SPAIN

Law and Practice

Contributed by:
Jaime de la Torre, Arnau Pastor and Jaime Juan Rodríguez
Cuatrecasas

Contents

Cuatrecasas has more than 1,700 professionals and is firmly established in Spain, Portugal and Latin America, where it has offices in Chile, Colombia, Mexico and Peru. The Cuatrecasas securitisation team is based in Madrid and Barcelona, and provides legal advice to originators, management companies, rating agencies, placement entities and arrangers on the structuring and execution of securitisation transactions regarding all types of underlying assets, including residential mortgage, commercial mortgage, credit cards, auto loans, leasing, trade receivables, non-performing loans, etc. Cuatrecasas has a strong focus on green securitisation, and especially the application of green labels, including the European Green Bond (EuGB). It recently advised UCI in the first green public securitisation in Spain (RMBS Green Prado XI), the JLMs in a landmark auto loan transaction (Santander Consumer Auto 2023-1), and ING in the biggest Spanish securitisation (Sol Lion II).

Authors

Jaime de la Torre is a partner at Cuatrecasas and advises private and public entities on debt capital markets issuances, public and private placings, domestic and international issuances, and high-yield and direct lending transactions. He regularly advises on acquiring distressed debt and non-performing loans. Jaime is admitted to practise in Spain in the Madrid Bar (Ilustre Colegio de Abogados de Madrid) and in England & Wales. He lectures in postgraduate and specialisation courses at different universities, including ESADE Business & Law School, CUNEF University College of Financial Studies, the Institute of Stock Exchange Studies and Universidad CEU San Pablo

Arnau Pastor is a principal associate at Cuatrecasas and advises on public and private securitisation transactions across a diverse range of asset classes and other structured financing transactions, such as cross-border factoring programmes backed by commercial and consumer receivables. He specialises in financial derivatives instruments, advising banks and companies on negotiating and drafting the framework agreements based on market standards as well as ad hoc documentation for specific OTC products (deal-contingent swaps, credit default swaps and forward swaps). Arnau is admitted to practise in Spain and is a member of the Barcelona Bar (Ilustre Colegio de Abogados de Barcelona).

Jaime Juan Rodríguez is an associate at Cuatrecasas and provides legal advice on DCM matters with listings in regulated markets or multilateral trading facilities (MTFs) of the European Union. His advice on securitisation transactions extends to residential mortgages, auto loans, balloon loans, consumer loans and credit cards. He also offers expertise in the preparation of interest rate hedges under ISDA and CMOF standards. Jaime Juan is a member of the Madrid Bar (Ilustre Colegio de Abogados de Madrid) and is an adjunct professor in undergraduate law programmes on private law (civil law).

Cuatrecasas

Calle de Almagro, 9
28010 Madrid
Spain

Tel: +34 915 24 71 00
Email: madrid@cuatrecasas.com
Web: www.cuatrecasas.com

CUATRECASAS

1. Specific Financial Asset Types

1.1 Common Financial Assets

The Spanish securitisation market is dynamic and closely linked to the country's economic conditions. Consumer loans and auto loans are the most commonly securitised assets in Spain, based on the number of transactions.

For instance, according to the official register of the Spanish Securities Exchange Commission (CNMV) for 2023, the 17 publicly disclosed securitisation deals in Spain included four auto loans transactions and four consumer loans transactions; the remaining transactions involved trade receivables, corporate loans, residential mortgage loans and non-performing loans. In contrast, in 2022, six out of 20 publicly disclosed transactions involved residential mortgage loans.

1.2 Structures Relating to Financial Assets

There are no significant structure differences for different asset types. Spanish securitisations necessarily pivot on a special-purpose vehicle known as a *fondo de titulización* ("securitisation fund"), as explained in **6.2 SPEs**.

A securitisation transaction in Spain may use one of the following options:

- public SPE or private SPE – depending on whether the notes are listed in a regulated market (eg, AIAF – in which case it will be considered a public fund) or in a multilateral trading facility or without listing (a private fund);
- opt-out from the Securitisation Regulation – since securitisation is regulated at both the EU level and the domestic level, a securitisation transaction may be structured under national law outside the scope of the Securitisation Regulation's definition of securitisation, although several implications should be carefully addressed by a specialist legal team;
- closed-ended or open-ended – Spanish SPEs can be structured with open or closed assets and liabilities, or any combination of both;
- sale documentation – if the underlying assets comprise mortgages and the seller is a credit institution, the sale transaction to the SPE will be documented under a special regulation contained in Royal Decree-Law 24/2021;
- risk retention modality – how the risk retention requirement set forth in Article 6 of the Securitisation Regulation is met (see **4.3 Credit Risk Retention**);
- waterfall – Spanish SPEs should feature at least one ordinary waterfall and a post-enforcement waterfall; additional waterfalls are optional;
- initial costs – the initial costs are typically funded by the originator, either through a specific note tranche or by means of a subordinated loan; and
- meeting of creditors – if a meeting of creditors is considered, the numbers required for majorities and the scope of decisions should be necessarily included.

Changing any of these characteristics once the transaction has been executed is difficult, and could involve in the winding down of the transaction (whenever possible).

1.3 Applicable Laws and Regulations

The main laws and regulations that are relevant for the purposes of structuring a securitisation transaction is Spain are either EU regulations or domestic regulations.

Spanish Regulations

- Law 5/2015 (the "Spanish Securitisation Law") sets out the domestic legal framework for securitisation transactions.
- Law 6/2023 (the "Spanish Securities Markets Law") sets out the domestic legal framework for the issuance of notes in capital markets. It has recently been recast in order to transpose a number of EU directives.
- Royal Decree 724/2023 (the "Spanish Capital Markets Regulation") sets out the domestic legal framework developing the Spanish Securities Markets Law.
- Royal Decree-Law 24/2021 (the "Spanish Mortgage Mobilisation Regulation") sets out the domestic legal framework for mobilising mortgage loans by credit institutions by means of securitisation, covered bonds and collateralised loan obligations.

EU Regulations

- Regulation (EU) 2017/2402 (the "Securitisation Regulation") and delegated regulations – most of the transactions in Spain are covered under the definition of "securitisation" in the Securitisation Regulation, and are therefore subject to its provisions.
- Regulation (EU) 2017/1129 (the "Prospectus Regulation") and delegated regulations are applicable in the case of public transactions when notes will be listed in a regulated market, and therefore a prospectus should be registered with the CNMV.

1.4 Special-Purpose Entity (SPE) Jurisdiction

The most common way to securitise Spanish-governed assets is through a transaction in Spain subject to both the Securitisation Regulation and the Spanish Securitisation Law. There are several advantages for choosing this option, including the lower costs and the regulatory framework, which has proven agile and is especially designed to allocate Spanish assets. Please see **6.2 SPEs** regarding the special type of entity known as a "securitisation fund" (*fondo de titulización*), which is a special type of orphan vehicle.

However, it is possible to structure a cross-border securitisation of Spanish assets by means of foreign SPEs, although the use of this structure is residual. Recently, several transactions pertaining to Spanish assets have been instrumented by means of an Irish designated activity company (DAC) or a Luxembourg company together with a private Spanish SPE. Several complexities arise from this alternative, such as cross-border frictions in terms of listing requirements, tax implications and corporate obligations.

1.5 Material Forms of Credit Enhancement

Of the multiple material forms of credit enhancement used in Spanish securitisation transactions, the following are used most frequently:

- subordination – the tranching of notes is the most usual credit enhancement, but it should be noted that this alternative is expressly omitted when the structure is intended to opt-out from the Securitisation Regulation;
- hedging instruments – this credit enhancement is especially relevant in transactions where the assets and liabilities have different interest profiles;
- reserves – Spanish transactions sometimes embed one or two types of reserves:
  (a) reserves as proper credit enhancements; and/or
  (b) reserves to mitigate other risks (commingling risk, compensation risk, etc); and

- excess spread – this is the most usual credit enhancement in Spain and is closely linked to the financial model of the transaction.

2. Roles and Responsibilities of the Parties

2.1 Issuers

Under the Spanish Securitisation Law, securitisations made in Spain are structured by means of a special type of SPE known as a *fondo de titulización*, the main characteristics of which are discussed in **6.2 SPEs**.

The role of the SPE is ring-fenced as it is administered by a management company (see **2.7 Bond/Note Trustees**) without no possibility of undertaking other business activities outside the scope of the transaction.

2.2 Sponsors

The concept of a sponsor is alien to the Spanish Securitisation Law; unlike other EU jurisdictions, this role is not part of the securitisation tradition of Spain. Therefore, at the Spanish level, the only applicable rules are those established in Article 2 of the Securitisation Regulation, which covers certain credit institutions (located inside or outside the EU) or investment firms (other than the originator).

2.3 Originators/Sellers

The originator and the seller are usually the same party, and their roles are limited to the following.

- Sale and purchase agreement (SPA) – the seller executes the SPA with the SPE (in the case of assets other than mortgage loans). If mortgage loans are transferred, the seller will issue and deliver multiple titles in favour of the SPE, representing the ownership of the mortgage loans (provided that the seller is a financial entity).
- Asset liability – the seller assume liabilities vis-à-vis the SPE under a set of representations and warranties regarding itself and the assets. Such liability subsists for the length of the securitisation transaction.
- Prospectus liability – responsibility is assumed vis-à-vis noteholders for certain sections of the prospectus (or the information memorandum) that are drafted based on the information provided by it.

The most common originators in Spain are:

- major and medium banks, especially in residential mortgage loans and consumer loans;
- specialist car finance companies, which regularly package car loans in traditional or innovative structures;
- consumer loan lenders, which usually securitise consumer loans and credit card loans, in both statis and revolving structures; and
- working capital specialists – asset classes of working capital and invoices have been increasingly active of late.

2.4 Underwriters and Placement Agents

The role of a placement agent is key in Spanish securitisations, but the role of an underwriter is practically non-existent.

The role and responsibilities of placement agents are as follows.

- Regulated activity – the placement activity is regulated under Article 38 of the Spanish Securities Market Law, so those entities acting as placement agents must be registered with the relevant registers of the CNMV or the Bank of Spain.

- Lead manager – the usual title used by placement entities is "lead manager", either as "sole lead manager" or as "joint lead manager". The tasks under this title cover the placement of the notes, controlling the status and evolution of the investors' demand, and executing the pricing of the notes.
- Arranger – at least one of the placement entities acts as arranger of the transaction. This role is related not to the placement of the notes, but to the structuring of the transaction. However, the arranger of a transaction usually holds a key position in the settlement of the notes as billing and delivery agent, although several structures are possible in this regard.
- Prospectus – under Article 38 of the Spanish Securities Markets Law, an arranger assumes responsibility for certain sections of the prospectus (or the information memorandum) that are prepared based on the information provided by the originator.
- Placement agreement – the originator, the SPE, the lead managers and the arrangers execute a placement agreement upon closing, setting the terms of the placement of the notes. This agreement is usually governed by Spanish law.

2.5 Servicers

The servicer's main functions are as follows.

- Contractual delegation – the SPE's management company delegates a number of functions related to the administration of the underlying assets in accordance with the terms of the SPE's deed of incorporation and the servicing agreement.
- Payments and collateral – the servicer is usually bound by some sort of sweep process related to the bank accounts where the debtors pay the underlying assets.
- Reporting – under the servicing obligations, the servicer usually has to deliver periodic reports on the underlying assets' behaviour.
- Enforcement – one of the key functions of the servicer is to manage the defaulted assets. An enforcement policy is usually agreed in the servicing agreement, setting out the scenarios for out-of-court renegotiations or forbearance, and also for court enforcements.

The features of the servicing activities in the context of a securitisation transaction are further discussed in **3.5 Principal Servicing Provisions**.

2.6 Investors

The role of investors is to subscribe the notes issued by SPEs and pay the purchase price of the notes. Depending on the type of transaction, the following responsibilities will apply to investors.

- Subscription agreement – in some transactions, some or all investors execute a subscription agreement in order to allocate subscription tickets.
- Regulatory obligations – some types of investors are subject to special regulatory obligations, due to their legal status. Moreover, investors in securitisation transactions are bound by the due diligence requirements under Article 5 of the Securitisation Regulation.
- Qualified investors – transactions are usually restricted to qualified investors, as defined by Article 2 of the Prospectus Regulation.
- Retail clients – if a securitisation position is to be marketed to any retail client as defined under Article 4(1) of Directive 2014/65/EU (ie, any client that does not constitute a "qualified investor"), certain strong requirements must be met, including the suitability test.

2.7 Bond/Note Trustees

Given the continental nature of Spanish law, the concept of "trust" or "trustee" is alien to the Spanish Securitisation Law. However, as explained in **2.1 Issuers**, as SPEs are devoid of legal personality, they must be administered by a special type of management company that has the following features.

- Strongly regulated entities are the only type of entities that are legally allowed to administer SPEs under the Spanish Securitisation Law (Title III, Chapter II). They must be authorised by the CNMV, which has a list of authorised management companies available on its website.
- Legal duties include handling the incorporation, management and legal representation of an SPE in the interest of the noteholders. In particular, management companies must:
  (a) have staff with expertise;
  (b) conduct a risk assessment of the securitised assets;
  (c) avoid conflicts of interest; and
  (d) comply with reporting obligations.
- Status – entities shall have the suffix "S.G.F.T." in their legal name (as an abbreviation of *sociedad gestora de fondos de titulización*).
- Foreign SPEs – according to Article 25.2 of the Spanish Securitisation Law, Spanish management companies may only incorporate, manage and represent foreign SPEs that are similar to Spanish SPEs, in accordance with the applicable regulations of the relevant jurisdiction.

Apart from the general obligation of the management company to act in the interest of the noteholders, securitisations can be embedded with or without a meeting of creditors; see **1.2 Structures Relating to Financial Assets**.

2.8 Security Trustees/Agents

Due to the specific legal framework in Spain, the role of the security trustee is not necessary. However, there are a number of other agents that are customarily needed, such as the paying agent, the billing and delivery agent and the account bank.

3. Documentation

3.1 Bankruptcy-Remote Transfer of Financial Assets

The classic risk for securitisations is the risk of claw-back in the event of the seller's insolvency. Fortunately, the Spanish Securitisation Law contains an exception to the typical claw-back mechanism under the Spanish Insolvency Law.

Securitisations made under the Spanish Securitisation Law by means of an SPE enjoy an "absolute separation right", which means that claw-back is substantially restricted as it can only take place on grounds of fraud. This legal exception is sufficient to comply with Article 20(1) of the EU Securitisation Regulation, which requires that the transfer of receivables to an SPE shall not be subject to severe claw-back provisions in the event of the seller's insolvency.

3.2 Principal Warranties

Types of Warranties

Two sets of representation and warranties (R&W) given by the seller are commonly used in Spanish securitisations.

- Representations on the seller – the standard R&W include:
  (a) the legal form and status of the seller;
  (b) the absence of insolvency or bankruptcy situations;
  (c) authorisations and corporate approvals;

and
(d) audited annual statements for the last two fiscal years.
- Representations on the assets – the standard R&W include that the assets:
(a) originated in the ordinary course of the seller's business;
(b) are existing, valid and susceptible of being enforced under the applicable laws; and
(c) meet all necessary conditions to be transferred to the SPE.

Breach of R&W

Most of the wording of warranties regarding the breach of an asset representation and warranty is usually structured as a breach of the eligibility criteria, and its contractual enforcement is materialised as a three-step obligation process for the seller:

- to remedy the breach;
- to replace the affected receivable; and
- if these are not possible, to repurchase the affected asset.

Enforcement is made primarily by the management company, although judicial enforcement is a possibility since these provisions are a contractual undertaking under the deed of incorporation of the SPE.

3.3 Principal Perfection Provisions

Common Provisions

The transfer of assets from the seller to the SPE is instrumented under Spanish law as follows.

- Assignment transaction – as an assignment (*cesión*) of the receivables derived from the loans.
- Type of asset – the sale is executed by means of an SPA generally or, in the case of mortgage loans, through the issuance of multiple titles if the seller is a financial entity.
- Formalities – the assignment transaction also has to comply with the formalities contained in Article 17 c) of Law 5/2015.
- Revolving formalities – in the context of revolving securitisations, the management company should deliver to the CNMV for each additional purchase a document executed by the seller containing identification of the additional assets and a declaration of compliance with the eligibility criteria.

Notarisation

Considering Articles 1227, 1280 and 1526 of the Civil Code, the documentation usually includes an execution covenant so that the sale agreement is notarised in order to be fully effective vis-à-vis third parties.

Notification to Borrowers

Notification is not a perfection requirement. However, until the borrower is notified of the sale of the loan to the SPE, pursuant to Article 1,198 of the Civil Code, the borrower will be:

- legally discharged of its obligations for payments made to the seller (as original lender); and
- able to set off obligations against the seller (this can be an issue if the seller performs retail banking).

As the seller is usually designated as servicer in Spanish securitisations, no notification is required, except in the following instances.

- If required by law – several regional regulations require notification to borrowers if those borrowers are qualified as consumers and the loans meet certain requirements.

- Upon a servicer event – certain event-specific scenarios normally trigger the servicer succession mechanism, such as the insolvency of the servicer or a breach of obligations. In this scenario, a compulsory notification to all borrowers is usually the best practice to avoid a few operational risks.

3.4 Principal Covenants

There are usually three sets of covenants in any securitisation from a subjective point of view:

- from the seller;
- from the originator; and
- from the management company.

The following key commitments are usually included in the documentation.

- Sale – the seller shall sell the relevant assets meeting the eligibility criteria (the representations and warranties described in **3.2 Principal Warranties**) to the SPE.
- Collection – the servicer shall transfer the amounts collected from the debtors of the underlying assets to the SPE.
- Servicing – the servicer shall manage the underlying assets (see **4.9 Banks Securitising Financial Assets**).
- Risk retention – the seller (as originator) shall retain a material net economic interest of not less than 5% of the nominal value of the securitisation (see **4.3 Credit Risk Retention**).
- Compliance – the applicable regulations shall be complied with.

3.5 Principal Servicing Provisions

Under Article 26 of the Spanish Securitisation Law, the primary rule is that the management company of the SPE is legally responsible for administering the assets pooled in the SPE.

Usual Servicing Provisions

The servicing provisions should be ring-fenced in a servicing agreement to be executed upon closing by the SPE. Those provisions should include at least the following:

- custody of the documentation relating to the underlying assets;
- collections – an undertaking to transfer all collection amounts to the SPE;
- default process – the actions to be implemented in case of defaulted assets;
- notices between the management company and the SPE; and
- termination – servicer termination events and a replacement procedure.

Servicing Differences

Depending on the asset class, the servicing activity can be subject to certain requirements.

- Mortgage loans – in the case of real estate mortgages, the Spanish Mortgage Mobilisation Regulation requires the seller (as original lender) to retain a number of non-delegable tasks. The remaining tasks can be (and usually are) delegated as part of the servicing arrangement. This issue can be particularly important when securitising NPL portfolios.
- Other loans – the management company usually completely delegates the management of the assets to a servicer (usually the seller), but this delegation does not impair the primary liability of the management company under Article 26 of the Spanish Securitisation Law, which shall continue to be liable vis-à-vis the noteholders.

3.6 Principal Defaults

Three different sets of defaults can be differentiated.

- SPE defaults – Spanish transactions do not usually embed SPE defaults. Actually, payment default is usually not observed and, therefore, an interest payment default simply leads to an accumulation in the next payment date (without default interest). At the SPE level, most of the early redemption triggers are linked with ad hoc calls such as the clean-up call, the tax call and the regulatory call. However, it is possible to include tailor-made calls, depending on the needs of the seller (such as a green call or a random repurchase call).
- Management company default – management companies are bound by certain operational defaults established in the Spanish Securitisation Law, related to their legal status and compliance with legal covenants. If the defaults are not cured within a statutory period, the documentation always replicates the replacement procedure established in the Spanish Securitisation Law.
- Seller defaults – as described in **3.2 Principal Warranties**, the seller is bound by certain asset representations, which can have the effect of triggering the seller's liability.
- Servicers' default – the paying agent, the account bank, the hedge provider, the servicer, etc, are bound by certain defaults in their respective documentation. For instance, in the case of the account bank, a rating downgrade event is the most common type of default that triggers a replacement procedure.

3.7 Principal Indemnities

The very concept of "indemnity" is alien to the continental legal systems. However, the placement agreement executed between the seller, the SPE and the placement agents occasionally includes a number of indemnities due to the influence of English law, limited to the compliance of the selling restrictions in the context of the placement activity of the placement agents.

3.8 Bonds/Notes/Securities

As described in **1.2 Structures Relating to Financial Assets**, one of the structural drivers is the difference between a private transaction and a public transaction. The notes are usually represented as book entries in Iberclear, although listing differs as follows.

- Public securitisation – a prospectus must be filed with the CNMV drawn under the Prospectus Regulation, and the notes are usually listed in the Spanish regulated market for fixed income securities (AIAF).
- Private securitisation – no prospectus is needed as the notes are listed in a multilateral trading facility. The most usual venues are the Spanish MARF, the Vienna MTF and Dublin MTF.

On certain occasions, the transaction can be structured without book entries, but with the note represented in a physical security.

3.9 Derivatives

Interest rate derivatives are the most common type of derivative used in Spanish securitisations to match the interest profile of the assets of the SPE (ie, the loans) and the liabilities of the SPE (ie, the notes).

The ISDA standard is the most used documentation package, but in some instances the CMOF standard is also used. Interest derivatives can be governed by Spanish law or foreign law (English law, French law and Irish law are the most usual foreign legislation used in Spain). It should be taken into consideration that using a foreign ISDA will likely involve extra costs for the legal opinion related to the hedging agreement.

3.10 Offering Memoranda

As described in **1.2 Structures Relating to Financial Assets**, one of the structural decisions is choosing between a public and a private transaction.

- Prospectus – a prospectus is necessary in the case of public securitisations (ie, when the notes issued by the SPE are listed on a regulated market). This prospectus has to be drawn up according to the Prospectus Regulation and must be authorised by the Spanish CNMV.
- Information memorandum – no prospectus will be needed if the notes are listed in a multilateral trading facility, but a listing document might be necessary. For instance, in the case of listing the notes in the Spanish MARF, an "information memorandum" should be drawn up in accordance with the minimum requirements and custom formats of this venue set up in MARF Circular 2/2018.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

Spanish Level

Disclosure to the CNMV

The assignment of receivables to an SPE is subject to the following requirements (Article 17 of Law 5/2015):

- annual accounts – the assignor must provide its audited annual accounts for the previous two years to the CNMV (unless it has been recently incorporated);
- annual reports – the assignor must detail the transactions involving the transfer of credit rights (whether regarding present or future receivables) in its annual reports;
- revolving nature – if additional assets are assigned to the SPE (beyond the initial ones), a notification must be sent to the CNMV identifying the assets incorporated and their characteristics, together with a representation stating that such new assets meet all the requirements set out in the SPE's deed of incorporation; and
- formalities – transfers of assets to an SPE must be formalised in a written document.

Public information

Management companies shall publish the following information on their websites, for each of the SPEs they manage (Article 34 of Law 5/2015):

- the deed of incorporation and any other subsequent deeds;
- the prospectus and any supplements thereto, if applicable; and
- the annual/quarterly reports (see **4.4 Periodic Reporting**).

European Level

SPEs are generally subject to the disclosure requirements envisaged under the Securitisation Regulation (see **4.2 General Disclosure Laws or Regulations**).

4.2 General Disclosure Laws or Regulations

Disclosure to Investors and National Supervisory Body

According to the Securitisation Regulation, SPEs shall make the following information regarding the securitisation available to the CNMV and investors before pricing (and also to potential investors if they so require):

- all underlying documentation that is essential for the understanding of the transaction;
- where a prospectus has not been drawn up, a transaction summary/overview of the main features of the securitisation; and
- in simple, transparent and standardised (STS) securitisations, the STS notification.

Disclosure to Securitisation Repository

In public deals, according to the Securitisation Regulation, disclosures must be made to a securitisation repository – ie, an entity duly registered with the European Securities and Markets Authority (ESMA) for that purpose. The means of disclosure for private deals, on the other hand, is not prescribed. According to ESMA, "absent any instructions or guidance provided by national competent authorities, reporting entities are free to make use of any arrangements that meet the conditions of the Regulation".

4.3 Credit Risk Retention

Spanish regulations do not contain specific risk retention requirements for securitisation transactions; the applicable legal framework is to be found in Article 6 of the Securitisation Regulation, which establishes the obligation of the originator, sponsor and original lender to retain a material net economic interest of not less than 5% of the nominal value of the securitisation.

Such economic net interest shall be measured at the origination date, maintained throughout the securitisation transaction and determined by the notional value for off-balance sheet items. Furthermore, the net economic interest cannot be sold, divided between different retainers nor subject to any credit-risk mitigation, any short positions or any other hedging.

The Securitisation Regulation sets forth alternative procedures with the retention of the following to comply with requirements:

- no less than 5% of the nominal value of each of the tranches sold;
- the originator's interest of no less than 5% of the nominal value of each of the securitised exposures (in revolving securitisations or securitisations of revolving exposures);
- randomly selected exposures, equivalent to no less than 5% of the nominal value of the securitised exposures, where such exposures would otherwise have been securitised in the securitisation and the number of potentially securitised exposures is not less than 100 at origination;
- the first loss tranche and, where such retention does not amount to 5% of the nominal value of the securitised exposures, if necessary, other tranches having the same or a more severe risk profile than those transferred or sold to investors and not maturing any earlier than those transferred or sold to investors, so that the retention is equal in total to an amount equivalent to no less than 5% of the nominal value of the securitised exposures; and
- a first loss exposure of not less than 5% of every securitised exposure.

4.4 Periodic Reporting

Reporting to the CNMV

Management companies of SPEs must submit the following information on each SPE to the CNMV, as the national public supervisory body (Article 35 of Law 5/2015):

- quarterly, within two months of the end of each calendar quarter, certain information including a breakdown of the assets transferred to the SPE, a breakdown of the SPE's

liabilities and the total commitments arising from the derivative instruments in place (when applicable); and
- annually, the relevant SPE's annual financial statements for registration with the CNMV, together with the auditors' report in respect thereof, within four months following the end of the SPE's financial year (ie, prior to 30 April of each year).

Other Relevant Information to Make Publicly Available

Management companies must give immediate notice to the CNMV and to their creditors (Article 36 of Law 5/2015) of any material event that is specifically relevant to the situation or development of the SPE (except in the case of an SPE whose securities are not admitted to trading on an official secondary market). Material facts specifically relevant to the SPE will be those that could have a significant impact on the notes issued and/or on its assets.

4.5 Activities of Rating Agencies

According to Law 5/2015, there is no legal requirement in Spain to grant a credit rating to the securitisation notes in order to incorporate an SPE, but it is common market practice to assign ratings to the notes of public securitisations.

In Spain, the securitisation activities of rating agencies are primarily regulated under:

- Regulation EC 1060/2009 on credit rating agencies (the CRA), which has subsequently been amended by Regulation EU 513/2011 (CRA II), which transferred the responsibility for the registration and supervision of credit agencies to ESMA; and
- Regulation EU 462/2013 (CRA III), which introduced certain items in relation to credit rating agencies (eg, the reliance of firms on external credit ratings, independence, sovereign debt ratings, or the degree of competition in the industry or the liability regime).

4.6 Treatment of Securitisation in Financial Entities

Banks' capital and liquidity requirements are regulated under the so-called "CRDV package" of legislation, which includes:

- Directive 2013/36/EU, regarding prudential supervision, which has been transposed into the Spanish legal framework by Law 10/2014 and Bank of Spain Circulars 2/2014 and 2/2016;
- Regulation EU 575/2013, on prudential requirements;
- Directive EU 2019/878, the transposition of which into the Spanish legal framework has been initiated by Royal Decree-Law 7/2021; and
- Regulation EU 2019/876 (CRR II).

In general terms, the CRDV package establishes the following two main requirements.

- The liquidity coverage requirement (LCR) assesses if the number of high-quality liquid assets (HQLA) owned by banks is sufficient to cover the liquidity needs over a stress period. In this regard, there are three tiers of HQLA (Level 1, Level 2A and 2B), and securitisations can only be eligible as Level 2B when the following requirements are fulfilled:
  (a) the securitisation qualifies as STS; and
  (b) an external credit quality assessment has been conducted by an External Credit Assessment Institution meeting some requirements.
- The net stable funding requirement (NSFR) has the main purpose of ensuring that banks

do not suffer from a short-term funding crisis, by establishing the holding of a minimum level of stable funding. In this regard, in the securitisation context, an originator bank is required to establish a certain level of stable funding in relation to the assets held. In addition, a bank that invests in a securitisation will be required to establish a certain amount of stable funding in relation to the securitisation that it is holding.

The legal framework for insurance companies is contained in Law 20/2015 and Royal Decree 1060/2015, regarding the regulation, supervision and solvency of insurance and reinsurance entities.

The requirements in relation to other regulated financial entities (eg, alternative investments fund managers) are established in Law 22/2014, regulating venture capital entities, other closed-ended collective investment entities and management companies of closed-ended collective investment entities.

4.7 Use of Derivatives

Hedging

Derivatives continue to be a common tool to hedge possible risks for SPEs, mainly interest rate risk, which is hedged by means of swaps and caps.

The CNMV is the Spanish supervising body for the derivatives market, as well as the principal regulator of the entities operating in such market. When the relevant entity is a credit institution, the Bank of Spain may also have certain supervisory or control functions.

In any case, the relevant regulation on derivatives is as follows:

- Spanish regulation – with regards to the use of derivatives as hedge instruments, Law 5/2015 (Article 35) lays out that management companies shall submit the annual report to the CNMV for each of the SPEs they manage (as described in **4.4 Periodic Reporting**), which must include, inter alia, the total commitments arising from the derivatives in place (if any); and
- European regulation – the Securitisation Regulation (Article 21) sets forth that SPEs shall not enter into derivative contracts except for the purpose of hedging interest rate or currency risk, and that such derivatives shall be underwritten and documented according to common market standards.

Synthetic Securitisation

In addition to employing derivatives instruments as hedging, in synthetic securitisation transactions a financial derivative instrument is used for risk transfer. Said synthetic securitisation transactions are permitted under both Spanish and European regulations (Law 5/2015 and the Securitisation Regulation), as outlined in **5.1 Synthetic Securitisation Regulation and Structure**.

4.8 Investor Protection

Spanish Supervisory Body

Securitisation in Spain is a regulated activity under Law 5/2015, supervised by the CNMV. For public SPEs, prior authorisation is required from the CNMV, which is the supervisory body responsible for approving and registering the relevant prospectuses. For private securitisations that do not require a prospectus to be published, the CNMV performs an ex-post control, as the deed of incorporation of the SPE must be registered in the CNMV's records. In this regard, note that securitisations can only be carried out in Spain through securitisation funds, as further

discussed in **4.10 SPEs or Other Entities** and **4.11 Activities Avoided by SPEs or Other Securitisation Entities**.

The Meeting of Creditors

Law 5/2015 (Article 37) contains the possibility of setting up the so-called "meeting of creditors" (*Junta de Acreedores*), which is a creditors' committee in the context of a particular securitisation transaction and constitutes an additional protection for investors.

European Regulations

In any case, European regulation is the main legal framework that provides protection for investors by virtue of:

- the Securitisation Regulation, which contains, among others, the disclosure requirements and the compulsory periodic reporting obligations; and
- when applicable, the Prospectus Regulation, which ensures that investors will be provided with all material information regarding a securitisation transaction.

4.9 Banks Securitising Financial Assets

In Spain, the applicable legal provisions for securitising banks are to be found primarily in the Securitisation Regulation, the CRR and Law 5/2015. In addition, the following Spanish legal requirements must be considered.

Mortgage Loans

The applicable legislation establishes that the credit rights arising from mortgage loans can be assigned by means of transferrable securities called mortgage participations (MPs) (*participaciones hipotecarias*). In order to transfer said credit right through an MP, the following general conditions must be met:

- the mortgage loan shall be secured with a first-rank mortgage;
- the LTV does not exceed 60% or 80% regarding commercial or residential properties, respectively;
- the mortgaged property is insured against damages; and
- the assets do not qualify as excluded assets (eg, mortgage loans granted over a right of usufruct, surface rights or administrative concessions).

If any of these requirements are not met, the credit rights may be transferred through different transferrable securities, called mortgage transfer certificates (MTCs) (*certificados de transmission de hipoteca*). However, MTCs can only be held by qualified investors (as defined in **2.6 Investors**).

Consumer Loans

The applicable Spanish legal framework does not establish particularities in relation to the sale and perfection of consumer loans. However, according to Law 16/2011, if a loan is assigned by the original lender and said lender is no longer the servicer, a notification to the customer shall be completed.

In addition, as outlined in **3.3 Principal Perfection Provisions**, certain regional regulations require notification to borrowers if those borrowers are qualified as consumers and the loans meet certain requirements.

4.10 SPEs or Other Entities

Securitisation in Spain is regulated under Law 5/2015, according to which Spanish securitisation transactions can only be carried out specifically through a securitisation fund (*fondo de titulización*) (the SPE).

Please see **2.7 Bond/Note Trustees** regarding the main features of an SPE established under the Spanish Securitisation Law.

4.11 Activities Avoided by SPEs or Other Securitisation Entities

As explained in **4.10 SPEs or Other Entities**, securitisation in Spain is only carried out through SPEs, which are managed by *sociedad gestora de fondos de titulización* (SGFTs), whose sole purpose is to manage such securitisation SPEs in Spain and abroad.

4.12 Participation of Government-Sponsored Entities

In general, government-sponsored entities do not participate in the securitisation market.

4.13 Entities Investing in Securitisation

Securitisations can have a wide variety of investor profiles, including credit institutions, investment funds, insurance companies and other institutional investors.

4.14 Other Principal Laws and Regulations

The following domestic laws have incidental relevance in securitisations carried out in Spain.

- Royal Legislative Decree 1/2020 (the "Spanish Insolvency Law") sets out the domestic legal framework regulating insolvency. On the one hand, the law affects the bankruptcy-remoteness nature of Spanish SPEs, as set forth in **6.1 Insolvency Laws**; on the other hand, depending on the underlying asset, it affects the insolvency regime of the debtors vis-à-vis the SPE.
- Royal Decree of 24 July 1889 (the "Civil Code") establishes the basic private and civil law regulations in Spain, which are relevant in terms of executing documentation and structuring the transfer of assets to the SPE.

5. Synthetic Securitisation

5.1 Synthetic Securitisation Regulation and Structure

In Spain, synthetic securitisation transactions are permitted under both Law 5/2015 and the Securitisation Regulation. Securitisation transactions are those where the risk is transferred from the originator to the investors by means of derivatives instruments or guarantees, without transferring the exposures being securitised.

In particular, Law 5/2015 (article 19) establishes that:

- SPEs may synthetically securitise loans and other credit rights by contracting credit derivatives with third parties and/or granting financial guarantees to the holders of the loans or credit rights; and
- the assets of the SPE may include deposits in credit institutions and/or fixed income securities traded in official secondary markets.

In addition to the Securitisation Regulation and Law 5/2015, Spanish synthetic securitisations are also regulated at a European level, through CRR II and Regulation EU 2021/557, which establishes the requirements for a synthetic securitisation to achieve an STS label.

6. Structurally Embedded Laws of General Application

6.1 Insolvency Laws

Insolvency regulations affect Spanish securitisations in the following ways.

- Transfer – claw-back risk is the classical challenge when transferring assets, in this case from the seller to the SPE. As explained in **3.1 Bankruptcy-Remote Transfer of Financial Assets**, the transfer of receivables to an SPE shall not be subject to severe claw-back provisions in the event of the seller's insolvency.
- Insolvency of the SPE – as described in **6.5 Bankruptcy-Remote SPE**, the Spanish SPE is excluded from insolvency proceedings by legal design. The Spanish Securitisation Law establishes certain procedures for the early liquidation of the SPE in an orderly manner.
- Insolvency of the SPE management company – Article 33 of the Spanish Securitisation Law provides for the compulsory replacement of the management company upon its insolvency. Moreover, money belonging to the SPE would not be deemed part of the bankruptcy assets of the management company. See **6.2 SPEs** for more information on the legal structure of the SPE.

6.2 SPEs

Structural Aspects of the SPE

As described in **4.10 SPEs or Other Entities**, securitisations made in Spain are regulated under the Spanish Securitisation Law, without a wide margin of discretion. A special type of SPE has to be incorporated as an ad hoc special purpose fund, with the following features:

- orphan in nature, with separate estate and zero equity, organised in a single or several compartments (which are independent among them);
- devoid of legal personality, administered by a special type of management company (see **2.7 Bond/Note Trustees**);
- the suffix "*fondo de titulización*" or "F.T." is used, which means "securitisation fund";
- the fund is incorporated at closing of the securitisation transaction by means of the notarisation of a deed of incorporation, which is the equivalent of the by-laws of a company;
- the activities carried out by an SPE are restricted to those described in the prospectus (and the deed of incorporation) – those activities usually cover the issuance of notes and the acquisition of underlaying assets, as well as the ancillary ongoing obligations in terms of disclosure obligations, waterfall administration, etc; and
- ownership and security of assets – the SPE is the owner of the transferred assets, in addition to any ancillary rights, such as the security attached to each asset.

Substantive Consolidation

The general doctrine on substantive consolidation is irrelevant in the context of Spanish securitisation. The bankruptcy-remote nature of the SPE is not affected by this doctrine, given that the Spanish insolvency law is not applicable to SPEs.

6.3 Transfer of Financial Assets

Legal Requirements

The sale of assets to the SPE must comply with the requirements set forth in Article 17 of the Spanish Securitisation Law, which include the following:

- written agreement – the seller and the SPE should execute a written document identifying each loan by at least the following data fields: identification code, execution date, outstanding balance as of cut-off date, interest, amortisation system and maturity date; and
- disclosure – the seller must file the financial statements for the last two fiscal years with

the CNMV, and states any executed securitisation transactions in its financial statement.

True-Sale Opinion

Usually, the drafting counsel includes a declaration in its transaction legal opinion concluding that the assignment of the receivables to the SPE on the incorporation date:

- has been carried out legally, validly and unconditionally for the remaining term until maturity by means of a true sale or assignment or transfer; and
- is enforceable vis-à-vis the seller and any third parties with full recourse to borrowers (and, where applicable, guarantors).

6.4 Construction of Bankruptcy-Remote Transactions

As described in **6.5 Bankruptcy-Remote SPE**, Spanish SPEs are bankruptcy-remote by legal design. However, there is one specific risk related to the collections, which must be mitigated from a structural point of view.

Commingling risk arises in Spanish securitisations when the servicer (usually the seller/originator) collects the loans in its own bank account and transfers the amount to the SPE's bank account within a period of time. In the event of the servicer's insolvency, there is a risk that the claim of the SPE to the moneys deposited in the servicer's bank account may be challenged by other creditors due to the fungible nature of money.

Best practice in Spain to mitigate the commingling risk include the following:

- operational term – reducing the time of transfer from the seller's collection account to the SPE in order to quantitatively reduce the risk amount;
- the seller setting up a commingling reserve in an SPE's locked account amounting for an average of commingling risk; and
- creating a pledge on the seller's collection account in order to have a preferential claim over that account in the event of the seller's insolvency.

6.5 Bankruptcy-Remote SPE

The bankruptcy-remoteness of SPE funds is a feature by legal design. As described in **2.1 Issuers**, the SPE used in Spanish transactions is necessarily a securitisation fund regulated under the Spanish Securitisation Law. The Spanish Insolvency Law is inapplicable to securitisation funds due to their lack of legal personality.

Notwithstanding the above, the following best practices must be observed in connection with the bankruptcy-remote nature of Spanish SPEs.

- Prospectus and deed of incorporation – several legal references shall be included in the prospectus and the deed of incorporation related to:
  - (a) the nature of the SPE as a Spanish securitisation fund incorporated under the Spanish Securitisation Law;
  - (b) the non-applicability of the Spanish Insolvency Law to the SPE; and
  - (c) the application of Article 16.4 of the Spanish Securitisation Law, Article 15 of Law 2/1981 (which is now contained in Article 42.2 of the Spanish Mortgage Mobilisation Regulation) and the First Additional Provision of the Spanish Mortgage Mobilisation Regulation.
- Legal opinion – the drafting counsel customarily prepares a legal opinion covering the

whole transaction, with the following being specifically mentioned:

(a) the absence of severe claw-back provisions for the transfer in the event of the seller's insolvency;
(b) the non-application of the Spanish Insolvency Law to the SPE; and
(c) the consequences of an insolvency of the management company of the SPE (ie, the replacement by another management company pursuant to Article 33 of the Spanish Securitisation Law).

7. Tax Laws and Issues

7.1 Transfer Taxes

Under Spanish value-added tax (VAT) legislation, the transfer of receivables would be a supply of services for VAT purposes, which would be deemed to be located in the place where the recipient of the services is established for VAT purposes. Therefore, as long as the recipient of the services (SPE) is established for VAT purposes within Spanish VAT territory or has a permanent establishment within the Spanish VAT territory to which the service is supplied, the transfer would be subject to VAT in Spain, but exempt.

Note that the services rendered by the seller to the purchaser, consisting of the collection of the payments made by the obligors, would be considered a separate transaction. According to the Spanish general VAT location rules, such collection services would be deemed to be located in the jurisdiction where the purchaser is established for VAT purposes.

In addition, provided the assignment of the receivables is formalised by means of a public deed and meets certain requirements (ie, the receivables have an ascertainable value; the transaction has a document that can be registered in a public registry, regardless of whether it is effectively registered; and the receivables are not subject to transfer tax, capital duty or inheritance gift tax), the assignment shall be subject to stamp duty. Tax rates currently range between 0.5% and 2%, depending on the autonomous region in which the public deed is to be registered. However, a specific exemption from this stamp duty tax applies when the originator assigns mortgage transfer certificates (*certificados de transmission de hipoteca* – MTCs) or mortgage participations (*participaciones hipotecarias* – MPs) over mortgage loans. This exemption is governed by Royal Decree-Law 24/2021 and by transfer tax and stamp duty legislation.

7.2 Taxes on Profit

The SPE is subject to the general provisions of the Corporate Income Tax (CIT) Law. The taxable base is calculated in accordance with the provisions of Section IV of the CIT Law. The current applicable tax rate is 25%.

The SPE's CIT taxable base should be close to nil if its financial income (interest earned from the receivables) offsets its financial expenses (interest paid to the bondholders). However, certain specific CIT features are applicable to the SPE, as follows.

- The tax deductibility of the impairment in the value of debt securities registered as assets in the SPE – in this regard, Rule 13 of CNMV Circular 2/2016 sets forth the criteria for the SPE to carry out value adjustments resulting from the impairment in the value of their registered financial assets. Article 13.1 of the CIT Law states that the CIT regulations (Article 9 and the seventh Transitory Provision) will rule the conditions for the deductibility of value adjustments made on account of the impair-

ment in the value of debt securities valued at amortised cost.
- As of 1 January 2024 and pursuant to Article 16.6 of the CIT Law, the limitation on the tax deductibility of financial expenses shall apply to the SPE.
- The yield of credit rights that constitute the income of the SPE shall not be subject to any withholding tax on account of the CIT liability payable by the SPE.

The SPE can be considered an entrepreneur for VAT purposes. However, as SPEs carry out VAT-exempt activity, they are not entitled to deduct any input VAT.

7.3 Withholding Taxes

Whether the payments on the receivables made to a non-Spanish tax resident purchaser by Spanish obligors would be subject to withholding taxes in Spain depends on the characterisation, for tax purposes, of the income received by the purchaser, and on the jurisdiction where the purchaser resides for tax purposes.

Although the tax characterisation of the income obtained by the non-Spanish tax resident purchaser is not clearly defined under Spanish law, it is likely to be deemed to be either interest income or capital gains.

According to the Spanish Non-Resident Income Tax Law, regardless of whether it is characterised as interest or capital gains, such income would be tax-exempt in Spain to the extent the purchaser meets the following requirements:

- it is resident for tax purposes in an EU member state or in a state within the European Economic Area (EEA), other than a tax haven territory, provided that the purchaser is also the "beneficial owner" of such income; and
- it does not act, in regards to the purchase of the receivables, through a permanent establishment located in Spain or outside the EU or EEA.

Residency for tax purposes in an EU member state or in a state within the EEA must be accredited through a certificate of tax residency issued by the relevant tax authorities. Tax residency certificates are valid for a one-year period.

If the purchaser is resident for tax purposes in a state that is neither an EU member state nor a state within the EEA, it may be subject to withholding tax in Spain in accordance with the provisions set forth in the relevant convention for the avoidance of double taxation.

Residency in a particular jurisdiction for the purposes of the application of a reduced rate of withholding tax in accordance with a specific convention must be accredited through a certificate of tax residency, issued by the relevant tax authorities. These certificates are valid for a one-year period.

If the purchaser is not accredited to be tax resident in an EU member state or a state within the EEA, nor in a jurisdiction with which Spain has a convention for the avoidance of double taxation in force, the purchaser would be subject to tax on the income derived from the transaction at the general current tax rate of 19%.

7.4 Other Taxes

The incorporation of the SPE is subject to but exempt from "Capital Duty" (*Operaciones Societarias*) (Article 45.I.B.20.4 of the Revised Text of the Law on Transfer Tax and Stamp Duty). The incorporation and winding-up of the SPE is not subject to Stamp Duty Tax (Article 31.2 of

the Revised Text of the Law on Transfer Tax and Stamp Duty).

7.5 Obtaining Legal Opinions

Legal opinions usually cover taxation matters, such as the taxation of the transaction (including stamp taxes and VAT on the transfer of the receivables and on the collection services provided to the SPE) and the taxation of the investors on the income deriving from the notes issued by the SPE.

8. Accounting Rules and Issues

8.1 Legal Issues with Securitisation Accounting Rules

There are three accounting issues related to securitisation:

- a review of the status of the receivables in the assignor's balance sheet prior to the securitisation – the receivables must be recorded as existing credit rights;
- SPEs have a legal obligation to audit the yearly financial accounts; and
- credit entities transferring mortgage loans according to the regime envisaged under Royal Decree-Law 24/2021 (further described in **4.9 Banks Securitising Financial Assets**) have to create and update a special accounting registry to keep track of the following, among other matters:
  (a) the total mortgage pool;
  (b) the MPs and MTCs issued (as defined in **4.9 Banks Securitising Financial Assets**);
  (c) the *cédulas hipotecarias* and *bonos hipotecarios* issued; and
  (d) the final balance of the eligible collateral available versus the already issued transfer titles.

8.2 Dealing with Legal Issues

Accounting rules do not usually trigger legal issues.

There is one special case where the review of the status of the receivables in the assignor's balance sheet prior to the securitisation is key: when the transaction involves the transfer of balloon instalments, it is necessary to confirm that, unlike leasing instalments, the balloon loan instalments are actually recorded as existing receivables.