Structured Finance & Securitisation 2021

Contributing editors
Cadwalader, Wickersham & Taft LLP

LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Structured Finance & Securitisation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Malta, the United Kingdom and the United States.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Cadwalader, Wickersham & Taft LLP, for their assistance with this volume.

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Spain

Jaime de la Torre Viscasillas, Miguel Cruz Ropero and Tania Esteban Logroño

Cuatrecasas

GENERAL FRAMEWORK

Legislation

1 | What legislation governs securitisation in your jurisdiction? Has your jurisdiction enacted a specific securitisation law?

The Promoting Business Financing Act (Law No. 5/2015), sets out a unified legal regime for standard, market-oriented securitisation transactions in Spain. Until April 2015, the legal regime on securitisation was set out in different laws and regulations, repealing former regulations on securitisation funds.

The repealing provision repeals the regulations on securitisation funds and their management funds established on 7 July 1992 in the Real Estate Investment Funds and Companies Act (Law No. 19/1992), the Mortgage Securitisation Funds Act (Law No. 19/1992) and the Royal Decree regulating asset securitisation funds and securitisation fund management companies (Royal Decree 926/1998).

Law No. 5/2015 establishes important new measures regarding securitisation, adapting their legal framework to the new financial context, based on the experience accumulated from their use over the past two decades. The new law combines two previous legal securitisation categories: asset securitisation funds and mortgage securitisation funds, which enables a more flexible system. The new law also strengthens transparency and investor protection requirements, defines the role of management companies and modifies the supervision regime.

In addition, Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 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) applied since 1 January 2019. The Securitisation Regulation develops several rules that apply to all types of securitisation transactions (in particular, rules on due diligence, risk retention and disclosure requirements), and established a new framework for simple, transparent and standardised long-term securitisations and asset-backed commercial paper programmes.

Applicable transactions

2 | Does your jurisdiction define which types of transactions constitute securitisations?

Law No. 5/2015 does not expressly define the concept of securitisation, but section 1, article 15 of Law No. 5/2015 defines what securitisation funds are. In particular, it states that the securitisation funds (FTs) are separate pools of assets lacking legal personality, whose fair value is zero and is integrated by present or future receivables on its asset side, and by fixed income securities (or loans) on the liability side.

FTs may be incorporated either as closed funds or as open funds, depending on whether additional assets or liabilities may be incorporated to the FT:

- Closed FTs: if the FT is incorporated as a closed fund, the deed of incorporation of the FT will not envisage the inclusion of additional assets or liabilities after the incorporation of the FT. However, the deed of incorporation may set out a four-month ramp-up period during which additional assets and liabilities may be transferred to the FT up to a certain limit. Additionally, replacements may take place in certain cases, such as in the case of non-eligible assets.
- Open FTs: if the FT is designed as an open fund, its assets, its liabilities or both of them, may be modified (renewed) or extended, or both, after the incorporation of the FT. For instance, the FT may issue new securities, new credit facilities may be granted to the FT, or new assets may be assigned to the FT. In addition, Law No. 5/2015 allows for active management of the assets of the FT, as long as it is expressly foreseen and regulated in the public deed of incorporation of the FT and the relevant prospectus, when applicable, may envisage that the assets of the FT may be actively managed. Therefore, assets can be modified to maximise the profitability of the FT and perform a proper risk treatment of it.

In addition to the public FTs, Spanish legislation also permits the incorporation of private funds, that is, FTs whose bonds will not be listed in the Spanish official secondary markets and whose holding will be restricted to qualified investors. In such cases, a prospectus will not be legally required (only the deed of incorporation of the FT) unless the private FT will be listed in a multilateral trading facility (ie, Mercado Alternativo de Renta Fija) in which case, an information memorandum will be required.

Law No. 5/2015 also foresees the incorporation of funds with different independent compartments against which notes may be issued or different types or obligations may be assumed. Each compartment shall be incorporated by means of a complementary deed of the incorporation deed of the fund.

Market climate

3 | How large is the market for securitisations in your jurisdiction?

According to the recent National Stock Market Commission asset-backed securities statistics at the end of September 2020, €8,193.2 billion-worth of securitisation products were issued on Spain's official secondary markets.

Based on the same statistics, the outstanding nominal amount of securitisation bonds at the end of September 2020 was €170,791.77 billion.

In addition, the following figures indicate the outstanding total nominal amount of securitisation bonds for industry or sector type at the end of September 2020:

- mortgage loans: €121,747.60 billion;
- consumer loans (including auto loans): €17,656.21 billion; and

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- company loans (including small and medium-sized enterprises, and leases loans): €14,850.54 billion.

REGULATION

Regulatory authorities

4 Which body has responsibility for the regulation of securitisation?

The National Stock Market Commission (CNMV) regulates and supervises securitisations in Spain. Incorporation of Spanish securitisation funds needs prior authorisation of, and registration with, the CNMV, except for private securitisation funds (FTs) whose verification by the CNMV takes place after its incorporation based on the new fast-track process implemented by the CNMV. In the case of a multi-compartment securitisation fund, the incorporation of each compartment shall be subject to the above-mentioned processes with the CNMV depending on the type of the securitisation fund (public FT or private FT).

Regarding Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the Securitisation Regulation), the CNMV and Bank of Spain have been appointed as the national competent authorities for the purposes of supervising compliance (1) of the investors with article 5 of the Securitisation Regulation (due diligence requirements), and (2) of the originators and FTs with articles 6, 7, 8 and 9 of the Securitisation Regulation (risk retention and disclosure requirements). In addition, the CNMV has been appointed as the national competent authority for the purposes of supervising compliance with articles 18 to 27 of the Securitisation Regulation (the new framework for simple, transparent and standardised securitisations). See the list of competent authorities published by ESMA.

Licensing and authorisation requirements

5 Must originators, servicers or issuers be licensed?

Originators of receivables and servicers do not require a specific licence, while issuers (FTs) do.

Although lending money is a typical activity of credit institutions (which may be carried out by regulated institutions specialising exclusively in such activity), it is not reserved. Section 1.1 of the Regulation, Supervision and Solvency of Credit Act (Law No. 10/2014) states that the activity prohibited without licence is deposit-taking but not money lending, provided the monies invested in such activity do not come from deposits (or any other form of resources gathered from the public, except under securities markets' discipline).

As a result, no registration, authorisation or licences as lender are needed for performing those activities in Spain, and lenders do not need to establish a presence in Spain or gain authorisation for this purpose.

However, without prejudice to that general rule, professional lenders other than credit institutions, to the extent that they deal professionally with consumers in mortgage-secured loans, must register with a public registry (which is kept by the autonomous regions for Spanish companies and by the National Consumers' Institute for non-Spanish companies acting in Spain) and observe some rules on transparency set out in the Mortgage Loans or Credit Contracting with Consumers and Loans and Credits Intermediation Services Act (Law No. 2/2009). In this case, registration is not equivalent to an authorisation.

The activity related to the administration of loans and credits (eg, recovery management and loan portfolio monitoring) is not a regulated activity, meaning that no particular regulatory licence is required. Therefore, it may be freely carried out by any company.

In Spain, the issuers (FTs) are special purpose vehicles with no legal personality requiring representation by a management company, with a duty to safeguard the interests of the bondholders and the other FT creditors. The FT's management company (Sociedad Gestora de Fondos de Titulización) is responsible for the incorporation, management and representation of it. In addition, they can also set up, administer and represent managing bank asset funds, and managing special purpose funds and vehicles similar to securitisation funds established abroad (in the latter case, subject to applicable regulations). Responsibility for authorising the setting up of management companies has been transferred to the CNMV. The term for ruling on the authorisation has been extended to six months; and, if the term expires without a resolution, it will be considered that the request has been approved. Under previous regulations, the Ministry of Economy and Treasury was responsible for this where, based on a report from the CNMV, the term for making a decision was three months and administrative silence was considered a rejection. Simply, no entity can develop the activities legally reserved to FT management companies without having obtained prior CNMV authorisation and having being registered with them.

Pursuant to the Promoting Business Financing Act (Law No. 5/2015), the requirements to obtain and keep the authorisation are as follows:

- being a public limited liability company;
- having as corporate purpose the incorporation, management and representation of the FTs;
- having its corporate domicile and effective management in Spain;
- having a minimum capital and total own funds at €1 million, fully disbursed. Companies managing funds with assets exceeding €250 million must increase their own resources by 0.02 per cent of the book value of the assets managed (up to €5 million);
- having suitable shareholders (for the ones holding relevant stakes);
- having at least three members on the board of directors;
- having the technical means and human resources capabilities to perform its activities;
- having the name Sociedad Gestora de Fondos de Titulización or SGFT included in its corporate name;
- having internal control and information technology security procedures and mechanisms, with systems to prevent money laundering and a procedure to deal with related-party transactions. They must also have units for regulatory compliance, risk control and internal audit, which must be kept separate from the operating units; and
- approving internal conduct regulations on the actions of administrators, executives, employees, attorneys in fact and other persons to whom they delegate duties.

6 What will the regulator consider before granting, refusing or withdrawing authorisation?

The authorisation for incorporating a securitisation fund management company must include the following documentation:

- the project of by-laws;
- an explanatory memorandum, describing in detail the organisational structure, the activities to be developed and the technical means and human resources;
- the details of those to hold administration or management positions in the entity, as well as proof of their suitability;
- the identity of the shareholders, whether direct or indirect, having meaningful participation in the company and participation amount; and
- any other documents, reports or background determined by the CNMV.

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Sanctions

7 | What sanctions can the regulator impose?

Infringements are classified into those considered very serious, serious and moderate, falling under the notification obligations specified under Law No. 5/2015 and applicable legislation. This legislation regulates:

- investment in assets and the contracting of transactions;
- compliance with own-capital requirements; and
- the purchase of controlling interests in management companies.

In most cases, seriousness is evaluated according to the impact on the quality of assets and the securities holders' interests, and whether the behaviour has occurred repeatedly.

This supervision and sanctioning regime will apply to:

- management companies;
- the funds they manage;
- the entities assigning assets to the funds;
- the issuers of the assets created for their incorporation to a fund;
- the managers of the assigned assets; and
- any remaining persons bound by applicable regulations.

Public disclosure requirements

8 | What are the public disclosure requirements for issuance of a securitisation?

Pursuant to article 17 of Law No. 5/2015, the assignment of receivables to FTs is subject to the following requirements:
the assignor must have audited annual accounts for the past two financial years. This requirement may be waived if the assignor is a newly incorporated company. Furthermore, it is not required if:

- the securities are not listed in a regulated market or in an multilateral trading facility and are exclusively sold to qualified investors; or
- if the state, an autonomous community, a local administration or an international body of whom Spain is a party is the debtor of the receivables;
- the assignor must set out in its annual reports the assignment transactions (whether regarding present or future receivables) it has performed;
- assignment transactions must be executed in a written document; and
- any new incorporation of assets must be notified to the CNMV.

The management company must publish on its website the deed of incorporation of the FT and the prospectus (if any).

In addition, the FTs are subject to article 7 of the Securitisation Regulation (disclosure requirements), and therefore, they must make certain prescribed information relating to the securitisation available to investors, competent authorities and, upon request, to potential investors before pricing. This information shall be made available by means of a securitisation repository.

9 | What are the ongoing public disclosure requirements following a securitisation issuance?

The management company must publish the following information on its website:

- any public deeds subsequently granted to the deed of incorporation;
- any supplements to the prospectus; and
- the annual financial statements and quarterly reports (within two months of the end of each calendar quarter).

The annual financial statements together with the auditors' report must be filed with the CNMV within four months following the end of the FT's financial year, which will coincide with the calendar year (ie, before 30 April each year).

In addition, in accordance with article 7 of the Securitisation Regulation, the FTs must make certain information relating to the securitisation available to investors, competent authorities and, upon request, to potential investors on a regular basis and without any delay, as applicable by means of a securitisation repository.

ELIGIBILITY

Originators

10 | Outside licensing considerations, are there any restrictions on which entities can be originators?

No.

Receivables

11 | What types of receivables or other assets can be securitised?

The Promoting Business Financing Act (Law No. 5/2015) expressly envisages the assignment of present and future receivables. Future receivables must be collections of an already known or estimated amount. The assignment needs to be executed in a way that evidences, in a credible and unambiguous way, that the transfer of ownership has taken place. Law No. 5/2015 sets out examples of future receivables such as flows arising from toll-road projects or any other credit rights that the National Stock Market Commission (CNMV) determines by circular letter.

Eight transitional provisions of Law No. 5/2015 envisage that a new circular letter will be issued by the CNMV to replace Order EHA/3536/2005. However, this new circular has yet to be enacted, and therefore Order EHA/3536/2005 remains in force, which sets out that the transfer of future receivables must meet certain requirements, such as the assignment having to be full and unconditional and that the incorporation deed of the securitisation fund (FT) shall specify:

- the terms or the activity under which those receivables will be generated;
- the powers of the assignor over those receivables;
- the conditions of that assignment; and
- the risk allocation between the assignor and the assignee.

Investors

12 | Are there any limitations on the classes of investors that can participate in an offering in a securitisation transaction?

Spanish law does not impose specific limitations on the classes of investors participating in a securitisation offer. However, Spanish securitisation transactions are typically subscribed by professional and qualified investors. However, certain limitations may be imposed according to the specific nature of each of the investors, including potential restrictions to invest in certain financial products.

In addition, private FTs are restricted to a qualified investors.

Custodians/servicers

13 | Who may act as custodian, account bank and portfolio administrator or servicer for the securitised assets and the securities?

In principle, any bank could act as account bank of the transaction. If the originator meets the rating required by the rating agencies it would normally act as account bank; although, typically, if the originator's rating is low, this role is performed by a third bank.

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The originator will typically act as servicer. This is compulsory in the case of mortgage loans, where pursuant to article 26.3 of Royal Decree 716/2009, implementing certain aspects of Law No. 2/1981 on Regulation of the Mortgage Market and other rules of the mortgage and financial systems (Royal Decree 716/2009), the originator is required to provide custody and administration of the mortgage loans. For non-mortgage loans, the originator shall be entitled to subdelegate the servicing to third parties; although, pursuant to article 26.1.b of Law No. 5/2015, the management company shall still be responsible for the servicing and management of the non-mortgage loans.

Public-sector involvement

14 | Are there any special considerations for securitisations involving receivables with a public-sector element?

The collection of receivables arising from a contract signed with a government authority may be subject to the specific regulation applicable to that government entity. This regulation may provide for mandatory provisions of law, the application of which cannot be waived by agreement. This regulation may include:

- the legal right of the government entity to claim for itself or for some of its assets (ie, the assets allocated to, or used in, a public service) immunity from suit, execution, attachment or other legal processes in Spain;
- the obligation of the government entity not to exceed certain limitations; and
- the requirement for the receivable's payment to be included in the relevant budget law of that government entity for the relevant year.

TRANSACTIONAL ISSUES

SPV forms

15 | Which forms can special purpose vehicles take in a securitisation transaction?

In Spanish securitisation transactions, the special purpose vehicle can only be a securitisation fund, which is considered a separate set of assets and liabilities, lacking legal personality, whose fair value is zero, and has to be represented by a management company.

SPV formation process

16 | What is involved in forming the different types of SPVs in your jurisdiction?

The period of time necessary to incorporate a Spanish securitisation fund and its cost depends on the type of securitisation fund (FT) (ie, public or private).

- Public FTs require the prior approval and authorisation of the National Stock Market Commission (CNMV), a four-week process from submitting the written authorisation request to the CNMV, together with a draft of the prospectus. The CNMV's fees will be a variable fee of 0.01 per cent of the nominal amount of the bonds, with a cap of €60,600. If, for any reason, the bonds are not admitted to trading, there will be a fixed fee of €5,050. Additional costs from, among others, the Spanish regulated market, rating agencies (if applicable), auditors, legal counsels and notaries, have to be taken into consideration.
- Private FTs require the registration of the deed of incorporation by the CNMV and, if the securitisation bonds will be listed in a multilateral trading facility (MTF), the admission of the securitisation bonds on the relevant MTF. The registration in the official registers of the CNMV should take one week following submission of the deed of incorporation duly granted before a Spanish public notary.

In both cases, the cut-off date of the final portfolio included in the prospectus (or in the information memorandum) and the date of the registration with the CNMV cannot exceed 30 calendar days. Additionally, in the case of public FTs, disbursement cannot exceed 10 calendar days from registering the prospectus with the CNMV. Constitutional documents include the prospectus (or, in the case of private FTs, the information memorandum (if applicable)), the deed of incorporation and the transaction agreements, which usually include:

- a management, placement and subscription agreement;
- a servicing agreement;
- payment agency agreement;
- a guaranteed reinvestment agreement by virtue of the FT's bank accounts being opened; and
- a subordinated loan agreement for initial expenses.

Governing law

17 | Is it possible to stipulate which jurisdiction's law applies to the assignment of receivables to the SPV?

Yes. The parties may, pursuant to article 3 of Regulation (EC) No. 593/2008 (Rome I Regulation), choose the law applicable to the assignment agreement of the receivables between the originator as assignor and the issuer (the FT) as assignee, which does not have to be the same as the law governing the underlying contract under which the receivables derive. Furthermore, the Rome I Regulation enables the possibility to choose different laws for different parts of the contract, and the possibility to change the applicable law during the contract's validity if this does not affect the third parties' rights.

However, the above-mentioned freedom of choice has certain restrictions, mainly because of overriding mandatory provisions (ie, those provisions that a country considers essential for safeguarding its public interest, such as its political, social or economic organisation).

In this regard, the Spanish courts may refuse the application of the chosen law if the relevant provisions are clearly contrary to Spanish public policy. In this situation, the relevant Spanish court would apply the relevant provisions under Spanish law instead of those applicable under the chosen foreign law.

Alternatively, the principle of party autonomy may be limited when the chosen law is the law of a non-EU member state and all the relevant elements in the contract are located in one or more EU member state. In this regard, the choice of the parties regarding the applicable law may not prejudice the application of mandatory provisions under EU law.

Asset acquisition and transfer

18 | May an SPV acquire new assets or transfer its assets after issuance of its securities? Under what conditions?

Yes. It is possible in an open FT during the revolving period in which the fund is opened for the acquisition of additional receivables that meet the eligibility criteria or in a closed FT, during a four-month ramp-up period if such an option is included in the deed of incorporation.

The eligibility criteria would include requirements such as:

- the assignor is the owner of the loans that are not subject, in whole or in part, to any change, amendment, modification, pledge, security or waive of any kind that in any material way adversely affects the enforceability or collectability of all or a material portion of the receivables being assigned;
- all loans exist, are valid, binding and enforceable in accordance with Spanish law;
- the assignor has no knowledge that any obligor is insolvent;
- on the date of the assignment of the receivables to the fund there are no arrears more than 30 days;

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- all loans or credit assigned to the fund are denominated and payable in euros; and
- each obligor has made at least one scheduled payment under the relevant loan.

Consumer loans, auto-loans, credit card receivables and backed FTs would typically be incorporated as open funds to allow for a longer maturity of the fund.

Registration

19 | What are the registration requirements for a securitisation?

Pursuant to article 22 of the Promoting Business Financing Act (Law No. 5/2015), the incorporation of an FT is subject to the prior compliance of the following requirements:
written authorisation request to the CNMV;
approval and registration by the CNMV of:

- a draft of the incorporation deed;
- supporting documentation on the assets to be assigned to the FT; and
- any other supporting documentation required by CNMV;
- an audit report on the securitised assets must be issued either by the managing company or by an external audit. This requirement may be waived depending on the structure and circumstances of the transaction. In the case of an STS securitisation, this requirement is usually waived by the CNMV based on article 22.2 of Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the Securitisation Regulation); and
- approval and registration by the CNMV of a prospectus. The prospectus will not be required if:
- the securitisation bonds are not intended to be listed in the Spanish official secondary markets; and
- they are exclusively addressed to qualified investors (ie, when it is a private FT).

Private FTs are subject to a fast-track process by virtue of which the documentation should be submitted to CNMV once the deed of incorporation has been granted before a Spanish public notary and the transaction documents have been executed.

FT registration in the commercial registry is voluntary, although its annual accounts should be deposited with the CNMV.

According to current legislation set out in Law No. 5/2015, the granting of a credit rating to securitisation bonds with respect to a public FT has ceased to be a requirement to incorporate the FT.

Obligor notification

20 | Must obligors be informed of the securitisation? How is notification effected?

Notice is not a requirement to perfect a valid transfer of a receivable in a securitisation transaction, unless otherwise agreed by the parties of the original contract. However, an obligor will be deemed to have validly discharged its obligations under a receivable if it has made the payment to the original creditor before it is notified, or it becomes aware of, the transfer. An obligor may also set off its obligations under a receivable against the original creditor until it is notified of the transfer. In both cases, the new creditor will have no legal case against the obligor to claim the amount paid (or set off); it would only be entitled to claim from the original creditor the amount received by it from the obligor, or (as applicable) the amount set off. In Spanish securitisations, it is not customary to serve notice to the obligors ab initio. However, the originator will typically grant the management company powers so that it may, on behalf of the FT, notify the obligors of the assignment at the time it deems appropriate. In addition, in the event of insolvency, liquidation or replacement of the originator as servicer, or because the management company considers it to be reasonably justified, the management company may request the servicer notify the obligors of the transfer of the outstanding receivables to the FT and that payments deriving from it will only be released if made into the account opened in the name of the FT.

Notwithstanding the above, several autonomous communities (ie, Valence, Castilla La Mancha, Andalusia, Catalonian and Extremadura) have implemented regulations requiring the assignors to notify the obligor of, inter alia, assignment to securitisation funds of receivables arising from loans.

21 | What confidentiality and data protection measures are required to protect obligors in a securitisation? Is waiver of confidentiality possible?

Regulation (EU) 2016/679, of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation (GDPR)) and the Spanish Organic Law 3/2018, of 4 December 2018, on the Personal Data and digital rights protection (Organic Law 3/2018), in force as from 7 December 2018, set out restrictions on the processing and transfer of personal data (understood as any information relating to an identified or identifiable natural person (the data subject), therefore affecting obligors who are individuals (consumer obligors and sole traders)).

In general, data subjects' personal data can only be processed if the following two requirements are met:

- information regarding the data processing is provided; and
- the controller has a legitimate legal ground to process the personal data. Among others, these legitimate legal grounds can be:
  - the data subjects' express and informed consent;
  - the processing is necessary for the performance of a contract;
  - the processing is necessary for compliance with a legal obligation; or
  - the processing is necessary for the purposes of the legitimate interests pursued by the controller, or the party to whom the personal data is transferred, provided that such interest is not overridden by the data subject's interests or fundamental rights and freedoms.

To transfer personal data to a third party, the data controller (ie, any natural or legal person, whether public or private, or administrative body that determines the purposes and means of the processing of personal data) must have previously informed the data subject of the transfer, identifying the data recipients and specifying the purpose of the transfer. In addition, the data controller must have a legal ground to transfer the personal data.

The requirements above do not apply when the data recipient acts as the data processor, processing the personal data exclusively on behalf of the data controller and under its written instructions to render a service to the data controller. In this case, the data processing must be regulated in a contract specifying the conditions established under article 28 of the GDPR.

Additionally, when the data is transferred to a country whose level of protection has not been declared adequate by the relevant authorities (any country outside the European Economic Area, or in relation to which the Commission has not issued an adequacy decision), a controller or a processor may transfer the personal data only

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if appropriate safeguards have been implemented and on the condition that enforceable data subject rights and effective legal remedies for data subjects are available. Additionally, article 49 of the GDPR establishes specific exceptions in which a transfer can take place, for instance, when the data subject has explicitly given consent to the data transfer after having been informed of the possible risks; when the transfer is necessary for the performance or conclusion of a contract between the data subject and the data controller; to adopt precontractual measures at the data subject's request; for important reasons of public interest; or for issuing legal claims.

Under article 34.1 of Organic Law 3/2018, credit institutions and investment firms are obliged to appoint a data protection officer within its organisation, which can be an external firm or an in-house employer (ie, a person that ensures that the organisation processes the personal data in compliance with the applicable data protection rules and cooperates with the data protection authority).

Although these rules only apply to individuals' personal data, other regulations (eg, banking secrecy) may also impose restrictions on the use and dissemination of sole traders' and enterprises' data.

Credit rating agencies

22 | Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

Spanish law, particularly Law No. 5/2015, does not foresee any specific provision applicable to the relationship between credit rating agencies and FTs, which is subject to the EU regulation, in this regard: Regulation (EU) No. 462/2013 and Directive 2013/14/EU (formally known as CRA III).

The granting of a credit rating to the securitisation bonds is not a requirement to incorporate the FT in accordance with Law No. 5/2015. However, rating securitisation bonds issued by public FTs is still common practice in Spain. In rating the securitisation bonds, the credit rating agencies follow their own methodology described in their legal criteria and are usually updated annually.

Directors' and officers' duties

23 | What are the chief duties of directors and officers of SPVs? Must they be independent of the originator and owner of the SPV?

The issuers (FTs) are special purpose vehicles with no legal personality that have to be represented by a management company that has the duty to safeguard the interests of the FT's bondholders and the other creditors. Therefore, the FT itself has no directors or officers other than the ones belonging to the management company.

The management company must have a board of directors consisting of at least three members, all of whom must be persons of recognised commercial and professional reputation and must have, at least most of them, expertise and experience appropriate to exercise its functions. The reputation, expertise and experience must also apply to the general managers, or assimilated managers, of the entity. Such requirements must be considered in the provisions set out in the Collective Investment Institutions Act (Law No. 35/2003).

Risk exposure

24 | Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Spanish law, particularly Law No. 5/2015, does not foresee any specific risk retention obligation for Spanish securitisation transactions. However, as Spain is an EU member, any EU regulation is directly applicable.

Article 6 of the Securitisation Regulation sets forth the obligation of the originator to retain a material net economic interest of not less than 5 per cent of the nominal value of the securitisation on an ongoing basis until the final maturity of the bonds.

Article 6 of the Securitisation Regulation establishes five risk retention options to retain the material net economic interest. These are retention:

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

Delegated Regulation 625/2014 develops the above-mentioned requirement until the new regulatory technical standards to be adopted by the Commission apply pursuant to article 43(7) of the Securitisation Regulation.

SECURITY

Types

25 | What types of collateral/security are typically granted to investors in a securitisation in your jurisdiction?

Granting collateral or security is not customary in Spanish securitisation transactions. One of the main reasons is because of their almost ring-fenced structures. The assignment of the receivables to the securitisation fund (FT) may only be rescinded or challenged under article 226 of the Royal Legislative Decree 1/2020, of May 5, approving the recast of the Insolvency Law, as currently worded (the Insolvency Law) by the insolvency administration and in so challenging, the insolvency administration will have to prove the existence of fraud in the assignment. Moreover, as the FT lacks legal personality, it cannot be the subject of insolvency proceedings.

In some securitisation transactions, a pledge over the collection account is granted by the servicer (when the servicer is the assignor) in favour of the FT to mitigate the commingling risk derived from a potential insolvency of the servicer.

Perfection

26 | How is the interest of investors in a securitisation in the underlying security perfected in your jurisdiction?

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Enforcement

27 | How do investors enforce their security interest?

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Commingling risk

28 | Is commingling risk relating to collections an issue in your jurisdiction?

In the event of insolvency of the originator, all of the FT's assets held by the originator, except for cash, owing to its fungible nature, will become the property of the FT and must be made available under the terms of article 239 of the Insolvency Law. According to most scholars' interpretation, if the originator is declared insolvent, monies received and held thereby on behalf of the FT in its capacity as counterparty to certain agreements, signing before the date of declaration of insolvency may be affected by the results of the insolvency. Therefore, the commingling risk only exists in respect of the cash deposited in originator's account before getting transferred to the FT but not in relation to the collections in respect of non-transferred receivables. Nevertheless, the prospectus and the deed of incorporation of the FT would envisage certain mechanisms aimed at mitigating the aforementioned effects in relation to cash owing to its fungible nature, such as transferring the balances deposited in the account opened with the originator or the affected provider to another account or accounts opened on behalf of the FT in the event that the provider of the account concerned loses the minimum rating required.

TAXATION

Originators

29 | What are the primary tax considerations for originators in your jurisdiction?

Corporate income tax

According to the Corporate Income Tax Act (Law No. 27/2014) the corporate income tax base is determined by applying certain adjustments provided for within Law No. 27/2014 to the accounting result. Therefore, if, from an accounting perspective, the assignment of the receivables leads to the registration of an income, this income will be subject to corporate income tax (25 per cent).

VAT

According to the Value Added Tax Act (Law No. 37/1992) (which implements the EU Directive), the transfer of good or rights as well as the supply of services by an entrepreneur for VAT purposes, linked to its economic activity, are subject to VAT. Notwithstanding, there are certain cases in which the assignment or transfer or certain goods or rights are exempt from VAT. For instance, the assignment of receivables is subject but exempt from VAT. Therefore, the originator or assignor will not be obliged to charge VAT to the assignee.

Issuers

30 | What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

The main tax considerations to bear in mind in respect of debt issuance by a securitisation fund in Spain are the following.

Corporate income tax

Securitisation funds are corporate income tax taxpayers; therefore, they are subject to the general provisions of Law No. 27/2014. The amount subject to this tax is calculated in accordance with the provisions of section IV of Law No. 27/2014 and apply the 25 per cent corporate income tax rate. With regard to the operating mechanism of the securitisation funds, the tax base is almost nil owing to financial income offsetting (interest from the receivables assigned) and financial expenses (interest paid to the bondholders).

However, there are certain specific features to bear in mind in respect of this special vehicle:

deductibility of the impairment in the value of debt securities included as asset in the securitisation funds: rule 13 of Circular 2/2016 from the CNMV, sets forth the criteria through which securitisation funds must carry out the pertaining value adjustments resulting from drops in the value of the financial assets. As a general rule, the impairment of debt securities is not tax deductible. However, article 13.1 of Law No. 27/2014 states that the regulation of the Corporate Income Tax Act (Royal Decree 634/2015 of the Corporate Income Tax), will govern the circumstances determining the deductibility of value adjustments made on account of losses in the value of debt securities valued at amortised cost and included in securitisation funds. In particular, article 9 and the seventh Transitory Provision of the Corporate Income Tax regulation establishes the special deductibility provisions applicable in these cases;

in general, net financial expenses are tax deductible with a limitation set at the highest of:

- €1 million; or
- 30 per cent of earnings before interest, taxes, depreciation and amortisation. However, this limitation shall not be applicable to securitisation funds so financial expenses are deductible with no limitation; and
- finally, the yield of credit rights that constitute income of the securitisation fund shall not be subject to any withholding tax on account of the corporate income tax quota that shall be payable by the securitisation fund.

VAT

The securitisation fund can be considered as an entrepreneur for VAT purposes. However, as they develop an activity that is subject to, but exempt from, VAT (ie, financing), they are not entitled to deduct any incurred input VAT. Therefore, any input VAT incurred by the securitisation fund shall be deemed as a final cost, and it is deductible for corporate income tax purposes.

The acquisition of the receivables and credit rights is subject to, but exempt from, VAT (ie, the originator must not charge VAT owing to the assignment, so the securitisation fund is not obliged to pay any VAT).

Stamp duty

Stamp duty is levied on certain commercial, notary and administrative documents that are formalised in Spain or must have effect in Spain. In particular, all public deeds are subject to stamp duty when they:

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- have an ascertainable value;
- contain a transaction that can be registered in a public registry, regardless of whether it is effectively registered; and
- are not subject to transfer tax, business operations tax or inheritance gift tax.

Therefore, provided the assignment of the receivables is formalised by means of a public deed and it meets such requirements, the assignment shall be subject to stamp duty that currently ranges between 0.5 per cent and 1.5 per cent depending on the autonomous region in which it is registered.

However, there is a specific exemption for this stamp duty tax that applies when the originator assigns mortgage transfer certificates or mortgage participations over mortgage loans. This exemption is governed by Law No. 2/1981 and by transfer tax and stamp duty legislation.

Investors

31 | What are the primary tax considerations for investors?

Individual resident for tax purposes in Spain

Income obtained both as interests and, due to the transfer, reimbursement or amortisation of the bonds, will be considered income from movable capital obtained owing to the supply of funds to third parties upon the terms of article 25.2 of the Personal Income Tax Act (Law No. 35/2006). This income is taxed at a flat rate of:

- 19 per cent on the first €6,000;
- 21 per cent on the following €44,000;
- 23 per cent on the following €150,000; and
- 26 per cent for any amount in excess of €200,000.

In principle, any income derived from the interests of the bonds will be subject to a withholding tax of 19 per cent on account of the personal income tax. However, there is no obligation to withhold tax on the income derived from the transfer or reimbursement of bonds with explicit yield, provided they are represented by book entries and are traded on a Spanish-regulated market, except the part of the price equivalent to the accrued interest on any transfers made within the 30 days immediately prior to the maturity of the coupon when:

- the acquirer is an individual or entity not resident in Spanish territory, or is a taxable person for corporate income tax purposes; and
- this explicit yield is exempt from the obligation to withhold in relation to the acquirer.

Corporations resident for tax purposes in Spain

Income obtained by corporate income tax bondholders, both owing to the payment of interest and due to the transfer, redemption or repayment of the bonds, will be included in the taxable base.

In particular, income obtained owing to the payment of interest or the transfer, redemption or reimbursement of bonds, with implicit or explicit yield, will not be subject to withholding tax, provided the corresponding bonds are represented by book entries and are traded on a Spanish-regulated market or on the Alternative Fixed Income Market (multilateral trading facility). Likewise, income derived from financial assets traded on an organised market of the OECD shall not be subject to withholding tax as long as certain requirements established by the General Directorate of Taxes are met.

Notwithstanding the above, to benefit from the withholding tax exception, the information and payment of income procedure foreseen in Royal Decree 1065/2007, which passes the General Regulation over actions and procedures of the tax administration and inspection and development of common rules for the procedures of application of taxes, needs to be fulfilled.

Non-resident acting in Spain through a permanent establishment

Income from the bonds obtained by a permanent establishment in Spain will be taxed in accordance with the rules of the above non-residents' income tax legislation, subject to the provisions of the conventions for the avoidance of double taxation signed by Spain.

The above-mentioned income will not be subject to withholding tax on account of non-residents' income tax on the same terms indicated above for corporate income taxpayers.

Non-resident not acting through a permanent establishment

Income from the bonds issued by the securitisation fund obtained by non-residents without a permanent establishment in Spain shall be exempt from non-residents' income tax, in the same terms as the returns derived from public debt, even if the above-mentioned income is obtained through a tax haven, to the extent these bonds are traded in a multilateral trading facility (MTF), regulated market or any other organised markets. Royal Decree 1065/2007 requirements should be met.

Withholding procedure from bonds' interest and information obligations

When issuing bonds traded in an MTF, regulated market or any other organised markets, a special information procedure has to be met. In particular, regarding securitisation funds issuing bonds in a Spanish regulated market or MTF, registered in a compensation and liquidation entity domiciled within the Spanish territory:

- the entities maintaining the securities in its third-party accounts; and
- entities managing securities compensation and liquidation systems established in a foreign country that have signed an agreement with a compensation and liquidation entity domiciled within Spanish territory, shall file before the issuer a statement according to the form annex of Royal Decree 1065/2007, which will include:
  - identification of the securities;
  - total amount of income derived from the securities;
  - amount of income corresponding to personal income tax taxpayers;
  - payment date; and
  - amount of income to be paid on its gross amount.

The statement has to be submitted the working day prior to the maturity date of the interests and can be submitted electronically.

The lack of submission of the statement referred to in article 44, by any of the obliged entities, at the date foreseen in the first paragraph of article 44.6 would imply, for the issuer or its authorised paying agent, the obligation of paying the interest corresponding to the entity on its net amount resulting after deducting withholding taxes at the general tax rate over the total amount of the interest.

Subsequently, if the obliged entity submits the statement established in article 44 prior to the 10th day of the month following to the month when the maturity of the interest derived from the bonds takes place, the issuer or its authorised paying agent will refund the exceeded withholding. If such was not the case, the issuer or its authorised paying agent will not refund the withholding. For individuals and corporations resident for tax purposes in Spain, along with non-residents acting through a permanent establishment, it is just a mere financial effect. However, the non-resident not acting thorough a permanent establishment, who is entitled to apply an exemption, will have to request a refund of the withholding from the tax authorities.

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BANKRUPTCY

Bankruptcy remoteness

32 | How are SPVs made bankruptcy-remote?

Under article 226 of Royal Legislative Decree 1/2020, of May 5, approving the recast of the Insolvency Law, as currently worded (the Insolvency Law), any acts detrimental to the insolvency estate carried out within the two years before the declaration of insolvency may be rescinded, even in the absence of any fraudulent intent. However, Insolvency Law sets forth certain safe harbours, as well as rebuttable and non-rebuttable presumptions of acts and transactions that are preferential or detrimental to the estate (hence avoidable). Safe harbours are fundamentally:

- acts and transactions done within the ordinary course of business according to standard conditions; and
- certain ring-fenced out-of-court workouts.

Rebuttable presumptions (ie, admitting evidence to the contrary, whose proof corresponds to the defendant) are:

- onerous acts and transactions entered into with insiders (specially related persons or connected parties);
- the perfection of security interests in favour of existing debt (except for certain public claims); and
- early payment of secured claims with maturity subsequent to bankruptcy declaration.

Non-rebuttable presumptions are:

- gifts and other acts or transactions without consideration; and
- early payment of unsecured claims with maturity subsequent to bankruptcy declaration.

Under Spanish law, a securitisation fund (FT) constitutes a separate set of assets and liabilities that lacks legal status, which is managed by the management company. In accordance with article 1.1 of Insolvency Law, the declaration of an insolvency situation requires that the insolvent has the status of debtor, which is linked to the status of a legal subject (ie, the status of natural or legal person, which the fund lacks; it being a legally separate patrimony allocated for a purpose and managed by a third party, so that the fund could not be the subject of insolvency proceedings). Moreover, the FT's liability for its obligations with regard to its creditors will be limited in recourse to the extent of its assets. Therefore, the noteholders and other creditors of the FT will have no rights of action either against the FT or the management company in the event of a payment default of the amounts owing from the FT arising out of:

- the existence of delinquency in repayment or non-payment of the receivables;
- the failure by the originator or by the counterparties to the transactions entered into on behalf of the FT to comply with their duties; or
- the insufficiency of the financial transactions aimed at hedging or generally enhancing and covering the financial obligations of the bonds.

Furthermore, if the originator becomes insolvent, the assignment of assets to the FT may be subject to rescission pursuant to the provisions of Insolvency Law. The Promoting Business Financing Act includes a safe harbour, by virtue of which the assignment of the receivables to the FT may only be rescinded or challenged under article 226 of the Insolvency Law by the insolvency administration. In so challenging, the insolvency administration will have to prove the existence of fraud in the assignment.

True sale

33 | What factors would a court in your jurisdiction consider in making a determination of true sale of the underlying assets to the SPV (eg, absence of recourse for credit losses, arm's length)?

One of the main factors that the courts would normally take into account to determine whether a transfer of assets could be considered as a true sale is the payment of the purchase price by the purchaser, either in full or in substantial part. Failure to advance any significant funds may lead to the courts considering that the risk attached to the underlying assets has not been transferred and, accordingly, the transfer may not be deemed a true sale. Other factors, such as whether the transfer is agreed on a recourse or non-recourse basis, are not crucial.

Consolidation of assets and liabilities

34 | What are the factors that a bankruptcy court would consider in deciding to consolidate the assets and liabilities of the originator and the SPV in your jurisdiction?

During securitisation transactions, the only factor that could lead to consolidating the assets and liabilities of the originator and the FT would be the insolvency authorities proving that the assignment was fraudulently made. Even if there were grounds to challenge the transaction based on fraud, any good-faith third party's rights would not be affected.

In the event of originator insolvency, the FT will enjoy a right of removal according to the terms of article 239 of the Insolvency Law, over any assets belonging to the FT, except for money, owing to its status as a fungible asset.

UPDATE AND TRENDS

Key developments of the past year

35 | Are there any rules governing securitisations pending in your jurisdiction or reforms under way, such as prohibitions on financial firms betting against the securities they package, improved disclosure and oversight of the asset-backed securities market, rules limiting bank compensation structures that incentivise risk, etc?

There have been no such developments in the past year.

36 | What legislation or government or industry initiatives are in place or contemplated to address the termination of LIBOR and transition to a substitute rate?

The European Union has approved a Proposal for a Regulation of the European Parliament and

of the Council amending Regulation (EU) 2016/1011 as regards the exemption of certain third-country foreign exchange benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation with the aim of European Commission designating a replacement for a benchmark (ie, LIBOR) to replace all references to that benchmark in contracts or financial instruments that have not been renegotiated yet.

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Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

No specific regulations or initiatives in relation to securitisation transactions have been approved by the Spanish government to address the covid-19 pandemic.

However, the originators should take into consideration certain measures adopted by the Spanish government related to consumer and mortgage loans that can affect the receivables to be assigned to securitisation funds.

In this sense, until 29 September 2020, borrowers qualifying as being under circumstances of economic vulnerability could request the following measures under the Royal Decree-Law 11/2020:

- a temporary suspension of the contractual obligations under the relevant loan or credit (ie, while the moratorium is in force, no principal or interests must be paid under the relevant loan or credit and no interests (either ordinary or default interests) shall be accrued);
- an extension of the final maturity of these loans or credits equivalent to the duration of the moratorium (therefore, instalments affected by the moratorium shall not be payable upon the end of the three-month suspension, and the remaining instalments must be postponed on the same duration of the moratorium); and
- personal guarantors in circumstances of economic vulnerability due to the covid-19 crisis can benefit from the moratorium, being entitled to request lenders to pursue and exhaust the main debtors' assets before claiming the secured debt from them, even in those cases where the relevant guarantor or security provider has expressly waived the excussion benefit foreseen in Spanish Civil Code.

On 2 February 2021, the Council of Ministers adopted the Royal Decree-Law 3/2021, which established a new deadline for submissions of requests for these moratoriums until 30 March 2021. In this regard, article 7 of Royal Decree-Law 3/2021 limits the eligibility to those debtors that, for any particular financing, either: are requesting a covid-19 moratorium for the first time; or that have already exercised one or several covid-19 moratoriums for a cumulative period not exceeding nine months. Article 8 establishes a limit of nine months as maximum aggregated duration of covid-19 moratoriums, from 30 September 2020. Notwithstanding the above, those moratoriums granted either before 30 September 2020 or between 30 September 2020 and the entry into force of Royal Decree-Law 3/2021 (ie, 3 February 2021) will maintain the conditions and duration originally agreed (ie, can have a total duration exceeding nine months, provided that these cannot exceed in any case 12 months).

In addition, any party to a loan agreement – and not only those in circumstances of economic vulnerability – could request an additional voluntary moratorium provided that the lender adhered to an industry-wide decision. Certain financial entities have adhered to the decision sponsored by the Spanish Banking Association (AEB) on 16 April 2020. Such an industry-wide decision was in line with the guidelines published by the European Banking Authority (EBA) on 2 April 2020, which recognises voluntary moratoriums or deferment of payments derived from the agreement of an industry-wide association. This non-legislative moratorium could be requested until 30 September 2020. New guidelines were published by the EBA on 2 December 2020. In line with the later guidelines, the AEB issued an addendum to the industry wide decision establishing a new deadline for submissions of requests for these moratoriums until 30 March 2021. Under the addendum, those moratoriums requested by the relevant debtor after 30 September 2020 will be subject a maximum duration of six months – in the event that several moratoriums (either legal moratoriums or conventional moratoriums) had been previously granted for a period of time lower than six months, then the entity will be able to grant a contractual moratorium for an additional period of time that is on aggregate up to six months.

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