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Securitisation

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Contents

1. Structurally Embedded Laws of General Application p.3
- 1.1 Insolvency Laws p.3
- 1.2 Special-Purpose Entities p.4
- 1.3 Transfer of Financial Assets p.4
- 1.4 Construction of Bankruptcy-Remote Transactions p.6

2. Tax Laws and Issues p.6
- 2.1 Taxes and Tax Avoidance p.6
- 2.2 Taxes on SPEs p.6
- 2.3 Taxes on Transfers Crossing Borders p.6
- 2.4 Other Taxes p.6
- 2.5 Obtaining Legal Opinions p.6

3. Accounting Rules and Issues p.7
- 3.1 Legal Issues with Securitisation Accounting Rules p.7
- 3.2 Dealing with Legal Issues p.7

4. Laws and Regulations Specifically Relating to Securitisation p.7
- 4.1 Specific Disclosure Laws or Regulations p.7
- 4.2 General Disclosure Laws or Regulations p.8
- 4.3 Credit Risk Retention p.9
- 4.4 Periodic Reporting p.9
- 4.5 Activities of Rating Agencies p.10
- 4.6 Treatment of Securitisation in Financial Entities p.10
- 4.7 Use of Derivatives p.10
- 4.8 Investor Protection p.10
- 4.9 Banks Securitising Financial Assets p.11
- 4.10 SPEs or Other Entities p.11
- 4.11 Activities Avoided by SPEs or Other Securitisation Entities p.11
- 4.12 Material Forms of Credit Enhancement p.11
- 4.13 Participation of Government-Sponsored Entities p.11
- 4.14 Entities Investing in Securitisation p.11

5. Documentation p.11
- 5.1 Bankruptcy-Remote Transfers p.11
- 5.2 Principal Warranties p.11
- 5.3 Principal Perfection Provisions p.11
- 5.4 Principal Covenants p.12
- 5.5 Principal Servicing Provisions p.12
- 5.6 Principal Defaults p.12
- 5.7 Principal Indemnities p.13

6. Roles and Responsibilities of the Parties p.13
- 6.1 Issuers p.13
- 6.2 Sponsors p.13
- 6.3 Underwriters and Placement Agents p.13
- 6.4 Servicers p.13
- 6.5 Investors p.13
- 6.6 Trustees p.14

7. Synthetic Securitisation p.15
- 7.1 Synthetic Securitisation Regulation and Structure p.15

8. Specific Asset Types p.15
- 8.1 Common Financial Assets p.15
- 8.2 Common Structures p.15

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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

The Securitisation Law provides specific protections vis-à-vis the general legal regime of insolvency, compared to both an ordinary assignment of receivables under the Portuguese Civil Code (enacted by Decree-Law No 47 344, dated 25 November 1966, as amended from time to time), and a secured loan, which can be exposed to general claw-back rights during the applicable hardening periods, foreseen in the Portuguese Insolvency Code (enacted by Decree-Law No 53/2004, dated 18 March 2004, as amended from time to time), as far as the transaction or the relevant security is concerned.

Upon an assignment of receivables made pursuant to the Securitisation Law, the relevant assigned receivables portfolio – which is no longer an asset of the originator – will not form part of the originator's insolvency estate, and the assignment is not generally subject to claw-back rights and hardening period provisions. Furthermore, any amounts held by the originator for any reason will not be part of its insolvency estate, but will rather belong to the assignee. The same applies to the entity performing the role of servicer of the assigned receivables (which may or may not be the originator, depending on the circumstances and regulatory approvals). The Securitisation Law clearly provides that, in an insolvency event, the amounts held by the servicer which pertain to the assigned receivables – ie, amounts relating to payments made under the assigned receivables – do not form part of the servicer's insolvency estate. The assignee fully bears the credit risk of the underlying borrowers of the assigned receivables, so there is no recourse to the originator.

The assignment of receivables for securitisation purposes may only be invalidated in the case of fraud against creditors. This is subject to very demanding requirements, including fraudulent intent and bad faith on the part of both parties (assignor and assignee), which are extremely difficult to meet in the context of a market transaction that is carried out and executed with the approval, and under the supervision of, the regulatory authorities. Similarly, and in the absence of bad-faith action by both parties, the transaction is also not subject to termination or revocation in the case of the insolvency of the originator (ie, there are no claw-back rights and no hardening periods in cases of insolvency).

The Securitisation Law also provides specific protections with regard to the insolvency of the assignee (which is a regulated special-purpose entity (SPE) – see **1.2 Special-Purpose Entities**), which would otherwise work to the detriment of the investors who have acquired the relevant asset-backed securities (ABS).

Even though the SPE itself can be subject to insolvency (but bearing in mind that its limited corporate purpose and regulated nature make this highly unlikely to occur), in respect of rights and obligations within its general estate, such an insolvency would not affect the relevant securitisation(s) undertaken by the SPE, given that each securitisation corresponds to a segregated and autonomous pool of assets, comprised of the assigned receivables, and that each such pool of assets is only available to meet the liabilities arising from that securitisation transaction.

In fact, the pool of assets backing the relevant ABS issuance, including the relevant receivables portfolio, forms an autonomous pool of assets (segregated from other autonomous pools of assets pertaining to other securitisation transactions) that is only available to meet the liabilities due from the SPE (either a securitisation fund (FTC) or a securitisation company (STC), as defined in **1.2 Special-Purpose Entities**) to its security holders and other creditors (service-providers, swap counterparties, etc) in respect of that transaction only.

In the case of multi-transaction SPEs (which is the case for STCs), such parties are not entitled to claim payments from the SPE out of its general estate, nor to claim out of other autonomous and segregated pools of assets backing other securitisations. This means that each pool of assets is only available to meet the liabilities arising from the respective securitisation transaction and, moreover, that the liabilities of any given securitisation transaction can only be satisfied by its respective autonomous pool of assets. Additionally, there is a special creditor's privileged entitlement (the strongest possible form of security provided by law) protecting the interests and rights of payment of such parties in these situations – ie, securing the liabilities of the creditors of a given securitisation transaction.

Finally, it should be noted that the autonomous pool of assets is codified and granted an asset digit code by the competent regulator (the Portuguese Securities Market Commission – CMVM), which allows for the identification of the pool at any given time by the respective creditors.

The insolvency analysis is a typical component of legal opinions issued in the context of securitisations, which details and analyses the above-discussed insolvency protections. This analysis should be (and normally is) carved out from the ordinary insolvency law qualification included in such legal opinions. Opinions normally also include a reference to searches undertaken in the relevant courts, and/or regulatory authorities' confirmation that at the time of assignment there were no insolvency proceedings pending against the originator in the competent courts.

1.2 Special-Purpose Entities

A regulated SPE is typically used in a securitisation, as noted in **1.1 Insolvency Laws**.

The Securitisation Law provides for two possible SPE types, which both come under the supervision of the CMVM, the local securities market regulator.

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 (ie, a unit trust-like format). For this reason, it is required to have a fund manager (ie, 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 (for tax reasons), 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 of the notes from a competent regulator outside Portugal.

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 (called 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 authorises 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 EUR125,000, 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; 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 silo, 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, normally tranched in two or more classes. 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 cash flows generated by the receivables portfolio. Since these are notes, these ABS can be placed and held directly by the investors as debt instruments, without the need to employ a double structure, as is the case with the FTCs described above.

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.

1.3 Transfer of Financial Assets

The assignment of receivables between the assignor and the assignee (ie, the originator and the issuer) is effective upon execution of the assignment agreement, which is in line with general law. However, under the Securitisation Law, as a general rule (ie, 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 (ie, 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.

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, as described in **1.1 Insolvency Laws**.

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 non-performing loan (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. 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. These receivables may already exist (which is typically the case), but the Securitisation Law also allows the assignment of future receivables, provided they arise under existing or reasonably expected legal relationships and are in a determinable (known or estimated) amount.

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

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

As mentioned above, the assignment must be without recourse (or guarantee) to the originator or any group entity, and must not be subject to any conditions or terms.

Securitisation transactions have been conducted under the Securitisation Law for around 20 years; before the entry into force of this Law, they were conducted under the general Civil Code provisions, with no specific tax framework. It is not generally preferable to execute such transactions outside the legal securitisation framework (and respective tax regime, as discussed in **2. Tax Laws and Issues**) so this analysis will focus only on securitisations carried out under the Securitisation Law, which corresponds to the established market practice.

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

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

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

1.4 Construction of Bankruptcy-Remote Transactions

A securitisation is the more typical way to detach a receivables assignment from the insolvency of the originator/transferor. 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.

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

Generally, the transfer of receivables generates potential exposure to corporate income tax (CIT)/withholding tax (WHT), stamp duty and value added tax (VAT). However, provided that the transfer complies with the requirements set out in the Securitisation Law, under which transfers must occur exclusively from the originator to the SPEs, its tax treatment should be neutral from a CIT/WHT, stamp duty and VAT perspective, pursuant to the securitisation tax law, approved by Decree-Law 219/2001, of 4 August 2001 (the Securitisation Tax Law), as follows:

- no WHT applies to:
  - (a) payments made by the SPEs (purchasers) to the originator (seller) in respect of the purchase of the receivables;
  - (b) payments made by the obligors under the receivables; and
  - (c) the payment of collections by the servicer (who is usually also the originator) to the SPEs;
- no stamp duty applies to the transfer of receivables being securitised; and
- the transfer of receivables is VAT-exempt under the Portuguese VAT Code.

Therefore, practitioners usually ensure that the transfer qualifies as a securitisation under the Securitisation Law.

2.2 Taxes on SPEs

Interest income paid by the debtors should not be subject to WHT under the Securitisation Tax Law, assuming that the relevant SPEs are located in Portugal, pursuant to the requirements of the Securitisation Law.

SPEs are designed as pass-through vehicles, passing on the proceeds they receive under the receivables portfolio (and other transaction assets) to investors/transaction creditors. Thus, the taxable income arising for the issuer under a particular transaction will tend to be limited to the transaction fee it retains. In any case, this pass-through nature of the vehicle must be properly reflected in its respective accounts.

2.3 Taxes on Transfers Crossing Borders

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 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 Law 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.

2.4 Other Taxes

Pursuant to the Securitisation Tax Law, no stamp duty or VAT is due on servicers' fees. In addition, no documentary taxes are due in Portugal.

When hedging instruments are entered into, typically in the form of swaps or cap agreements, and particularly where the hedging counterparty is a foreign bank (which is normally the case for rating purposes), it is prudent to detail certain tax form delivery obligations in the Schedule to the International Swaps and Derivatives Association (ISDA) Master Agreement, in order to avoid WHT issues. In any case, it is advisable for the negotiation of the derivative documentation to also involve tax lawyers.

2.5 Obtaining Legal Opinions

The transaction legal opinion usually covers taxation matters, discussing some of the above issues, and also often addresses tax disclosure under the prospectus or offering memorandum.

3. Accounting Rules and Issues

3.1 Legal Issues with Securitisation Accounting Rules

Provided that the securitisation is a regulated one, the accounting treatment will not affect the legal status of the assets or the rights of the SPE.

Under the Securitisation Law, any collections in the possession of the originator or the servicer that relate to receivables already assigned to the SPE will not form part of the insolvency estate of the originator or the servicer. In any case, in the event of the insolvency of the originator/servicer, the SPE may need to provide evidence (to the insolvency administrator) of its entitlement to those collections and receivables. This process is swifter if the collections are properly segregated in the originator/servicer's systems and accounts, which is usually the case.

3.2 Dealing with Legal Issues

Legal opinions do not cover accounting matters, but may include certain qualifications or assumptions related thereto, presented to sustain opinions or risk assessments.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

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 will be addressed in **4.2 General Disclosure Laws or Regulations**, but the following regulations 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.

On 28 December 2017, Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 was published, laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (the Securitisation Regulation). Such regulation became applicable on 1 January 2019 and, in the Portuguese jurisdiction, has been complemented by Law No 69/2019, of 28 August 2019, which has been amended by the Securitisation Law.

As mentioned, the Securitisation Regulation has created a specific framework for a simple, transparent and standardised securitisation (STS Securitisation). The requirements for a securitisation to be compliant with the "simple, transparent and standardised" criteria are set forth in Article 18 et seq of the Securitisation Regulation. According to these provisions, originators, sponsors and issuers will be jointly responsible under the Securitisation Regulation for assigning the STS Securitisation designation. The final step in the labelling process is to notify regulators of the STS Securitisation designation. In Portugal, the Securitisation Law has recognised the STS Securitisation concept, and the first STS Securitisation has already occurred in 2020.

Returning to the reporting topic, and 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. Until at least one securitisation repository has been registered with ESMA, information that should be made available by reporting entities in securitisation repositories must instead be made available via a website that meets the requirements set out under article 7(2) of the Securitisation Regulation.

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 3" reporting templates – has 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 brings a greater level of homogeneity and certainty in the information disclosed to the investors, thereby reducing due diligence costs and increasing comparability across transactions.

Moreover, in addition to the impact on existing transactions, the COVID-19 pandemic crisis may have specific implications for securitisations with respect to regulatory disclosure obligations.

Under the Securitisation Regulation, certain indicated "significant events" must be disclosed. This 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.

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.

4.2 General Disclosure Laws or Regulations

In the context of more general frameworks, 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 (ie, the primary trading venue of stock exchanges) or in cases where there is a public offer in place that is not exempt.

The securities issued are normally wholesale (ie, EUR100,000 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 sophisticated investors only.

In order to obtain European Central Bank (ECB) eligibility for the most senior notes (Class A) in accordance with the ECB Guidelines, these 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 (ie, no listing on a regulated market, or public offering). In this case (ie, 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 is 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, such as 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 of 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. As such, a transaction requiring a prospectus will not close without a duly approved prospectus.

However, it is not the regulator but rather the issuer (and 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.

A law firm is usually in charge of drafting the prospectus and liaising with the regulator(s). No Listing Agent is required in Portugal, unlike in other jurisdictions, such as Luxembourg or Ireland. It is commonplace for legal opinions to confirm that certain sections in the prospectus fairly summarise certain legal or tax laws, but no general opinion is provided with respect to the prospectus, given that this mainly depends on the accuracy of the factual (and not legal) information contained therein.

4.3 Credit Risk Retention

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 such, and as is the case in other jurisdictions (such as the USA), 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 (ie, 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 (ie, 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 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.

As mentioned above, 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).

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 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.

4.4 Periodic Reporting

SPEs are regularly required to report information to the CMVM, including, when applicable, monthly information on the underlying receivables portfolio. Accordingly, the servicing agreements should contractually require the servicers to provide monthly servicing reports, in addition to the quarterly or semi-annual reports that serve as a basis for the investor report from the transaction manager, seeing as the interest payment dates do not tend to be monthly. As far as is known, CMVM is finalising a review process of its current regulation on securitisation, which may entail changes to the reporting requirements.

These reporting requirements are set out under Article 7 of the Securitisation Regulation, which is commonly applied across the EU.

According to Article 7(2) of the Securitisation Regulation, the mechanisms for disclosure depend on the type of transaction:

- for public transactions (ie, where a prospectus is required to be published under the Prospectus Directive), disclosure must be through a regulated securitisation repository or (where none exists) on a website meeting certain prescribed standards;
- for private transactions, disclosure may be done through a repository but can also be done privately.

4.5 Activities of Rating Agencies

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. There is also the so-called CRA III framework, of which some provisions are still to be made operative, including those regarding information disclosure.

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 for them to do so.

4.6 Treatment of Securitisation in Financial Entities

Under the so-called CRD IV framework (Capital Requirements Directive IV, which includes the Capital Requirements Regulation or CRR), institutions are subject to the holding of regulatory capital against their RWAs. In this context, the CRR specifically addresses securitisations. Similar concepts will be found under the Alternative Investment Fund Managers Directive (AIFMD) framework for other regulated entities, such as alternative asset managers, including of hedge funds, or under the Insolvency II Directive framework for insurance and reinsurance undertakings.

The CRD IV framework has been amended by the Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019. However, such amendments have not been implemented in Portugal and therefore are not taken into account herein. Notwithstanding this, Regulation (EU) 2017/2401 of 12 December 2017, which has consolidated certain sections of the above legislative acts, shall also be considered.

In respect of credit institutions in particular, the treatment of off-balance sheet securitised exposures assigned to the issuer (receivables), regarding the calculation of the originator's capital requirements, should be highlighted, as should the treatment of securitisation positions, regarding the calculation of the relevant owner's own funds.

4.7 Use of Derivatives

Derivatives may be contracted for SPEs to hedge risks, notably currency and interest rate risks. It is also possible to enter into credit default swaps or other derivatives with a hedging purpose, on the side of the SPE. The most typical hedging instruments are interest rate derivatives. Before the financial crisis, it was quite common to have an interest rate swap (IRS) in place for rated deals, in order to hedge the floating or fixed component of interest rates. Hedging was not used during the years when securitisations were generally retained deals. There is now a renewed and increased use of derivatives, typically in the form of interest rate cap transactions.

The derivatives are contracted in the ISDA format, and SPEs do not normally place collateral, even though they may be receiving it from the swap counterparty, either from inception or if certain rating triggers are met.

The CMVM supervises the use of derivatives in Portugal by SPEs under the Securitisation Law and the European Market Infrastructure Regulation (EMIR).

4.8 Investor Protection

The key statutes for investor protection are the Securitisation Regulation, the Securitisation Law and, where applicable, the Prospectus Regulation, as complemented by the relevant secondary and other legislation.

4.9 Banks Securitising Financial Assets

The key statutes applicable to securitising banks are the Securitisation Regulation, the Securitisation Law, the Civil Code and the CRR, as complemented by the relevant secondary and other legislation (including Bank of Portugal and ECB regulations and guidance, which provide, inter alia, for pre-notification of the transaction and ongoing reporting, on top of the Securitisation Regulation disclosure requirements).

4.10 SPEs or Other Entities

There are only two specified SPEs in the Portuguese jurisdiction that may be assignees in securitisations under the umbrella of the Securitisation Law: the STCs and the FTCs. The former vehicle is the one consistently used over the last decade (and before that both were used), as it is more efficient than FTCs (which will require an additional vehicle to hold the FTC's units and then issue asset-backed notes to the investors).

4.11 Activities Avoided by SPEs or Other Securitisation Entities

Portuguese securitisations are conducted using regulated SPEs. However, regulatory issues often arise, stemming from other jurisdictions, notably the US, including whether or not the SPE can be considered an investment company under the Securities Act or a covered fund under the Volcker Rule. This depends on a US law analysis, but the answers have typically been negative. The analysis of the second matter is more complex, and issuers sometimes require a US legal opinion confirming that they fall outside the scope of a covered fund. Such matters are addressed in the prospectus and also in the relevant subscription agreement and/or master framework agreement.

4.12 Material Forms of Credit Enhancement

The same types of credit enhancement 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 trigger unintended tax consequences.

4.13 Participation of Government-Sponsored Entities

So far, there are no government-sponsored entities actively participating in the Portuguese securitisation market, even though there has been one significant transaction with tax and social security credits securitised by the Portuguese tax and social security authorities.

4.14 Entities Investing in Securitisation

Following the financial crisis, during which there was no real investor appetite (other than for private deals in the NPL market), new transactions are now coming to the market and starting to be publicly placed. Placement is conducted by the relevant arranger, lead manager or placement agent. In any case, investors can include institutional investors, family offices, private equities, funds and others. EU-regulated entities are subject to certain constraints, such as due diligence on the transaction, including by confirming that the originator (or another eligible entity) agreed to retain a relevant net economic exposure (under the applicable EU, US or other laws).

5. Documentation

5.1 Bankruptcy-Remote Transfers

The receivables are assigned (sold) under a certain type of specific Receivables Sale Agreement (or a transfer document with a similar name and purpose). This agreement essentially mirrors the terms and structure found in other jurisdictions, including the identification of the assets, a package of representations and warranties on the relevant receivables portfolio and their origination, given as of the relevant collateral determination date (and sometimes repeated on the closing date).

5.2 Principal Warranties

The warranties package is much in line with other jurisdictions, considering that the relevant concerns are essentially the same. In light of the Securitisation Law, the originator will represent and warrant that the legal requirements applicable to securitised receivables are met, that the receivables have been duly originated and serviced, that the relevant consumer and data protection laws (where applicable) have been respected, that there are no defaults at all or in excess of a given number of days (except for NPLs), and that the relevant security is in force and perfected, etc.

The typical remedy under Portuguese law for a breach of contract, including incorrect representations, is the indemnification of the other party, even if the contract does not expressly provide for this. In any case, indemnities are always provided for in receivables sale agreements. For a breach of representations in respect of the receivables portfolio, the originator may also have to repurchase the relevant receivables and/or (as is more common) substitute them for other eligible receivables, as an alternative to indemnification.

5.3 Principal Perfection Provisions

The assignment of the receivables takes place once the parties have entered into the receivables sale agreement and all conditions precedent are met. A specific formality applies in cases

where there is security subject to public registration (such as mortgages), as the parties' signatures must be notarised or certified by a lawyer or the company secretary.

As discussed above, except in the NPL market, the perfection of security vis-à-vis third parties is usually not conducted immediately by the issuer (in order to avoid costs in a context where the originator retains the servicing), even though it holds the right to do so. Thus far, there have been no performing securitisations where the issuer actually followed these steps.

5.4 Principal Covenants

Covenants exist across all the documentation from the various parties. The key covenants are normally legal obligations already under the Securitisation Law and/or Portuguese law generally, so it is more a matter of the documentation providing detail on how they shall be complied with. It is also worth noting that the covenants package is much in line with what would be expected in other jurisdictions, notably under English law agreements, which were the original inspiration for Portuguese securitisation documentation. Among others, the documentation always includes a covenant from the relevant issuer to pay, in the terms and conditions of the securitisation notes and/or in the common representative appointment agreement, a covenant from the originator to repurchase or substitute receivables not meeting the relevant eligibility criteria (see **5.2 Principal Warranties**) and various covenants from the servicer (see **5.5 Principal Servicing Provisions**).

As far as is known, there has been no actual litigation where the principal covenants package has been discussed in court between transaction parties. When a possible matter arises, the transaction parties negotiate and have so far always reached an amicable outcome, including by granting waivers or amending the transaction documentation, with the benefit (where applicable) of a noteholders' resolution.

5.5 Principal Servicing Provisions

The Securitisation Law already sets out the key obligations of the servicer – ie, to diligently service the assets, and to collect and pass on to the issuer the relevant monies. The servicing agreements then add further detail, with provisions much in line with what can be expected in other jurisdictions, notably under English law agreements, which were the original inspiration for the Portuguese securitisation documentation.

A usual key provision requires the servicer to service the assets under the same criteria as if they were its own, but the documentation may also contain certain provisions on changes to the servicer's operating procedures. This typically includes the servicer being restricted to agree to certain variations to the receivables agreements with the borrowers, unless the originator repurchases or substitutes them (and that repurchase or substitution is normally capped by a certain threshold – usually a certain percentage (10%, 20%, other) of the initial principal amount outstanding of the receivables portfolio). The servicing agreements always include a schedule with detailed servicing provisions, including on the segregation and transfer of funds received to the applicable issuer account (and respective periodicity – daily is the more common), to avoid commingling risk within the servicer's estate. Provisions on information and reporting, including the servicer report, are also necessary (and even more so following the reporting requirements under the Securitisation Regulation). Following the publication of Regulation (EU) 2016/679 of 27 April 2016 (GDPR), it is also 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).

As far as is known, there has been no actual litigation where the principal servicing provisions have been discussed in court between transaction parties. When a possible matter arises, the transaction parties negotiate and have so far always reached an amicable outcome, including by granting waivers or amending the transaction documentation, with the benefit (where applicable) of a noteholders' resolution.

5.6 Principal Defaults

Under Portuguese law, it is not necessary for default provisions to be specified in a contract in order for a default to have legally taken place (and a claim to be based thereupon), if a given obligation, written in or implied into that contract, is breached. In any case, the documentation will show the typical default events also found in the same type of agreements in other jurisdictions, and notably under English law, including the terms and conditions of the notes, the servicing agreement or the accounts agreement. These include default for non-payment, a breach of other obligations and an insolvency event, among others (sometimes a rating downgrade). Normally (except in some cases for insolvency), the occurrence of the event will not automatically lead to termination or acceleration, but will rather entitle the counterparty to serve a notice to that effect. It is also usual to find certain default events being qualified by a material adverse effect concept.

As far as is known, there has been no actual litigation where the principal servicing provisions have been discussed in court between transaction parties. When a possible matter arises, the transaction parties negotiate and have so far reached an amicable outcome, including by granting waivers or amending the

transaction documentation, with the benefit (where applicable) of a noteholders' resolution.

5.7 Principal Indemnities
Under Portuguese law, it is not required that the contracts contain indemnity language in order for a party to be legally required to indemnify the counterparty, if that party breaches its obligations. In any case, and as one would expect in this sort of transaction, the agreements contain indemnity language (sometimes quite long language), which is a direct influence of the English law templates that inspired the first Portuguese securitisation documents.

It is also common to include indemnity limitation language, including in terms of amount (for instance, for certain matters the servicer is not required to indemnify above a certain multiple of the servicer fee) or in terms of conduct. In this latter respect, under Portuguese law indemnification cannot be excluded if the default is wilfully attributable to the breaching party or if it acted with gross negligence, but it is possible to exclude for "mere" negligence. Also worth noting is that indemnities by the issuer to other transaction parties are usually contained within the transaction and are payable as issuer expenses, and thus in priority over payments to noteholders in the payments waterfall and without contaminating other securitisations or the issuer's own funds.

As far as is known, there has been no actual litigation where the indemnity provisions have been discussed in court between transaction parties. When a possible matter arises, the transaction parties negotiate and have so far reached an amicable outcome.

6. Roles and Responsibilities of the Parties

6.1 Issuers
Please see **1.2 Special-Purpose Entities**. As noted, the STCs are the typical vehicles used to purchase the receivables portfolio and issue the securitisation notes, while the FTCs add an unnecessary layer of complexity. The business of STCs is exclusively to be used as securitisation vehicles, by entering into transactions with the above features, which always require the prior approval of the CMVM.

For reference, there are several STCs in the Portuguese market, some more directed to the performing securitisation market and others more devoted to the NPL segment. In any case, the legal object of any STC can comprise both types of deals.

6.2 Sponsors
No parties have exclusively taken on the role of sponsor (and certainly not within the meaning of the Securitisation Regulation). To some extent, the role one would consider to be that of a sponsor is normally split between the originator (for the retention obligation, for instance) and the relevant arranger lead manager.

6.3 Underwriters and Placement Agents
These roles are the same as those found in other jurisdictions. Underwriters have typically been investment banks, but in more recent years other parties have stepped into the market (eg, financial boutiques). Although these parties are not banks, they are typically regulated and they arrange the transaction, source investors and place the notes (but do not subscribe them, in the sense that the risk of lack of placement remains with the issuer/originator and not the placement agent).

6.4 Servicers
These are generally the same as those found in other jurisdictions. As regards performing assets, the servicers will normally be the originators but can be other entities, as provided for in the Securitisation Law, provided that the entity has obtained the approval of the CMVM. The mandated servicer is expected to act with a degree of diligence as a prudent lender of the specific type of assets, and the law expressly sets out that the servicer will carry out all the acts necessary or adequate to the proper management of the assets and their respective guarantees, on behalf of the assigning entity, including collection services, administrative services and ensuring all relationships with the debtors. In the NPL segment, and also for deconsolidation purposes, the servicers tend to be independent specialised third parties instead of the originator.

A project Decree-Law on the activity of servicing companies is being discussed in Portugal. However, its submission for approval has not yet occurred and, as such, the contents thereof are not taken into account herein.

6.5 Investors
Investors in securitisations can be regulated or non-regulated investors. Typically, there is a wholesale denomination of the securitisation notes (EUR100,000) and no Key Investor Information Document (KIID) under Regulation (EU) 1286/2014 of 26 November 2014 (the PRIIPs Regulation) is expected to be produced, so the target market of the securitisation notes does not comprise retail investors. Regulated investors will need to ensure that they properly perform diligence for the transaction, including by confirming that the originator (or another eligible entity) has agreed to retain a relevant economic net exposure (under the applicable EU, US or other laws).

6.6 Trustees

Portuguese law does not recognise the concept of a common law trustee, but it does have the concept of the bondholders' common representative, which performs a similar role of representing the interests of the noteholders. Even though the common representative legally enjoys less discretion and more limited powers than a trustee, in practice the difference is mitigated, given that trustees under English law usually tend to avoid taking material action without a noteholder direction.

The common representative's role is documented in the terms and conditions of the notes and in a common representative appointment agreement, which follows the structure and contents applicable to trustees under English law, to the extent possible.

The role of common representative can be performed by, inter alia, credit institutions and entities specifically set up for the trustee business. In any case, it is advisable for trustees to obtain Portuguese law advice on their role and responsibilities, particularly a trustee entering into this business in Portugal for the first time.

According to Article 65 of the Securitisation Law and Article 359 of the Portuguese Commercial Companies Code, the common representative is generally entitled to perform all the necessary acts and operations in order to ensure the protection of the interests and rights of the noteholders in the context of the issuance of the notes, acting as a representative of the noteholders, and namely:

- to represent the noteholders in respect of all matters arising from the issuance of the notes and to exercise their legal or contractual entitlements on their behalf, on the terms set forth in the documents;
- to enforce any decision taken by the noteholders' meetings calling for the delivery of an enforcement notice declaring the notes capable of being accelerated;
- to represent the noteholders in any judicial proceedings, including in judicial proceedings against the issuer and, in particular, in the context of any execution proceedings and insolvency proceedings commenced against the issuer;
- to collect and examine all the relevant documentation in respect of the issuer which is provided to the shareholder(s) of the issuer; and
- to provide the noteholders with all the relevant information of which it may become aware regarding the issuance of the notes.

The rights of the common representative under the documents will be enforceable in Portuguese courts by the common representative against the purchaser, the originator and the servicer (in these latter two cases on the terms set forth in the co-ordination agreement), by virtue of the applicable legal regime and further to the provisions in this respect contained in the documents, being the common representative entitled to enforce the noteholders' rights thereunder acting on their behalf. Upon the enforcement of any given right, Portuguese courts will require the relevant entity to provide enough evidence of its right to claim. The duties and obligations of the common representative under the documents that are expressed to be governed by Portuguese law (including the co-ordination agreement) will be enforceable in Portuguese courts.

As a matter of Portuguese law, the common representative would also be entitled to give notice to the CMVM of any event that could give rise to the CMVM revoking the authorisation granted to the issuer to operate as a credits securitisation company, without incurring any costs. However, as this matter is subject to the discretion of the regulators and may only be ascertained in specific contexts, no assurance can be given as to the position the CMVM would ultimately take in this respect.

Regarding the appointment of a common representative of the noteholders, it is important to stress that, in similar terms to those that have been provided for in the Italian context, the assets segregation principle and the legal creditor's privilege over the assets exclusively allocated to a given issue of securitisation notes, which are clearly established in the Securitisation Law, seem to dispense with the need for the function of a "security trustee" in connection with this transaction, with the common representative of the noteholders acting rather like a "spokesman" or co-ordinator of the noteholders in respect of certain matters, performing the type of role that is usually played by "trustees" in transactions designed under common law jurisdictions. In the case of insolvency, infringement of contractual duties and obligations or any other default situation occurring in respect of the common representative, the retirement thereof and the corresponding appointment of a substitute common representative would happen simply following a decision by the meeting of noteholders, as provided for in Article 65.3 of the Securitisation Law.

According to Article 65.6 of the Securitisation Law, the isolated enforcement of the noteholders' entitlements, whenever in contradiction with the valid decisions taken at the meeting of noteholders, may be restricted by the documents.

7. Synthetic Securitisation

7.1 Synthetic Securitisation Regulation and Structure

Synthetic securitisation is permitted, but remains fairly uncommon. Such transactions are defined as securitisations under Article 1 (3), paragraph b) of the Securitisation Law and under Article 2 (10) of the Securitisation Regulation. In such securitisations, there are no receivables actually being assigned, but only a transfer of credit risk on a bilateral basis. In addition, they are provided for as securitisation transactions in the banking laws and regulations, which provide the framework thereof in terms of capital treatment. They serve the same type of purpose as a credit default swap, with the relevant assets remaining in the originator's balance sheet. The principal laws to take into account are the Securitisation Regulation, the Securitisation Law and the CRR.

These transactions allow for the transfer of the credit risk of the underlying portfolio (even though there may then be exposure to the credit risk of the originator's counterparties in the synthetic securitisation), which is why there is still interest in this sort of transaction among originators.

Article 8(4) of the Securitisation Law sets out specific provisions regarding the segregation of the assets included in the underlying portfolio of a synthetic securitisation.

Given that the originators are credit institutions, they are supervised by the relevant banking supervisors (and if a prospectus is required, by the relevant securities regulator).

As noted above, synthetic securitisations are fairly limited in the Portuguese market and, as such, no substantiated trend can be identified but 2019 saw the first synthetic securitisation carried out in compliance with CRR requirements. Interested parties may also look into the structures commonly used in other jurisdictions for guidance, but Portuguese legal requirements may entail some adjustments. In the so far sole CRR-compliant securitisation in the Portuguese market, the key document is a so-called Credit Protection Deed, entered into between the originator and the issuer, whereby the risk transfer is regulated. The issuer is based in Ireland, and Irish law is expected to take the place of English law in most of the documents in the future, due to Brexit.

8. Specific Asset Types

8.1 Common Financial Assets

In more recent years, the most common securitised performing assets among financial institutions have been mortgage loans (both retained and market deals), commercial mortgage loans, consumer loans (secure and unsecured, including auto loans) and SME loans. For non-financial institutions, electricity receivables (tariff deficits and the like) have been the most commonly securitised asset, along with highway toll receivables, tax and social security credits and TV broadcasting rights receivables.

In the NPL segment, the most significant have been secured loans from banks (in particular, non-performing mortgage loans), without prejudice to unsecured loan transactions. In fact, given that NPLs are still the most significant issue to be solved in the Portuguese financial system, this market segment is expected to grow in volume and innovation, including with rated transactions being brought to the market.

8.2 Common Structures

The applicable legal framework is the same irrespective of the asset class. The documentation package is essentially also the same, with the relevant adjustments dictated by the type of assets.

VdA is an independent Portuguese law firm with more than 440 people and strong experience in a wide variety of industries. Over the past 40 years, VdA has been involved in a significant number of pioneering securitisation transactions, both in Portugal and abroad, in some cases together with leading international law firms, with which it has strong working relationships. It is recognised in Portugal as an innovative and market-leading firm. VdA has advised in most Portuguese securitisations, in many instances in the role of transaction counsel and drafter. It has been engaged in the most innovative deals, across a variety of asset classes, ranging from mortgage loans, consumer loans, leases, commercial loans and non-performing loans generally to non-banking assets such as taxes and social security receivables, electricity receivables, future receivables in the aviation, infrastructure and telecommunications sectors, and TV broadcasting rights receivables. VdA's recent work includes advising on the first Portuguese STS securitisations, the first Iberian green-labelled securitisation and the first CRR-compliant synthetic securitisation.

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