugal
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For the reasons stated in our answer to question 7.1 above, in Portuguese securitisation transactions the servicers do not grant powers of attorney to secured parties.

In any case, pursuant to article 110 of the Portuguese Insolvency and Company Recovery Code, the general rule is that mandates shall expire upon the declaration of insolvency of the principal, even if the mandate was also given in the interest of the principal or a third party, without the principal having the right to compensation for the damage suffered. Also, article 112 of the Portuguese Insolvency and Company Recovery Code establishes a general rule pursuant to which, upon the declaration of insolvency of the represented party, any powers of attorney concerning the assets of the insolvency estate shall expire, even if they were granted in the interest of the attorney or a third party.

In addition, the Securitisation Law establishes 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 that of any other transaction parties). This segregation principle means that the receivables and other related assets and amounts existing at a given moment for the benefit of a securitisation company, and which are related to a certain issuance of notes, constitute an autonomous and ring-fenced pool of assets exclusively allocated to such issuance of notes and 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 are attributed an asset identification code also by the CMVM. Any amounts held by the servicer as a result of its collection of payments in respect of the credits assigned under the Securitisation Law will thus not form part of the servicer's insolvency estate.

7. 9. Do limited recourse, non-petition and subordination provisions bind creditors of SPVs in your jurisdiction and what are the applicable qualifications?

Portugal
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As referred to above, securitisation transactions in Portugal are subject to a segregation principle. In order to render this segregation principle effective, the noteholders and other creditors relating to each series of securitisation notes issued by an 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 notes, including assets located outside Portugal. 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 take the view that they correspond to an application in a specific context (that of securitisation) of the possibility of having a contractual limitation on the assets liable for certain obligations or debts, which is provided for by Portuguese law on general terms (namely article 602 of the Portuguese Civil Code).

8.Registration and disclosure

8. 1. What public disclosure and reporting requirements apply to securitisations in your jurisdiction?

Portugal
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Disclosure matters are generally governed by EU legislation or have an EU law source.

Certain disclosures need to be made and documented, the absence of which prevents regulated entities from investing in asset-backed securities, or makes it much more burdensome for them to do so. This entails disclosure on exposure retention and ongoing information requirements.

Article 7 of the Securitisation Regulation establishes a new set of disclosure requirements commonly applicable across EU Member States. The details and standardised templates to be used to fulfil these requirements were published on 3 September 2020.

The relevant technical standards elaborate on the information to be provided to investors, competent authorities and potential investors in securitisation transactions that fall under the scope of the Securitisation Regulation, providing greater certainty and accuracy to these players. Annexes to the technical standards detail which information is to be provided on underlying exposures and investor reports for securitisation transactions, as well as on inside information and significant events for public securitisation transactions, and contain the standardised templates for making such information available.

According to article 7(2) of the Securitisation Regulation, the mechanisms for disclosure depend on the type of transaction:

- for public transactions (i.e., where a prospectus is required to be published under the Prospectus Regulation), disclosure must be made through a regulated securitisation repository; and
- for private transactions, disclosure may be made through a repository but can also be made privately.

The material forms of disclosure include a duly approved prospectus, unless the transaction does not require a prospectus (i.e., no listing on a regulated market, or public offering). In this case (i.e., private offerings, where there is no public visibility of the transaction through the means of a prospectus that is normally made available on the regulator or stock exchange's website, free of charge), certain transactions include an information memorandum (as in the case of deals listed on a multilateral trading facility/unregulated market) or a transaction summary, which may resemble a prospectus (but is not approved by a regulator), while others just rely on the contractual documentation, without the need for a more comprehensive key information document. In this respect, it is relevant to consider the requirements set out under article 7(1)(c) of the Securitisation Regulation.

Moreover, in relation to certain entities, the Bank of Portugal and, if applicable, the ECB shall be notified by the originators of securitisation transactions for prudential purposes, without prejudice of the disclosure requirements set out under article 7 of the Securitisation Regulation.

SPVs are regularly required to report information to the CMVM, including, when applicable, information on the underlying receivables portfolio.

8. 2. What registration requirements, if any, apply to securitisations in your jurisdiction?

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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 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. Under the Securitisation Law, the assignee is entitled 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 with the relevant Real Estate Registry Office. 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 it is not the office where such mortgage loan is registered. Registration of the transfer of mortgage loans requires payment of a fee for each mortgage loan.

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.

8. 3. Is there any requirement to notify obligors of a securitisation? If so, how is this effected?

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As referred to in our answer to question 6.3, the assignment of receivables between the assignor and the assignee is effective upon execution of the assignment agreement, in line with general law, and is effective against the obligors upon notification.

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, whereby 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. This expection applies whenever the assignor is the State, the social security authority, credit institutions, financial companies, insurance companies and pension funds or pension fund management entities, and thus covers most types of originators active in the market.

Please 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, which is the case in most NPL securitisations.

It should also be noted that in cases where the relevant receivables contract expressly requires the obligors' consent or notification, then such consent or notice is necessary for the assignment to be effective against such obligors.

Under the Securitisation Law, debtors may be notified by registered letter with acknowledgement of receipt, which shall be considered, for all purposes, as having been served on the third business day following that on which the letter was registered, or, in the case of debtors who previously communicated their consent, by e-mail with read receipt, to the address indicated in the loan agreement that originated the receivables.

9.Credit rating agencies

9. 1. What requirements and restrictions apply to credit ratings agencies in your jurisdiction? Are there specific provisions that regulate their relationship with issuers?

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

The first Credit Rating Agency Regulation ("**CRA**") was passed in 2009, with two substantial amendments since then. There is also the so-called CRA III framework, certain provisions of which are still to be made operative, including those regarding information disclosure.

Regulated investors may only rely on ratings issued by rating agencies registered with ESMA or endorsed by a rating agency registered with ESMA. The three big rating agencies all have registered entities in the EU and there are several other registered agencies, including DBRS Morningstar. CRA III has introduced a requirement establishing that any issuer or related third party (such as sponsors and originators) that intends to solicit a credit rating of a structured finance instrument must appoint at least two credit rating agencies to provide independent ratings, and should also consider appointing at least one rating agency holding no more than a 10% total market share (a small credit rating agency), provided that a small CRA is capable of rating the relevant issuance or entity.

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

9. 2. What are the main factors that rating agencies consider when rating the securities of the issuer?

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When rating an issuer's securities, rating agencies will mainly consider the following:

- Collateral risk analysis, including (i) collateral asset types and characteristics, (ii) collateral default and loss-distribution analysis, (iii) collateral pool characteristics (non-granular or variable composition), (iv) obligor and risk presenter concentration risk, (v) collateral market value risk, and (vi) sensitivity analysis;
- Counterparty risk analysis, including (i) materiality of financial and operational risks, and (ii) asset management and servicer quality; and
- Structure analysis, including (i) legal risks and tax aspects review, (ii) structural and enhancement features and cash flow analysis, (iii) liquidity risks, (iv) country and industry risks, and (v) representations and warranties.

10.Taxation

10. 1. What tax considerations should be borne in mind from the perspective of the originator? What strategies, if any, are available to mitigate them?

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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, Law No. 53-A/2006 of 29 December 2006 and Decree-Law No. 53/2020 of 11 August 2020 (the "**Securitisation Tax Law**"), establishes the tax regime applicable to securitisation transactions carried out under the Securitisation Law. Its main goal was to ensure a tax-neutral treatment of securitisation transactions set up by each of the securitisation vehicle types provided for in the Securitisation Law. Therefore, under articles 2(5) and 3(5) of the Securitisation Tax Law, there is no withholding tax on:

- payments made by the purchaser (a securitisation company (STC) or a securitisation fund (FTC) to the seller in respect of the purchase of the receivables;
- payments made by the obligors under the loans; and
- the payment of collections by the servicer (who is usually 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 risk of recharacterisation of the deferred purchase price, as payments of collections are not subject to withholding tax.

Under article 4(1) of the 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 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 for debt securities (as established in Decree-Law No. 193/2005 of 7 November 2005, as amended) also applies to income generated by the holding or 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 for registration of securitisation notes in the relevant clearing systems and the exemption applicable to income obtained by non-resident holders of such securitisation notes. In this regard, payments of interest and principal on securitisation notes are exempt from Portuguese income tax, including withholding tax, provided that the relevant noteholder qualifies as a non-Portuguese resident having no permanent establishment in Portugal. This exemption does not apply to non-resident individuals or companies whose 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 a double tax treaty or tax information exchange agreement in force, provided that the requirements and procedures for evidencing 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 the 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, while 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 Law, no stamp duty is due on the sale of receivables being securitised or on the fees and commissions that fall under article 5 (i.e., 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 (i.e., as to any of the described attributions of the depositary), both of the Securitisation Law, which may be charged by the servicer to the purchaser. In addition, no documentary taxes are due in Portugal.

The sale of receivables is exempt from value added tax (VAT) under articles 9(27)(a) and (c) of the Portuguese VAT Code, in line with articles 135(b) and (d) of the VAT Directive (EC Directive 2006/112/EC). Pursuant to the Securitisation Tax Law, no VAT is due on the administration or management of securitisation funds nor 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 receivables is qualified as a true sale transaction under the Securitisation Law, the purchaser being the legal owner of the receivables and therefore subject to tax in Portugal (namely in respect of income arising from the receivables). However, despite being viewed as an ordinary taxpayer, to ensure a tax-neutral treatment of securitisation transactions, the taxable income of the purchaser tends to be equivalent to zero for tax purposes, as the income payments made to the noteholders are tax-deductible (though subject to the Portuguese interest barrier rule).

10. 2. What tax considerations should be borne in mind from the perspective of the issuer? What strategies, if any, are available to mitigate them?

The Securitisation Law regulates only two types of securitisation vehicles for the Portuguese market and the tax regime is applicable to the securitisation transactions carried out under the Securitisation Law – its main goal being to ensure a tax-neutral treatment of the securitisation transactions set up by each of the securitisation vehicles provided for in the Securitisation Law.

Under articles 2(5) and 3(5) of the Securitisation Tax Law, there is no withholding tax on:

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

The nature or 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 risk of recharacterisation of the deferred purchase price as payments of collections are not subject to withholding tax.

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 Law, no stamp duty is due on the sale of receivables being securitised or on the fees and commissions that fall under article 5 (i.e., 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 (i.e., as to any of the described attributions of the depositary), both of the Securitisation Law, which 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, in line with article 135(b) and (d) of the VAT Directive (EC Directive 2006/112/EC). Pursuant to the Securitisation Tax Law, no value added tax is due on the administration or management of securitisation funds nor 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 receivables is qualified as a true sale transaction under the Securitisation Law. As the legal owner of the receivables, 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 of 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 (though subject to the Portuguese interest barrier rule).

10. 3. What tax considerations should be borne in mind from the perspective of investors? What strategies, if any, are available to mitigate them?

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Decree-Law No. 193/2005, as amended, is applicable to securitisation notes, notably regarding the requirements for registration of securitisation notes in the relevant clearing systems and 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 that the relevant noteholder qualifies as a non-Portuguese resident having no permanent establishment in Portugal. This exemption does not apply to non-resident individuals or companies whose 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 a double tax treaty or tax information exchange agreement in force, provided that the requirements and procedures for evidencing 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 the procedures required under Decree-Law No. 193/2005.

11.Trends and predictions

11. 1. How would you describe the current securitisation landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

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Although the securitisation market has remained active during the past four years, 2022 has brought a further resurgence in performing securitisations, following the trend seen in 2021, with a variety of transactions having already been completed. These include transactions listed on the regulated market of Euronext Lisbon, both retained and placed in the market, with a variety of assets or receivables being securitised, including mortgage-backed loans, motor vehicle loans, consumer loans and credit card receivables. The transaction structures used are, in certain cases, becoming more complex and we are again seeing derivatives being used to hedge interest rate risks (in the form of a cap and, more recently, in the form of swap).

NPLs are still a hot topic in the Portuguese financial system and securitisations have been playing an important role in solving this, even though most transactions are still being made in a whole loan sale format. Following the Évora deal by Caixa Económica Montepio Geral in November 2017 (the first NPL listing prospectus in southern Europe), similar deals were launched in 2018, 2019 and 2021. This type of structure, which is particularly complex, requires the inclusion of a real estate asset management company, a monitoring agent and a servicing committee in the structure.

Synthetic securitisations are also becoming increasingly popular in our market, with a number of these deals having been successfully placed with professional investors in recent years. These include multi-jurisdictional transactions of performing senior secured and unsecured Portuguese loans originated by Portuguese banks.

Financing that takes into account environmental, social and governance ("**ESG**") factors has steadily been gaining prominence and investors are increasingly seeking products which are not only financially robust, but also aligned with the ESG agenda. This has translated into an increase in ESG bond and loan issuance volumes over the last couple of years. Thus far there has only been one ESG securitisation in Portugal (RMBS Green Belém No. 1), which involved a €392 million securitisation of residential mortgage credits originated by Unión de Créditos Inmobiliarios Establecimiento Financiero de Credito – Sucursal em Portugal. However, this type of transaction is expected to become a trend in the Portuguese market, as issuers and originators increasingly seek to provide a robust response to investor demand.

Finally, we do not anticipate any material amendments to our domestic securitisation legal framework, which has proved capable of providing both originators and investors with the legal tools necessary to navigate the Portuguese securitisation market. Nevertheless, it is worth considering Directive 2021/2167 of 24 November 2021 on credit servicers and credit purchasers, which was published in the Official Journal of the European Union on 8 December 2021 and entered into force on 28 December 2021. Member States are required to adopt and publish their implementing rules by 29 December 2023 and to bring those rules into effect on 30 December 2023. This new directive will, *inter alia*, impose new obligations on entities servicing loans on behalf of credit purchasers.

12.Tips and traps

12. 1. What are your top tips for the smooth conclusion of securitisations and what potential sticking points would you highlight?

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Other than ensuring full compliance with all legal and regulatory requirements, we would highlight the importance of involving the regulator from the outset, informing it of the transaction deadlines, respecting these deadlines and ensuring the greatest possible transparency. Special attention should also be devoted to preparation of the data tape, which needs to be submitted to the regulator in a pre-approved template, as otherwise the transaction may experience unnecessary delays.

It is also important to ensure timely interaction with the central securities depository where the securitised notes will be registered and that all third parties relevant to the transaction are properly informed and have access to all documentation necessary to implement the transaction within the intended timeframe.

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