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Portugal

SECURITISATION

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This country-specific Q&A provides an overview of securitisation laws and regulations applicable in Portugal.

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PORTUGAL
SECURITISATION

1. How active is the securitisation market in your jurisdiction? What types of securitisations are typical in terms of underlying assets and receivables?

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

The majority of securitisation transactions have used residential mortgages and corporate and small and medium-sized enterprise (SME) loans, and leasing receivables. Other asset classes have also often been securitised in the Portuguese market, namely tax and social security credits, regulatory credits arising from the tariff-deficit in the electricity sector, non-performing loans, highway toll receivables, future receivables, TV broadcasting rights receivables, advertising rights and sponsorship rights receivables.

Throughout the financial crisis, securitisation mechanics and features continued to be used as an important financing tool, allowing access to European Central Bank (ECB) liquidity lines by using eligible collateral such as rated asset-backed securities in the Eurosystem monetary policy transactions. This trend only really slowed due to the Bank of Portugal's programme, whereby loans could be directly posted with the Bank of Portugal as collateral against liquidity, even though the Eurosystem operations were still an open option. Key milestones were achieved with the first two rated securitisations in the national market of non-performing loans, in 2017 and 2018.

Up to this date, securitisation transactions continue to strive and be used as an important liquidity tool.

This also relates to the fact that, in July 2020, the European Commission, as part of its efforts to battle the economic shock caused by the COVID-19 pandemic, has proposed a Capital Markets Recovery Package, in which securitisation is a tool for enhancing the capacity of financial institutions in order to support economic recovery therefore restoring market players' confidence. One element of the referred package consists of proposed amendments to the EU's securitisation regime, comprised in Regulation (EU) 2017/2402 (the Securitisation Regulation) and Regulation (EU) 575/2013 (the CRR).

The first set of measures of the Capital Markets Recovery Package was implemented in February 2021 and the specific amendments to the Securitisation Regulation and the CRR came into force on 1 April 2021. These amendments aimed at, amongst others, (i) implementing the STS (simple, transparent and standardized) framework for balance sheet synthetic securitisations, and (ii) removing certain regulatory obstacles to the securitization of non-performing exposures (NPEs). It is safe to say that, in the wake of the pandemic, these measures have contributed to keeping the securitisation market in Portugal dynamic (along with the remaining countries of the European Union) and to enhance the growth of the Portuguese economy.

Overall, the securitization market in Portugal has continued to be very active (even from 2020-2022 and more so afterwards), with several securitisation transactions being entered into annually over the most common financial assets, such as mortgage loans, consumer loans and SME loans. These included transactions listed on the regulated market of Euronext Lisbon, both retained and placed in the market (at least some tranches of the transactions), with a variety of assets or receivables being securitized. Non-performing loans are still a hot topic in the Portuguese financial system and securitisations have been playing a role in solving this, even though most of the transactions are still made in a whole loan sale format. As the sustainable finance trend progresses swiftly, we expect sustainable securitisation to continue to grow in Portugal and abroad, being worth noting that the first Iberian green

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RMBS was originated and issued out of Portugal in 2020, while the first synthetic STS deal took place in 2021.

2. What assets can be securitised (and are there assets which are prohibited from being securitised)?

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

For non-STS securitisations under article 4(1) of Decree-Law No. 453/99 of 5 November 1999, as republished by Law No 69/2019, of 28 August 2019 and as amended from time to time (the Securitisation Law) only credits meeting the following requirements may be assigned for securitisation purposes:

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

Altogether, these are the eligibility criteria under the Securitisation Law. Under article 4(3) of the Securitisation Law, securitisation of future receivables is expressly allowed, provided they both:

- arise from existing relationships; and
- their amounts are known or quantifiable.

For the purpose of assigning future receivables, the originator or assignor assigns to the SPV certain rights over future assets, equivalent to an amount exceeding the debt service due (over-collateralisation). The originator or assignor of the receivables will then confirm that the future receivables generated during each collection period will be sufficient to cover the agreed debt service. For each interest period, the originator or assignor will transfer to the buyer an amount equivalent to 100 percent of the debt service in respect of the interest period. Furthermore, if the originator or assignor is unable to originate sufficient future receivables to meet their obligations for a given interest period, they will pay to the buyer an amount equal to the shortfall of future receivables, to ensure all the relevant debt service.

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

3. What legislation governs securitisation in your jurisdiction? Which types of transactions fall within the scope of this legislation?

In the context of securitisation, the Securitisation Law is the general legal framework applicable to securitisation transactions carried out under Portuguese law.

The Securitisation Law has implemented a specific securitisation legal framework in Portugal, which contains a simplified process for the assignment of credits for securitisation purposes. 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 will become the new legal owner of the receivables. It corresponds to a perfected sale of receivables; although there are some specifics features relating to exercise of means of defense and set-off rights against the securitisation vehicle, as described below.

In particular, the Securitisation Law regulates, among other things:

- securitisation vehicles;
- receivables eligibility criteria;
- types of assignors;
- licensing, authorisation, and assignment requirements;
- notification of borrowers;
- servicing of the assigned credits; and
- segregation of assets and bankruptcy-remoteness.

Additionally, the Portuguese jurisdiction has several sets of rules governing the following subjects on securitisation transactions:

- Decree-Law No. 219/2001 of 4 August 2001, as amended from time to time (the Securitisation Tax Regime) and general debt issuance tax legal framework, governing all tax matters on securitisation transactions;
- offers and listing of securitisation bonds are governed by the Portuguese Securities Code (approved by Decree-Law No. 486/99, as amended from time to time);
- specific regulation issued by the Portuguese Securities Commission (CMVM) – the

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Portuguese markets and securities regulatory body in charge of supervising the securities market and, in particular, of securitisation transactions and relevant players, establishing rules on accounting and own funds requirements of securitisation vehicles; and
- specific regulation issued by the Bank of Portugal applicable to originators assigning credits or loans for securitisation purposes to securitisation vehicles under the Securitisation Law.

It is also important to highlight the entry into force of the Securitisation Regulation and its amendments, which lays down a general framework for:

- securitisation;
- defines securitisation and establishes due diligence requirements;
- risk retention and transparency requirements for parties involved;
- credit granting criteria;
- selling securitisation requirements to retail clients;
- a ban on re-securitisation;
- securitisation special purpose entities' requirements; and
- conditions and procedures for securitisation repositories.

It has also created a specific framework for STS securitisation which has been amended on April 2021 to introduce an STS framework for balance sheet synthetic securitisations. The STS legal framework (as amended from time to time) became directly applicable, in all member states, to securitisations entered into on or after 1 January 2019.

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

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

Without prejudice to the above, please note that transactions without subordination of tranches (*i.e.* with only a single tranche) shall not fall within the scope of application of the Securitisation Regulation, but will remain subject to the Securitisation Law.

4. Give a brief overview of the typical legal structures used in your jurisdiction for securitisations and key parties involved.

A regulated Special-Purpose Entity (SPE) is typically used in a securitisation. The Securitisation Law provides for two possible SPE types, which both come under the supervision of the CMVM.

Accordingly, the assignee's SPE in a securitisation may be an FTC or an STC. The creation of any such SPE is subject to prior authorisation from the CMVM, and the securitisation (the transaction) itself is also subject to the CMVM's approval.

An FTC is an autonomous pool of assets without separate legal personality (i.e., a unit trust-like format). For this reason, it is required to have a fund manager (i.e., a securitisation funds management company – an SGFTC), which has been authorised and supervised by only one regulator (the CMVM) since 1 January 2020.

It must also have a custodian (an authorised credit institution), which is mandated to hold its assets. Certain share capital and minimum own funds requirements apply to both entities.

When an FTC structure is used, securitisation units are issued, each representing a similar undivided ownership interest in the FTC. The legal rationale would be for these to be issued directly to investors. However, since the units are qualified as equity instruments, this would be detrimental for many investors (particularly for regulated investors, notably due to equity instruments consuming more regulatory capital than debt instruments). Accordingly, in the Portuguese market, and in cases where these structures have been used in the past (some of which are still outstanding transactions), a double-SPE structure has been used.

An orphan SPE would usually be set up in another jurisdiction, normally Ireland or Luxembourg, and would acquire all the units and then issue notes to investors backed by such units (and indirectly by all the FTC's assets). This type of structure also involved additional costs and normally entailed obtaining approval of the prospectus for offer and/ or listing of the notes from a

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competent regulator outside Portugal, given the jurisdiction of the SPV.

For these reasons, the Portuguese securitisation market has generally only seen transactions using the other type of SPE (the STC) since 2008, which is considered in more detail below.

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

Besides a minimum share capital of EUR 125,000, STCs must have additional own funds (typically ancillary capital contributions with the features of regulatory capital under the CRR), which, in practice, are set in light of a certain percentage of their annual fixed expenses or a certain percentage of the amount of the securitisation notes issued by them, whichever is highest.

Whenever a new securitisation is being entered into, the STC shall confirm in advance whether it will have sufficient own funds to cover the additional requirements stemming from the new transaction and new notes to be issued and such level of own funds in monitored on a quarterly basis by the CMVM; if not, it must increase its own funds by the necessary amount.

STCs are multi-securitisation SPEs, operating on a silo-by-silo basis. Each securitisation transaction corresponds to a separate compartment, without cross-contamination across silos. When entering into a transaction, the STC will acquire a receivables portfolio and fund it through the issuance of securitisation notes. This receivables portfolio will be used to pay the liabilities under the issued securitisation notes, with the notes only being repaid by means of the cashflows generated by the receivables portfolio. Since these are notes, these asset-backed securities (ABS) can be placed and held directly by the investors as debt instruments, without the need to employ a double structure, as described in the case with the FTCs.

In light of the Securitisation Law, and notably the concept of autonomous estate exclusively allocated to the security holders and other creditors of the transaction assets of a given securitisation, any assets and liabilities pertaining to the securitisation will not be consolidated with the originator, the parent or an affiliate in case of the former's insolvency.

5. Which body is responsible for regulating securitisation in your jurisdiction?

The CMVM regulates and supervises securitisations in Portugal (see www.cmvm.pt). The CMVM:

- analyses the relevant securitisation documents and regulatory requirements;
- analyses the receivables pool of assets to be collateralized by way of the assignment for securitisation purposes;
- approves the assignment of receivables and incorporation of the securitisation fund (where an FTC is used as the securitisation vehicle), or the granting of an identification asset-code to the bulk of receivables in the asset securitised portfolio (where an STC is used as the securitisation vehicle); and
- is the competent authority for approving the prospectuses for admission to trading of securitisation notes issued by STCs on regulated markets 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 transaction being executed and approved by the CMVM (see bportugal.pt).

6. Are there regulatory or other limitations on the nature of entities that may participate in a securitisation (either on the sell side or the buy side)?

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

The Securitisation Law defines which entities may qualify as originators of receivables to be assigned for securitisation purposes, although no specific licence is required for this specific purpose. Under the Securitisation Law, the entities referred to in article 2(3) of the Securitisation Regulation and the Portuguese state and other public legal persons, credit institutions, financial companies, insurance firms, pension funds and pension fund managers are allowed to assign loans for

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securitisation purposes.

As to servicing of the securitised assets, the mere purchase and management of a certain portfolio of receivables does not, in itself and to date, 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 servicing of receivables, as is foreseen in the Securitisation Law, for example, when a sponsor (as defined in the Securitisation Law) intervenes in the securitisation and the seller is a credit institution, financial company, insurance firm, pension fund or pension fund manager, no licence or authorisation is required for the seller to continue to enforce and collect receivables, including to appear before a court, assuming the debtors are not aware of the assignment. However, should the assignment of the receivables have been notified to the debtors, then the servicer will need to show good and sufficient title to appear in court (such as power of attorney) in the event its legitimacy is challenged by the relevant debtor. Only a qualified creditor has the relevant legitimacy to claim credit in court.

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

7. Does your jurisdiction have a concept of "simple, transparent and comparable" securitisations?

Yes. Please see question 3 above. In Portugal, the Securitisation Law has recognised the STS Securitisation concept, and the first STS Securitisations in Portugal have been conducted in 2020, while 2021 witnessed the first synthetic STS deal.

8. Does your jurisdiction distinguish between private and public securitisations?

The private placement provisions in force are those established in the Portuguese Securities Code enacted by Decree-Law 486 / 99, as amended from time to time.

According to the referred legal framework, the following offers are deemed private offers:

1. Offers exclusively addressed to qualified investors;
2. Subscription offers addressed by non-publicly held companies to the majority of their shareholders, except if these offers are preceded or accompanied by a prospectus, a solicitation to an unidentified addressee to invest, or promotional materials; and
3. Offers addressed to fewer than 150 identified recipients, either a natural or legal person that are retail investors.

Certain private offers are only subject to a subsequent reporting requirement to the CMVM for statistical purposes.

Public offers are usually preceded by the disclosure of a prospectus.

Please see question 10 below, in specific, regarding further differences in the disclosure requirements.

9. Are there registration, authorisation or other filing requirements in relation to securitisations in your jurisdiction (either in relation to participants or transactions themselves)?

See the answer to question 6 in relation to participants of the securitisation transactions.

There are no specific formality requirements for an assignment of credits under the Securitisation Law. A written private agreement between the parties is sufficient for a valid assignment to occur (including an assignment of loans with underlying mortgages or other guarantees subject to registration under Portuguese law). Transfer by means of a notarial deed is not required. In the case of an assignment of mortgage loans, the signatures to the assignment contract must be certified by a notary public, lawyer or the company secretary of each party under the terms of the Securitisation Law, such certification being required for the registration of the assignment at the relevant Portuguese Real Estate Registry Office. Additionally, the assignment of any security over real estate or of an asset subject to registration in Portugal is only effective against third parties acting in good faith further to registration of such assignment with the competent registry by, or on behalf of, the assignee. The assignee is entitled under the Securitisation Law to effect such registration. As mentioned above, in order to perfect an

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assignment of mortgage loans and ancillary mortgage rights, which are capable of registration at a public registry against third parties, the assignment must be followed by the corresponding registration of the transfer of such mortgage loans and ancillary mortgage rights in the relevant Real Estate Registry Office. The Portuguese real estate registration provisions allow for the registration of the assignment of any mortgage loan at any Portuguese Real Estate Registry Office, even if the said Portuguese Real Estate Registry Office is not the office where such mortgage loan is registered. The registration of the transfer of the mortgage loans requires the payment of a fee for each such mortgage loan.

Concerning promissory notes, the usual practice is for these to be blank promissory notes in relation to which the originator has obtained from a borrower a completion pact that grants the originator the power to complete the promissory note. In order to perfect the assignment of such promissory notes to the assignee, the assignor will have to endorse and deliver these instruments to the assignee. The assignment of marketable debt instruments is perfected by the update of the corresponding registration entries in the relevant securities accounts, in accordance with the Portuguese Securities Code.

10. What are the disclosure requirements for public securitisations? How do these compare to the disclosure requirements to private securitisations? Are there reporting templates that are required to be used?

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

The EU prospectus requirements are of a more general nature, and the EU Prospectus Regulation (and its complementing Regulation (EU) 2017/1129) should be borne in mind when a prospectus is required (particularly when the listing on regulated markets of more senior tranches is involved).

Note that a prospectus will only mandatorily apply to listings on regulated markets (i.e., the primary trading venue of stock exchanges) or in cases where there is a non-exempt public offer.

Securities issued are normally wholesale (i.e., EUR 100,000 minimum denomination), in which case there is a public offer exemption. However, there is no similar exemption for the listing of those securities on regulated markets, even if they are placed with professional investors only.

In order to obtain European Central Bank (ECB) eligibility for the most senior notes (Class A) in accordance with the ECB Guidelines, securities shall be listed on a regulated market.

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

Prospectuses are approved by a securities regulator, which is usually the CMVM for Portuguese securitisations with listing on the Euronext Lisbon regulated market. It is also possible to request approval from another competent regulator in another EU Member State for listing on its market, and it would be common for Portuguese transactions to find listings on the Central Bank of Ireland in Ireland, or the *Commission de Surveillance du Secteur Financier* in Luxembourg.

The listing jurisdiction will also determine the jurisdiction of the banking supervisor confirming ECB eligibility, if applicable.

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

Without a prospectus, it is not possible to list the relevant securitisation notes on a regulated market, which is normally a condition precedent in the subscription agreement for public transactions.

However, it is not the regulator but rather the issuer (the guarantor (if applicable), the members of the managing and supervisory bodies of the issuer, and the certified public accountant that approved the relevant accounts, all in office at the date of approval of the prospectus, and any other named parties in the prospectus) who are liable for the information contained therein. Accordingly, in addition to civil liability, inaccurate or incomplete information in a prospectus may lead to the application of regulatory sanctions, including fines.

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Furthermore, the following regulations in regard to specific securitisation disclosure requirements should be highlighted. Certain disclosures need to be made and documented, the absence of which prevents regulated entities investing in ABS, or makes it much more burdensome for them to do so. This entails disclosure on exposure retention and ongoing information requirements.

Although the Securitisation Law does not foresee specific requirements, disclosure obligations for securitisation transactions are directly applicable via the Securitisation Regulation. Article 7 of the Securitisation Regulation sets out a new set of disclosure requirements commonly applicable across EU Member States.

The details and standardised templates to be used to fulfil these requirements were published on 3 September 2020 by means of two regulations, which have applied since 23 September 2020.

These regulations further elaborate on the information to be provided to investors, competent authorities and potential investors in securitisation transactions that fall under the scope of the Securitisation Regulation, providing greater certainty and accuracy to these players. Annexes to the Disclosure Regulatory Technical Standards (RTS) contain the set of information to be provided on underlying exposures and investor reports for securitisation transactions, and on inside information and significant events for public securitisation transactions.

In turn, annexes to the Disclosure Implementing Technical Standards (ITS) contain the standardised templates for making such information available.

The Disclosure RTS also sets out guidance on those cases where certain information cannot be made available or is not applicable, allowing the use of specific "No Data" options. The use of these "No Data" options is limited to those situations in which there are justifiable reasons to do so and should not be used to circumvent the reporting requirements set out under the Securitisation Regulation.

Securitisation repositories are required to verify the completeness and consistency of the information provided with respect to public securitisations, and that the use of the "No Data" options does not prevent the reported information from being sufficiently representative of the underlying exposures, as well as the compliance with certain percentage thresholds. Securitisation repositories centrally collect and maintain the records of securitisations and are registered and supervised by the European Securities and Markets Authority (ESMA).

Multiple technical standards on securitisation repository registration and supervisory fees were published on 3 September 2020 and entered into force on 23 September 2020, allowing for the registration of securitisation repositories with ESMA as of such date.

Since 23 September 2020, these templates have been used to report the information in respect of the existing securitisation transactions, and the transitional provisions that were previously in force – namely article 43(8) of the Securitisation Regulation, which allowed for the use of the so-called "CRA III" reporting templates – ceased to apply.

The publication of the Disclosure RTS and Disclosure ITS and the entry into force of these reporting templates has been long-awaited by securitisation market stakeholders and brought a greater level of homogeneity and certainty in the information disclosed to the investors, thereby reducing due diligence costs and increasing comparability across transactions.

In June 2021, ESMA informed market participants that it had approved the registrations of the first two securitisation repositories under the Securitisation Regulation (European DataWarehouse GmbH based in Germany;, and SecRep B.V. based in the Netherlands), with reporting entities having to make their reports available through one of them as of 30 June 2021.

Moreover, in addition to the impact on existing transactions, the COVID-19 pandemic crisis has raised some uncertainty for securitisations with respect to regulatory disclosure obligations.

Under the Securitisation Regulation, certain indicated "significant events" must be disclosed. Such raises for instance the question of whether any (and which) "significant events" should be disclosed, for the purposes of Article 7(1)(g) of the Securitisation Regulation, under the current crisis scenario (e.g. the post-pandemic scenario, the war conflicts between Russia and Ukraine, and between Israel and Palestine, and the high increase of global inflation, which has triggered a cost-of-living crisis).

ESMA has made available further technical standards on disclosure requirements, stating that any event that would be likely to materially impact the performance of the securitisation and have a significant effect on the prices of the tranches/bonds of the securitisation should be considered to be a significant event. Nevertheless, such effects will need to be analysed on a case by case basis, as they vary according to each securitisation transaction.

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11. Does your jurisdiction require securitising entities to retain risk? How is this done?

Although the Securitisation Law does not contain specific requirements regarding retention obligations for securitisation transactions, the Securitisation Regulation applies in respect of risk retention rules.

As is the case in other jurisdictions, the EU has credit-risk retention obligations in place, which are framed to enhance the quality of the assets an originator securitises, from the outset. This applies from a regulated investors' perspective and entails disclosure on exposure retention and ongoing information requirements under the Securitisation Regulation.

Such investors are not allowed to invest in securitisations without such a retention obligation being ensured, or are heavily restricted when doing so. The retention obligation can be fulfilled in different ways, but the end result is the holding of no less than 5% of the risk position of the securitisation (i.e., no less than 5% of a net economic interest in the securitisation). In most cases, the originator will hold 5% of the securities issued, starting from the more junior class, but it is also possible, for instance, to hold a similar position outside the securitisation (i.e., an originator securitises 100 loans and commits to retaining five similar loans until the securitisation notes have been redeemed – this is the typical way for the originator to retain in non-performing loans (NPL) deals, when the originator has agreed to a retention obligation). The originator will be required not to hedge, sell or in any other way mitigate its credit risk in relation to such retained exposure.

Where the originator, sponsor or original lender have not agreed between them who will retain the material net economic interest, the originator shall retain the material net economic interest. Multiple applications of the retention requirements for any given securitisation are not allowed, and the material net economic interest may not be split among different types of retainers (nor, likewise, subject to credit risk mitigation or hedging).

Pursuant to the amendments to the Securitisation Regulation, in force from April 2021 onwards, the risk retention requirement may also be fulfilled by the servicer in the case of traditional NPE securitisations, provided that the servicer can demonstrate that it has expertise in servicing exposures of a similar nature to those securitised and that it has well-documented and adequate policies, procedures and risk-management controls in place relating to the servicing of exposures.

The retention obligation and the related disclosures are described in the prospectus (or other information memorandum), including in the risk factors section, and are then contractually undertaken by (typically) the originator and servicer, and by any other relevant parties (such as the transaction manager, who would typically report this information in the periodical investor report) in the transaction agreements, notably the receivables sale agreement and the servicing agreement.

In addition to the consequences from a risk-weighted assets (RWA)/capital ratios perspective, non-compliance may lead, inter alia, to fines. The retention legal requirements are typically supervised by the relevant banking, securities or insurance supervisor of the originator/investors. In Portugal, this would be the Bank of Portugal, the CMVM and the Insurance and Pension Funds Supervisory Authority (ASF), respectively. Foreign investors should look to the laws of their own jurisdiction to assess whether similar rules apply and whether it is possible to comply with those rules if the issuer or originator is subject to and complies with substantially similar rules.

12. Do investors have regulatory obligations to conduct due diligence before investing?

As mentioned above in question 3, the Securitisation Regulation establishes due diligence requirements.

Nevertheless, and although Investors should perform their own due diligence before investing, these regulatory obligations tend to be directed towards the originator, sponsor and SSPE.

13. What penalties are securitisation participants subject to for breaching regulatory obligations?

The Securitisation Law imposes a specific sanctions framework for the breach of securitisation transactions requirements. Ancillary sanctions include temporary prohibitions on performance of activities.

Specific sanctions are provided for the inappropriate labelling of a securitisation as an STS securitisation.

14. Are there regulatory or practical restrictions on the nature of securitisation SPVs? Are SPVs within the scope of regulatory requirements of securitisation

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in your jurisdiction? And if so, which requirements?

Please see question 4 above.

15. How are securitisation SPVs made bankruptcy remote?

A securitisation is the more typical way to detach a receivables assignment from the insolvency of the originator/transferor. This Securitisation Law framework endures even after the originator's insolvency, and the assignment can only be set aside under very exceptional circumstances of fraud and bad-faith action by the parties.

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

16. What are the key forms of credit support in your jurisdiction?

The same types of credit support forms are typically found in Portuguese securitisations as in other jurisdictions – more specifically, tranching of the notes, subordination of the claims of the different noteholders and transaction creditors in the payment waterfalls, various types of cash reserves held in a specified cash reserve account, over-collateralisation, and hedging instruments (most commonly IRS or interest rate cap agreements). Guarantees and letters of credit (which can only come from unrelated parties under the Securitisation Law) are not common and may attract tax considerations.

17. How may the transfer of assets be effected, in particular to achieve a 'true sale'? Must the obligors be notified?

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

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

In many securitisations, the relevant receivables are secured.

The relevant security can be of several types, depending on the deal in question and the underlying assets, with the most common being mortgages, pledges and personal guarantees. In a residential mortgage-backed security (RMBS) or a commercial mortgage-backed security (CMBS) deal, the security will be represented by mortgages over the relevant housing properties or commercial real estate, but in other deals there may be mortgages over other assets (such as cars, ships or aircrafts, seeing as these are subject to registration, as with real estate), or pledges over shares, securities, bank accounts or other forms of security.

Security rights, and notably any mortgage or pledge, require perfection steps vis-à-vis third parties, even though the transfer of the security is fully effective between assignor and assignee.

However, in most cases, the originator retains the servicing of the assets and the commercial relationship with the borrowers, and therefore the relevant security transfer is not registered immediately (also for cost-related reasons and reasons relating to the ongoing relationship between the originator and its clients, who do not know of the assignment).

The issuer holds the right to implement this registration but, due to the respective costs, the originator roles detailed above and the envisaged neutrality of the transaction towards the borrowers, the parties rely on the originator's good faith to avoid having to register immediately, accepting the risk of a bad-faith action by the originator, which could, in theory, assign the same receivables and security to unrelated third parties. In practice, that risk has thus far never materialised, having been accepted by rating agencies and discussed in legal opinions.

The exception to the above is NPL securitisations, where the originator normally does not retain – and is not willing to retain (also for full deconsolidation purposes) – the servicing of the assets upon the assignment (sale) agreement.

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In this case, borrowers are notified of the new creditor and respective payee bank account, and registration of the security assignment takes place after the closing date.

The above-mentioned exemption of not requiring borrower notification of the assignment does not apply to assignments of rights under secured loans that are not being securitised.

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.

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/assignor. The Securitisation Law awards specific protections to safeguard that detachment, including in case of assignor/originator insolvency.

18. In what circumstances might the transfer of assets be challenged by a court in your jurisdiction?

Please see question 17 above.

19. Are there data protection or confidentiality measures protecting obligors in a securitisation?

Following the publication of Regulation (EU) 2016/679 of 27 April 2016 (GDPR), it is key to have detailed provisions on data protection procedures and the allocation of responsibilities between the servicer and the issuer (in performing securitisations, the servicer will actively manage such data and the issuer will essentially be passive and have no actual access to such data, except in cases of servicer event/default, which so far has never taken place).

Law No. 58/2019 of 8 August 2019 (Data Protection Act) supplementing GDPR provides for the protection of natural persons with regard to the controlling or processing of personal data and on the free movement of such data.

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

20. Is the conduct of credit rating agencies regulated?

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

The first Credit Rating Agency Regulation (CRA) was passed in 2009, and there have since been two substantial amendments. The latest legislative package on CRAs consists of Regulation no. 462/2013 (CRA III Regulation) and the CRA III Directive (Directive 2013/14/EU), which entailed significant amendments to the CRA Regulation on issues including 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 registered with ESMA or endorsed by a rating agency registered with ESMA. The three big rating agencies all have registered entities in the EU, and there are several other registered agencies, including DBRS Morningstar. CRA III has introduced a requirement establishing that any issuer or related third party (such as sponsors and originators) that intends to solicit a credit rating of a structured finance instrument must appoint at least two credit rating agencies to provide independent ratings, and should also consider appointing at least one rating agency holding no more than a 10% total market share (a small credit rating agency), provided that a small CRA is capable of rating the relevant issuance or entity.

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

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for them to do so.

21. Are there taxation considerations in your jurisdiction for originators, securitisation SPVs and investors?

The Securitisation Tax Regime establishes the tax regime applicable to the securitisation transactions carried out under the Securitisation Law. Its main goal was to ensure a tax-neutral treatment of the securitisation transactions set up by each one of the securitisation vehicles provided for in the Securitisation Law. Therefore, under articles 2(5) and 3(5) of the Securitisation Tax Regime, there is no withholding tax on:

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

The nature or the characteristics of the receivables and the location of the seller have no influence on the tax regime referred to above. However, the purchaser must be an STC or FTC resident in Portugal for tax purposes to benefit from the special tax regime. There is no recharacterisation risk of the deferred purchase price as payments of collections are not subject to withholding tax.

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

According to Circular No. 4/2014 issued by the Portuguese Tax Authorities and to the Order issued by the Secretary of State for Tax Affairs, dated 14 July 2014, in connection with tax ruling No. 7949/2014 disclosed by the tax authorities, the general tax regime on debt securities (as established in Decree-Law No. 193/2005 of 7 November 2005, as amended) also applies on income generated by the holding or the transfer of securitisation notes issued by STCs under securitisation transactions.

Decree-Law No. 193/2005, as amended, is therefore applicable to securitisation notes, notably regarding the requirements on registration of securitisation notes in the relevant clearing systems and on the exemption applicable to income obtained by non-resident holders of such securitisation notes. In this regard, payment of interest and principal on securitisation notes are exempt from Portuguese income tax, including withholding tax, provided the relevant noteholder qualifies as a non-Portuguese resident having no permanent establishment in Portugal. Such exemption does not apply to non-resident individuals or companies if the individual's or company's country of residence is any jurisdiction listed as a tax haven in Ministerial Order No. 150/2004 of 13 February 2004 (as amended from time to time) and with which Portugal does not have in force a double tax treaty or a tax information exchange agreement provided the requirements and procedures for evidencing the non-residence status are complied with. To qualify for the exemption, noteholders will be required to provide the direct registry entity with adequate evidence of non-residence status prior to the relevant interest payment date, according to procedures required under Decree-Law No. 193/2005.

No specific tax accounting requirements need to be complied with by the seller under the securitisation tax regime. However, CMVM Regulation No. 1/2002 of 5 February 2002, sets forth the specific accountancy regime for FTCs, and CMVM Regulation No. 12/2002 of 18 July 2002, establishes specific accountancy rules for STCs (although the accounting procedure of this type of corporate entity follows the general Portuguese Accountancy Standards).

Pursuant to the Securitisation Tax Regime, no stamp duty is due on the sale of receivables being securitised or the fees and commissions that fall under article 5 (ie, referring to required acts to ensure good management of the receivables and, if applicable, of the respective guarantees, and to ensure collection services, the administrative services relating to the receivables, all relations with the debtors and also maintaining, modifying and extinguishing acts related to guarantees, if any), and under article 24[1] (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[2], which is in line with article 135(b) and (d) of the VAT Directive (EC Directive 2006/112/EC, as amended from time to time). Pursuant to the Securitisation Tax Regime, no value added tax is due on the administration or management of securitisation funds and also on the fees and commissions regarding management services falling under article 5 and transactions undertaken by depositary entities pursuant to article 24 of the Securitisation Law, as described above. Considering the above, it is important to highlight that the purchase of

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the receivables is qualified as a true sale transaction under the Securitisation Law; the purchaser being the legal owner of the receivables and therefore the purchaser is subject to tax in Portugal (namely in respect of income arising from the receivables). However, despite being viewed as an ordinary taxpayer, in order to ensure a tax-neutral treatment on the securitisation transactions, the taxable income of the purchaser tends to be equivalent to zero for tax purposes since the income payments made to the noteholders are tax-deductible (while STCs are no longer exempted from the general limitation rules on the deductibility of financing expenses, applicable to companies in general, an amendment to the Securitisation Tax Regime ensured that this has limited or no actual tax impact to STCs paying income (i.e. interest) to the noteholders which is essentially generated by a similar type of income received by the STCs under the receivables portfolios (i.e. interest payments from borrowers).

Footnotes:

[1] Although the reference to article 24 of the Securitisation Law is still mentioned in the Securitization Tax Regime, the referred provision was repealed by Law no. 69/2019, from 28 August.

[2] Decree-law No. 102/2008.

22. To what extent does the legal and regulatory framework for securitisations in your jurisdiction allow for global or cross-border transactions?

Please refer to question 3 above.

Regarding specific taxation issues on transfers on cross-border transactions, when dealing with locally regulated SPEs, the nature or characteristics of the receivables and the location of the originator (seller) do not have any influence on the tax regime referred to above.

An important issue to consider is the withholding tax (WHT) in respect of payments made under the securitisation notes. Payments of principal are not subject to any WHT. Interest payments are payments of income that could generally be subject to WHT. Under both the Securitisation Tax Regime and the special debt securities tax regime, approved by Decree-Law 193/2005, of 7 November 2005, there are income exemptions for payments made to foreign investors, provided that certain requirements are met.

The most important income tax exemption applies to non-resident investors, where certain tax procedures are met through the custody chain, and provided that the noteholder (the ultimate beneficiary of the income) is not resident in a blacklisted (tax haven) jurisdiction with which Portugal has no double taxation treaty or information exchange in force. These requirements are normally described in the relevant prospectus.

23. To what extent has the securitisation market in your jurisdiction transitioned from IBORs to near risk-free interest rates?

The Portuguese market has transitioned in a smoothly manner and near risk-free interest rates transactions have been put in place during the years of 2020 and 2021. As an example, in July 2020, a cash flow securitisation of a revolving portfolio of credit card receivables entered the Portuguese market. This was the first securitisation of credit card receivables in Portugal and also the first securitisation with fixed rates (such rates being connected with the relevant credit card agreements). Market players have prepared for the definitive discontinuation of Sterling, Euro, Swiss Franc, and Japanese Yen LIBOR settings in all tenors, as well as US Dollar LIBOR 1-week and 2-month, from 31 December 2021 onwards, by adjusting the terms of the agreements in place in accordance with ESMA recommendations, namely by including benchmark fallbacks and referencing RFRs.

In the Portuguese jurisdiction, the prospective investors are being informed, under the terms and conditions included in the prospectus, of the risks related to benchmarks.

24. How is the legal and regulatory framework for securitisations changing in your jurisdiction? How could it be improved?

In 2023, Regulation (EU) 2023/2631 of the European Parliament and of the Council of 22 November 2023, on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds was enacted, setting out the basis for sustainable securitization and introducing the “European Green Bond Standard” (“EuGBS”), a designation to be used on a voluntary basis by bond issuers. The sustainable finance trend shall continue to progress worldwide, while we note an increasing demand for sustainable products from investors in Portugal.

Furthermore, after years of discussion and negotiation, an agreement regarding the proposal to implement the

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European regulation for artificial intelligence was finally reached in December 2023, which final draft was published on February 2, 2024. This agreement mostly aims at placing stricter transparency and testing requirements for high-risk artificial intelligence systems, thus combining encouragement for further advancements in the field and the necessary safeguard of public safety.

In the wake of these developments, challenges linked to the sustainable securitization structures and the potential impact of artificial intelligence and distributed ledger technology on the securitization market will certainly continue to fuel the discussions around the future of the legal and regulatory framework for securitization in Portugal.

As regards opportunity for enhancement of the current framework, one of the improvements that could be considered under Portuguese jurisdiction relates to the tax treatment of real estate holding by STCs. According to the no. 6 of Article 45 of the Securitisation Law, it is legally enshrined that STCs may acquire and hold real estate assets for the benefit of their ring fenced silos (*patrimónios autónomos*), where those are acquired in the context of a lieu in payment (*dação em pagamento*) or in the context of the enforcement of security (*garantias reais*) granted in connection with its assets, provided that the real estate assets are sold within two years from the date on which they were included in the aforementioned silos, such deadline being able to be extended in accordance with the terms and conditions to be set by the Portuguese Securities Market Commission. However, the tax regime applicable to the sale of the real estate assets held by the STCs it is not clear and the application of a tax exemption should be considered, in the same terms as the one already provided for the real estate companies.

On other hand, the tax regime applicable to the securitisations should also be revisited to accommodate the reality of synthetic securitisations. This is because, in such transactions, there is no transfer of exposures, but only transfer of risk through the exchange of financial flows, rights and obligations or risks, associated with a pool of exposures, by way of credit derivatives or guarantees.

Finally, on another front, the regulatory regime applicable to the procedures between the European and national central banks with regards to securitisation transactions could be improved for further harmonization and consolidation.

25. Are there any filings or formalities to be satisfied in your jurisdiction in order to constitute a true sale of receivables?

Please see question 17 above.

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