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STRUCTURED FINANCE & SECURITISATION

Portugal

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Structured Finance & Securitisation

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Dechert LLP

Generated on: February 28, 2024

Contents

Structured Finance & Securitisation

BANKRUPTCY

UPDATE AND TRENDS

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Portugal

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GENERAL FRAMEWORK

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

A general legal framework applicable to securitisation transactions was approved by Decree-Law No. 453/99 of 5 November 1999, as amended from time to time, notably by Decree-Law No. 144/2019 of 23 September 2019 and Law 25/2020 of 7 July (the Securitisation Law).

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

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.

The Portuguese jurisdiction also has several sets of rules governing the following with respect to securitisation transactions:

- the Securitisation Tax Law and general debt issuance tax legal framework, governing all tax matters in securitisation transactions;
- offers and listing of securitisation bonds are governed by the Securities Code (approved by Decree-Law No. 486/99, as amended from time to time);
- specific regulation issued by the Portuguese Securities Commission, which is the Portuguese markets and securities regulatory body in charge of supervising the securities market and, more specifically, securitisation transactions and the 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.

Being directly applicable, in all member states, to securitisations involving securities issued on or after 1 January 2019, the Portuguese jurisdiction also embraced the entry into force of Regulation (EU) 2017/2402 (the Securitisation Regulation).

Law stated - 8 January 2024

Applicable transactions

Does your jurisdiction define which types of transactions constitute securitisations?

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

- traditional securitisation: an assignment of credits where the assignee is a securitisation vehicle (ie, a securitisation company (STC) or a securitisation fund (FTC));
- synthetic securitisation: a securitisation whereby a bank (originator) buys credit protection on a portfolio of loans from an investor by the execution of a derivative contract or hedging agreement;
- STS securitisation: an assignment of credits that meet the criteria set out in articles 20 or 24 of the Securitisation Regulation; and
- non-STS securitisation: risk transfers and credit assignments that meet the requirements set out in article 4 of the Securitisation Law.

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

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

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

Law stated - 8 January 2024

Market climate

How large is the market for securitisations in your jurisdiction?

Despite the increasing inflation in the global economy and financial markets, the securitisation market in Portugal has been very active in recent years, with securitisation transactions involving receivables originated from several industries having been successfully put together. The banking and finance industry has been, and still is, the most significant, originating both performing or non-performing loans, and secured or unsecured portfolios. Most securitisation transactions have used residential mortgages and corporate and small and medium-sized enterprise (SME) loans, auto loans and leasing receivables.

Other asset classes have also often been securitised in the Portuguese market, namely tax and social security credits, regulatory credits arising from the tariff-deficit in the electricity sector, non-performing loans, highway toll receivables and future receivables.

Synthetic securitisations is also a trend in our market and some Portuguese banks Banks often prefer synthetic securitisations to obtain capital relief, because they tend to be cheaper and easier to execute due to their bilateral nature, implying in general a direct interaction with a guarantor, allowing risk transfer to the underlying assets, resulting in a reduction of the risk-weighted assets (RWAs) associated with the pool, and structured in accordance with the new EU STS on-balance sheet.

Law stated - 8 January 2024

REGULATION

Regulatory authorities
Which body has responsibility for the regulation of securitisation?

The Portuguese Securities Commission (CMVM) regulates and supervises securitisations in Portugal. The CMVM:

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

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

Law stated - 8 January 2024

Licensing and authorisation requirements
Must originators, servicers or issuers be licensed?

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

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

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

When the assignor or seller of the securitised pool of assets remains in charge of the collection of receivables, as is foreseen in the Securitisation Law, for example, when a sponsor (as defined in the Securitisation Law) intervenes in the securitisation and the seller is a credit institution, financial company, insurance firm, pension fund or pension fund manager, no licence or authorisation is required for the seller to continue to enforce and collect receivables, including to appear before a court, assuming the debtors are not aware of the assignment. However, if the assignment of the receivables has 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 legitimacy to claim credit in court.

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

Law stated - 8 January 2024

Licensing and authorisation requirements
What will the regulator consider before granting, refusing or withdrawing authorisation?

Before approving a securitisation transaction, the CMVM will:

- analyse the relevant securitisation documents (including the prospectus for admission to trading) and regulatory requirements, such as any reports prepared by third parties; and
- analyse the pool of assets (receivables) to be collateralised by way of the assignment for securitisation purposes.

Law stated - 8 January 2024

Sanctions
What sanctions can the regulator impose?

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

Law stated - 8 January 2024

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

Several elements need to be submitted to the CMVM for appreciation and analysis prior to the relevant securitisation transaction approval (in the case of FTCs) or granting of the asset-identification code to the asset pool (in the case of STCs) by the CMVM, such as the securitisation vehicle board approval, own funds statement or due diligence statement confirming asset eligibility for securitisation purposes in accordance with the requirements of the Securitisation Law. Although the Securitisation Law does not foresee specific requirements, disclosure obligations for securitisation transactions are directly applicable via European regulations. As such, the Securitisation Regulation, applicable to securitisations involving securities issued on or after 1 January 2019, sets out the disclosure requirements (under its article 7) commonly applicable across EU member states. Also, public disclosure requirements being applicable within the context of securitisation are those applicable to private or public offers, or the admission to trading of the relevant securitisation instruments being issued, to which the general rules of the Portuguese Securities Code (generically corresponding to the implementation of the Prospectus Regulation (Regulation (EU) 2017/1129), as amended and currently in force) are applicable.

According to article 7(2), for public transactions (ie, where a prospectus is required to be published under the Prospectus Directive) disclosure must be made through a regulated securitisation repository, whereas for private transactions disclosure may be made through a repository but can also be made privately.

Finally, it is worth highlighting the green rule specific to securitisation, corresponding to the requirement for an STS securitisation backed by auto or mortgage assets to report available information on environmental performance (article 22(4) of the Securitisation Regulation). Nevertheless, disclosure rules in this field have been expanding since, if certain information is not provided to potential investors by the originator, these investors will have to do their own 'digging' to be able to meet the internal compliance information requirements, which is likely to be very unattractive.

Law stated - 8 January 2024

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

Although the Securitisation Law does not foresee specific requirements, disclosure obligations for securitisation transactions are directly applicable via European regulations. As such, following a securitisation issuance, transparency and disclosure requirements as enshrined in the Securitisation Regulation and set out under its articles 7 and 22 are applicable throughout the life of the securitisation.

Law stated - 8 January 2024

ELIGIBILITY

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

Yes. 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, only the entities referred to in article 2(3) of the Securitisation Regulation, 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.

Law stated - 8 January 2024

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

For simple, transparent and standardised (STS) securitisations, articles 20, 21 and 22 of the Securitisation Regulation set out which receivables or other assets may be securitised. For non-STS securitisations, article 4(1) of the Securitisation Law determines that only credits meeting the following requirements may be assigned for securitisation purposes:

- their transfer is not subject to legal or conventional restrictions;
- they convey stable, quantifiable or predictable monetary flows, based on statistical models;
- their existence and enforceability are guaranteed by the originator; and
- they are not subject to litigation and/or given as a guarantee or judicially pledged or seized.

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

- 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).

Law stated - 8 January 2024

Investors

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

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

Law stated - 8 January 2024

Custodians/servicers

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

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

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

When the assignor or seller of the securitised pool of assets remains in charge of the collection of receivables – as is foreseen in the Securitisation Law, for example, when a sponsor (as defined in the Securitisation Law) intervenes in the securitisation and the seller is a credit institution, financial company, insurance firm, pension fund or pension fund manager – no licence or authorisation is required for the seller to continue to enforce and collect receivables, including to appear before a court, assuming the debtors are not aware of the assignment. However, if the assignment of the receivables has 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 credit in court.

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

Law stated - 8 January 2024

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

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

Law stated - 8 January 2024

TRANSACTIONAL ISSUES

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

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

- securitisation funds (FTCs); and
- securitisation companies (STCs).

FTC

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

An FTC structure consists of:

- the fund itself (FTC); and
- a management company or fund manager, which manages the FTC under the terms of its fund regulation.

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

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

STC

The incorporation of STCs is subject to an approval process with the CMVM and, although they do not qualify as financial companies, this process imposes compliance with a set of requirements similar to those arising under the relevant banking law requirements.

These requirements may be said to have an impact on the shareholding structure of STCs, to the extent that full disclosure of both direct and indirect ownership is required to allow the CMVM to assess the reliability and soundness of the relevant shareholding structure. The same applies to members of corporate bodies, namely directors, who must be persons whose reliability and availability can ensure the sound and prudent management of the STC business.

The shares in STCs can be held by one or more shareholders, although ownership is subject to certain requirements. To establish an STC, prospective shareholders must obtain approval from the CMVM, which will only be granted when it is shown that they meet the Securitisation Law's 'fit and proper' requirements (namely, that they are capable of ensuring sound and prudent management).

STCs are also subject to capital requirements and must meet the minimum levels of own funds, as foreseen in article 43 of the Securitisation Law.

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

This segregation principle means that the receivables and other related assets and amounts existing at a given moment for the benefit of an STC, and that are related to a certain issuance of notes, constitute an autonomous and ring-fenced pool of assets, exclusively allocated to such issuance of notes. It is not, however, available to creditors of the STC, other than the noteholders and the services providers existing specifically in the context of such issuance of notes, until all amounts due in respect of the notes have been repaid in full. To this effect, the assets integrated in each autonomous and ring-fenced pool of assets are listed and filed with the Portuguese Securities Commission (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 (equivalent to a security interest) over all of the assets allocated to the relevant issuance of securitisation notes, including assets located outside Portugal. In fact, according to article 63 of the Securitisation Law, this legal special creditor's privilege exists in respect of all assets forming part of the portfolio allocated to each transaction related to an issuance of notes. This has effect over those assets existing at any given time for the benefit of the STC that are allocated to the relevant issuance of securitisation notes.

Law stated - 8 January 2024

SPV formation process
What is involved in forming the different types of SPVs in your jurisdiction?

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

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

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

Initially, in securitisations transactions in the Portuguese market:

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

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

In recent years, securitisations have essentially adopted the STC structure, with direct issuance out of Portugal where the assignment of loans is fully governed by Portuguese law and subject to the supervision of the CMVM.

Law stated - 8 January 2024

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

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

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

Law stated - 8 January 2024

Asset acquisition and transfer

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

As to the purchase of new assets by the issuer of the securitisation securities, and without prejudice to our remarks on the assignment of future receivables, continuous sales are possible under the Securitisation Law provided that they are in compliance with the eligibility criteria required under the Securitisation Law and that the original receivables agreement does not foresee any restrictions on the assignment. However, sellers have preferred to carry out securitisation transactions with revolving periods for assignment of additional receivables on a periodic basis, against payment out of collections and additional funding by the issuance of further notes, rather than continuous sales.

Also, the Securitisation Law imposes a restriction on the transfer of securitisation transaction assets, whereby the issuer may only assign receivables to FTCs, other STCs, credit institutions and financial companies authorised to grant credit pursuant to article 45(1) of the Securitisation Law. The issuer may further assign securitised receivables in accordance with article 45(2) and (3) of the Securitisation Law in the following cases:

- the securitised receivables correspond to non-performing loans;
- retransfer to the assignor and acquisition of new loans in replacement, if:

- there are changes to the receivables features when renegotiating the respective conditions between the relevant borrower and the assignor; or
- under the terms of the Securitisation Regulation; and
- reassignment to the originator whenever there are latent defects on the securitised receivables.

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

Law stated - 8 January 2024

Registration

What are the registration requirements for a securitisation?

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

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. The assignee is entitled under the Securitisation Law to perform such registration.

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 at any Real Estate Registry Office.

Registration of the transfer of the mortgage loans requires the payment of a fee for each mortgage loan.

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

Law stated - 8 January 2024

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

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

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

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

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

Under the Securitisation Law, when applicable as per the procedure described above, notification to the debtor may be given by means of a registered letter. Such notification will be deemed to have occurred:

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

There is no applicable time limit for delivery of notice to the obligors, considering in any case that, if no exception applies, the assignment shall only be effective towards the obligors upon delivery of the relevant notice. The notice can be delivered after the commencement of any insolvency proceedings against the obligor or against the seller, and the contractual documents for securitisation transactions usually include provisions allowing the assignee to notify all the obligors in the event that the seller or assignor fails do so.

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

Law stated - 8 January 2024

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

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (the General Data Protection Regulation, GDPR) and Law No. 58/2019 of 8 August 2019 (Data Protection Act) supplementing the GDPR provide for the protection of natural persons with respect to the processing of personal data and the free movement of such data. GDPR obligations apply to the processing activities carried out during a securitisation, to protect the personal data involved, although certain specificities and adjustments to procedures and documentation should be determined on a case-by-case basis. The Data Protection Act does not include relevant measures aimed specifically at securitisations, or regarding financial/banking transactions in general.

Pursuant to the GDPR, any processing of personal data requires the fulfilment of one of the legal grounds set out under article 6 of the GDPR, such as express consent from the data subject.

Alternative legal grounds under article 6 include, for example, the need to process the data for the purpose of compliance with a legal obligation to which the controller is subject, or the pursuance, by the controller or by a third party, of legitimate interests, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject – these legal grounds and their application have been further developed and elaborated on by the European Data Protection Board since the approval of the GDPR.

The entity acting as data controller (which defines the purposes and means of processing) must fulfil other data protection obligations, such as providing information to data subjects on the details of the processing activity, prior to its commencement. Under articles 13 and 14 of the GDPR, the information to be provided includes, for instance, the purposes of the processing, the legal basis of such processing, categories of data recipients and the means for data subjects to exercise their rights in this matter. If personal data is to be transferred to countries outside the EEA, information on this transfer should also be provided.

Additionally, the GDPR requires that all parties involved in the data processing adequately secure the personal data processed by them. Such security measures shall consider the nature, scope, context and purposes of the processing, as well as the risk for the rights and freedoms of data subjects – this is particularly relevant in transactions involving the processing of potentially sensitive and/or confidential information, and requires a personalised approach, depending on the circumstances of the arrangements between the parties.

Law stated - 8 January 2024

Credit rating agencies

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

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

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 (the CRA Regulation). This legislation applies to their activities in general, including their rating of securitisations.

The first Credit Rating Agency Regulation was passed in 2009, and there have since been two substantial amendments. There is also the so-called CRA III framework, including the CRA III Regulation (Regulation 462/2013) and the CRA III Directive (Directive 2013/14/EU), which entailed significant amendments to the CRA Regulation on issues such as the reliance of firms on external credit ratings, sovereign debt ratings, competition in the CRA industry, the civil liability of CRAs and the independence of CRAs.

Regulated investors may only rely on ratings issued by rating agencies that are 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 per cent 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 a failure to comply with certain requirements may also prevent regulated investors investing in securities that are not duly rated in accordance with the CRA, or make it more burdensome for them to do so.

In recent transactions, we have seen that credit rating agencies are becoming more demanding in terms of their analysis of the capital structure and the underlying pool of assets, including the review of transaction documents.

Law stated - 8 January 2024

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

There are no specific requirements of independency applicable between the directors of an SPV and officers and the originator and owner of the SPV.

Law stated - 8 January 2024

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

Although the Securitisation Law does not foresee specific requirements as to retention obligations for securitisation transactions, Portugal, as an EU member state, is subject to European rules and regulations and, in particular, with the entering into force of the Securitisation Regulation, to the risk retention rules laid down in its article 6.

Law stated - 8 January 2024

SECURITY

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

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 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 establish a full segregation principle and a creditor's privileged entitlement over the assets so segregated and which 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 (STC), 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 that is not, therefore, available to creditors of the STC other than the noteholders nor to the service providers existing specifically in the context of such issuance of notes until all 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 (equivalent to a security interest) over all of the assets allocated to the relevant issuance of securitisation notes, including assets located outside Portugal. In fact, according to article 63 of the Securitisation Law, this legal special creditor's privilege exists in respect of all assets forming part of the portfolio allocated to each transaction related to an issuance of notes and, therefore, has effect over those assets existing at any given moment in time for the benefit of the STC that are allocated to the relevant issuance of securitisation notes.

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

Therefore, other than obtaining the relevant approval for incorporation of the fund or asset digit code approval from the CMVM confirming the applicability of the legal creditor's privilege in respect of a given portfolio of receivables pertaining to certain notes issued, no additional formalities are required to perfect such legal creditor's privilege, given that it is not subject to registration under 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 being 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. An important feature of such financial pledges is that the collateral taker may have the possibility to use and dispose of the financial collateral provided as its owner.

Law stated - 8 January 2024

Perfection

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

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 of any other transaction parties), it is not usual in Portuguese securitisation transactions to grant security or collateral to investors in securitisation securities.

Other than obtaining the relevant approval for incorporation of the fund or asset digit code approval from the CMVM confirming the applicability of the legal creditor's privilege in respect of a given portfolio of receivables pertaining to certain notes issued, no additional formalities are required in order to perfect such legal creditor's privilege, given that it is not subject to registration, in accordance with the Securitisation Law.

Law stated - 8 January 2024

Enforcement
How do investors enforce their security interest?

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 there are sufficient available funds in the transaction accounts for full payment of the notes). The appointment of a common representative is not legally required, and some private deals have avoided this by having the rights of a common representative directly vested in the noteholders.

Law stated - 8 January 2024

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

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

In addition, where a collections account is not an exclusive transaction account of the securitisation or the servicer cannot assure a collections cash sweep to occur daily to a reserve account, we have seen commingling reserve ledgers being set up for the purpose of mitigating commingling risk.

Law stated - 8 January 2024

TAXATION

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

Decree-Law No. 219/2001 of 4 August 2001, as amended by Law No. 109-B/2001 of 27 December 2001, Decree-Law No. 303/2003 of 5 December 2003, Law No. 107-B/2003 of 31 December 2003, Law No. 53-A/2006 of 29 December 2006 and Decree-Law No. 53/2020 of 11 August 2020 (the Securitisation Tax Law), establishing the tax regime applicable to the securitisation transactions carried out under the Securitisation Law. Its main goal was to ensure a tax-neutral treatment of the securitisation transactions set up by each one of the securitisation vehicles provided for in the Securitisation Law. Therefore, under articles 2(5) and 3(5) of the Securitisation Tax Law, there is no withholding tax on:

- the 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;
- the payments made by the obligors under the loans; and
- the payments of collections by the servicer (who usually is also the seller) to the purchaser.

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

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

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

According to Circular No. 4/2014 issued by the Portuguese Tax Authorities and to the order issued by the Secretary of State for Tax Affairs, dated 14 July 2014, in connection with tax ruling No. 7949/2014 disclosed by the tax authorities, the general tax regime on debt securities (as established in Decree-Law No. 193/2005 of 7 November 2005, as amended) also applies 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 on registration of securitisation notes in the relevant clearing systems and on the exemption applicable to income obtained by non-resident holders of such securitisation notes. In this regard, payments of interest and principal on securitisation notes are exempt from Portuguese income tax, including withholding tax, provided the relevant noteholder qualifies as a non-Portuguese resident having no permanent establishment in Portugal. This exemption does not apply to non-resident individuals or companies if the individual or company's country of residence is any jurisdiction listed as a tax haven in Ministerial Order No. 150/2004 of 13 February 2004 (as amended from time to time) and with which Portugal does not have a double tax treaty or a tax information exchange agreement in force, provided the requirements and procedures for confirming the non-resident status are complied with. To qualify for the exemption, noteholders will be required to provide the direct registry entity with adequate evidence of their non-resident 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, Portuguese Securities Commission (CMVM) Regulation No. 1/2002, of 5 February 2002, sets forth the specific accountancy regime for FTCs, and CMVM Regulation No. 12/2002, of 18 July 2002, establishes specific accountancy rules for STCs (although the accounting procedure of this type of corporate entity follows the general Portuguese Accountancy Standards).

Pursuant to the Securitisation Tax Regime, no stamp duty is due on the sale of receivables being securitised or the fees and commissions falling under article 5 (ie, referring to required acts to ensure the 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) or under article 24 (ie, as to any of the described attributions of the depositary), both of the Securitisation Law, that may be charged by the servicer to the purchaser. In addition, no documentary taxes are due in Portugal.

The sale of receivables is exempt from value added tax (VAT) under article 9(27)(a) and (c) of the Portuguese VAT Code, which is in line with article 135(b) and (d) of the VAT Directive (EC Directive 2006/112/EC). Pursuant to the Securitisation Tax Regime, no VAT is due on the administration or management of securitisation funds or 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. With the purchaser being the legal owner of the receivables, it is 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).

Law stated - 8 January 2024

Issuers

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

The Securitisation Law regulates two different 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 one 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:

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

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

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

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

Pursuant to the Securitisation Tax Regime, no stamp duty is due on the sale of receivables being securitised or the fees and commissions falling under article 5 (ie, referring to required acts to ensure the 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), or under article 24 (ie, as to any of the described attributions of the depositary), both of the Securitisation Law, that may be charged by the servicer to the purchaser. In addition, no documentary taxes are due in Portugal.

The sale of receivables is VAT-exempt under article 9(27)(a) and (c) of the Portuguese VAT Code, which is in line with article 135(b) and (d) of the VAT Directive (EC Directive 2006/112/EC). Pursuant to the Securitisation Tax Regime, no value added tax is due on the administration or management of securitisation funds or 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. With the purchaser being the legal owner of the receivables, it is therefore 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).

Law stated - 8 January 2024

Investors
What are the primary tax considerations for investors?

Decree-Law No. 193/2005, as amended, is applicable to securitisation notes, notably regarding the requirements on registration of securitisation notes in the relevant clearing systems and on the exemption applicable to income obtained by non-resident holders of such securitisation notes. In this regard, payment of interest and principal on securitisation notes are exempt from Portuguese income tax, including withholding tax, provided the relevant noteholder qualifies as a non-Portuguese resident having no permanent establishment in Portugal.

This exemption does not apply to non-resident individuals or companies if the individual or company's country of residence is any jurisdiction listed as a tax haven in Ministerial Order No. 150/2004, of 13 February 2004 (as amended from time to time) and with which Portugal does not have a double tax treaty or a tax information exchange agreement in force, and provided the requirements and procedures for confirming the non-resident status are complied with. To qualify for the exemption, noteholders will be required to provide the direct registry entity with adequate evidence of their non-resident status prior to the relevant interest payment date, according to the procedures required under Decree-Law No. 193/2005.

Law stated - 8 January 2024

BANKRUPTCY

Bankruptcy remoteness
How are SPVs made bankruptcy-remote?

In Portugal, full portfolio separation and insolvency remoteness is established under the Securitisation Law. This is partly achieved by securitisation funds (FTCs) and securitisation companies (STCs) being exclusively engaged in carrying out securitisations.

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

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

Similarly, an FTC is only required to pay amounts to the extent that it receives the corresponding cash flow as part of collections on the pool of receivables (under article 32(4) of the Securitisation Law). The FTC's recourse is limited to the receivables in the pool.

Therefore, from a practical perspective, creditors cannot initiate insolvency proceedings against the FTC.

The FTC is also independent of the fund manager and is not consolidated with the fund manager if the fund manager becomes bankrupt. The FTC's assets are not available to the fund manager's creditors.

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

Law stated - 8 January 2024

True sale

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

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

Under the Securitisation Law, a 'true sale' (a non-recourse sale) of financial assets must take place. Legally, this is construed as an assignment of receivables, whereby the assignee acquires full legal title over the receivables, not dependent on any condition or term, and whereby the assignor does not guarantee or accept any responsibility for the performance of the assigned receivables. These receivables may already exist (which is typically the case), but the Securitisation Law also allows the assignment of future receivables, provided they arise under existing or reasonably expected legal relationships and are in a determinable (known or estimated) amount.

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

- they must not be subject to legal or contractual assignment restrictions;
- they must convey stable, quantifiable or predictable monetary flows, based on statistical models;
- their existence and enforceability must be warranted by the assignor; and
- they are not litigious and are not pledged as security or judicially attached or seized.

As in other jurisdictions, a secured loan granted by a bank (or other entity) represents a liability of the relevant borrower. Accordingly, there is no detachment from the borrower's credit risk, without prejudice to any applicable credit enhancement achieved by any applicable guarantee or security attaching to the loan.

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

The true sale analysis is a typical component of legal opinions issued in the context of securitisations.

Law stated - 8 January 2024

Consolidation of assets and liabilities

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

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

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

Law stated - 8 January 2024

UPDATE AND TRENDS

Key developments of the past year

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

So far, no legislation or guidance has been officially enacted by Portuguese regulators.

Law stated - 8 January 2024

Key developments of the past year

What legislation or government or industry initiatives are in place or contemplated to address the termination of LIBOR and transition to a substitute rate?

Market players in Portugal have been preparing for the termination of LIBOR throughout the past couple of years, without any major challenges or disruptions. In fact, although no specific Portuguese legislation or government initiative has been adopted, the industry practice in Portugal has closely followed the example of international players and the recommendations of international organisations. In the context of securitisations, we would highlight the Association for Financial Markets in Europe's contribution with a model wording for new issues of securitisation bonds to help facilitate the transition from IBORs to new risk-free rates (eg, SOFR and SONIA, as applicable). On the derivatives front, parties have chosen either to adhere to the IBOR Fallbacks Protocol or, most recently, to incorporate the 2021 ISDA Interest Rate Derivative Definitions, which, among other things, enables them to include robust fallbacks ahead of termination.

Law stated - 8 January 2024