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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 vast majority of financial transactions involve the financing of mortgage loans, which can be divided in three categories: residential mortgage loans (RMBS), commercial mortgage loans (CMBS) and buy-to-let mortgage loans (B2L). In addition to mortgage loan receivables, other assets include corporate loans (mainly small- and medium sized enterprise loans), acquisition finance, car loans, consumer loans, financial and operating leases, credit cards and trade transactions. Besides distinction in type of assets, distinction can also be made in the quality of the asset. Most assets are performing, however there is also a market for securitisations of non-performing loans (NPL's).

In 2022, the total amount of Dutch residential mortgage securitizations outstanding decreased by € 5.3 billion (-17%) to € 25.9 billion, according to the latest figures of the Dutch Central Bank (*De Nederlandsche Bank*). This decline was almost twice the average since 2010. The downward trend can be attributed to the use of alternative funding sources by banks, which have become easier and cheaper in recent years. These include the European Central Bank's additional lending facilities and the issuance of covered bonds. Another contributing factor was the reduced share of banks in new mortgage lending.

In 2022, new external securitization issuances for residential mortgages totaled € 3.1 billion (€ 5.9 billion in 2021), predominantly by non-bank mortgage lenders. However, these were not enough to offset the expiration of existing securitizations and reverse the downward trend.

In addition, banks reported for three quarters in a row over 2023 a decline in demand for mortgage loans (the first quarter a change in demand of -83%). The main factors for the declining demand are the rising interest rates and expectations in the housing market, including price developments. Also, more banks have tightened their underwriting criteria. The main reasons are the general economic outlook and the creditworthiness of households applying for mortgages.

With regard to the Buy-to-let market, it is noteworthy that it is becoming less profitable as a result of measures to deter investors from the housing market, such as the transfer tax, buyout protection and the proposed law on affordable rent (*Wet betaalbare huur*) to regulate intermediate rent.

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

All assets that can be assigned or transferred and which create a cash flow can be securitised.

Under Dutch law, there are no restrictions on the types of assets that can be securitised. The EU Regulation (EU) 2017/2402 of the European Parliament and of the Council (the **Securitisation Regulation**) which regulates securitisations in the Netherlands, does prohibit the securitisation of assets that are themselves "securitisation positions" (as defined in the Securitisation Regulation).

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

Securitisations are regulated by the Securitisation Regulation. There is no specific Dutch legislation on how a securitisation should be structured.

The asset separation and legal transfer of the portfolio of receivables is usually realised by way of assignment (*cessie*) or contract transfer (*contractsovername*) which are governed by the Dutch Civil Code (*BurgerlijkWetboek*, **DCC**).

Depending on the assets that are securitised, the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, **FSA**) might be in scope.

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

In a typical structure, an originator sells receivables to a special purpose entity (**SPV**) which funds the receivables through the issuance of debt instruments (generally in the form of notes). The SPV typically appoints the originator to act as servicer of the receivables sold to the SPV.

The SPV is set up for the acquirement of a portfolio of assets, obtaining financing for their acquisition and enter into agreements for this financing and acquisition. To ensure that the SPV's assets aren`t seen as assets of the originator, the SPV is a stand-alone company without connections to the originator's group. Most Dutch SPV's are set up as a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*, BV). To establish its independence, a licensed trust company – pursuant to the Dutch Trust Companies Act (*Wet toezicht trustkantoren*) – will be appointed as the SPV's director.

Other parties involved include, inter alias, the security agent (typically a Dutch foundation) which preserves the rights of investors and acts as their representative, the collection foundation tasked with performing all payment collection and disbursements services through separate accounts, calculation agents, swap counterparties, liquidity providers or asset managers.

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

Securitisations where the originator, sponsor or original lender has a license from Dutch Central Bank (*De Nederlandsche Bank,* **DNB**) are under the supervision of DNB. All other securitisations are under the supervision of the Authority Financial Markets (*Autoriteit Financiële Markten*, **AFM**). DNB supervises the additional requirements for all Dutch securitisations that have been notified to the European Securities and Markets Authority (**ESMA**) as a Simple, Transparent and Standardised securitization (**STS**). See also paragraph 7.

The European Central Bank (**ECB**) is the competent authority for credit institutions directly under ECB supervision.

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 no specific Dutch legislation that regulates or limits the nature of entities that may participate in a securisation. But depending on the assets to be securitized, originators, servicers and SPV's might require a license or exemption pursuant to the FSA.

Under the Securitisation Regulation, a SPV must be a corporation, trust or other entity, other than an originator or sponsor, established for the purpose of carrying out one or more securitisations, the activities of which are limited to those appropriate to accomplishing that objective, the structure of which is intended to isolate the obligations of the SPV from those of the originator. There are also certain requirements as to the location of the SPV unless it is located in an EU member state.

The Securitisation Regulation restricts the sale of securitisation positions to retail clients.

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

Since the concept of simple, transparent and standardised (STS) securitization stems from the Securitization Regulation, it also applies in the Netherlands.

Securitisations, which are fully European (originator, sponsor and SPV all established in the European Union), can be qualified as an STS-securitisation, if they fulfil the conditions of 'simplicity, standardisation and transparency'. The STS-label will provide preferential capital treatment for banks and certain investment firms.

Securitisations that meet the simple, transparent and standardised (STS) requirements are supervised by DNB in the Netherlands. The originator or the sponsor sends an STS notification to ESMA. The notification is published on the ESMA website, except in the case of private securitisations. After sending a notification to ESMA, DNB and the AFM must also be notified.

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

All securitisations for which a prospectus must be published when securities are issued (under 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; **Prospectus Regulation**) fall under the category of 'public securitisations'. All other securities that are not required to publish a prospectus are '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 10 for requirements in relation to transactions and to paragraph 14 in relation to requirements in relation to an SPV as participant.

If the underlying assets of the securitisation are consumer mortgage loans or consumer credit, the servicer will require a license for credit mediation pursuant to article 2:80 FSA since credit mediation is not limited to the actual conclusion of a credit agreement, but also includes the administration and performance of such agreements.

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?

The originator, sponsor and SPV of a securitisation need to comply with the disclosure requirements of Article 7 of the Securitisation Regulation. One of the three parties must publish certain information about transactions. This can be done in a securitisation repository, which is a regulated legal person, set up specifically for this purpose.

Article 7 is applicable both to private and public securitisation. However, for private securitisations, there are some additional conditions, set by the AFM. The AFM has provided a template on its website, where attention is paid to, inter alia, the stakeholders, securitisation characteristics, the type of instruments and securities, and contact details of the designated reporting entity.

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

This is covered by Article 6 of the Securitisation Regulation. The originator, sponsor, or initial lender (who must agree on the retainer, with the originator as the default if no agreement is reached) must continuously maintain a substantial net economic interest of 5% in the securitisation. This can be achieved through all generally accepted methods The most common method of satisfying the risk retention is for the risk retaining entity (usually the originator) to hold the first loss/most junior notes or debt issued by the SPV. Furthermore, an entity that has been established or operates for the sole purpose of securitising exposures cannot act as originator for risk retention purposes.

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

Yes, Article 5 of the Securitisation Regulation subjects institutional investors in securitisations to due diligence requirements when investing in securitisations. First and foremost, institutional investors must check whether the originator, sponsor or original lender of a securitization has met certain conditions. In this context, the institutional investor must check, inter alia, whether the requirements for risk retention have been met, whether certain information has been made available and whether the criteria for the granting of credit have been respected.

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

The Securitisation Regulation requires Member States to lay down rules establishing appropriate administrative sanctions and remedial measures for failure to comply with certain breaches of the Securitisation Regulation.

For the Netherlands, such rules are contained in the FSA as well as the rules promulgated thereunder, including the Decree implementing EU Regulations on Financial Markets (*Besluit uitvoering EU-verordeningen financiële markten*) for the enforcement of EU regulations.

Under the Dutch Decree on Administrative Sanctions in the Financial Sector (*Besluit bestuurlijke boetes financiële sector*) non-compliance with the Securitisation Regulation could lead to a second-category administrative fine of up to € 1,000,000 (for, inter alia, non-compliance with due diligence requirements) or third-category administrative fine of up to € 5.000.000 (for, inter alia, non-compliance with risk retention and disclosure requirements). Depending on the severity of the violation, the FSA also allows for a fine up to ten percent of total group revenue, potentially exceeding EUR 5,000,000.

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?

By obtaining repayable funds from the public and granting credit for its own account, an SPV could be considered a "credit institution" (*kredietinstelling*) as defined in the FSA and Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (**CRR**). As such the SPV would require a banking license. In order for an SPV not to qualify as a credit institution under the FSA and CRR, it must ensure that it attracts repayable funds solely from parties that do not qualify as 'the public.'

By lack of European guidance as to what constitutes 'the public' and light of the explanatory notes of the Dutch legislator for the implementing act of the CRR in the Netherlands, it is generally assumed that if repayable funds are exclusively taken from 'professional markets parties' (*professionele marktpartijen*) as defined in the FSA and the Decree on definitions (*Besluit definitiebepalingen*), the SPV is not considered a credit institution. Professional market parties are, inter alia, credit institutions, investments firms and insurance companies. Also, persons or entities purchasing notes of at least EUR 100,000 qualify as professional market parties irrespective of their status and location.

If the underlying assets of the securitisation are mortgages or consument credit, a license is in principle required for the provision of credit, unless use can be made of the 'securitisation exemption'. Pursuant to article 2:60 FSA it is prohibited to offer credit without a licence granted for that purpose by the AFM. The offering of credit is a broad concept. The broad definition of offering credit means that a party, such as an SPV, that holds or obtains the receivables under a credit agreement qualifies as credit provider and in principle requires a licence. However, the Exemptions Regulation (*Vrijstellingsregeling Wft*) contains an exemption for the purchaser in securitisation transactions (the SPV), provided the receivables are managed by a 'credit manager' (*kredietbeheerder*) after the transfer. A credit manager is defined as a (licensed) credit provider or credit intermediary. In practice the lender of record often is the credit manager, but this could also be a third party servicer.

Note that private lease is presently not considered as consumer credit and therefore not regulated. Under the Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 private lease is considered credit. Once implemented in the Netherlands a license for granting private lease will in principle be required.

Regarding securitisation of consumer loans, it should be noted that if the receivables of consumer loans or the loan contract are transferred, the consumer needs to be informed about the transfer based on article 7:69(2) DCC. It is generally accepted that this is not a constitutive requirement for transfer. However, this notification is not required if the original lender, continues to manage the credit on behalf of the SPV. The original lender remains the point of contact for the consumer. With the implementation of Directive (EU)2021/2167 on credit servicers and credit purchasers (the **Servicers Directive**), which amends Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property (the **Mortgage Credit Directive**), a similar notification requirement and exception will be introduced for mortgage loans. The implementation act is still pending and not expected to enter into force before Q3 2024.

15. How are securitisation SPVs made bankruptcy remote?

The Dutch SPV is a stand-alone company without connections to the originator's group to ensure that the assets of the SPV will not be regarded as assets of the originator. Dutch SPV's are mostly in the form of a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) of which the shares are typically held by a Dutch foundation (*stichting*). A licensed trust company pursuant to the Dutch Trust Companies Act (*Wet toezicht trustkantoren*) will be appointed as director of the SPV or foundation to establish independence of other related parties. The SPV is made bankruptcy remote by different measures to

mitigate this risk, such as a limited recourse to the SPV's assets and that none of the secured creditors are able to bring claims against the SPV or petition its insolvency.

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

The key forms of credit support in the Netherlands are:

1. Subordination: This involves providing credit enhancement to one or more tranches of debt of the SPV by subordinating other debt obligations to these tranches. In the event of losses on the asset portfolio, such losses are first absorbed by the lower-ranking debt obligations, thus increasing the chances of full repayments of the senior tranches. The higher risk associated with lower-ranking tranches is balanced by higher interest rates.
2. Overcollateralisation: This technique implies that the value of the assets transferred by the originator to the SPV is greater than the consideration paid by the SPV. This creates a buffer against defaults on the cash flows received from these assets. The transaction terms usually provide that the SPV's initial consideration constitutes initial payment and the originator is entitled to deferred consideration as and when the SPV has funds available for this purpose.
3. Reserves: SPVs often retain a part of their surplus income as a reserve, which is typically calculated as a percentage of the amounts due under the assets or the SPV's debt obligations, with a minimum amount. The reserve can be used to cover unexpected costs, expenses, or losses that the SPV may incur as a result of a payment or other default. The SPV can maintain several types of reserves, such as a default reserve.

These techniques, individually or combined, enhance the creditworthiness of an SPV and the quality of the debt securities it issues, reducing the likelihood of default.

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

Under Dutch law, the proper procedure for transferring receivables is through assignment (*cessie*). This transfer can be done through a disclosed assignment (*openbare cessie*) or, given that the receivables are present or arise from a legal relationship at the time of the transfer, through an undisclosed assignment (*stille cessie*). For a disclosed assignment to be valid, it needs to be notified to the debtor of the receivable.

For an undisclosed assignment to be valid, the deed of assignment needs to be included in a notarial deed or submitted for registration with the Dutch tax authorities. In the case of consumer credit as defined in Book 7 Title 2A of the Dutch Civil Code, the consumer must be informed about the transfer of the credit, unless the original credit provider continues to service the credit. This is an exception to the general rules for undisclosed assignments. In the case of an undisclosed assignment, the debtor still needs to be notified to prevent the debtor from validly fulfilling its obligations (*bevrijdend betalen*) by making a payment to the assignor of the receivable.

There has been debate over whether such transactions in Dutch RMBS could be reclassified as a secured loan rather than a sale, which would make the transfer of receivables void under Dutch law. However, as long as the parties genuinely aim to facilitate a sale from the originator of the receivables to the SPV, and as part of this sale, transfer full title of the receivables from the originator to the SPV, there is generally no reason to worry about the transfer being void.

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

If a deed of assignment is registered (for undisclosed assignments) or notified to a debtor (for disclosed assignments) after the transferor (e.g., an originator) has been declared bankrupt or subjected to a suspension of payments or emergency regulations (*noodregeling*) as per the FSA in the Netherlands, the registration or notification will not be effective. As a result, the receivables will not have been validly transferred from the transferor to the transferee (i.e., the SPV). Assuming an assignment has been perfected via registration with the Dutch tax authorities (for undisclosed assignments) or notification to the debtor of the receivable (for disclosed assignments) prior to the effectuation of insolvency proceedings regarding the transferor, the validity of such assignment will not be impacted by subsequent insolvency proceedings against the transferor. Nevertheless, this does not preclude the potential challenge of such transaction for other reasons, such as if the transaction is deemed to not be in the originator's corporate interest, or seen as detrimental to the other creditors of the originator, and if the originator and SPV were or should have been aware of this when they entered into the transaction.

As long as the assignment has not been notified, any payments made by the debtor under a receivable must be made to the relevant originator. In terms of payments made prior to the originator's insolvency proceedings, the SPV will be a regular, non-preferred creditor with an insolvency claim (*concurrente schuldeiser*). For payments made post-insolvency, the SPV will be a creditor of the estate (*boedelschuldeiser*). The notification of a perfected undisclosed assignment of receivables can still be given to the debtor validly.

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

Data protection in the Netherlands is governed by 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 (GDPR) and the GDPR Implementation Act (*Uitvoeringswet AVG*).

20. Is the conduct of credit rating agencies regulated?

Credit rating agencies are regulated 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. [ESMA is designated as the European public authority in charge of overseeing the registration of credit rating agencies and supervises their activities.]

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

The tax issues set out below refer to a typical Dutch securitisation structure (see also paragraph 4) whereby the SPV is a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*, **BV**) of which the shares are held by a Dutch foundation.

Corporate income tax

A BV is subject to Dutch corporate income tax (*vennootschapsbelasting*). This means that all of the income of the BV is, in principle, taxable at the statutory Dutch corporate income tax rates. Under the current corporate tax rates, the first EUR 200,000 of profits are subject to tax at the rate of 19% and profits that exceed EUR 200,000 are subject to tax at the rate of 25.8% in 2024.

In usual circumstances, the difference between the revenue generated from the receivables owned by the SPV and the expenditures on the notes issued by the SPV should be such that it leaves only a minimal taxable profit within the SPV itself. For the tax-deductible nature of the SPV's expenses, it is important that the SPV's revenue is classified as interest (or its equivalent) sourced from a loan (or its equivalent), such as interest on a loan.

A Dutch foundation is only subject to Dutch corporate income tax if and to the extent that it carries on a business enterprise. A Dutch foundation established and operating with the sole purpose of holding shares in an SPV will therefor generally not be subject to Dutch corporate income tax.

Withholding tax on received interest

Interest paid to the SPV will often be exempt from withholding tax in the country where the obligor of the receivable is resident in, or subject to a significantly reduced withholding tax rate by virtue of a double tax treaty concluded between the Netherlands and the obligor country. The Dutch treaty network is regularly expanded by ongoing negotiations with jurisdictions around the world. If the interest received by the SPV has been subject to withholding tax, the withholding tax should be creditable against the Dutch corporate income tax, provided that the interest is included in the SPV's taxable base. Withholding tax on received interest is subject to the possible application of beneficial ownership or (other) anti-abuse rules in the jurisdiction of the obligor of the receivable.

Interest expenses

In a typical Dutch securitisation structure whereby the shares in the SPV are held by a Dutch foundation, none of the SPV's creditors will exercise control over the SPV or (indirectly) participate in the profits of the SPV. For that reason, interest paid by the SPV to its creditors, which are normally third parties, is in principle not subject to Dutch withholding tax on interest (*Wet bronbelasting 2021*).

Transfer taxes

The transfer of Dutch real estate or real estate-related rights including shares in real estate companies may be subject to Dutch transfer tax (*overdrachtsbelasting*). This is particularly relevant for mortgage-backed securities transactions. The rate in 2024 is generally 10.4% for all real estate. Exceptions and exemptions exist for self-occupied residential property (2%) with an exemption for

housing market starters between 18 – 35 years of age.

Acknowledgement: with thanks to tax partner Jean Pierre Viergever (jeanpierre@fbamsterdam.nl) of the Financial Boardroom Amsterdam.

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

There are no specific hurdles in the Netherlands for cross-border transactions. Typically, securitization transactions involve multiple originator and debtor jurisdictions.

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

In the Netherlands, securitisation transactions frequently continue to use IBOR rates. However, these transactions' documentation typically includes provisions for the replacement of IBOR, and the associated prospectus explicitly outlines the risks involved in transitioning from one benchmark to another. To our knowledge, actual replacements of this kind have not yet taken place in public Dutch securitisation transactions. The SPV usually enters into derivatives transactions that hedge the difference between the income it receives on the portfolio of securitised assets and the interest it must pay on the debt securities.

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

The legal and regulatory landscape of the securitisation sector in the Netherlands is largely dictated by European legislation. One of the most notable is the ongoing review of the Securitisation Regulation by the European Union (EU), which underpins the securitisation sector in the Netherlands. The focus of the review is on further harmonising and simplifying disclosure requirements, clarifying roles and responsibilities of those involved in securitisation transactions, and potentially establishing a new framework for synthetic securitisations.

Another significant development which will have a strong impact on the Dutch securitization sector is the introduction of the EU Green Bond Standards and sustainability requirements is a significant development impacting the Dutch securitisation sector (in 2023 various 'green' securitisations have been set up in the Netherlands).

These measures aim to enhance sustainable finance and incorporate environmental, social, and governance (ESG) factors into investment decisions. These initiatives reflect the EU's commitment to sustainable finance and its goal to align the financial sector with wider climate and sustainability objectives. Thus, the securitisation sector's future trajectory is being shaped by these evolving regulatory expectations.

25. 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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