

# Securitisation and structured finance in Portugal

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THE PORTUGUESE SECURITISATION AND STRUCTURED FINANCE MARKET IS MATURE, ROBUST AND INNOVATIVE. WHILE THE USE OF SECURITISATION DATES BACK MORE THAN 15 YEARS AND, THEREFORE, MAY NO LONGER BE CONSIDERED A TREND, THE TRUTH IS THAT OVER THE LAST COUPLE OF YEARS IT HAS PROVEN ITS ABILITY TO REINVENT ITSELF AND ADAPT TO CHALLENGING EVENTS. THESE INCLUDE, FOR EXAMPLE, THE INCREASE IN EUROPEAN UNION (EU) REGULATION AND THE NEED TO ADAPT TO NEW ASSET CLASSES OR TO DEAL WITH EVENTS TAKING PLACE THROUGHOUT THE LIFE OF THE TRANSACTION.

## Regulatory framework in Portugal

From a regulatory perspective, there are some specific features worth mentioning regarding how securitisation is framed under Portuguese jurisdiction. These arise from Decree Law No. 453/99 of November 5, 1999, as amended from time to time (hereinafter, the “Portuguese Securitisation Law”).

Firstly, the receivables to be securitised have to meet the following eligibility requirements: (i) be subject to legal or contractual assignment restrictions; (ii) convey stable, quantifiable or predictable monetary flows, based on statistical models; (iii) their existence and enforceability has to be warranted by the assignor; and (iv) not be litigious nor pledged as security or judicially attached or seized.

Securitisation of future receivables is also allowed, provided that the receivables arise from existing or expected legal relationships and their amounts are known or quantifiable. In Portugal, several transactions have taken place securitising future receivables from a wide

range of sectors such as aviation, infrastructure, telecommunications and TV broadcasting rights.

These receivables are typically assigned under a “true sale” concept which facilitates the assignment of credits under Portuguese Law from the originator (as the owner of the credits) to the securitisation company (*Sociedade de Titularização de Créditos*) (as the special purpose vehicle which acquires the receivables and issues the notes) (“STC”). Under this true sale, the assignment operates as an effective, complete and unconditional assignment of the receivables with immediate translativity effectiveness with the consent of the parties, regardless of the debtor's consent. As a general rule, the effectiveness of the assignment towards the debtors depends on them being notified accordingly.

There are exceptions to this latter requirement, however, such as the scenario where the originator typically retains the servicing – in this case, debtor notification is not required and the registration of security in the name of the STC is only to take place in the case of enforcement events. Whilst the instances of the originator retaining the

servicing is very common in transactions involving performing loans, in transactions concerning non-performing loans the servicing is typically taken up by an independent servicer (approved by the Portuguese Securities Market Commission, CMVM) and debtor notification and registration of security take place after closing.

The applicability of the true sale naturally entails that a very strong detachment operates, i.e., the assignor (originator) does not guarantee or accept any responsibility for the performance of the assigned receivables and the assignee acquires full legal title over the receivables, regardless of any condition or term.

The key factor arising from this regulatory strategy is that, from an insolvency perspective, the STC's ownership over the securitised assets will be recognised as a matter of law and any creditor of the insolvent originator will not be able to satisfy its claims out of the proceeds of the securitised assets. Securitisation ends up isolating the portfolio of underlying assets from the bankruptcy risk of the originator, protecting investors who have acquired the relevant asset-backed securities. Moreover, in compliance with the asset segregation principle, each securitisation corresponds to a segregated and autonomous pool of assets, comprised of the assigned receivables, only allocated to the liabilities arising from that specific securitisation transaction.

As a final note on insolvency matters, there is a special privileged entitlement securing the liabilities of the creditors of a securitisation transaction. As such, security holders' rights in the context of each issuance rank senior to those of other creditors in respect of receivables allocated to the relevant issue of securities, such as providers of services required for the carrying out of their activity or tax authorities for amounts due in respect of taxes.

A simplified regime is also in place for the purpose of assigning and registering mortgage loans (or any other guarantees subject to registration), allowing for the formalities to be less strict. As long as the relevant agreement is duly recognized, either by a lawyer, a public notary or by the company secretary, legal requirements

are satisfied and registrations can be made centrally in a unitary and expedited process, through a single submission.

It is also interesting to note that there is no legal concept of "trustee" under Portuguese Law and, typically, a common representative is appointed to fulfil a similar role. In certain private and/or single-investor transactions, this may be deemed unnecessary as it may be more practical for noteholders to decide directly on any relevant matters by means of a written resolution.

Differently from the EU Securitisation Regulation, Portuguese Securitisation Law does not require tranching for a transaction to be qualified as a securitisation. This allows the Portuguese legal and tax regime to be used for the benefit of investors in untranching transactions, as is common in the Portuguese non-performing loan market.

Finally, in Portugal, each securitisation is approved by the CMVM which grants an asset identification code to the relevant autonomous pool of assets (allowing its identification at any given time by the respective creditors), after reviewing the transaction documents and assessing their compliance with Portuguese Securitisation Law and with EU Securitisation Regulation, in the particular case of STS securitisations.

If the notes are to be listed on a regulated market and admitted to trading, the CMVM will also approve the respective prospectus, assessing whether it complies with the requirements of Portuguese Prospectus Regulations. The CMVM also reviews a detailed data-tape, which is kept at the CMVM (and updated from time to time by the originator), available to be consulted by investors in case of issuer default.

## Overview of securitisation transactions in the Portuguese market

An increasing number of securitisation transactions have been successfully put together in Portugal, from year to year, resulting in a very busy Portuguese market. The framework of these transactions is quite diversified, either

from a perspective of the type of transaction, or from the perspective of the characteristics of the securitised receivables.

As regards the types of securitisations, and based on publicly disclosed information by the CMVM, 79% of the completed securitisation transactions were carried out under the Portuguese Securitisation Law (traditional securitisation, including single tranche securitisations); and the remaining 21% were carried out in accordance with EU Securitisation Regulation. Securitisations under the EU Securitisation Regulation can be framed as “non-STs” (which corresponds to an assignment of credits where the risk transfers and credit assignments meet the requirements in article 4 of the Portuguese Securitisation Law) or as “STs” (transactions which correspond to an assignment of credits that meet, amongst others, specific STS requirements relating to simplicity, standardisation and transparency, as set out in articles 20 to 22 or 23 to 26 of the EU Securitisation Regulation).

Demand for the STS label in Portugal has rapidly increased, evidenced by the fact that only a quarter of the 21% of transactions undertaken in accordance with the EU Securitisation Regulation were non-STs. Further types of securitisation transactions have taken place such as synthetic securitisations, green securitisations and restructuring of existing deals.

Most of the portfolios subject to securitisation include non-performing receivables with only a small percentage being exclusively composed of performing loans. The types of assets securitised in the Portuguese market have originated from diverse industries, such as residential mortgages, auto-loans, credit cards, broadcasting rights, leasing and consumer loans.

Although we are accustomed to these receivables being typically originated by banks and other financial institutions, reality has revealed itself as not so linear. In fact, in a growing number of transactions the seller has been of a different nature altogether - either because the receivables have been originated by non-financial entities or because they have been previously acquired to speed up a transaction.

## ESG Surge – the future is now

Sustainable finance, which takes into account environmental, social and governance (“ESG”) factors, has gained significant prominence, enhanced by increased investor's appetite for investment products aligned with an ESG agenda and not exclusively driven by financial robustness. The market has been responding to such needs and securitisation has been keeping pace with it.

Sustainable securitisation is progressively becoming a trend and entails a specific-use-of-proceeds approach aligned with ESG objectives that ultimately intend to achieve climate/social change goals and a transition to a greener economy.

ESG securitisation is a road that has just started to be travelled and a specific legal framework for the securitisation is yet to be constructed for this purpose. In the meanwhile, and as an intermediate step, guidance is taken from the EU regulations on sustainable finance, namely on the EU Green Bond Standard, which can be applied to securitisation transactions, provided that some adjustments are made, as noted on the EBA's report.

The EU Green Bond Standard requirements may apply



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either at (i) the origination level (the assets backing the transaction comprise, in full or in part, a collateral, which has a positive impact on ESG factors such as energy-efficient mortgages or electric auto loans/leases) or at (ii) the issuer level (the proceeds are used to (re)finance in full or in part assets that have a positive impact on ESG factors).

One of the first STS securitisations in Portugal (in 2020) was also the first 'green' RMBS securitisation in the Iberian Peninsula. It fitted in the first scenario described above, with the proceeds received by the originator (receivables' purchase price) being applied towards the funding of earmarked green building initiatives and sustainable finance projects in the Iberian Peninsula.

## What lies ahead

As we all know, two world crises essentially originated by the Covid-19 pandemic and by the war currently taking place in Ukraine have unfolded since the year of 2020. Naturally, these events are expected to have a significant impact on the financial market. We have already witnessed the responses to the Covid 19 pandemic, both temporary (like debt moratoria) and permanent (like the EU Capital Markets Recovery Package). Effects from the war in Ukraine, so far, have received less attention from the regulators. The combination of these factors has led to an accumulation of credit by banks that still do not qualify as non-performing loans, inflation and an increase in interest rates.

As such, and despite these scenarios, no significant changes have yet impacted the market. Even though 2020 was a slower year in terms of investment, allied with a more demanding portfolio management, recovery did not diminish. But the real question seems to be: "with debt moratoria having come to an end and the rising inflation caused by the continuing war in Ukraine, is it just a matter of time?"

Regardless of the uncertainty, the market is resilient, and the players seem to be here to stay. Small and medium-sized enterprise loans are expected to become a trend, which will entail more challenges to overcome in the near future (such as more challenging pricings, due diligence processes and management) and the ESG securitisation will continue to tread its own rising path.

Portugal is, after all, a small market and, for the optimistic, no major changes are foreseen. In any case, it will ultimately be up to us (law firms, players, arrangers and regulators) to keep on finding solutions to mitigate risk and overcome barriers that we may face at the crossroads we meet.

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