

CHAPTER 22A

Securitization in Portugal

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§ 22A.01 Introduction

[1]—Securitization Framework

A securitization specific framework was introduced in Portugal in 1999, through Decree-Law No. 453/99 of 5 November (as amended from time to time the “Securitization Law”). The Securitization Law contains a simplified process for the assignment of credits for securitization purposes. It regulates (a) the establishment and activity of Portuguese securitization vehicles, (b) the type of credits that may be securitized, (c) the conditions under which credits may be assigned for securitization purposes, and (d) the entities which may assign credits for securitization purposes. It also addresses in detail the relevant issues relating to licensing/authorization and assignment requirements, notification of borrowers, servicing of the assigned credits and segregation of assets and bankruptcy remoteness.

[2]—Rules Under Portuguese Jurisdiction Governing Securitization Transactions

The Portuguese jurisdiction has several sets of rules governing the following subjects on securitization transactions:

- a specific securitization tax regime and a general debt issuance tax legal framework, governing all tax matters on securitization transactions;
- offers and listing of securitization bonds are governed by the Securities Code (approved by Decree-Law 486/99, as amended from time to time);
- specific regulation issued by the *Comissão do Mercado de Valores Mobiliários*, the Portuguese Securities Commission (CMVM) (the Portuguese markets and securities regulatory body, in charge of supervision of the securities market and, in particular, of securitization transactions and relevant players),

establishing rules on accounting and own funds requirements of securitization vehicles; and

- specific regulation issued by the Bank of Portugal applicable to originators assigning credits or loans for securitization purposes to securitization vehicles under the Securitization Law.

[3]—Securitization Market in Portugal

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

Throughout the financial crisis, securitization mechanics and features continued to be used as an important financing tool, allowing access to European Central Bank (ECB) liquidity lines by using eligible collateral such as rated asset-backed securities in the Eurosystem monetary policy transactions. This trend only really slowed down because of the Bank of Portugal's program, 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.

The most important aspects of the Portuguese securitization framework may be summarized as follows:

- (i) the establishment of special rules facilitating the assignment of credits (including small and medium sized enterprise loans) in the context of securitization;
- (ii) the establishment of the types of originators which may assign their credits pursuant to the Securitization Law;
- (iii) the establishment of the types of credits that may be securitized;
- (iv) the establishment of the conditions under which the credits may be securitized; and
- (v) the creation of two different types of securitization vehicles: (i) credit securitization funds (*Fundos de Titularização de Créditos* – “FTC”) and (ii) credit securitization companies (*Sociedades de Titularização de Créditos* – “STC”).

The main features of the two types of securitization vehicles are discussed at length in the sections that follow.

§ 22A.02 Credit Securitization Funds

The credit securitization funds (FTC) structure requires that (a) the Fund is managed by a fund manager pursuant to the terms of the applicable fund regulation, (b) a servicer collects and manages the portfolio assigned to the FTC, and (c) a custodian holds the portfolio acquired by the FTC.

[1]—The Fund—Concept and Types

An FTC consists of a segregated portfolio of assets in which an undivided ownership interest is held jointly by the holders of the Securitization Units, who may be individuals or corporate entities. An FTC is not liable for the debts of (a) the holders of the Securitization Units, (b) the FTC management company, or (c) the originator of the portfolio of assets acquired by such FTC.

An FTC may be a variable fund (*fundo de património variável*) or a closed fund (*fundo de património fixo*). If an FTC is a variable fund, it may acquire further assets and issue further Securitization Units. If an FTC is a closed fund, it may not acquire further assets or issue further Securitization Units.

The Securitization Units issued by an FTC must take the form of registered book-entry securities.

The proceeds of the issuance of Securitization Units must be invested in accordance with the fund regulation and applicable legal constraints.

The holders of the Securitization Units are the joint owners of the FTC but will have no liability to contribute to any losses of the FTC.

In accordance with the terms of the fund regulation, the Securitization Units may entitle the holders to the following rights:

- (a) payments of distributions;
- (b) reimbursement for the nominal value of the Securitization Units; and
- (c) sharing of the assets of the FTC upon its liquidation, in proportion to their respective participation.

Holders of Securitization Units are not entitled to give instructions to the FTC management company with respect to the management of an FTC and cannot request the liquidation of an FTC.

[2]—The Management Company

An FTC is managed by a management company (*Sociedade Gestora de Fundos de Titularização de Créditos*). A management company is a financial company pursuant to Portuguese Credit Institutions and Financial Companies Law enacted by Decree Law No. 298/92 of

31 December 1992, as amended. Accordingly, the management company is required to have its registered office and effective place of management in Portugal, must be characterized as a *sociedade anónima* (public limited liability company), and must have a minimum share capital of €250,000 represented by nominative shares.

The exclusive object of the management company is the management of one or more FTCs on behalf of the holders of the Securitization Units.

The management company is also subject to specific capital adequacy requirements to the extent that the capital qualifying as own funds must not be less than the following minimum percentages of the net value of all FTCs managed by such management company: up to euro 75 million, being 0.5 percent, and in excess of euro 75 million, being 0.1 percent.

[3]—The Custodian

Decree Law No. 298/92 of 31 December 1992 (as amended) with a share capital of, at least, euro 7.5 million and which is required to have its registered office in Portugal or in another Member State, in which case it must have a branch in Portugal.

A custodian has the power to apply an FTC's assets in accordance with the instructions of the management company, but it must at all times ensure that any instructions received from the management company are in conformity with the Securitization Law and the respective fund regulation. An agreement must be entered into to regulate the relations between the management company and the custodian.

The management company and the custodian are jointly and severally liable to the holders of the Securitization Units for the performance of the obligations they have assumed under the terms of the Securitization Law or of the fund regulation and for the accuracy and sufficiency of the information contained in the fund regulation.

§ 22A.03 Credit Securitization Companies

Credit securitizations companies (STCs) are established for the exclusive purpose of carrying out securitization transactions in accordance with the Securitization Law. The following is a description of the main features of an STC.

[1]—Corporate Structure

STCs are commercial companies (*sociedades anónimas*) incorporated with limited liability, having a minimum share capital of €250,000. The shares in STCs can be held by one or more shareholders. STCs are subject to the supervision of the the Portuguese Securities Commission (CMVM) and their incorporation is subject to the prior authorization by the CMVM. STCs are also subject to ownership requirements. A prospective shareholder must obtain approval from the CMVM in order to establish an STC. Such approval is granted when the prospective shareholder shows that it is capable of providing the company with a sound and prudent management.

If the shares in an STC, corresponding to a qualified stake (*participação qualificada*) as defined in Decree Law no. 298/92 of 31 December 1992 (as amended), are to be transferred to another shareholder or shareholders, prior authorization of the CMVM of the prospective shareholder has to be obtained. The interest of the new shareholder in the STC has to be registered within 15 (fifteen) days of the purchase.

[2]—Regulatory Compliance

In order to ensure the sound and prudent management of STCs, the Securitization Law provides that the members of the board of directors and the members of the board of auditors meet high standards of professional qualification and personal reputation.

The members of the board of directors and the members of the board of auditors must be registered with the CMVM.

[3]—Corporate Object

STCs can only be incorporated for the purpose of carrying out one or more securitization transactions by means of the acquisition, management and transfer of receivables and the issue of securitization notes for payment of the purchase price for the acquired receivables.

An STC may primarily finance its activities with its own funds and by issuing notes.

Without prejudice to the above, pursuant to the Securitization Law, STCs are permitted to carry out certain financial activities, but only to the extent that such financial activities are (i) ancillary to the issuance

of the securitization notes, and (ii) aimed at ensuring that the appropriate levels of liquidity funds are available to the STC.

[4]—Nature of Credits

The Securitization Law sets out the types of credits that may be securitized and the eligibility criteria for such credits.

[5]—Who May Assign Assets for Securitization Purposes?

Under the Securitization Law, originators include the Portuguese Republic and public legal entities, credit institutions, financial companies, insurance companies, pension funds and pension fund managing companies and any other corporate entities whose accounts have been audited by an auditor registered with the CMVM for the last three (3) consecutive years.

[6]—Assignment of Credits

Under the Securitization Law, the sale of credits for securitization is effected by way of assignment of credits. In this context the following should be noted: notification of debtors about the assignment, the formal requirements for assignment, and whether assignment can be challenged for the benefit of the assignor's bankruptcy.

[a]—Notice to Debtors

In general, an assignment of credits is effective against the relevant debtor after notification of assignment is made to such debtor.

Notification to the debtor is required to be made by means of a registered letter (to be sent to the debtor's address included in the relevant receivables contract) and such notification will be deemed to have occurred on the third business day following the date of posting of the registered letter.

An exception to this requirement applies when the assignment of credits is made under the Securitization Law by, *inter alia*, credit institutions or financial companies, and such entities are the servicers of the credits. In that case, there is no requirement to notify the relevant debtor since such assignment is deemed to be effective in relation to such debtor when it is effective between assignor and assignee.

Accordingly, in the situation set out above, any payments made by the debtor to its original creditor after an assignment of credits has been made will effectively belong to the assignee who may, at any time and even in the context of the bankruptcy of the assignor, claim such payments from the assignor.

[b]—Assignment Formalities

There are no specific formal requirements for an assignment of credits under the Securitization Law. A written private agreement between the parties is sufficient for a valid assignment to occur (including the 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 loans which have underlying mortgages or other guarantees subject to registration under Portuguese law, the signatures to the assignment contract must be certified by a notary public, the company secretary of each party or a lawyer qualified for such purpose (when the parties have appointed such a person) under the terms of the Securitization Law and other laws applicable in Portugal, namely Decree Law no. 76A/2006 of 29 March 2006.

In order to perfect an assignment of loans where ancillary rights are capable of registration at a public registry (such as a mortgage over real estate) against third parties, the assignment must be followed by the corresponding registration (as described in the paragraph below) of the transfer of such ancillary rights.

The Portuguese real estate registration provisions were amended with new provisions effective from 1 January 2009, allowing for the registration of the assignment of any mortgage at any Portuguese Real Estate Registry Office, even if the said Portuguese Real Estate Registry Office is not the office where the mortgage is registered. The registration of the transfer of the mortgage requires the payment of a fee for each small and medium sized enterprise loan of approximately €200 (two hundred euros).

The Securitization Law provides for the assignment of credits to be effective between the parties upon execution of the relevant assignment agreement. This means that in the event of bankruptcy of the assignor prior to registration of the assignment of credits, the credits will not form part of the bankruptcy estate of the assignor even if the assignee may have to claim its entitlement to the assigned credits before a competent court. However, the assignment of any security over real estate 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 Issuer is entitled under the Securitization Law to provide for such registration.

[c]—Assignment and Bankruptcy

Unless an assignment of credits is effected in bad faith, such assignment under the Securitization Law cannot be challenged for the benefit of the assignor's bankruptcy estate and any payments made to the assignor in respect of credits assigned prior to a declaration of

bankruptcy will not form part of the assignor's bankruptcy estate, even when the term of the credits falls after the date of declaration of bankruptcy of the assignor. In addition any amounts held by the servicer as a result of its collection of payments in respect of the credits assigned under the Securitization Law will not form part of the servicer's bankruptcy estate.

[7]—Risk of Set-Off by Borrowers

[a]—General

The Securitization Law does not contain any specific provisions with respect to set-off. Accordingly, Articles 847 to 856 of the Portuguese Civil Code are applicable. The Securitization Law has an impact on set-off risk to the extent that, by virtue of establishing that the assignment of credits by a credit institution, a financial company, an insurance company, pension funds and pension fund managers is effective against the debtor on the date of assignment of such credits without notification to the debtor being required (provided that the assignor is the servicer of the assigned credit). It effectively prevents a debtor from exercising any right of set-off against an assignee if such right did not exist against the assignor prior to the date of assignment.

[b]—Set-Off on Bankruptcy

Under Article 99 of the Code for the Insolvency and Recovery of Companies, applicable to bankruptcy proceedings commenced on or after 15 September 2004, a debtor will only be able to exercise any right of set-off against a creditor after a declaration of bankruptcy of such creditor provided that, prior to the declaration of bankruptcy, (i) such set-off right existed, or (ii) the circumstances allowing set-off, as described in Article 847 of the Portuguese Civil Code, were met.

[c]—Data Protection Law

Law no. 67/98 of 26 October 1998, as amended, (the "Data Protection Law") provides for the protection of individuals regarding the processing and transfer of personal data.

Pursuant to the Data Protection Law as amended, any processing of personal data requires express consent from the data subject, unless the processing is necessary in certain specific circumstances as provided under the relevant laws.

The entity collecting and processing personal data must obtain prior authorization from the Comissão Nacional de Protecção de Dados (the "CNPD") the Portuguese Data Protection Authority, before processing such data.

In principle, transfer of personal data to an entity within a Member State does not require it to be authorized by the CNPD unless such transfer involves any change to the scope and use of the personal data from what had been originally set, but notification about the relevant data subject is required.

Certain other Portuguese law matters are relevant to consider in the context of securitization, and these are discussed in the sections that follow.

[d]—Mortgages Charging Real Estate and Other Security under Portuguese Law

[i]—Concept

A mortgage entitles the mortgagee, in the event of default of the relevant obligations, to be paid in preference to non-secured creditors from the proceeds of the sale of the relevant property, the subject of the mortgage.

A pledge entitles the pledgee, in the event of default of the relevant obligations, to be paid in preference to unsecured creditors from the proceeds of the sale of the relevant asset subject of the pledge.

[ii]—Legal Form, Registry and Priority Rights

Until 31 December 2008, mortgages could only be created by means of a notarial deed, which is a document prepared and testified by, and executed before, a public notary and in compliance with certain formalities as to its creation.

However, the Portuguese real estate regime was amended whereby besides the previously existing procedure for creation of a mortgage by means of a notarial deed, mortgages can also be validly created by a private document, provided that the authenticity of such document is ensured, which means that it shall be either executed before, or certified by, a notary public, a lawyer, a bailiff (*solicitador*) or a commerce association. The mortgage can also be created by a public document executed before a Real Estate Registry Office.

The notarial deed or written contract for the creation of a mortgage is not sufficient for the full validity and enforceability of this type of security, as registration with the Real Estate Registry Office is required in order for a mortgage to be considered validly created.

Registration also rules the ranking of creditors in the event that several mortgages are created over the same property. In this case, the ranking of rights among such creditors will correspond to the priority of mortgage registration (i.e. the creditor with a prior registered mortgage will rank ahead of the others).

Pledges (including, for the avoidance of doubt, financial pledges) may also be created by private contracts, and the following specifications are applicable.

The validity of the pledge over movable assets generally requires either the physical delivery of the pledged assets to the creditor (i.e. transfer of possession though not of ownership) or the delivery of documentation conferring the creditor full possession powers over the relevant assets to the absolute exclusion of any other party. The sole exception to this general principle is the case of pledges of assets in favor of banks which do not require transfer of possession. However, this type of pledge does require compliance with specific formalities, such as the inclusion of mandatory legal provisions in the contract and certification of capacity of the parties (and of the insertion of said provisions) by a notary.

Pledges over rights will be validly transferred in accordance with the legal formality required for the creation or transmission of such right and notification to the relevant debtor. Pledges subject to registration are only valid and effective as from the registration date.

The creation of pledges over shares must comply with the formalities applicable to the transfer of shares, which may be different according to the type of shares to be pledged but which entail, in the case of registered shares, the execution of special forms and registration of the pledge in the share ledger book of the company as a condition for its validity and enforceability. It must be noted that ranking among creditors secured by pledge over the same shares also depends on priority of registration. Pledges over participations in share capital (quota), beginning 30 June 2006, may be created by means of private contracts and will be subject to registration in the relevant Commercial Registry Office.

Although mortgagees and pledgees have priority over nonsecured creditors, there are preferential rights which apply by operation of law (*privilégios creditórios*) and which rank, or may rank, ahead of a mortgage and a pledge such as: (i) amounts due to the Portuguese Republic with respect to social security charges and taxes (except, in relation to certain taxes, when bankruptcy of the obligor has been declared); and (ii) employees' credits with respect to unpaid salaries due by the mortgagor.

[e]—Enforcement and Court Procedures

Enforcement of a mortgage over real property may only be made through a court procedure, whereby the mortgagee is entitled to demand the sale by a court of the property and be paid from the proceeds of such sale (after payment to the preferential creditors, if any).

The mortgagee cannot take possession or become the owner of the property (foreclosure) by virtue of enforcement of the mortgage, and

is only entitled to be paid out of the proceeds of sale of the relevant property.

Should the mortgagee be willing to acquire the property, he may bid in the court sale along with (but with no preference) any other parties interested in the purchase of the property.

In case there are various creditors with mortgages over the same property, the proceeds of the sale of the property are distributed among the secured creditors in accordance with the registration priority and are allocated first to the payment of the first ranking secured creditor, with the remaining amount (if any) being allocated to the next ranking creditor.

Enforcement of a pledge over assets or rights may be made through a court procedure, whereby the pledgee is entitled to demand the sale by a court of the relevant pledged asset or right and be paid from the proceeds of such sale (after payment to the preferential creditors, if any). The Parties may also agree to an extra-judicial enforcement of the pledge. If the pledge at stake is a financial pledge created over bank accounts or financial instruments, the enforcement of the pledge may be carried out by means of appropriation of the pledged assets by the pledgee in accordance with the rules set out in the relevant pledge agreement.

The pledgee may not take possession or become the owner of the pledged asset or right by virtue of enforcement of the pledge, and is only entitled to be paid out of the proceeds of sale of the relevant asset or right, except in what concerns financial pledges in the terms described in the paragraph above.

Should the pledgee be willing to acquire the relevant asset or right, he may bid in the court sale along with (but with no preference) any other parties interested in the purchase of such asset or right. In case there are various creditors with mortgages over the same property or pledges over assets or rights, the proceeds of the sale of the property/asset/right are distributed among the secured creditors in accordance with the registration priority and are allocated first to the payment of the first ranking secured creditor, with the remaining amount (if any) being allocated to the next ranking creditor.

Court procedures in relation to enforcement of mortgages over real property or pledges over assets or rights usually take two to four years on average for a final decision to be reached on the execution of the underlying loan. Court fees payable in relation to the enforcement process of mortgages and pledges are determined in accordance with the amounts claimed.

In summary, the goal of this general overview of the most relevant securitization related issues in the Portuguese jurisdiction has been to illustrate that Portuguese securitization law offers a robust and investor friendly framework for the securitization of traditional and exotic assets.