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The Netherlands
Securitisation

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

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The Netherlands: 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 Netherlands has an active securitisation market. The most common asset in Dutch securitisations are residential mortgage loan receivables. We especially note a rise in investor appetite for "green" securitisations and in particular with respect to residential mortgage loan receivables. Other assets that are commonly seen are auto-leases, buy-to-let mortgage loan receivables, consumer loans and trade receivables. Less common assets are assets such as commercial mortgage loan receivables and equipment lease securitisations.

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

Securitisation positions are the only assets prohibited from being securitized in the Netherlands (pursuant to Article 8 of the Regulation (EU) 2017/2402 (as amended) ('EU SR')).

Therefore, any cash flow-generating assets that are freely assignable and transferable and which do not constitute securitisation positions can be securitised.

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

There is no securitisation-specific legislation on a national level in the Netherlands. However, the EU Securitisation applies to all Dutch securitisation transactions.

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

The standard structure used for Dutch securitisation transactions entails an asset sale by an originator to a special purpose vehicle ('SPV') through a legal "true sale". This process typically, but not necessarily, involves an orphan SPV. The SPV is usually incorporated as a Dutch limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*), although Irish as well as Luxembourg-incorporated SPVs are also regularly seen in the Dutch market. The SPV funds the purchase of the assets by issuing secured notes with different risk profiles or by borrowing funds under senior and subordinated secured loan arrangements.

The SPV will typically outsource the various tasks/obligations that the SPV needs to perform or observe under a transaction, such as asset servicing and cash management, to independent third parties.

Furthermore, a security trustee or agent is appointed to represent and safeguard the interest of the SPV's secured creditors. In addition, the SPV will provide security for its financial obligations vis-à-vis the SPV's prescribed creditors by pledging all of its assets to the security trustee or agent, which will hold the security on behalf of the prescribed secured creditors.

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

Securitisation transactions involving an originator, sponsor or original lender licensed by the Dutch Central Bank (*De Nederlandsche Bank*, 'DNB') are subject to DNB's supervision. Securitisation transactions that do not fall within this scope are subject to supervision by the Financial Markets Authority (*Autoriteit Financiële Markten*, 'AFM').

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)?

There is only one restriction applicable to Dutch securitisation transactions that relates to the nature of entities that may participate in a Dutch securitisation transaction, which is included in Article 2(2) of the EU SR. Under Article 2(2) of the EU SR, the issuer SPV in a Dutch securitisation transaction must be a corporation, trust or other entity other than the relevant originator(s) or sponsor(s). Furthermore, the SPV must be established for the purpose of carrying out one or more securitisations,

its activities must be limited to those activities that are appropriate for the accomplishment of such corporate objective and the SPV must be structured in such manner that it is unambiguously clear that the relevant transaction parties intend to isolate the SPV's assets and obligations from those of the originator(s).

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

Yes, the EU SR has introduced the "simple, transparent and standardised" ('STS')-regime, according to which asset-backed commercial paper ('ABCP') securitisation transactions, non-ABCP securitisation transactions and synthetic securitisation transactions can obtain the STS-label if (i) the originator, sponsor and SPV are established in the European Union and (ii) the requirements from Articles 20-22 EU SR (for non-ABCP transactions), Article 24 SR (for ABCP transactions) and Articles 26b-26e SR (for synthetic transactions), respectively, are met. In addition, an ABCP securitisation program (as defined in the EU SR) can also obtain the STS-label if (i) the originator, sponsor and SPV are established in the European Union, (ii) the requirements from Article 25 EU SR are met and (iii) the sponsor complies with the requirements provided for in Article 25 EU SR. Furthermore, pursuant to Article 27 of the EU SR, a STS notification needs to be sent to the European Securities and Markets Authority ('ESMA')

The STS-label can (subject to various requirements) provide various benefits in terms of regulatory capital management for credit institutions and other entities that fall under the scope of Directive 2013/36/EU (as amended) ('CRD').

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

Under the Dutch legal framework (through direct application of the EU SR) provides for a distinction between private and public securitisations: Dutch securitisation transactions for which the obligation to publish a prospectus pursuant to Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (the 'Prospectus Regulation') applies qualify as public securitisations. Dutch securitisation transactions for which such obligation does not apply qualify as private securitisations.

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

We refer to paragraph 17 with respect to any registration requirements for the transfer deed of the receivables.

Under normal circumstances, SPVs are not considered as credit institutions as defined in Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012 ('CRR'). Therefore, no banking license is required for the SPV.

In addition, in case of receivables to be transferred to the SPV qualifying as consumer credit receivables, the SPV can invoke an exemption pursuant to the Exemption Regulation (*Vrijstellingsregeling Wft*) with regard to the license for the 'offering of credit' which the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, 'FSA') requires, if the SPV outsources the servicing of such receivables to an appropriately licensed third party.

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?

Either the originator, sponsor or original lender must disclose to investors, the competent authorities and, upon request, potential investors, the following information, among other information, pursuant to Article 7 of the EU SR:

- information on the underlying exposures, on a regular basis;
- all underlying documentation that is essential for the understanding of the transaction, which also includes a comprehensive description of the payment waterfall of the transaction, before pricing;
- information about the risk retention, on a regular basis;
- in the case of STS-securitisations, the STS notification, before pricing; and
- in the case of private securitisation transactions, a transaction summary or overview of the main features of the transaction, before pricing.

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

The legal framework for risk retention is set out in Article 6 of the EU SR and further set out in Commission Delegated Regulation (EU) 2023/2175 of 7 July 2023 on supplementing Regulation (EU) 2017/2402 of the European Parliament and of the Council with regard to regulatory technical standards specifying in greater detail the risk retention requirements for originators, sponsors, original lenders, and servicers ('Risk Retention RTS').

The originator, sponsor or original lender (or possibly the servicer in case of traditional NPE securitisation transactions) must retain on an ongoing basis a material net economic interest of not less than 5%, which is measured at the time of the origination of the transaction and determined by the notional value for off-balance sheet items. Any mechanisms that effectively reduce such net material interest are prohibited, this includes undertaking any hedging or other forms of credit-risk mitigation.

There are different methods of retaining the required material net economic interest:

- the risk retainer retaining at least 5% of the nominal value of each of the tranches sold or transferred to investors;
- in the case of revolving securitisations or securitisations of revolving exposures, the risk retainer retaining an interest of not less than 5% of the nominal value of each of the securitised exposures;
- the risk retainer retaining randomly selected exposures, provided that these amount to not less than 5% of the nominal value of the securitised exposures, where such non-securitised exposures would otherwise have been securitised in the securitisation, provided that the number of potentially securitised exposures is not less than 100 at origination;
- the risk retainer retaining the first loss tranche, and where such retention does not amount to 5% of the nominal value of the securitised exposures, if necessary, other tranches having the same or a more severe risk profile than those transferred or sold to investors and not maturing any earlier than those transferred or sold to investors, so that the retention equals in total not less than 5% of the nominal value of the securitised exposures.

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

Institutional investors are subject to fairly extensive due diligence requirements when participating in Dutch securitisation transactions pursuant to Article 5 of the EU SR. Institutional investors are supported in doing their due diligence by the disclosure requirements for the originator, sponsor or original lender under Article 7 of the EU SR.

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

In general, the AFM and DNB have several instruments which they are entitled to use in case of a regulatory breach. Depending on the severity of the breach, the AFM and DNB will decide on which instrument to use. Possible measures include but are not limited to:

Informal measures

- Warning letter; and
- Warning per intervening conversation.

Formal measures

- Giving instructions;
- Cease and desist letter;
- Rescinding regulatory licences;
- Appointing a trustee;
- Fine.

14. Are there regulatory or practical restrictions on the nature of securitisation SPVs? Are SPVs within the scope of regulatory requirements of securitisation in your jurisdiction? And if so, which requirements?

We refer to paragraph 9.

15. How are securitisation SPVs made bankruptcy remote?

The SPV is generally designed to be an orphan entity with a restricted scope of objects and activities. Furthermore, the SPVs bankruptcy-remoteness is further enhanced by the upfront fixation (to the extent possible) of the (small) group of creditors, each of which agree to limited-recourse provisions as well as non-petition clauses. Finally, the SPVs orphan status is reinforced by the appointment of an independent third-party corporate service providers as the SPVs director (and the SPVs shareholder, if applicable).

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

There are various approaches in terms of which forms of credit support will be used with Dutch securitisation transactions. The following forms of credit support are often used with Dutch securitisation transactions"

- *Subordination of interests.* The SPV issues secured debt instruments (or borrows the equivalent in a secured loan format) to investors with varying levels of seniority regarding payment and security. The most subordinated debt instruments will incur losses first in the event of non-performance of the securitised assets. The more senior debt instruments remain unaffected by the non-performance of the securitised assets, provided that such losses do not exceed the SPV's payment obligations under the junior (or more junior) debt instruments.
- *Cash reserves.* The SPV will maintain a cash reserve to cover principal losses on the asset portfolio and/or shortfalls in senior-ranking costs, fees, and expenses of the securitisation transaction. This reserve fund is financed and maintained by periodically allocating any excess cash flow generated by the securitisation transaction and/or using the proceeds from subordinated debt instruments issued by the SPV, which are often purchased by the seller/originator. Consequently, the seller/originator will be effectively responsible for covering such shortfalls and/or losses.
- This process entails securitising a notional amount of financial assets that exceeds the notional amount of the securitised debt issued or otherwise raised by the SPV. Since there is more value supporting the securitised debt, the likelihood that the SPV cannot meet all of its payment obligations is reduced. Any excess cash flow stemming from the overcollateralisation will usually be allocated to the seller/originator as a deferred purchase price in case no cash flow shortfall occurs.

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

Although there are various ways to transfer receivables, in most instances parties to a Dutch securitisation transaction transfer the receivables to the SPV via assignment (*cessie*), and more specifically through undisclosed assignment (*stille cessie*), which does not require notification to the underlying obligors but requires either (i) registration of the deed of assignment, or (ii) the deed of assignment to be executed by a civil law notary (*notaris*). Alternatively, receivables may be assigned by way of a disclosed assignment which requires notification (*openbare cessie*). In any case, to ensure a valid and enforceable transfer of the receivables, the following is required under Dutch law:

i. a seller with the power to dispose (*beschikkingsbevoegdheid*) of the receivables;
ii. a valid title (*geldige titel*) for the transfer of the receivables; and
iii. valid delivery (*levering*) of the receivables.

However, undisclosed assignment comes with a caveat. For as long as the debtor is not notified of the assignment, the debtor can still make payment to the assignor which will qualify as a valid discharge (*bevrijdende betaling*). After the notification, such valid discharge is only possible with respect to payments made by the debtors to the assignee.

This caveat grows in importance in the event of bankruptcy of the seller/originator. If no notification has been provided to a debtor prior to the seller's/originator's bankruptcy, any payment made by a debtor to the insolvent seller/originator will be considered as belonging to the estate of the insolvent seller/originator, which negatively affects the SPVs payment obligations. Moreover, the SPV will qualify as an unsecured creditor in the seller's/originator's insolvency proceedings with respect to payments made by debtors prior to bankruptcy. The transaction documentation usually provides for assignment trigger events to mitigate for such risk. Upon the occurrence of an assignment trigger event, the relevant underlying debtors will be notified in order to protect the SPV payment waterfall.

With respect to the transfer of future receivables, it is only possible under Dutch law to transfer future receivables that follow from a legal relationship that already existed at the time of the assignment. In order to capture any further future receivables that follow from future contracts, the seller will need to enter into further deeds of assignment to ensure the transfer of such receivables.

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

See paragraph 17 for valid discharge by debtors in case of an undisclosed assignment. In a bankruptcy scenario of the originator / seller, it is important to note that any receivables coming into existence on or after the date of bankruptcy, regardless of whether they follow from an

existing contract or not, will be considered part of the bankruptcy estate of the seller / originator. In a bankruptcy, the transfer will furthermore be subject to the general claw back provisions under Dutch law.

A sale and assignment under a securitisation may be subject to rescission by a bankruptcy.

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

Yes. Both Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) and the General Data Protection Regulation Implementation Act (*Uitvoeringswet Algemene verordening gegevensbescherming*) apply to Dutch securitisation transactions.

20. Is the conduct of credit rating agencies regulated?

Yes. Credit rating agencies fall within the scope of ESMA's supervision pursuant to Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies ('CRA Regulation').

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

There are several Netherlands taxation considerations that may be of relevance for originators, securitisation SPVs and investors:

Originators:

- VAT**:** The sale of receivables is not subject to VAT and should typically not affect the right of the originator(s) to deduct input VAT. Collection agent services may, however, be subject to VAT if these relate to non-performing receivables.
- Corporate income tax: In most securitisation transactions, the SPV will be treated as an agent of the originator(s) for (corporate) income tax purposes, as a result of which the originator(s) will not recognise a taxable gain upon the sale of the receivables.
- Transfer taxes: The Netherlands does not levy any transfer taxes, stamp duties, or other documentary taxes, other than real estate transfer tax (***RETT***). RETT is typically not triggered by the transfer of receivables on the basis that such assets do not represent an economic interest in any real estate for RETT purposes. Hence, no transfer taxes, stamp duties, or other documentary taxes should be due upon the sale of receivables.

Securitisation SPVs:

- Withholding taxes: Payments received by the SPV from Netherlands payors under the receivables are typically not subject to withholding taxes. Payments by the SPV under the notes issued to investors are not subject to Netherlands withholding taxes, unless (a) the notes have certain equity-like characteristics, or (b) such payments are (deemed) made to investors that are affiliated (*gelieerd*) to the SPV (or, where the SPV is treated as an agent of the originator, potentially to entities affiliated to the originator) and such investors are holding the notes in or via a low-tax jurisdiction or through a hybrid or abusive structure. Hence, interest payments (deemed) made by the SPV on notes or other debt instruments to unaffiliated investors will not be subject to any withholding tax. Dividends paid by the SPV are generally subject to 15% withholding tax, unless such dividends are paid to affiliated entities resident in, or holding the shares in the SPV via, a low-tax jurisdiction or through a hybrid or abusive structure (in which case the withholding tax rate will be equal to the highest corporate income tax rate).
- VAT: Certain services (depending on the nature thereof) provided to SPV may be subject to VAT. Since the SPV typically does not typically provide any services subject to VAT, it will generally not be able to recover (all) incurred VAT, as a result of which any such VAT will constitute a hard cost. Some services provided to the SPV may be VAT-exempt if they qualify as services related to the management of special investment funds, which is dependent on specific regulatory requirements and should be assessed on a case-by-case basis.
- Corporate income tax: The SPV is subject to corporate income tax over its actual net profits. In practice, such net profits may be limited if the SPV is treated as an agent of the originator(s) for corporate income tax purposes (see above under **Originators**).
- Transfer taxes: See above under **Originators**.
- Pillar II**:** If the SPV is consolidated for financial accounting purposes with the originator and/or any other party and such originator and/or other party is in scope of the Netherlands implementation of the global

minimum tax for certain large multinational and domestic groups ("Pillar Two", which applies to certain groups with annual consolidated revenues in excess of EUR 750 million), the SPV may be held secondarily liable for any Netherlands Pillar Two tax liabilities of such group.

Investors:

- Withholding taxes: See above under **Securitisation SPVs**.
- Transfer taxes: See above under **Originators**.

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

Most securitisations in the Netherlands contain a cross-element with often either the SPV or one or more investors being foreign entities. The fact that the Netherlands does not have any local securitisation laws and relies on the EU SR for its regulatory framework is useful in this respect, especially in a European context.

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

As set out in paragraph 1, the Netherlands does not have any national securitisation laws and relies on the EU SR for its regulatory framework with respect to securitisation. Consequently the Dutch legal framework changes whenever there is a change to the EU SR or any related EU legislation.

We are currently awaiting certain EU driven changes for transactions involving non-performing loans following the adoption of the Non-Performing Loans Directive (Directive (EU) 2021/2167) (the **NPL Directive**). Although the deadline for implementation in the Member States has already expired, the Dutch NPL Directive Implementation Act (*Implementatiewet richtlijn kredietservicers en kredietkopers*) has not yet been adopted. The timeline of implementation currently remains unclear.

Following the envisaged implementation of the NPL Directive, a purchaser of receivables or the transferee, in each case in relation to non-performing credit agreements (as defined in Section 3 (13) of the NPL Directive), will be obliged to notify the AFM once they have enlisted a credit servicer with respect to the non-performing loans (see also question 8.2 below). The credit purchaser or transferee (as applicable) will also become subject to semi-annual reporting requirements with respect to its non-performing loan portfolio.

Additionally, as mentioned in paragraph 1, we see a growing appetite for green securitisation, especially in relation to (residential) mortgage loan receivables. We are therefore expecting to see further development and improvement on the EU framework aimed to facilitate such green securitisations.

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

We refer to paragraph 17.

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