

EFMLG
Working group on securitisation

**LEGAL OBSTACLES TO CROSS-BORDER
SECURITISATIONS IN THE EU**

7 MAY 2007

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NOTICE

This Report is published by the European Financial Market Lawyers Group (EFMLG). All of the members of the EFMLG, whose names are set out in Annex V, are experts in the field of financial markets law in the legal system of their Member State and have a high degree of practical experience. The members of the EFMLG participate in its work on a strictly personal basis. The views expressed in this paper are those of the EFMLG members and do not necessarily reflect those of their institutions.

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EXECUTIVE SUMMARY

Over the past years, both at the national and European level, securitisation markets have witnessed important legislative and regulatory developments. At the Member States level, a number of initiatives have been taken to establish an appropriate legal and regulatory environment to facilitate the development of domestic securitisation markets across Europe. However, the securitisation landscape in the European Union (EU) is characterised by its diversity and its fragmentation and a number of legal obstacles affect the development of true cross-border securitisation.

Domestic securitisation laws have been enacted without coordination between the EU Member States and thus, there is a need for convergence of securitisation laws in Europe. Although these laws generally tend to increase the efficiency and transparency of the domestic legal frameworks, they fail to facilitate the development of cross-border securitisations on a pan-European scale and may give rise to legal uncertainty as to their applicability to non-domestic entities or assets.

The assessment of national legal frameworks undertaken by the EFMLG¹ in the fifteen old EU Member States, i.e. the EU Member States before the May 2004 enlargement, indicates that full harmonisation of securitisation laws is not a realistic or even desirable objective, since such exercise would affect a number of areas of law which are, for some Member States, intimately related to the roots of their domestic legal systems (for instance, in the field of civil law or insolvency law).

However, following extensive consultation with market participants and an assessment of the possible regulatory options available at the EU level to assist in the development of cross-border securitisations in Europe, the EFMLG concluded, in the case of securitisation transactions, that a certain number of principles common to all jurisdictions need to be applied to ensure a high level of transparency, efficiency and legal certainty with regard to these transactions. Most of these principles have been translated into EFMLG recommendations for further convergence of securitisation laws in the EU, which are set out in this Report (the Report). As an alternative to a full harmonisation scenario, these principles could be enshrined in an EU legal act, preferably an Internal Market Directive dealing with certain legal aspects of securitisation.

If a directive on certain legal aspects of securitisation was to be adopted, the implementing measures technique under the Lamfalussy comitology approach would enable technical rules relating to securitisation to be covered and financial innovation and regulatory developments in this field to be taken into account. The Lamfalussy committees, which have an interest in the development of securitisation in the EU financial sector, i.e. the Committee of European Securities Regulators, the Committee of European Banking Supervisors, and perhaps also the Committee of European Insurance

and Pensions Supervisors, could be involved and provide useful technical advice on regulatory and supervisory aspects of securitisation markets. An appropriate balance would need to be struck between the objective of ensuring a level playing field across EU securitisation markets and the need to respect the diversity of legal systems within Member States.

A more effective and homogeneous application of Single Market principles to the European securitisation industry would contribute to the diversification of opportunities offered to professionals involved in the securitisation market and to investors across the EU Member States. This could be particularly beneficial in the Member States that have not developed a specific legal framework on securitisation and/or where the securitisation market remains underdeveloped.

If the European Commission would plan to adopt a proposal for a directive on certain legal aspects of securitisation, one important consideration would be the possibility of developing a European passport for management companies of securitisation SPVs and of clarifying how corporate securitisation SPVs can operate cross-border. These vehicles would be entitled to operate on a pan-European level provided that they meet the requirements defined in the directive and would be given the possibility of performing their activities in other Member States. The EFMLG considers that, taking into account the legal traditions in common law and civil law countries, as well as the current structure of the European securitisation markets, the idea of creating new European legal forms (such as an optional European securitisation vehicle), although attractive, is premature. This issue itself would require a separate in-depth economic and legal assessment aimed at determining the expected benefits of such new European legal forms and examining the obstacles to the creation of such structures and possible solutions.

The EFMLG trusts that the recommendations contained in the Report will increase the awareness of legislators to the need to take legislative action to promote the development of an integrated European securitisation market. Without the support of public action, it is unlikely that pan-European integration of this promising financial sector will occur. Securitisation market members, legal practitioners and supervisory authorities could be instrumental in translating the core high-level principles identified in the Report into a proposed EU directive on certain legal aspects of securitisation and providing legal effectiveness to these principles. The Commission may wish to consider these recommendations in its action programme relating to the integration of EU financial markets. The EFMLG stands at the Commission's disposal to provide legal assistance on these matters.

¹ Available on the EMFLG's website at www.efmlg.org.

OVERVIEW

The Report contains five sections and seven annexes.

Part one introduces and provides an overview of EU securitisation markets and of their regulatory environment. It also provides a description of the assumptions and methodology of the EFMLG Working Group on securitisation (the Working Group) and outlines the scope of the Report.

Part two provides an overview of the main aspects of securitisation frameworks that have been identified as giving rise to serious or potential legal obstacles to cross-border securitisations and limit access to foreign securitisation markets across the EU. This part also suggests recommendations aimed at ensuring further convergence of rules at the EU level in order to increase the legal certainty and transparency of securitisation markets.

Part three assesses the treatment of securitisation in certain areas of EU legislation.

Part four reviews tax obstacles to cross-border securitisations in the EU.

Part five sets out possible regulatory options identified by the Working Group to implement these recommendations, and describes, in particular, the main features that a proposed EU legislative initiative on certain legal aspects of securitisation should include if the European Commission follows this course of action.

EFMLG RECOMMENDATIONS

1. There is a need for the convergence of securitisation laws in Europe to overcome the current legal fragmentation of securitisation markets. An EU legislative initiative on certain legal aspects of securitisation is warranted, which takes into account the recommendations set out in the Report.
2. In a proposal for an EU legal act on securitisation, the definition of securitisation should be harmonised. It should be sufficiently precise to ensure legal certainty, yet sufficiently broad to cover all types of securitisation techniques, including synthetic securitisation, and the widest range of assets (as further described in Recommendation No 12).
3. An EU legal act on securitisation should recognise the two existing types of securitisation vehicles, i.e. securitisation funds and corporate vehicles, each which meets specific market needs.
4. An EU legal act on securitisation should promote and give legal support to the practices of segregation of compartments, replenishment and, where relevant, active management of portfolios of securitised assets within a securitisation SPV.
5. The Banking Directive and other relevant Community rules should clarify that securitisation SPVs are not credit institutions, investment firms or any other types of financial institution.
6. Management companies of securitisation funds established in one Member State, that have an interest in operating in other Member States, should be given the opportunity to do so once they meet the minimum harmonised requirements defined at the EU level (see part V of the Report).
7. Securitisation laws should not contain any restrictions on the capacity of originators to securitise assets, unless they are objectively justified and proportionate.
8. It is necessary to achieve a level playing field with regard to servicing activities. To that end, specific limitations should be avoided (e.g. a requirement to be licensed as a credit institution or any other type of financial institution).
9. Any existing restrictions regarding the place of establishment of custodians should be removed.
10. With a view to ensuring legal certainty and uniformity throughout the EU, an EU legal act on certain legal aspects of securitisation should contain the following principles:
 - the perfection, admissibility into evidence or enforceability of an assignment against a debtor, debtor's creditors or any third party should not depend on the performance of a formal act, the debtor's consent or notification of the debtor;
 - ancillary rights should automatically transfer to an assignee without further requirement, as validated by the UNCITRAL Convention;
 - assignments of receivables in a securitisation transaction should be possible and made effective, unless such transfers are explicitly excluded by an agreement between the creditor and debtor.

11. With regard to insolvency:

- securitisation laws should ensure the ‘insolvency remoteness’ of securitisation SPVs and, in particular, permit the isolation of securitised assets from an originator, its creditors and insolvency officials, and prevent consolidation of an SPV with its originator for insolvency purposes; and
 - securitisation laws should prevent insolvency officers from interfering with cash flows associated with securitised assets (i.e. commingling) or the disposal by such SPVs of those assets to third parties.
- 12. Any regulatory restrictions on the types of assets that can be securitised should be closely circumscribed, proportionate and objectively justified. A requirement that such restrictive provisions be notified to the Commission could be set up with a view to ensuring transparency and a level playing field across the EU.**
- 13. An EU legal act on securitisation should include the principles set out in the UNCITRAL Convention with respect to bulk assignments as well as a common definition of future cash flows, with a view to ensuring legal certainty and the harmonised treatment of these assets across EU Member States.**
- 14. The amendments to the Consumer Credit Directive should remove any ambiguities as to the issue of the notification of assignment to consumers and its possible impact on the enforceability of the assignment.**
- 15. A directive on certain legal aspects of securitisation should ensure the uniform and proportionate application of data protection rules with respect to assignments of receivables for securitisation purposes so that parties to a securitisation are able to transfer confidential data without breaching data protection laws. Similarly, it is important to ensure that banking secrecy obligations are not an obstacle to the necessary exchange of information in the context of securitisation transactions.**
- 16. The Commission, the European Parliament and the Committee on civil law matters of the Council should further examine whether it is more appropriate to consider the proposed amendment regarding the conflict of law rule applied to ancillary rights attached to assigned receivables in the context of an EU directive covering certain legal aspects of securitisation.**
- 17. An EU legal act on securitisation should provide that Member States are required to ensure that entities representing note holders’ interests in securitisation transactions can be clearly identified by investors and that a precise description of their rights and obligations is provided to investors (including possible restrictions in terms of legal capacity vis-à-vis foreign investors).**
- 18. To ensure a level playing field across the EU Member States, it is important that an EU legal act on securitisation abolishes domestic rules imposing rating requirements for asset-backed securities issued to the public.**
- 19. The European Commission should mandate the CEBS to examine how to further increase legal certainty with regard to securitisation-related concepts contained in the Banking Directive and avoid the risk of divergent implementation across the EU Member States.**

- 20. There should be a level playing field across Europe as regards the application of accounting rules in the case of securitisation and no discrepancy between Community and national rules. Therefore, a specific provisions applying to securitisation SPVs (under a corporate form) could be introduced in the Company law Directives with a view to clarifying their status and their disclosure or accounting obligations.**
- 21. The EFMLG recommends:**
- clarifying whether the current definition of ABS in the Prospectus Regulation covers synthetic ABS;**
 - clarifying whether the notion of issuer/SPV covers securitisation funds devoid of a legal personality;**
 - undertaking a review of the terminology used in relation to ABS contained in the implementing measures of the Prospectus Directive;**
 - that the Commission request the CESR to contribute to developing a harmonised approach towards the treatment of disclosure requirements applicable to ABS; and**
 - examining whether a harmonised disclosure regime for private placement should also be considered.**
- 22. The UCITS Directive should be amended to clarify the issue of the eligibility of ABS (including ABCP) for UCITS investment purposes and ensure harmonised treatment across Europe.**
- 23. Securitisation SPVs should be fiscally transparent and achieve tax neutrality since the complex tax treatment of securitisation transactions discourages the use of securitisation techniques.**
- 24. The EFMLG invites the Commission to mandate the relevant Lamfalussy committees to define, in cooperation with market participants, the nature and scope of a European passport for management companies of securitisation SPVs and to clarify how corporate securitisation SPVs can operate cross-border.**
- 25. The EFMLG invites the Commission to launch a study on the need for European optional forms of securitisation (impact assessment, legal feasibility, etc.).**

Part I Introduction

1. The regulatory environment of securitisation markets in Europe

In a report devoted to the current state of financial integration in Europe, the International Monetary Fund (IMF) considers that the securitisation market in Europe, ‘virtually non-existent in the mid-1990s, has been expanding rapidly but remains underdeveloped’². The IMF noted that one of the main obstacles to achieving an integrated market is the absence of a common legal framework for pan-European securitisation programs, stating that ‘[t]he securitisation landscape in Europe appears more like an aggregation of local markets, based on the use of different techniques and instruments’³. The IMF also observed that, ‘[i]n the securitisation market, maybe more than in other market segments in Europe, the need to overcome differences in legal frameworks and market fragmentation has translated into the development of ‘high-tech’ financial products, based on sophisticated financial engineering’⁴.

In a May 2004 report commissioned by the European Commission in the context of preparing the post-Financial Services Action Plan policy, the Securities Expert Group noted that one of Europe’s most innovative and rapidly growing financial market sectors is securitisation, which has developed as an alternative capital markets financing, funding, arbitrage and risk-shifting mechanism and that considerable progress could still be made in terms of convergence of market practices, instruments and legal rules (regulation, capital, tax and accounting)⁵. The Expert Group also pointed out that, while several Member States have taken steps to create a more hospitable environment for securitisation⁶, more coordination of certain aspects of the legal framework applicable to these operations is necessary at the EU level, thereby facilitating a more harmonised framework and simultaneously encouraging innovation in securitisation markets across Europe.

The European Central Bank (ECB) is regularly consulted on Member State draft national laws which contain rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets⁷. In two opinions concerning draft laws on securitisation in

2 *Euro area policies, Selected Issues*, as approved by the IMF European Department, July 6, 2005, ‘IV.B The Integration of European Financial Markets’, ‘The Current State of Financial Integration in Europe’, pp. 91-92, paragraph 107. Available on the International Monetary Fund’s website at www.imf.org.

3 Ibid.

4 Ibid.

5 See the Final Report of the Securities expert group, *Financial Services Action: Progress and Prospects*, May 2004.

6 As pointed out by the European Securitisation Forum (ESF) in its Report of May 2002, ‘A Framework for European Securitisation’, p. 1 (hereinafter the ‘ESF Report’). Available on the ESF’s website at www.eurosecuritisation.org.

7 See Article 2(1), last indent of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

Luxembourg and France⁸, the ECB indicated that it supported the views expressed by the Expert Group and stressed that, looking beyond the EU Financial Services Action Plan, it saw merit in a strategy of increased harmonisation in the area of securitisation at the EU level.

2. Assumptions

In Europe, few systematic studies have been undertaken aimed at assessing the various features of national securitisation legislation⁹. One of the main reasons for the scarcity of such studies could be that, 'owing to the almost limitless combination of jurisdictions, structures, asset types, laws and transaction parties that one might encounter in the European structured finance market, it is not possible to have detailed criteria that cover every issue in every jurisdiction'¹⁰.

A survey undertaken by lawyers ten years ago also highlighted the impact of legal traditions over the developments of securitisation markets in Europe: 'The situation of England and Wales, with its tradition of common law, is the most similar to the United States. Different forms and structures may for the most part evolve freely so long as they are not prohibited. Structures would function more smoothly with some changes in the law and accounting practices, but it is not necessary to change the law for securitization to thrive so long as this form of financing makes economic sense. However, countries with civil law traditions are in a different situation. In large part, they must pass new laws in order for the securitization market to develop...But because it is so difficult to establish legal and accounting rules that can accommodate the tremendous creative energies of the market, markets in countries where rules must be created to permit securitization to flourish will inevitably develop more slowly. If the market is dependent on regulators in order to thrive, the market is constantly catching up. Conversely, if the market thrives so long as the regulators do not discourage such activity, it is more likely that the regulators will be the ones who are catching up'¹¹.

In May 2002, the European Securitisation Forum (ESF) produced a document entitled 'A Framework for European Securitisation' stating that 'the lack of a more uniform and harmonized legal, regulatory, tax, capital, accounting and market practice regime among individual jurisdictions has hindered the growth of securitisation on a broader, pan-European scale' and took the view that there was no clearly articulated or

8 See, in this respect, ECB Opinion CON/2004/30 of 14 September 2004 at the request of the French Ministry of Economic Affairs, Finance and Industry on a draft decree concerning *fonds communs de créances* (securitisation funds) and ECB Opinion CON/2004/3 of 4 February 2004 at the request of the Ministry of Finance of the Grand Duchy of Luxembourg on a draft law on securitisation.

9 See however, the ESF White Paper, *A Framework for European Securitisation*, May 2002; and the Global Legal Group Ltd. Report, *The International Comparative Legal Guide to: Securitisation 2005, A practical insight to cross-border Securitisation Law*, 20 April 2005. The Guide was updated in 2006.

10 This point is stressed by the rating agency Standard & Poor's in a guide devoted to its general methodology when reviewing legal aspects of European structured finance transactions 'European Legal Criteria 2005', *Standard & Poor's Structured Finance Ratings*, March 2005.

11 T. Baums and E. Wymeersch, eds., *Asset-backed Securitization in Europe*, Kluwer Law International, 1996, p. 5.

widely-acknowledged blueprint for the types of legal, regulatory and other provisions needed to facilitate securitisation on a broader scale throughout Europe'¹².

In 2004, the Forum Group on Mortgage Credit suggested that the European Commission harmonise legislation regarding segregation of assets and enact legislation that recognises the legal separateness of a securitisation vehicle from an originator of assets in the event of the insolvency/bankruptcy of such an originator¹³. In its report of 22 December 2006¹⁴, the Mortgage Funding Expert Group (MFEG) pointed out that the development of residential mortgage-backed securities is hampered by the lack of consistency in national legal frameworks on securitisation.

Over the past years, both at the national and European level, securitisation markets have witnessed important legislative and regulatory developments. At the Member States level, a number of initiatives have been taken (for instance, the adoption of specific frameworks in Luxembourg, Greece or more recently Malta, the substantial reform of the French legal framework in 2003, and the German Law on the creation of refinancing registers of 2005) in order to establish an appropriate legal and regulatory environment for securitisation (see also Annex 1 on domestic legal frameworks in Europe).

At the European level, the development of securitisation techniques is increasingly reflected in financial services legislation, albeit in a fragmented, inconsistent and legally incoherent manner. Until recently, EU financial law contained few references to securitisation concepts and there is a lack of substantive harmonisation of market practices, instruments and legal rules in the area of securitisation. At the same time, the expansion of securitisation across Europe has led the European regulators to reflect this development and introduce securitisation-related concepts within EU legislation. This was the case, for instance, in the context of the implementation of the new Basel II Framework¹⁵ into Community legislation¹⁶, for the accounting rules, disclosure requirements¹⁷, and the rules applicable

12 The ESF Report, p. 1. Despite these different legal traditions, certain experts also pointed out the need for further harmonisation (see, for instance, C. de Boissieu in *La titrisation: une mise en perspective*, *Revue d'Economie Financière*, Special issue on securitisation, No 59, 4-2000, p. 20, who advocates the need for an EU directive on securitisation).

13 The Forum Group on Mortgage Credit Report, *The integration of the EU Mortgage Credit Markets*, 13 December 2004. Some of the Forum Group's recommendations apply directly to the field of securitisation and not only to mortgage financing.

14 Report of the Mortgage Funding Expert Group (MFEG), http://ec.europa.eu/internal_market/finances-retail/docs/home-loans/mfeg/final_report-en.pdf. The MFEG was entrusted with the task to examine the need for and nature of action on the funding aspects (primary and secondary) of mortgage credit. The MFEG is assisting the European Commission in the preparations of the forthcoming White Paper on mortgage credit and mortgage funding in the EU.

15 Basel Committee on Banking Supervision, 'International Convergence of Capital Measurement and Capital Structure – A Revised Framework', November 2005.

16 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L177, 30.6.2006, p. 1), (hereinafter the 'Banking Directive'). See also Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast), (OJ L177, 30.6.2006, p. 201), (hereinafter the 'Capital Adequacy Directive').

to UCITS investments¹⁸ or in the context of the implementation of the Reinsurance Directive¹⁹. Further, a number of initiatives currently under consideration at the EU level, for instance regarding consumer credit²⁰ and possibly concerning the integration of European mortgage credit and mortgage funding markets, incorporate securitisation related considerations.

Lastly, in the context of monetary policy operations, the ECB amended its collateral framework to take into account the peculiarities of asset-backed securities (ABS) as an important growing class of assets eligible as collateral. The amendments aim to clarify the criteria on which the eligibility of ABS for use in Eurosystem credit operations is assessed²¹, in addition to the criteria applicable to debt instruments in general²². Under these new rules, cash flow generating assets must be legally acquired, in accordance with the laws of a Member State, from an originator or an intermediary by a securitisation SPV in a manner which the Eurosystem considers to be a ‘true sale’ that is enforceable against any third party and beyond the reach of the originator and its creditors, including in the event of the originator’s insolvency. Furthermore, they may not consist, in whole or in part, actually or potentially, of credit-linked notes or similar claims resulting from the transfer of credit risk by means of credit derivatives.

3. Methodology of the EFMLG Working Group on securitisation

Against this background, the EFMLG agreed to set up a working group (the Working Group) to identify the most pressing obstacles to cross-border securitisations across the EU (see Annex VI²³). The Working Group prepared a questionnaire comprised of eight sections covering the following topics:

- securitisation laws;

17 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64), (hereinafter the ‘Prospectus Directive’).

18 Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions (OJ L 79, 20.03.2007, p. 11).

19 Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC (OJ L 323, 9.12.2005, p. 1) (hereinafter the ‘Reinsurance Directive’).

20 Modified proposal for a Directive of the European Parliament and of the Council on credit agreements for consumers amending Council Directive 93/13/EC, 23.11.2005, COM(2005) 483 final/2 (hereinafter the ‘modified proposal’).

21 Guideline ECB/2005/17 of 30 December 2005 amending Guideline ECB/2000/7 on monetary policy instruments and procedures of the Eurosystem (OJ L 30, 2.2.2006, p. 26). The General Documentation including the above amendments is an annex to Guideline ECB/2005/17. The amendments to the General Documentation apply from 1 May 2006. See also the ECB’s website: http://www.ecb.int/mopo/implement/assets/assets/html/eligible_assetbacked.en.html.

22 These criteria do not apply to covered bank bonds issued in accordance with Article 22(4) of the UCITS Directive. Moreover, units of securitisation funds under the French model of securitisation funds are not eligible since they do not constitute debt instruments. For this reason, the Governing Council of the ECB has decided that units of French *fonds communs de créances* (FCCs) in the tier one list will remain eligible for a transitional period until 30 December 2008. This exclusion does not apply to debt instruments issued by the same funds.

23 The EFMLG Working Group on securitisation is chaired by Mr. Stéphane Kerjean, ECB and comprises the following lawyers: Mrs. Sandrine Conin, Kredietbank Luxembourg, Mr. Pedro Ferreira Malaquias, Uría & Menéndez (on behalf of Euribor Portuguese banks), Mr. Holger Hartenfels, Deutsche Bank, Mrs. Susan O’Malley, HSBC, Mr. Dimitris Tsibanoulis and Mrs. Elena Bailas (substituted by Mr. Emiliós Avgouleas), Tsibanoulis & Partners (on behalf of Euribor Greek banks) and Mrs. Sophie Vidal-Lemière, BNP-Paribas (substituted by Mr. Philippe Nugue).

- SPVs;
- treatment of the other parties involved in securitisation transactions (originators, servicers, custodians and rating agencies);
- transfer and ring-fencing of assets;
- data protection and banking secrecy;
- insolvency laws;
- rights of investors; and
- tax treatment.

Based on the answers to this questionnaire, the EFMLG Working Group assessed the main features of the existing rules applicable across the EU Member States. The Report does not provide an exhaustive overview on any of these aspects; however these elements provide insight into the main legal obstacles, which appear to be a reason for the existence of a fragmented securitisation market within the EU. Furthermore, the Working Group examined the existing EU legislation dealing with certain aspects of securitisation in detail and put forward recommendations in order to further improve this framework and remove certain legal uncertainties.

The Report is the outcome of the investigation undertaken by the Working Group with the EFMLG's assistance. The Working Group covered the following jurisdictions: France, Germany, Greece, Luxembourg, Portugal and England and Wales and the contributions for the nine other jurisdictions were directly provided by EFMLG members (the list of the other contributors is attached at Annex VI). This survey does not cover the new EU Member States, in which, except Poland and Malta²⁴, there are no specific legal frameworks on securitisation²⁵. The full text of the country-specific replies to the questionnaire is available as a separate report. It is available on the EFMLG's website at www.efmlg.org²⁶.

On 12 June 2006, the EFMLG organised a hearing with securitisation legal experts from various market associations (and, in particular, from the ESF), practitioners involved in the field of securitisation (e.g. rating agencies, international law firms and public authorities) and foundations/associations specialised in structured finance and securitisation²⁷. Based on the analytical work undertaken by the Working Group and the findings of the hearing, the EFMLG proposed a

24 Where appropriate, reference is made to the Polish and Maltese securitisation legal frameworks in the Report, although these two jurisdictions are not covered in the questionnaire.

25 The 2006 version of the Global Legal Group Ltd. Report, *The International Comparative Legal Guide to: Securitisation 2005, A practical insight to cross-border Securitisation Law*, incorporates detailed information regarding ten new Member States (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia) and Croatia. The survey confirms that only Poland, Bulgaria (in 2003) and Romania (in 2002 for mortgage loans) have adopted specific national legal frameworks for securitisation.

26 Last updated on 12 June 2006.

number of recommendations concerning current Community legislation. Furthermore, the assessment of national laws has also enabled the EMFLG to identify a number of recommendations regarding the main critical legal areas where convergence of domestic rules of Member States on securitisation would be required at the European level. Lastly, the EFMLG examined possible regulatory options with a view to contributing to the integration of European securitisation markets.

4. Scope of the Report

The focus of the Report is on securitisation techniques and not on the assessment of instruments such as covered bonds²⁸, which present some comparable legal features but for which distinct legal frameworks are generally in place in most EU jurisdictions²⁹.

A fundamental distinction is usually made between ‘traditional’ (‘true sale’) securitisation and synthetic securitisation. In the context of traditional securitisation, the conveyance of assets from an originator to an SPV generally needs to be conducted in a manner that results in a ‘true sale’, i.e. not in substance, merely a secured financing. A true sale is necessary in order to remove the assets from the patrimony, i.e. from the balance sheet, of the originator and, therefore, from the insolvency estate of the originator or other seller of the assets with a view to legally isolating these assets. Synthetic securitisation is defined as ‘a structure...where credit risk of an underlying pool of exposures is transferred, whole or in part, through the use of funded (e.g. credit linked notes) or unfunded (e.g. credit default swaps) credit derivatives or guarantees that serve to hedge the credit risk of the portfolio.’³⁰ A synthetic structure entitles an originator to transfer the credit risk of substantially more assets classes than would be available under a traditional ‘true sale’ structure. This is partly because the synthetic structure allows an originator to sidestep the requirements that exist for a ‘true sale’ of the securitised assets. There is no need to effect a legal transfer³¹. Moreover, in traditional securitisation the cash flow needed to service the interest payment on the issued

27 The list of participants in the hearing is available in Annex VII.

28 Defined as ‘full recourse debt instruments secured against a pool of mortgage assets and/or public sector claims, to which investors have preferential claim in the event of a bankruptcy of the issuing institution’ (footnote 42 of the report by the Forum Group on Mortgage Credit report, *The integration of the EU mortgage credit markets*, 2004, p. 40). Article 22(4) of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 375, 31.12.1985, p. 3). Directive as last amended by Directive 2005/1/EC of the European Parliament and of the Council of 9 March 2005 (OJ L 79, 24.03.2005, p. 9) (hereinafter the ‘UCITS Directive’) refers to ‘bonds that are issued by a credit institution which has its registered office in a Member State and is subject by law to special public supervision designed to protect bond-holders. In particular, sums deriving from the issue of these bonds must be invested in conformity with the law in assets which, during the whole period of validity of the bonds, are capable of covering claims attaching to the bonds and which, in the event of failure of the issuer, would be used on a priority basis for the reimbursement of the principal and payment of the accrued interest’.

29 On these aspects, see, for instance, the publications of the European Mortgage Federation and, for instance, *Mortgage banks and mortgage bonds in Europe*, 4th edition, November 2003. Available on the European Mortgage Federation’s website at www.hypo.org.

30 Paul Ali and Jan Job de Vries Robbé, *Synthetic, Insurance and Hedge Fund Securitisations*, Thomson, 2004, p. 41.

31 Ibid. at p. 44-45.

notes is generated by the collateral, whereas, in a synthetic structure the cash flow originates (at least partially) from the fee payments that the originating bank pays to the SPV under a credit default swap³².

The Report in the first place focuses primarily on the ‘traditional’ (‘true sale’) securitisation. However, the EFMLG is aware that synthetic securitisation plays a very important and rapidly growing role in the securitisation market. The Report examines whether specific domestic rules apply to synthetic securitisation and how they are covered in the respective EU national legal frameworks.

The UNCITRAL draft legislative guide on secured transactions defines securitisation as ‘a sophisticated form of financing under which a business enterprise can obtain less expensive financing based on the value of its receivables by transferring them to a wholly owned SPV that will issue commercial paper or other securities in the capital markets secured by the stream of income generated by such receivables’, for instance, credit card receivables, rents or home mortgages, although the securitisation of many other types of receivables is also possible³³. The Report does not contain any specific legal assessment with regard to the various possible types of underlying assets involved in a securitisation, although, from a financial integration perspective, certain types of assets (such as mortgage loans) would deserve, in some instances, further examination.

The EFMLG took note of the adoption of the Reinsurance Directive which is currently being implemented by EU Member States and will also require certain amendments to national securitisation frameworks³⁴. As pointed out in a report of the Group of Thirty, insurance securitisation is expected to be an important area of development in the near future³⁵. The impact of the implementation of the EU Reinsurance Directive on securitisation is not addressed specifically in the Report, except to the extent the provisions of this Directive (for instance, the provisions applicable to SPVs³⁶) affect domestic legal frameworks on securitisation.

32 Ibid. at p. 45.

33 Draft Legislative Guide on Secured Transactions, UNCITRAL Note by the Secretariat, New York, Working Group VI (Security interests), ‘F. Examples of financing practices covered by the Legislative Guide’, ‘4. Securitisation’, 12-16/02/2007, p. 22.

34 The Member States have until 10 December 2007 to implement the Reinsurance Directive.

35 ‘Insurance securitisation currently remains very small relative to the overall size of the insurance industry and in comparison with other types of asset-backed or similarly structured securities’ and ‘[n]otwithstanding the growing interest in insurance securitisation on the part of issuers and investors, numerous challenges remain in achieving the efficient transfer of insurance risk into the capital markets’, Group of Thirty Report on Reinsurance and International Financial Markets, Washington DC, 2006, pp. 5-6.

36 See Article 46 of Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, (OJ L 323, 9.12.05, p. 1).

Part II The fragmentation of the national legal frameworks on securitisation in the EU

This part of the Report provides an overview of the legal aspects of Member States' domestic securitisation frameworks, which the EMFLG has identified as requiring further convergence at the EU level in order to increase legal certainty of transactions and transparency of the markets or as giving rise to serious or potential legal obstacles to cross-border securitisations and to access to foreign securitisation markets across the EU. As mentioned above, a detailed description of the different frameworks existing in the fifteen 'old' EU Member States, i.e. Member States before May 2004, is provided for in a separate report³⁷. Where relevant, the EFMLG recommendations for convergence of these rules are set out following each of the sections of this part of the Report.

A. Overview of securitisation structures in the EU

1. The heterogeneous landscape of securitisation legal frameworks in the EU

In the 'old' EU Member States, seven countries have specific legislation on securitisation³⁸ and eight countries do not³⁹; some specific provisions relating to securitisation may however be found, notably in the tax and regulatory areas. Among the new Member States since 2004, Poland and Malta are the only jurisdictions having adopted a specific framework on securitisation, although the Polish framework, which is incorporated into the domestic UCITS legislation, is not well suited for the development of securitisation⁴⁰. In England and Wales, a host of provisions, the law of charge and assignment and the concept of trust, provide the necessary flexibility and facilitate the conduct of securitisation without recourse to specific legislation. Germany does not have a comprehensive law on securitisation, although the Law on the creation of refinance registers of 2005 is intended to facilitate securitisation transactions. A variety of structures ranging from the use of securitisation SPVs to the use of trust schemes (in jurisdictions such as England and Wales or Austria where such structures are recognised by law) have been utilized in most of the surveyed countries, regardless of whether the domestic law provides specific provisions dealing with securitisation transactions or securitisation vehicles.

Over the past years, national legislators in the EU have taken, in an uncoordinated manner, some important legislative initiatives aimed at clarifying the domestic legal frameworks applicable to their securitisation market. A number of EU Member States still do not have any legislation aiming to facilitate the development of securitisation, but consider the possible adoption or the review of their

37 Available on the EMFLG's website at www.efmlg.org.

38 Belgium, France, Greece, Italy, Luxembourg, Portugal and Spain.

39 Austria, Denmark, England and Wales, Finland, Germany, Ireland, Sweden and the Netherlands.

40 See the MFEG's Report, p. 28.

specific legal frameworks in this field. Although the existing domestic frameworks contribute to legal certainty and transparency of transactions at the national level and often provide innovative regulatory solutions, they fail to contribute to the development of a true pan-European securitisation market. The best practice approach, which consists in inviting national regulators to amend their respective legal frameworks to facilitate securitisation, has often been successful in improving the quality of existing laws and in promoting recourse to best practice used by other jurisdictions (for instance, regarding synthetic securitisation). At the same time, this uncoordinated approach at the European level tends to perpetuate the fragmentation of securitisation markets; securitisation laws continue to operate as a patchwork within the EU without enabling the development of true pan-European securitisations.

Furthermore, the uncoordinated development of domestic laws increases legal uncertainty and legal barriers, especially in the case of multi-jurisdictional securitisation transactions. As further demonstrated in section D below, the territorial constraints of domestic securitisation laws and the resulting risks of providing diverging solutions to identical issues in the EU jurisdictions stress the need for European rules enabling the development of truly European securitisations. Against this background, the EFMLG finds that there is a need for convergence of securitisation laws in Europe in order to overcome the current legal fragmentation of securitisation markets and that an EU legislative initiative on certain legal aspects of securitisation is warranted, which would take into account the recommendations detailed further in the Report.

Recommendation No 1:

There is a need for the convergence of securitisation laws in Europe to overcome the current legal fragmentation of securitisation markets. An EU legislative initiative on certain legal aspects of securitisation is warranted, which takes into account the recommendations set out in the Report.

2. Definition of securitisation and material scope of securitisation laws

Securitisation may broadly be defined as ‘the process whereby loans, receivables and other financial assets are pooled together, with their cash flows or economic values redirected to support payments on related securities. These securities, which are generally referred to as “asset-backed securities” or “ABS”, are issued and sold to investors - principally, institutions - in the public and private markets by or on behalf of issuers, who utilise securitisation to finance their business activities’⁴¹. In a majority of the surveyed jurisdictions⁴², the law does not provide any definition of securitisation. Definitions of the term ‘securitisation’ are often found in those countries that provide for specific laws on

41 European Securitisation Forum, *European Securitisation: a Resource Guide*, 1999, p. 1.

42 Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Portugal, Sweden, and the Netherlands.

securitisation (see below). However, in the countries where the law provides a definition, the notion of securitisation varies considerably from one jurisdiction to another: they may cover synthetic securitisation, provide for the recourse to an SPV and/or different techniques of transfer of assets, the securities issued may be of a different nature and the securitisation may be limited to private placement.

In Greece, the securitisation of claims is defined as ‘the transfer of business claims under a sale agreement concluded in writing between a ‘transferor’ and a ‘transferee’ combined with the issue and distribution, through private placement only, of bonds of any type and form, the redemption of which is effected: (a) by the proceeds of the business claims transferred; or (b) by loans, credit agreements and derivative instrument contracts’⁴³. In Italy, the law applies to ‘securitisation transactions carried out by way of non-gratuitous assignment of pecuniary receivables, whether already in existence or arising in the future, and identifiable as a pool (*blocco*) where the assignment of more than one receivable is involved’⁴⁴. In Luxembourg, securitisation means a ‘transaction by which a securitisation undertaking acquires or assumes, directly or through another undertaking, risks relating to claims, other assets, or obligations assumed by third parties or inherent to all or part of the activities of third parties and issues securities, whose value or yield depends on such risk’⁴⁵. In Spain, securitisation is defined as ‘a financial process whereby cash flows arising from the underlying assets (mortgage loans or others) are converted into fixed income securities’. In Malta, securitisation is defined as ‘a transaction or an arrangement whereby a securitisation vehicle, directly or indirectly: (a) acquires securitisation assets from an originator by any means, (b) assumes any risks from an originator by any means, or (c) grants a secured loan or other secured facility or facilities to an originator, and finances any or all of the above, directly or indirectly, in whole or in part, through the issue of financial instruments, and includes any preparatory acts carried out in connection with the above’⁴⁶.

In some jurisdictions, various securitisation techniques are expressly covered by national law. In the absence of specific provisions in the legal framework, various techniques may still be widely used since no provision in the legislation prohibits them. In France and Luxembourg, the law covers both traditional and synthetic securitisation, as well as the use of credit derivatives. In the Netherlands, both

43 Article 10(1) of the Greek Law on securitisation. For the purposes of this law, ‘private placement’ is the distribution of bonds to a restricted circle of persons whose total number cannot exceed 150. Participation in the placements in question is open to mutual funds and portfolio investment companies with their registered office in Greece, provided that the bonds have been rated as ‘investment grade’ by an internationally recognised risk rating agency. Insurance funds and insurance companies cannot participate in private placement through mutual funds or portfolio investment companies.

44 Article 1(1) of the Italian Law on securitisation. In addition, the following conditions must be fulfilled: (a) the purchasing company is a company provided for under Article 3 of the Law; and (b) the sums paid by the assigned debtor(s) are to be used by the purchasing company exclusively toward the satisfaction of the rights incorporated in the notes issued, whether by the purchasing company or a separate entity, for the purposes of financing the purchase of such receivables, as well as toward the payments relating to the costs of the transaction.

45 Article 1(1) of the Luxembourg Law on securitisation.

46 Law No V of 2006, 11 April 2006, part I, Article 2.

traditional and synthetic securitisation are used. Although the law only specifically addresses traditional securitisation techniques, other techniques may be used. In Portugal, techniques other than traditional securitisation may be used under the general provisions of national law. In Italy and in Greece, synthetic securitisation is excluded from the scope of the law and there is no mention of whether other techniques may be used⁴⁷. In Belgium, synthetic securitisation, and in particular credit derivatives used as part of synthetic securitisation, are not commonly documented nor are they governed by Belgian law.

Recommendation No 2:

In a proposal for an EU legal act on securitisation, the definition of securitisation should be harmonised. It should be sufficiently precise to ensure legal certainty, yet sufficiently broad to cover all types of securitisation techniques, including synthetic securitisation, and the widest range of assets (as further described in Recommendation No 12.

3. Characteristics of securitisation SPVs in the EU Member States

3.1. Legal forms of SPVs

The types of vehicles available in the different jurisdictions for the purpose of securitisation transactions can have various legal forms, which are generally determined and regulated by the local law in which the SPV is established. Typically, an SPV in a structured finance transaction is a limited liability company, a limited liability partnership or other form of corporation or trust (depending on the local law in the place of establishment)⁴⁸. The main distinction is between SPVs that are set up as a company with the legal personality and those set up as a fund without legal personality. Annex II of the Report identifies the Member States where these two types of structures are provided for and those where only one of the two structures is provided for.

Certain jurisdictions (e.g. France, Belgium, Luxembourg, Spain, Portugal and Italy - although less common in this country) have created by law dedicated forms of vehicles, i.e. securitisation funds devoid of legal personality with independent management companies available for the purpose of acquiring assets and securitising them. Although distinct from UCITS, rules applicable to these funds often fall under the general umbrella of the national legislation applicable to collective investment

⁴⁷ In Greece, the Law on securitisation limits securitisation to the issue and distribution of bonds, through private placement.

⁴⁸ 'Special-purpose vehicles in structured finance transactions', *Fitch Ratings report*, 13 June 2006, p. 2.

undertakings (for instance, in France and Belgium) or borrow some features of UCITS (e.g. under Luxembourg law)⁴⁹.

The most common legal form used for the establishment of SPVs in the surveyed countries is a limited liability company or corporation. In the Netherlands, an SPV is usually set up as a corporation with a limited charter and created solely for the purposes of the securitisation transaction. The corporation's shares are held by a foundation (*stichting*). SPVs are, in most cases, owned by trusts. The use of an 'orphan' company⁵⁰ whose shares are held on trust is quite common in the majority of the surveyed jurisdictions (e.g. England and Ireland). In Malta, a securitisation vehicle may be a company, including an investment company, a commercial partnership, a trust created by a written instrument or any other authorised legal structure⁵¹.

It is common practice to use two different SPVs, one holding the assets, another one issuing the notes, for securitisation transactions. The law usually does not distinguish between SPVs that acquire receivables and SPVs that issue securities in the surveyed jurisdictions, except in Luxembourg and Italy. The Luxembourg Law on securitisation defines securitisation undertakings as undertakings, which carry out a securitisation transaction, and undertakings, which participate in such a transaction by assuming all or part of the securitised risks (the acquisition vehicles) or by issuing securities to finance the transaction (the issuing vehicles)⁵². The Italian Law on securitisation refers to an SPV as a purchasing company or company issuing notes if other than the purchasing company and provides that an SPV shall have as its exclusive object the realisation of one or more securitisation transactions⁵³.

In some jurisdictions (usually the jurisdiction that has created dedicated vehicles for securitisation purposes), an SPV must be established in the jurisdiction creating those vehicles. The other jurisdictions do not provide for any restriction regarding the place of establishment of an SPV. The choice of jurisdiction for the establishment of an SPV is influenced by a number of factors; however, tax reasons usually result in an SPV being established abroad. In Greece, use of a domestic SPV is still very uncommon due to cumbersome and costly regulation relating to the creation of such vehicles. In

49 For example, the Belgian Law of 20 July 2004 permits the creation of an undertaking for investment in receivables (UIR). The purpose of a UIR must exclusively consist of the collective investment in receivables of third parties that are transferred to a UIR by a transfer agreement. A UIR may take a contractual form, being a fund for investment in receivables (FIR) or it may take a statutory form, as a company for investment in receivables (CIR).

50 SPVs are commonly 'orphaned', that is, not legally or beneficially owned or controlled by the originator of the securitised assets or other enterprise with an interest in those assets. Often, the beneficial ownership of an SPV will be held on trust for a charity by the immediate legal owner, a professional company specialising in the management of such vehicles, which performs the management duties, 'Special-purpose vehicles in structured finance transactions', *Fitch Ratings report*, 13 June 2006, p. 2.

51 Article 3 of the Maltese Law on securitisation.

52 Article 1(2) of the Luxembourg Law on securitisation. Article 2 of the Law only applies to securitisation undertakings established in Luxembourg and whose underlying documents provide that they are subject to its provisions. As a consequence, in the case of a securitisation involving an acquisition vehicle and an issuing vehicle where only one is situated in Luxembourg, the Law only applies to the vehicle situated in Luxembourg. The law is silent on what would be the consequences of a situation involving two distinct vehicles (an acquisition vehicle and an issuing vehicle) in two different jurisdictions.

Portugal, the majority of transactions are two-step transactions, which usually involve the *fundo de titularização de créditos* (FTC) and an off-shore SPV. The SPV issues units, which are then bought by an off-shore SPV, which thereafter issues bonds and places them on the international market.

Recommendation No 3:

An EU legal act on securitisation should recognise the two existing types of securitisation vehicles, i.e. securitisation funds and corporate vehicles, each which meets specific market needs.

3.2. Multi-transaction type SPVs

In several jurisdictions, the law does not expressly provide for the possibility of creating segregated compartments or cells of assets and liabilities within an SPV that are ring-fenced from other assets or liabilities. Assets acquired by an SPV from different originators are automatically commingled into one single asset pool and, in case of the insolvency of an SPV, all assets would be liable for all claims, even if investors or other participants in the securitisation have acquired their rights only in respect of receivables of a specific originator. In some jurisdictions, however, segregation within the asset pool can be achieved by appropriate structuring (e.g. through granting interests in specific assets to specific creditors or by agreeing on limited recourse with them). A similar result may be achieved through the use of a charge in England and Wales or of a special pledge in Greece. In Ireland, ring-fencing specific pools of assets and liabilities within an SPV is achieved by a combination of appropriate security interests over the relevant assets to secure the relevant liabilities and contractual limited recourse and non-petition undertakings from the SPV's creditors. In the Netherlands, it is possible to make a contractual arrangement pursuant to which it is agreed that the note holders will only have recourse to a specific part of an SPV's assets. In addition, effective segregation may also be achieved through the adoption of appropriate structural measures.

In some jurisdictions, such as Belgium, France, Italy, Luxembourg, Portugal and Spain, where a securitisation fund may be used, segregation within the asset pool is achieved by establishing separate compartments within the fund. Each compartment is legally isolated from the others⁵³. In Spain, the *fondo* (*fondo de titulización hipotecaria* or *fondo de titulización de activos*) is characterised as an SPV per transaction and, as a general rule each securitisation requires setting up a separate *fondo*. These *fondos* currently cannot operate as multi-transaction securitisation vehicles since the law does not recognise the constitution of segregated compartments in terms similar to those provided for in the

⁵³ Article 3 of the Italian Law on securitisation.

⁵⁴ See the ESF's response to the Croatian Law on securitisation consultative document, 20 November 2006, Answer to question 14. Available on the ESF's website at www.europeansecuritisation.org.

French *fonds commun de créances*⁵⁵. In Belgium, the creation of segregated compartments is allowed under Belgian UCITS legislation for CIRs, but not for FIRs. In Luxembourg, law provides that the rights of the investor and creditors are limited to the assets of the securitisation undertaking. Where such rights relate to a compartment or have arisen in connection with the creation, operation or liquidation of a compartment, they are limited to the assets of that compartment. The law also provides that the assets of a compartment are exclusively available to satisfy the rights of investors in relation to that compartment and the rights of creditors whose claims have arisen in connection with the creation, operation or liquidation of that compartment. Under the Luxembourg legislation, as between investors, each compartment is treated as a separate entity, except if otherwise provided for in the underlying contractual documents of the securitisation undertaking⁵⁶. Similarly, French law provides that, as an exception to Article 2093 of the *code civil* and unless otherwise stipulated in the instruments incorporating the securitisation fund, the assets of a given compartment shall be liable only for the debts, undertakings and obligations, and entitled only to the debt related to such compartment⁵⁷.

Most jurisdictions allow SPVs to be replenished. In Ireland, an SPV can acquire assets on a rolling basis, which become subject to the security created by the SPV at the inception of the transaction. Luxembourg law provides that securitisation undertakings may acquire and, subject to certain conditions defined in the law, transfer claims and other assets, existing or future, in one or more transactions or on a continuous basis⁵⁸. In the Netherlands, substitution of assets is possible, although with certain limits. In Portugal, the compartments of a *fundo de titularização de créditos* (FTC, securitisation fund) or of a *sociedade de titularização de créditos* (STC, securitisation company) can be replenished according to different rules. In Spain, it is not possible to actively manage the portfolios of securitised assets and a *fondo*'s deed of incorporation does not allow it, either directly or through a professional third party acting on their behalf to (a) acquire new assets; (b) resell the assets in the portfolio; (c) re-invest the assets; (d) create pledges or guarantee the asset; and (e) execute re-purchase agreements involving those assets⁵⁹. In England and Wales, Master Trusts are a structure commonly used whereby the receivables are assigned to a receivables trustee who declares a trust over the receivables, which it may own from time to time in favour of the beneficiaries of the trust, usually the seller or the originator and an investor beneficiary. They issue multiple series of securities backed by a

55 See the Letter of the ESF to the Spanish authorities of 28 October 2005, p. 6. Available on the ESF's website at www.europeansecuritisation.org.

56 Article 62(1) of the Luxembourg Law on securitisation. See also Q. Rutsaert, 'Protected cell companies - A new trend in the securitisation industry analysed from a Luxembourg and international perspective', *J.I.B.L.R.*, 2007, pp. 101-106.

57 Article L.214-43(2) of the French Financial and Monetary Code.

58 Article 54 of the Luxembourg Law on securitisation.

59 See the Letter of the ESF to the Spanish authorities of 28 October 2005, p. 9. Available on the ESF's website at www.europeansecuritisation.org.

single pool of assets, with the cash flow generated by the assets being allocated between the series according to a predetermined formula⁶⁰.

Recommendation No 4:

An EU legal act on securitisation should promote and give legal support to the practices of segregation of compartments, replenishment and, where relevant, active management of portfolios of securitised assets within a securitisation SPV.

4. Supervision of securitisation SPVs and management companies

To qualify as a credit institution under the definition of the Banking Directive⁶¹, the two following cumulative criteria must be met, i.e. ‘to receive deposits or other repayable funds from the public and to grant credits for its own account’⁶². In certain Member States, the possible application of banking laws to securitisation SPVs and their activities, raises in some instances legal uncertainty. For instance, in France, since the activity of acquiring receivables on a regular basis can be considered a credit operation, foreign securitisation vehicles risk being considered as infringing French banking law rules⁶³. Furthermore, in view of the prohibition on undertakings other than credit institutions, under the Banking Directive, from carrying on the business of taking deposits or other repayable funds from

60 Master Trusts allow issuers to sell multiple series of securities from the same trust, all backed by the same collateral pool of receivables. When further financing is needed, the issuer transfers receivables from additional accounts to the same trust and issues new securities. The receivables are not segregated in any way that would indicate which series of securities they support; instead, all receivables support all series of the securities. The structure of a transaction is designed to ensure that the insolvency of the seller would not interfere with the flow of principal and interest payments to investors, as all rights to the mortgages are assigned to the SPV by the seller, on the transfer of the loans. As such, these master trusts deals are considered to be ‘true sale’ transactions, and the loans involved are removed from the seller’s balance sheet at closing.

61 Article 4(1)(a) of the Banking Directive.

62 The Banking Directive (Recital 6) provides that the scope of these measures should be as broad as possible covering ‘all institutions whose business is to receive repayable funds from the public, whether in the form of deposits or in other forms such as the continuing issue of bonds and other comparable securities and to grant credits for their own account’.

63 In France, although domestic securitisation funds are not considered to be credit institutions, the law expressly provides that these funds may purchase non-matured receivables (Article R-214-94 of the French Financial and Monetary Code). Credit institutions may assign receivables to an FCC or to ‘similar’ foreign vehicles (see the CRBF Regulation No 93-06 of 21 December 1993 relating to the posting (*comptabilisation*) of securitisation transactions, Article 1, third paragraph). However, under French law, acquiring receivables on a regular basis constitutes a credit operation since the assignee has to provide immediately to the assignor sums in respect of claims for which the assignor is indeed a creditor but these claims only fall due in the future. Furthermore, the Financial and Monetary Code does not provide for an exception to the banking monopoly principle, i.e. the obligation to be licensed as a credit institution, for foreign securitisation vehicles. Such derogation is currently granted, on an implicit basis, only to the French securitisation vehicles. As a consequence, there is some uncertainty as to whether foreign securitisation vehicles acquiring receivables might be considered as infringing the French banking law rules. Article 511-1 of the Financial and Monetary Code defines credit institutions as ‘legal entities whose customary business activity is the carrying out of banking transactions within the meaning of Article L. 311-1’. Banking transactions comprise the receiving of funds from the public, credit transactions and the provision to customers, or administration of, means of payment. Article L.313-1 of the Code provides that ‘any act through which a person, acting in return for payment, makes, or promises to make, funds available to another person or gives an undertaking in favour of that person by signing an aval, a security bond or other guarantee, constitutes a credit transaction’.

the public⁶⁴, the question arises of whether the issuance of bonds by securitisation undertakings should be considered as an activity of ‘taking repayable funds from the public’⁶⁵.

In view of the above, the EFMLG believes that securitisation SPVs⁶⁶ should not be considered credit institutions⁶⁷, since they do not meet both criteria provided for in the Banking Directive. Furthermore, the EFMLG would see merit in expressly clarifying in the Banking Directive that securitisation SPVs cannot be considered to be credit institutions. In the same vein, securitisation SPVs should not be considered to be investment firms within the meaning of the MiFID and their activities should not qualify as investment services and activities⁶⁸.

Recommendation No 5:

The Banking Directive and other relevant Community rules should clarify that securitisation SPVs are not credit institutions, investment firms or any other types of financial institution.

At the same time, most jurisdictions impose a form of supervision on securitisation vehicles, the intensity of which varies substantially from one jurisdiction to another, depending both on the SPV’s legal form and the type of activities conducted by the securitisation vehicle (for instance, involvement in synthetic securitisation)⁶⁹. In this respect, the criterion of whether securitisation SPVs issue

64 Article 5, first paragraph of the Banking Directive.

65 In Luxembourg, securitisation undertakings (either companies or funds), which issue securities to the public ‘on a continuous basis’ need to be authorised by the CSSF (see the comments on the provisions of the Luxembourg Law on securitisation, Article 19). Similarly, in Belgium, by issuing securities (which can be considered repayable funds), an SPV could, in principle, be considered a credit institution if it is seen as soliciting the ‘public’. The criteria for the public nature of solicitation of repayable funds are determined by Royal Decree of 7 July 1999 on the public nature of financial transactions. The Royal Decree makes it clear that there is no public solicitation of repayable funds if a person, company or institution publicly offers securities as evidence of the receipt of repayable funds (e.g. bonds) under the Belgian public offering regime, even if the offering of securities is exempt from the obligation to publish a prospectus. In the light of the above, an SPV acquiring receivables and issuing securities would not be considered a credit institution under Belgian banking law.

66 Under Article 4(44) of the Banking Directive, a securitisation special purpose entity (SSPE) means a ‘corporation trust or other entity, other than a credit institution, organised for carrying on a securitisation or securitisations, the activities of which are limited to those appropriate to accomplishing that objective, the structure of which is intended to isolate the obligations of the SSPE from those of the originator credit institution, and the holders of the beneficial interests in which have the right to pledge or exchange those interests without restriction’.

67 In Austria, until 1 June 2005, SPVs were considered as conducting a banking business pursuant to the Law on banking. In Denmark, an SPV acquiring receivables is not considered to be a credit institution within the meaning of the banking legislation. In Finland and Italy, although not considered a credit institution, an SPV is defined as a financial institution. In Italy, SPVs must be registered in the special register of financial intermediaries held by Banca d’Italia and are subject to the prudential supervision of Banca d’Italia.

68 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.04.2004, p. 1).

69 More information on the national frameworks is provided in Annex III to this Report on the oversight of securitisation vehicles in the EU.

financial instruments either to the public or for private placement is often instrumental in national laws in deciding the appropriate level of supervision (for instance, in Malta, Luxembourg and Belgium)⁷⁰.

Box 1

Community legislation applicable to reinsurance SPVs

In the field of reinsurance, a minimum level of harmonisation applies at the EU level to SPVs that assume risks from insurance and reinsurance undertakings (Article 46, ‘Special purpose vehicles’ of Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC (hereinafter the ‘Reinsurance Directive’).

The Reinsurance Directive provides that the special nature of such SPVs, which are not insurance or reinsurance undertakings, calls for the establishment of specific provisions in Member States (recital 32). In this instance, an SPV is defined as ‘any undertaking, whether incorporated or not, other than an existing insurance or reinsurance undertaking, which assumes risks from insurance or reinsurance undertakings and which fully funds its exposure to such risks through the proceeds of a debt issuance or some other financing mechanism where the repayment rights of the providers of such debt or other financing mechanism are subordinated to the reinsurance obligations of such a vehicle’ (Article 2(1) (p)).

Where a Member State decides to allow the establishment of such SPVs within its territory, prior authorisation is required. The establishment in the insurance and reinsurance sector of such an SPVs is optional and left to the discretion of Member States. Member States must specify the conditions under which the activities of an SPV established in their territory may be carried out, and in particular:

- (a) the scope of authorisation;
- (b) mandatory conditions for inclusion in all contracts issued;
- (c) the good repute and appropriate professional qualifications of persons running the SPV;
- (d) fit and proper requirements for shareholders or members having a qualifying holding in the SPV;
- (e) sound administrative and accounting procedures, adequate internal control mechanisms and risk management requirements;
- (f) accounting, prudential and statistical information requirements; and
- (g) solvency requirements of SPVs.

There is currently no harmonisation of the requirements imposed on securitisation vehicles at the EU level; these requirements may differ considerably from one Member State to another. In the case of securitisation funds, the management companies must usually obtain a license from their respective

70 For instance, in Malta, public securitisation vehicles, i.e. that issue or that intend to issue financial instruments to the public on a continuous basis must apply in writing to the competent authority for a licence and comply with a number of requirements detailed in the law (part IV, Article 19 of the Maltese Law on securitisation). Other securitisation vehicles cannot commence business unless they have given notice to the competent authority that they intend to enter into one or more securitisation transactions (Article 18). Similarly, in Luxembourg, only securitisation undertakings (either companies or funds), which issue securities to the public on a continuous basis need to apply for a licence to the Luxembourg Financial Sector Supervisory authority (CSSF) (Article 19 of the Luxembourg Law on securitisation). In Belgium, public undertakings for investment in receivables (UIRs), either a fund or of a company, are heavily regulated and are subject to the supervision of the Belgian Banking, Finance and Insurance Commission (BFIC). For ‘public UIRs’ the financing is partly raised by a public offer of negotiable or non-negotiable securities. Prior to commencing activities, public UIRs must be registered with the BFIC. Any change to the articles of association or fund regulations of a public UIR requires the BFIC’s prior approval. By contrast, ‘institutional UIR’ are financed exclusively by institutional or professional investors acting for their own behalf; the securities issued by these institutional UIRs can only be purchased or otherwise acquired by such institutional or professional investors. They are subject to a less strict legal framework and are not supervised by a regulatory authority. The Belgian Law of 21 July 2004 was recently amended and institutional UIRs can now issue listed securities provided that they take adequate measures to ensure that their securities will only be held by institutional or professional investors.

domestic supervisory authorities⁷¹ and are subject to specific regulatory requirements (e.g. Belgium, France, Luxembourg, Portugal and Spain), including a requirement to establish, or have the registered or head office in the jurisdiction concerned. In most of the surveyed jurisdictions, there are no strict limitations on the composition of the shareholder body of management companies and SPVs, unless the management company is, by operation of law, a financial institution (e.g. Italy⁷²). In Luxembourg, management companies of securitisation funds are, in principle, entitled to manage UCITS funds⁷³, whereas the exclusive purpose of French and Spanish management companies is to manage FCC and Spanish *fondos*, respectively. The requirements applicable to these management companies vary depending on the type of activities performed⁷⁴.

Corporate SPVs are subject to the requirements of the company law regime in which they are incorporated. Generally, as regards corporate SPVs, an independent third party (such as a corporate services provider) acts as a management company and provides independent directors for SPVs as well as accounting, secretarial and compliance services. While an SPV has a board of directors and a company secretary, it does not have employees and is not designed to be capable of administrative functions, all of which are outsourced⁷⁵. An SPV director must have ‘administrative skills to ensure that the SPV is professionally managed to remain in compliance with company law, accountancy practice, the preparation of audited accounts and tax returns, and with its obligations under the multitude of contracts to which it is a party’⁷⁶.

71 This is a regulatory prerequisite for the establishment of securitisation funds in the jurisdictions that provide for this form of securitisation SPV (e.g. France, Belgium, Luxembourg, Italy, Portugal and Spain). For instance, in Belgium, the appointment of a management company is not compulsory for a Belgian company for investment in receivables (CIR). A CIR may consequently be self-managed, if it has the appropriate management structure. The appointment of a Belgian management company is mandatory for a Belgian fund for investment in receivables. A Belgian management company acting for a Belgian public undertaking for investment in receivables (UIR), or a foreign UIR offering its securities in Belgium, must be licensed by the BFIC. In France, the securitisation funds must be jointly created by the management company and the entity responsible for the safe custody of funds assets. The funds are not supervised by any regulatory body. Only the founders of the FCC are supervised by the Financial Markets Authority (AMF). The incorporation of the management company, which is a commercial company, must be approved by the AMF. By contrast, in the majority of the surveyed jurisdictions, SPVs established under a corporate form are managed by their own board and there is no obligation to set up a management company. No specific requirements are imposed on companies managing corporate securitisation SPVs, other than general company law provisions. In the case of a corporate SPV (especially an offshore SPV), specialised corporate service providers provide the directors and the other officers of the SPV.

72 In Italy, only credit institutions and financial intermediaries enrolled in a special register kept by the Banca d'Italia may qualify as managers of securitisation vehicles.

73 See the Explanatory memorandum to the draft Luxembourg Law on securitisation, commentary on Article 14, p. 28 and the opinion of the Luxembourg Council of State of 19 December 2003, p. 6.

74 In France, a management company must meet certain criteria set out in the French Financial Markets Authority (AMF) regulations. Furthermore, when a management strategy includes active asset management or the entry into credit derivatives transactions as protection for the seller, the management company must comply with certain additional specific requirements such as a new license and appropriate management and organisational procedures. Implementing rules provide detailed provisions regarding the conditions for the activity of securitisation funds management companies and in particular the rules applicable in case of delegation of the financial management of the funds to other entities such as managers of collective investment undertakings (See the French Ministerial Order of 1 September 2005 amending Article 331-10- I of the General Regulations of the AMF).

75 ‘Special Purpose companies and their importance within the securitisation markets’, SPV Management Limited, Wilmington Trust’s SP Services Firm for Europe, *The International Comparative Legal Guide to: Securitisation 2005, A practical insight to cross-border Securitisation Law*, The Global Legal Group Ltd., 20 April 2005, p. 11.

76 Ibid.

In the EFMLG's view, the Commission should ensure a level playing field with respect to regulatory requirements and level of oversight imposed on securitisation funds when these SPVs wish to operate in Member States other than the Member State in which they are established (and/or licensed in the case of management companies). One expected benefit of a harmonised approach at the EU level is that, once management companies of securitisation funds comply with the minimum requirements defined at the Community level, they could be recognised by the competent authorities in other Member States and would be entitled to provide their services throughout the EU. These aspects are further developed in part V of the Report.

As regards management companies of securitisation funds, the introduction of a European passport would require examining whether specific additional requirements should be imposed, depending on the type of securitisation undertaken (for instance, synthetic securitisation or insurance securitisation), the possibility for management companies to undertake activities other than the management of securitisation funds and the rules applicable in case certain activities are delegated.

Recommendation No 6:

Management companies of securitisation funds established in one Member State, that have an interest in operating in other Member States, should be given the opportunity to do so once they meet the minimum harmonised requirements defined at the EU level (see part V of the Report).

5. The status of other parties involved in a securitisation transaction

5.1. The status of originators

An originator (or seller/transferor) is defined as the party who intends to sell and securitise a portfolio of assets. In cash flow based transactions, an originator removes assets from its balance sheet through a 'true sale' operation⁷⁷. In most jurisdictions, the law does not impose any specific requirements with respect to an originator;⁷⁸ however, in Greece an originator must be a business undertaking registered in the country or at least have an establishment in Greece. In addition, if a bank is an originator, it

⁷⁷ ESF White Paper, 'A Framework for European Securitisation', May 2002, 2.2.15, p. 11.

⁷⁸ In Portugal an originator must be a credit institution, financial company, insurance company, pension funds, funds manager, the State or other public entity, or other entities with accounts from the previous three fiscal years legally certified by an auditor. In Malta, an originator or assignor is defined as 'a person, including Government or any local council who (a) transfers by any means securitisation assets to a securitisation vehicle; (b) enters into any arrangement with a securitisation vehicle for the purpose of transferring any risk in whole or in part to the securitisation vehicle; or (c) obtains a loan or other facility from a securitisation vehicle, such loan or facility being secured directly or indirectly over securitisation assets, and the term originator or assignor shall also include all its subsidiary undertakings or affiliates' (part I, Article 2 of the Maltese Act No V of 2006).

must follow certain rules stipulated by the Bank of Greece. None of the other surveyed jurisdictions impose any rules in terms of an originator's location⁷⁹.

Recommendation No 7:

Securitisation laws should not contain any restrictions on the capacity of originators to securitise assets, unless they are objectively justified and proportionate.

5.2. The status of servicers

A servicer is usually defined as 'the party - frequently the originator of the assets sold to the SPV - designed to administer the portfolio of securitised assets, including, among other activities, the collection of the cash generated by these assets and the preparation of regular reports to the administrator' which manages the SPV⁸⁰. The Banking Directive⁸¹ defines a servicer⁸² as 'an entity that manages a pool of purchased receivables or the underlying credit exposures on a day-to-day basis'. Generally, the servicing function of the receivables transferred to a securitisation vehicle can be assumed by the originator or by qualified third parties (generally banks). Unless considered as 'the acceptance of deposits and other repayable funds', the activity of servicing does not constitute one of the activities subject to mutual recognition under the Banking Directive⁸³.

This activity (and in particular the conditions required for the exercise of this activity) is regulated in a heterogeneous manner in the EU Member States. In principle, except in Italy and perhaps in Sweden⁸⁴, no license is required or other recognition by the competent authority under any applicable law⁸⁵ when such administration has been delegated by a securitisation vehicle to an originator or any third party⁸⁶.

79 The Banking Directive logically focuses on originator 'credit institutions'. An originator is defined in the Banking Directive as '(a) an entity which, either itself or through related entities, directly or indirectly, was involved in the original agreement which created the obligations or potential obligations of the debtor or potential debtor giving rise to the exposure being securitised; or (b) an entity which purchases a third party's exposures onto its balance sheet and then securitises them' (Article 1(41) of the Banking Directive).

80 ESF White Paper, 'A Framework for European Securitisation', May 2002, 2.2.21, p. 12. S&P defines the servicer as 'the organization that is responsible for collecting loan payments from individual borrowers and for remitting the aggregate amounts received to the owner or owners of the loans' (Structured Finance, glossary of securitisation terms, p. 27, 2003).

81 See Annex VII of the Banking Directive, 'Internal Ratings Based Approach'.

82 '*Organe de gestion*' in French/'*Forderungsverwalter*' in German.

83 Annex I of the Banking Directive.

84 In Italy, an originator, in order to be authorised to act as servicer, must be licensed as a bank or a financial intermediary. In Sweden, a license may be required from third party servicers for collection services/enforcement. In the Netherlands, an SPV will only be exempt from obtaining a license under the Law on financial services if the SPV has entered into a servicing agreement with an entity regulated under the FSA. In case the originator is the servicer, an agreement limits the liability of the servicer to those risks ensuing from the servicing agreement.

85 In Belgium, servicing functions are considered to be management and administration tasks and therefore, in principle, subject to the specific requirements applicable in case of outsourcing for non-supervised entities.

86 For instance, in Luxembourg, the law provides that a securitisation undertaking may entrust an assignor or a third party with the collection of claims it holds as well as any other tasks relating to the management thereof, without such persons having to apply for an authorisation under the Luxembourg financial sector legislation (Article 60 of the Law on securitisation). Similarly, in Malta, the law provides that the securitisation vehicle may delegate the management responsibility for the day-to-day administration of the securitisation vehicle or of the assets or risks thereof, including the collection of any claims, to any third party, including the originator (Article 8(1) of the Law on securitisation).

In France, when the recovery of the assigned debt is not ensured by the assigning entity, this function may only be entrusted to a credit institution, provided that the debtor is notified thereof by ordinary letter⁸⁷. In Greece, a servicer has to be a credit or financial institution established within the European Economic Area⁸⁸, unless the transferred assets concern claims against consumers, in which case the servicing agent must be established in the country. Moreover, certain specific requirements may apply in case the originator is a third party⁸⁹.

Recommendation No 8:

It is necessary to achieve a level playing field with regard to servicing activities. To that end, specific limitations should be avoided (e.g. a requirement to be licensed as a credit institution or any other type of financial institution).

5.3. The status of custodians or bank depositories

In most of the surveyed jurisdictions, a custodian's role in terms of the securitisation vehicle's assets is not specifically addressed under the law. Furthermore, apart from Belgium⁹⁰, France⁹¹, Portugal, Luxembourg⁹² and Greece, where registration of a custodian is required, there are no restrictions as regards the custodian's place of establishment. In Portugal, a portfolio of receivables transferred to a securitisation fund must be held by a custodian, which is a credit institution authorised by Banco de Portugal.⁹³ Most of the surveyed jurisdictions do not impose any specific obligations in terms of custody of assets and generally refer to general laws on this matter, except those that have adopted

87 Under French law, 'the recovery of the assigned debt shall continue to be ensured by the assigning entity under the conditions defined by an agreement with the manager of the FCC. However, all or part of the recovery may be entrusted to a credit institution or to the *Caisse des dépôts et consignations*, provided that the debtor is notified thereof by ordinary letter' (Article L.214-46 of the French Financial and Monetary Code).

88 Besides, a servicer can also be the originator, the guarantor of the receivables or the entity already servicing the receivables before the securitisation (Article 10(14) of the Greek Law on securitisation).

89 For instance, in Sweden, a third party servicer would be subject to data protection requirements. In Belgium, specific rules, for instance in terms of registration at the Ministry of Finance, also apply in case of a servicer collecting debts under consumer receivables.

90 In Belgium, public UIRs, either under the form of a fund or of a company, must appoint a custodian. 'Public undertakings' means that the Belgian securitisation vehicles issue debt instruments sold only to 'professional or institutional investors'. Only Belgian credit institutions, EU credit institutions with a branch in Belgium registered with the Belgian financial supervisory authority, Belgian stock broking firms, and licensed foreign investment firms may act as custodians for public UIRs. For institutional UIRs, foreign UIRs or other types of SPVs there is no obligation to appoint a custodian under Belgian law.

91 In France, the custodian must be a French credit institution or a French branch of a credit institution incorporated in the European Economic Area, or any institution approved by the Committee on credit institutions and investment firms (Article L. 214-48 of the French Financial and Monetary Code).

92 In Luxembourg, the law provides that securitisation undertakings that issue securities to the public on a continuous basis, i.e. licensed securitisation undertakings, must entrust the custody of their liquid assets and securities to a credit institution established or having its registered office in Luxembourg (Article 22 of the Law on securitisation).

93 In Portugal, the custodian is responsible for (a) holding the interest and principal payments received from the servicing agent; (b) investing the fund assets; (c) holding any securities acquired on behalf of the securitisation fund; (d) holding any loans obtained for the fund by the manager of the securitisation fund; and, where applicable; (e) entering into swap agreements on behalf of the fund. The custodian will allocate fund assets according to the instructions from the fund manager (See the separate EFMLG Report, Country-specific replies available on the EMFLG's website at www.efmlg.org).

specific laws on securitisation (in particular, France and Portugal⁹⁴). In France, under the law, a custodian over an SPV's assets is considered to be the 'founder' of the SPV, is responsible for oversight of the securitisation funds' management company and has a duty to protect the investors' interests⁹⁵. The custodian's role as founder of an FCC consists in setting up the FCC and signing the FCC's regulations. The custodian also acts as the depository (*dépositaire*) of the receivables acquired by the FCC, as well as its other liquid assets⁹⁶ (*trésorerie et créances acquises par le fonds*). However, the custodian may delegate custody of the receivables documents (*conservation des créances*) to a servicing agent, under certain conditions, with the main condition being that the custodian must remain directly and fully responsible for custody of the receivables' deeds of transfer (*bordereaux de cession de créances*).⁹⁷

Recommendation No 9:

Any existing restrictions regarding the place of establishment of custodians should be removed.

B. Legal obstacles relating to securitisation techniques of transfer of assets

1. Transfer and ring-fencing of assets

1.1. Overview of the segregation techniques

In most European jurisdictions, segregating an originator's assets on its balance sheet without transferring the assets is not possible. To effectively segregate or ring-fence transferred assets requires a transfer of those assets and of related ancillary rights and title to a separate legal entity or, as in Germany, assets must be segregated on behalf of such separate legal entity by entry into the new refinance register⁹⁸. Such segregation/ring-fencing is also possible through the use of a trust structure in Austria (*Treuhandsgesellschaft*) or a charge in England and Wales, Sweden and possibly, soon in Denmark. All jurisdictions permit ring-fencing assets that are the subject of a securitisation, i.e. the removal of these assets from the legal reach of the originator, its creditors and its insolvency or

94 In Malta, the law provides that the competent authorities may issue rules for the regulation of the custody of assets and financial instruments of 'public' securitisation vehicles, i.e. that issue or intend to issue financial instruments to the public on a continuous basis (Article 20(2)(b) of the Law on securitisation).

95 Articles L.214-47 and L.214-48 of the French Financial and Monetary Code.

96 Ibid. at Article L. 214-48.

97 Ibid. at Article R. 214-111. The servicing agent or the originator, as the case may be, must remain responsible for the custody of the agreements relating to the receivables and other media concerning the claims and securities, guarantees and collateral, and for this purpose must establish procedures for safe custody and regular and independent internal checks concerning compliance with the procedures. The procedure is defined in an agreement between the assignor or the entity responsible for recovery of the claims assigned to the FCC, the depository of the fund assets and the FCC's management company.

98 As set up by the German Law of 22 September 2005.

administration officers, thus making them available for the sole benefit of the parties to the securitisation⁹⁹. The different techniques to achieve such segregation can be described as follows:

- (a) **True Sale:** Sale and transfer of the receivables is the most commonly used approach by parties to a securitisation, the aim of which is ‘to give effect to the transfer of title in a way that mitigates as much as possible the ability of the originator (or any creditor of or bankruptcy official appointed to the originator) to overturn the sale and claw-back the assets sold’¹⁰⁰. The true sale is recognised in all jurisdictions, but may be subject to certain formal requirements like written documentation, notification of the debtor or registration. There are also different legal concepts of how to achieve a transfer, as further described below.
- (b) **Common Pool of Debts:** In some jurisdictions, like France, Belgium, Italy, Luxembourg, Portugal and Spain, securitisation funds¹⁰¹ are used to segregate assets. Different from corporate SPVs, such funds have no legal personality. They are pools of assets administered by an originator or by a management company. However, all assets transferred to the fund are deemed to be assets of the beneficiaries (the investors) and thereby removed from the legal reach of the originator.
- (c) **Trust:** In some jurisdictions, like England and Wales and Ireland, ring-fencing may also be achieved by a trust arrangement between an originator and SPV. Although the originator retains legal title to the assets, in case of its bankruptcy they are segregated from the estate and the beneficiary (the SPV) has the right to claim separation and recovery of those assets. The trust concept is mainly limited to Anglo-Saxon jurisdictions.
- (d) **Fiduciary Arrangements:** In some jurisdictions, like Austria, Germany and Luxembourg, fiduciary arrangements between an originator and SPV are recognised for ring-fencing purposes, but in some countries, only if certain requirements are met. If recognised, the consequences are similar to what occurs in the case of trusts. In Austria, fiduciary arrangements provide for segregation only, if they are not structured or construed as secured transaction. In Germany, segregation is only recognised if the trustee (the originator) obtains the assets directly from the beneficiary (the SPV), which would require a cumbersome back and forth transfer of assets and, if the receivables are collateralised by mortgages, related registrations in the land registers.

99 In general, an SPV or equivalent segregated fund remains separate from the originator in the event of the insolvency of the issuer. There is small amount of uncertainty regarding Germany, Ireland and England & Wales to the extent that an originator may retain a controlling interest in an SPV.

100 ‘Special-purpose vehicles in structured finance transactions’, *Fitch Ratings report*, 13 June 2006, p. 5. Available on Fitch Ratings’ website at www.fitchratings.com.

101 Belgium: *fonds de placement en créances*, France: *fonds commun des créances* (FCC), Luxembourg: *fonds de titrisation*; Italy: *fondi comuni di crediti*, Portugal: *fundo de titularização de créditos* (FTC) and Spain: *fondo de titulación*.

(e) **Registration:** In order to facilitate securitisation without a ‘true sale’ transfer of assets, Germany introduced the right to maintain refinance registers. An SPV’s claim to transferred assets is entered into a refinance register, which is maintained by credit institutions or certain specified entities (e.g. the Deutsche Bundesbank, the *Kreditanstalt für Wiederaufbau* (KfW), the public debt agency of the State). A refinancing enterprise that is not a credit institution may use the refinancing register of a bank or the KfW. Although the originator retains legal title, the registered assets are deemed to be SPV assets and, in the event of the originator’s insolvency, the SPV has the right to claim separation and recovery of those assets. The evolution that led to the creation of the German framework is discussed in more detail in Box 2 of the Report below.

Only the securitisation legal frameworks in France and Portugal provide for specific rules applicable to assignments of receivables made between an originator and an FCC (France) or a financial institution (Portugal). Apart from receivables that are secured by rights in real property, in Austria, Denmark, Germany, Finland and Sweden, an assignment of receivables may be affected without any formalities. In some jurisdictions, like England and Wales, Greece, Ireland, the Netherlands, Portugal and Spain, an assignment agreement must be in writing. Under the Italian Law on securitisation, public notice and registration in the companies register is required. The requirement to use a notary is only for obligations owed by public entities. In Greece, registration of the assignment agreement with the public register is required. In almost all jurisdictions, an assignment is valid upon the perfection of the agreement between the assignee and the assignor or, where notification is required, upon notification. In Greece, the assignment is valid upon registration unless otherwise agreed in the securitisation agreement.

The German example of transfer and ring-fencing of assets: the Refinancing register

Until September 2005, there existed no special legal regime governing securitisation in Germany. In order to ensure that an SPV had a right to segregate (*Aussonderung*) collateralised assets in cases where an originator became insolvent, title to the purchased assets had to have been transferred. It is obvious that such a ‘true sale’ raises legal and technical issues. There was, for example, a discussion triggered by a decision of the Higher Regional Court of Frankfurt in 2004 on whether banking secrecy could encompass an implied prohibition on the assignment of bank loans. Special difficulties were observed for the securitisation of receivables, which are secured by registered mortgages (*Hypotheken*) or land charges (*Grundsschulden*): A transfer of receivables backed by registered mortgages or land charges requires registration with the land register, which is time consuming and expensive. The alternative, a fiduciary arrangement where an originator continues to hold title to the sold assets as fiduciary on behalf of an SPV, was and continues to be subject to formal requirements; in order to be recognised as a fiduciary arrangement upon which segregation can be claimed, the fiduciary must acquire title to the assets directly from the SPV or a third party. This requires a transfer of title from the originator to the SPV and back to the originator. In practice, a compromise was used: the originator kept the title to purchased assets, but was obliged to immediately transfer title to the sold receivable if certain events of default (e.g. a material adverse change of creditworthiness) occurred.

On 28 September 2005, the Law on the creation of refinancing registers came into force. It introduces a new legal instrument, i.e. the refinancing trust (*Refinanzierungstreuhand*), enabling refinancing enterprises (*Refinanzierungsunternehmen*), i.e., enterprises that sell for refinancing purposes assets out of their business establishment, to segregate sold assets without transferring title simply by registration in a refinancing register (*Refinanzierungsregister*). This offers an additional technique to facilitate ‘true sale’ securitisation in Germany. The new Law changes the Law on banking (*Kreditwesengesetz*) by inserting a new sub-chapter on refinancing registers. The core provision is Section 22j, which provides that ‘assets of a refinancing enterprise duly registered in the refinancing register may be claimed for segregation by the beneficiary pursuant to Section 47 of the Law on Insolvency’. Beneficiary (*Übertragungsberechtigter*) means an SPV (*Zweckgesellschaft*), a credit institution acting as a refinancing intermediary (*Refinanzierungsmittler*) or a mortgage bank that has a right to claim the transfer of assets of the refinancing enterprise. Further, Section 22d(4) of the Law on Banking provides that a receivable is eligible for registration and transfer to the beneficiary even if the assignment of the receivable is prohibited by oral or implied agreement between debtor and creditor. Refinancing registers can only be maintained by credit institutions and certain specified entities (e.g. the Deutsche Bundesbank, the *Kreditanstalt für Wiederaufbau* (KfW), the public debt administration of a State) that use them as a refinancing enterprise for their own securitisations. A refinancing enterprise that is not a credit institution may use the refinancing register of a bank or the KfW. The refinancing register can be kept electronically. The proper operation of the register is supervised by an administrator (*Verwalter*) who is appointed by the German banking supervisory authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*).

In all jurisdictions, the sale and transfer (true sale) of receivables can be carried out through a bilateral assignment agreement between an originator and SPV. In some jurisdictions, the debtor’s consent, notification of the debtor or other formality is required. An alternative, but not commonly used technique, is the transfer of the contractual relationship or its novation by a tri-lateral arrangement between debtor, originator and SPV. The transfer or novation of the contractual relationship is recognised in all jurisdictions.

In almost all jurisdictions, the transfer is governed by the general rules of the substantive civil law. In Greece, an assignment for security purposes in a securitisation transaction is void. In other jurisdictions, given the additional risks inherent to collateral or because originators lack the intent to fully and definitely transfer ownership and risk, an assignment for security purposes does not result in the ring-fencing of assets (e.g. in England and Wales, Finland, Ireland, the Netherlands and Portugal).

In Germany, a security assignment is not eligible to achieve the balance sheet reduction intended by the originator and in Austria, a security assignment is subject to more onerous formalities than a normal assignment, but it will grant an assignee a priority right with respect to the assigned receivable, which will remain effective in the assignor's bankruptcy.

1.2. Consent or notification of the debtor

Apart from applicable provisions on data protection or banking secrecy (see below C.1) or agreements between an assignor and debtor that provide otherwise (see below 1.4), in most jurisdictions, receivables can be assigned without the prior consent of the debtor. In Sweden, consent is not required unless the agreement governing the assets requires such consent.

In certain jurisdictions receivables can be assigned without notifying the debtor (silent transfer) and the legal transfer between an originator and SPV is considered effective (e.g. in Austria, Belgium, France, Germany, Luxembourg and the Netherlands). The silent transfer is well suited to securitisation, since it is not detrimental to third parties and preserves an assignor's relationship with its debtor. Under French law, if a deed of transfer (*bordereau*) is delivered to an FCC, notification of the debtor is not necessary¹⁰². In Luxembourg, if Luxembourg law applies to a transfer, the assignment of an existing claim to or by a securitisation undertaking becomes effective between the parties and against third parties as from the moment the assignment is agreed on, unless the contrary is provided for in the agreement, i.e. without notifying the debtor or obtaining the debtor's consent¹⁰³. In Belgium, in the case of a silent transfer, as long as the assignment has not been acknowledged or notified, debtors can validly discharge their obligations in respect of the receivables as if they were in the hands of the assignor and debtors can invoke claims against the assignor and operate a set-off. Moreover, the rights of another assignee of the transferred receivables will rank above those of the 'first' assignee, if such assignee, acting in good faith, gives notice of the assignment to the debtor before the 'first' assignee gives notice. The assignment may not be invoked against a good faith creditor of the assignor, to whom the good faith debtor of the transferred receivable has made payment before the assignment was notified to him. In Austria, Germany and Luxembourg, a notification is only required to ensure that the debtor loses its right to discharge the obligation with the assignor (the originator) by payment or set-off. In England and Wales and Ireland, 'silent' assignments are effective under equity law. However, in order to avoid any discharge of obligations vis-à-vis the old creditor and ensure enforceability against third parties, notification of the debtor is required. In the Netherlands, 'silent' assignments are valid, if the written assignment has been registered with the competent Dutch tax authority or if a public notary was used.

¹⁰² Article L. 214-43 of the French Financial and Monetary Code.

¹⁰³ Article 55(1) of the Luxembourg Law on securitisation.

In Portugal, notification is not required if the seller is a bank, a financial company, an insurance company, a pension fund or pension fund management company; the assignment of receivables is effective against the relevant debtors at the date it becomes effective between the seller and the buyer. In Denmark, Finland, Greece and Sweden, notification of the debtor is mandatory for the sale to be considered effective (in Greece, however, a notification is considered to have taken place upon registration of the securitisation agreement with the public register). Furthermore, for the sale to become enforceable against third parties, notification to debtors is required in England and Wales, Italy, the Netherlands, Portugal (when the seller is not a financial institution) and Spain. In Italy, the assignee bank must give notice of the effected assignment by way of a publication in the Official Gazette of the Republic of Italy and registration of a notice in the relevant companies register.

1.3. The transfer of ancillary rights attached to the assets¹⁰⁴

In some jurisdictions, assigning receivables has the effect that all ancillary rights (Austria and the Netherlands) or all accessory rights (Belgium and Germany) are automatically transferred to the assignee without further requirement. In the Netherlands, there is legal uncertainty as regards ancillary rights in real property that not only serve as collateral for the assigned receivable but for any and all obligations that the borrower may have with respect to the lender. In other jurisdictions, like France, Italy, Luxembourg and Portugal, if the securitisation is done under the applicable securitisation legal framework, all ancillary or accessory rights are automatically transferred to the assignee upon acquiring the receivables (except where otherwise agreed). For instance, in France, the law provides that the delivery of the deed of transfer will automatically entail the assignment of any securities, guarantees and ancillary rights attached to each debt including mortgages and their enforceability against third parties without any further formality being required¹⁰⁵.

The practice of automatically transferring all ancillary rights to the assignee without further requirement, which contributes to facilitating the assigning of receivables, would be in line with the approach of the United Nations Convention on the Assignment of Receivables in International Trade of 2001 (hereinafter the ‘UNCITRAL Convention’) on the assignment of receivables in international trade (see below Box 3)¹⁰⁶.

104 e.g. security interests, pledges, guarantees, and credit insurance.

105 Article L. 214-43 of the French Financial and Monetary Code.

106 See Article 10 of the UNCITRAL Convention, ‘Transfer of security rights’.

The UNCITRAL Convention on the assignment of receivables in international trade

Adopted by the General Assembly on 12 December 2001, the main objective of the UNCITRAL Convention on the assignment of receivables in international trade (the UNCITRAL Convention) is to promote the movement of goods and services across national borders by facilitating increased access to lower-cost credit.

In order to achieve this objective, the UNCITRAL Convention, inter alia:

- (i) removes legal obstacles to certain international financing practices, such as asset-based lending, factoring, forfeiting, securitization, refinancing and project financing (e.g. by validating assignments of future receivables and bulk assignments, and by partially invalidating contractual limitations to the assignment of receivables);
- (ii) unifies assignment law with respect to a number of issues, such as effectiveness of an assignment as between the assignor and the assignee and as against the debtor;
- (iii) enhances certainty and predictability with respect to the law applicable to key issues, such as priority between competing claims; and
- (iv) facilitates the harmonization of domestic assignment laws by providing a substantive law regime governing priority between competing claims that States may adopt on an optional basis.

The UNCITRAL Convention is not yet in force. It was ratified by Liberia and signed by Luxembourg, Madagascar and the United States of America.

Source: www.uncitral.org.

1.4. The effect of restrictions contained in the underlying contractual documentation

In some jurisdictions, such as Austria, agreements between creditors and debtors prohibiting the transfer of a receivable do not affect the assignments. In other jurisdictions, such as Greece, the same legal result is achieved if the assignment is made under the applicable Securitisation law, i.e. any non-assignability clause is null and void. Under the Law on securitisation in Portugal and under the German Law on the creation of refinance registers, assignment or registration of receivables is possible, if the transferability is not explicitly excluded. In most jurisdictions, such as Belgium, Denmark, England and Wales, Finland, Germany, Ireland, Italy, the Netherlands, Spain and Sweden, the prohibition of transfer without prior consent is of relevance and any deviation makes the assignment ineffective, at least vis-à-vis the debtor. In Italy, if the debtor is a public entity, under certain circumstances, the debtor's formal approval is required. In Luxembourg, an assignment prohibited by the agreement out of which the assigned claim arises or which, for other reasons, does not comply with the provisions of such agreement is not effective against the assigned debtor unless (a) the assigned debtor has agreed thereto; (b) the assignee legitimately ignored such non-compliance; or (c) the assignment relates to a monetary claim¹⁰⁷. The UNCITRAL Convention provides, in this respect, that 'an assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its

¹⁰⁷ Article 57 of the Luxembourg Law on securitisation. Article 55(1) of the Law provides that an assignment of an existing claim to or by a securitisation undertaking becomes effective between the parties and against third parties as from the moment the assignment is agreed on, unless the contrary is provided for in such agreement.

receivables¹⁰⁸. In Malta, an assignment is treated as ‘final, absolute and binding on the originator, the securitisation vehicle and all third parties’ and cannot be subject to annulment, any right of the creditors of the originator or of a liquidator¹⁰⁹. These provisions apply ‘notwithstanding any underlying contractual or statutory prohibition or restriction on the originator to assign in whole or in part the securitisation asset to any third party’¹¹⁰.

Recommendation No 10:

With a view to ensuring legal certainty and uniformity throughout the EU, an EU legal act on certain legal aspects of securitisation should contain the following principles:

- **the perfection, admissibility into evidence or enforceability of an assignment against a debtor, debtor’s creditors or any third party should not depend on the performance of a formal act, the debtor’s consent or notification of the debtor;**
- **ancillary rights should automatically transfer to an assignee without further requirement, as validated by the UNCITRAL Convention;**
- **assignments of receivables in a securitisation transaction should be possible and made effective, unless such transfers are explicitly excluded by an agreement between the creditor and debtor.**

2. Securitisation and insolvency rules

2.1. Insolvency remoteness of SPVs

The legal nature of a securitisation SPV is relevant with respect to an SPV’s risk of bankruptcy. Where an SPV is a fund, it is normally not subject to general bankruptcy laws by virtue of the securitisation law that created it. Where an SPV is a company, it will be subject to general bankruptcy laws. The initial structuring considerations for all securitisation transactions generally focus on how assets can be isolated under domestic law so that the bankruptcy or corporate re-organisation of an originator does not adversely affect the payment of principal and interest on the securities issued by the securitisation SPV. Generally, to achieve this goal, the assets are transferred by means of a ‘true sale’ to a bankruptcy-remote SPV, i.e. a vehicle unlikely to be subject to voluntary or involuntary insolvency proceedings¹¹¹. Depending on the jurisdiction and the legal nature of the securitisation SPV, different or additional considerations will be relevant in order to determine whether an SPV is bankruptcy remote, since the relevant jurisdiction may have enacted a specific legal framework that

¹⁰⁸ Chapter III, Article 9(1) of the UNCITRAL Convention.

¹⁰⁹ Article 10(1) of the Maltese Law on securitisation.

¹¹⁰ Ibid.

¹¹¹ ‘European Legal Criteria 2005’, *Standard & Poor’s Structured Finance Ratings*, March 2005, part I, p. 11.

addresses bankruptcy and security interest concerns. These aspects are examined by the rating agencies to determine whether a given SPV is sufficiently bankruptcy-remote (see, for example, the methodology of Standard & Poor's described in Box 4).

Box 4

The insolvency remoteness criterion: the perspective from a rating agency

With a view to determining whether an SPV is bankruptcy remote, the rating agency Standard & Poor's examines the incentives of the SPV's directors or equity holders to institute voluntary insolvency proceedings and the incentives of the SPV's creditors to institute involuntary insolvency proceedings. Another aspect that needs to be assessed is whether third party creditors of the SPV's parent would have an incentive to make a claim against the SPV's assets to satisfy the parent's obligations. Therefore, the bankruptcy-remoteness analysis involves consideration of the insolvency regime that could govern an SPV's bankruptcy. Standard & Poor's has identified the following criteria which an SPV should satisfy to be considered 'bankruptcy-remote', i.e. sufficiently protected against both voluntary and involuntary insolvency risks:

- (a) restrictions on objects and powers: The objects and powers of an SPV must be restricted as closely as possible to the bare activities necessary to effect the transaction. The purpose of this restriction is to reduce the SPV's risk of insolvency due to claims created by activities unrelated to the securitised assets and the issuance of rated securities;
- (b) debt limitations: The purpose of the SPV additional debt limitation is to minimise the likelihood that an SPV will be filed or petitioned into bankruptcy by its creditors;
- (c) independent director: In certain European countries, among the major decisions requiring a resolution of the board of directors of an SPV is the decision to initiate insolvency proceedings. It is this concern that prompts the rating agency to request an independent director in respect of corporate SPVs, or the equivalent in the case of other forms of SPVs;
- (d) no merger or reorganisation: This criterion seeks to address the concern that, while the rated debt is outstanding, the insolvency-remote status of an SPV is not undermined by any merger or consolidation with a non-SPV or by any re-organisation, dissolution, liquidation, or asset sale, or the purchase by another company of the SPV's shares;
- (e) separateness covenants: Separateness covenants are designed to provide comfort that the SPV holds itself out to the world as an independent entity. If the entity does not act as if it has an independent existence, a court may apply the principles of 'piercing the corporate veil' or 'substantive consolidation' to bring the SPV and its assets into the parent's bankruptcy proceeding; and
- (f) security interests over assets: An SPV should grant a security interest over its assets to the holders of the rated debt. The granting of a security interest by an SPV assists the rating agency in reaching the analytical conclusion that an issuer is bankruptcy remote by reducing the incentives of the parent, the creditors of the parent and any other creditors of the SPV to file the issuer into bankruptcy and thus gain access to the SPV's cash flows and assets.

Source: Standard & Poor's' European Legal Criteria 2005', pp. 11-15.

In some jurisdictions, the law expressly provides that a transfer of assets will remain effective following a judgement on the opening of insolvency proceedings against an originator, except where these claims result from continuing contracts¹¹² for an undetermined amount¹¹³. Similarly, the Luxembourg law provides that '[i]n the event that the assignor or third party to which the collection of claims has been entrusted becomes subject to insolvency proceedings...or any other proceedings affecting the rights of creditors generally, the securitisation undertaking is entitled to claim any sums

¹¹² In French, '*contrats à exécution successive*'.

¹¹³ Article L. 214-43 of the French Financial and Monetary Code.

collected on its behalf prior to the opening of such proceedings'¹¹⁴. Moreover, as regards future cash flows, the Luxembourg law provides that the assignment of a future claim is conditional upon its coming into existence, but when the claim does come into existence, the assignment becomes effective between parties and against third parties as from the moment the assignment is agreed on, unless the contrary is provided for in such agreement, notwithstanding the opening of bankruptcy proceedings or any other collective proceedings against the assignor before the date on which the claim comes into existence¹¹⁵.

As regards the issue of under what circumstances the receiver of an originator's estate could challenge and declare void (a) a security interest by an SPV over its assets; (b) a sale of assets when liquidating them; or (c) payments to the investors under the debt instrument, jurisdictions are generally split between two approaches. First, those jurisdictions which have legislated specifically for securitisation allow for no or limited challenge to the securitisation vehicle, provided such structures are in full compliance with the relevant statutes. In France, the law provides that an FCC does not have any legal personality and cannot be subject to any insolvency proceedings by virtue of law. An FCC is not subject to the insolvency provisions of the Commercial Code. Unless otherwise stipulated in the instruments incorporating the fund, the assets of a given compartment are liable only for the debts, undertakings and obligations, and entitled only to the debt related to such compartment¹¹⁶. Within the six months after the funds last debt is extinguished or, where applicable, a compartment of the fund, the fund manager must liquidate the fund or this compartment¹¹⁷. In Malta, the law provides that no proceedings taken in relation to an originator shall have any effect on the securitisation vehicle, any securitisation assets acquired or risks assumed by the securitisation vehicle, as well as any cash flow or other asset of the securitisation vehicle and any payments due by the underlying debtors in connection with the securitised assets¹¹⁸. Second, those jurisdictions, which use existing legislation/common law allow for challenges in line with their usual insolvency law. For example, transactions can be challenged if they are considered to be preferential (i.e. preferring one creditor over others within a given time period prior to the onset of insolvency).

2.2. Commingling risk

Commingling risk is defined as the risk that cash belonging to an issuing SPV is mixed with cash belonging to a third party (for instance, an originator or servicer) or goes into an account in the name of a third party in such a way that, in the insolvency of the third party, it cannot be separately identified or is frozen in the accounts of the third party¹¹⁹. Techniques used to minimise the

114 Article 61(2) of the Luxembourg Law on securitisation.

115 Ibid. at Article 55(3).

116 Article L. 214-43 of the French Monetary and Financial Code.

117 Ibid. at Article L. 214-49.

118 Article 7 of the Maltese Law on securitisation.

119 Glossary of Legal Terms, Structured Finance, Standard & Poor's, 2003, p. 7.

commingling risk are quite diverse, and include (a) an originator declaring a trust over its accounts through which SPV monies flow; (b) a charge over an originator's accounts; and (c) the creation of 'lock-box accounts' that isolate the securitisation vehicle's assets from the originators. For all jurisdictions, this issue of commingling is largely dependent on whether the securitised assets associated with the cash flows form part of the originator's estate. If the 'true sale' is effective, insolvency officers generally cannot touch the securitised assets. There is, however, a range of challenges to a disposal of securitised assets available to insolvency officers. For example, in a winding-up in England & Wales, the liquidator can put a freeze on all cash flows in and out of accounts held in trust for the securitisation pending the establishment that the trusts over those accounts are validly constituted. In the Netherlands, if the transferor is still receiving cash flows from debtors that are actually for the securitisation and the debtors have not been notified of the transfer, the SPV will still take preference over those cash flows but subject to the costs of the insolvency of the transferor. All jurisdictions have either effectively legislated or structured transactions around these potential challenges to protect the cash flows.

France, Luxembourg, Portugal and Greece have introduced specific provisions establishing dedicated tools for minimising or avoiding the commingling risk in securitisation transactions. For instance, in France, the law provides that the fund manager and the establishment responsible for recovery of the assigned debt may agree that the amounts recovered shall be credited to an account specifically opened in favour of the fund or, where applicable, the compartment, and which may not be used by the creditors of the entity responsible for recovery to enforce payment of their debt, even in the event of administration or liquidation proceedings being opened against such entity¹²⁰. The operating conditions of this account are determined by decree¹²¹. The Luxembourg law provides that, in the event that an assignor or third party to which the collection of claims has been entrusted becomes subject to insolvency proceedings affecting the rights of creditors generally, the securitisation undertaking is entitled to claim any sums collected on its behalf prior to the opening of such proceedings, without the other creditors having any rights to such amounts, and notwithstanding any claims raised by the bankruptcy receiver, the controlled management commissioner or the liquidator¹²². This provision is intended to mirror the principle set up in the UNCITRAL Convention¹²³ signed by Luxembourg (see above Box 3). According to Greek law, the proceeds of the receivables have to be deposited immediately upon collection to a segregated account held with the servicer (if it is a credit institution) or with a credit institution established in the European Economic Area¹²⁴. In the Netherlands, any payments on the securitised assets, which are made to a bank account held by an

120 Article L. 214-46 of the French Financial and Monetary Code, third paragraph.

121 Ibid. at Article R. 214-110.

122 Article 61(2) of the Luxembourg Law on securitisation.

123 Article 24 of the UNCITRAL Convention.

124 Article 10(15) of the Greek Law on securitisation.

originator or servicer but not yet distributed to the SPV, will fall in the bankrupt estate of such originator or servicer upon being declared bankrupt. However, an issuer has the right to receive such amounts by preference after deduction of the general bankruptcy costs.

Recommendation n°11:

With regard to insolvency:

- **securitisation laws should ensure the insolvency remoteness of securitisation SPVs and, in particular, permit the isolation of securitised assets from an originator, its creditors and insolvency officials and prevent consolidation of an SPV with its originator for insolvency purposes; and**
- **securitisation laws should prevent insolvency officers from interfering with cash flows associated with securitised assets (e.g. commingling) or the disposal by such SPVs of those assets to third parties.**

3. The securitised assets

3.1. Limitations with respect to the type of assets to be securitised

As pointed out by the ESF¹²⁵, the financial assets that support payments on ABS include residential and commercial mortgage loans, as well as a wide variety of non-mortgage assets such as trade receivables, credit card balances, consumer loans, lease receivables, automobile loans, and other consumer and business receivables. Although these asset types are used in some of the more prevalent forms of ABS, the basic concept of securitisation may be applied to virtually any asset that has a reasonably ascertainable value, and that generates a reasonably predictable future stream of revenue. As a consequence, the types of financial assets that can be securitised are very diverse and comprise, in principle, receivables, debts, claims, present and future, performing and non-performing, including claims against governmental and quasi-governmental entities. The assessment of the respective legal frameworks tends to indicate that, although the law usually does not expressly restrict the type of assets, in practice, the scope of the assets that can be securitised covered by the domestic frameworks may vary substantially from one country to another as a result of legal provisions or the application or interpretation of such provisions.

In Austria, Belgium, the United Kingdom, Finland, Germany, Ireland and Sweden, there is no specific limitation in terms of assets. In France, the law covers receivables arising from an existing or future agreement. Such receivables may be governed by French law or foreign law, and can be receivables that have not matured, future receivables (the amount and maturity of which are not determined on the

¹²⁵ *European Securitisation: a Resource Guide*, ESF, 1999, p. 1.

relevant transfer date), illiquid/defaulted receivables, uncertain/doubtful receivables or disputed receivables/receivable subject to litigation. The law also covers debt securities. The scope of the Luxembourg law is very wide and provides that risks relating to holding assets, whether movable or immovable, tangible or intangible, as well as risks resulting from the obligations assumed by third parties or relating to all or part of the activities of third parties are capable of being securitised.

In Greece, the law covers claims against third parties including consumers. Such claims can be future claims or claims whose materialisation depends on the fulfilment of certain conditions. In Italy, the law covers only monetary claims, i.e. receivables and raises some legal uncertainty as to the possibility to securitise certain categories of assets (for instance, future receivables or synthetic securitisation¹²⁶). In Portugal, the law covers receivables, which are monetary in nature, not subject to any conditions, and not encumbered, pledged or seized under litigation.

In Spain, the assets grouped in a *fondo de titulización de activos* must be of ‘homogeneous nature’ with the exception of private funds (*fondos institucionales*), transactions where the securities are only targeted at institutional investors and are not admitted to trading¹²⁷. Although this notion is broadly interpreted by the Spanish supervisory authority for financial markets, this concept is challenged by market participants for commercial and legal reasons. From a legal viewpoint, the concept of homogeneity is not defined and therefore the scope of application is unclear (e.g. debtors assets, types of risks, etc.)¹²⁸.

The transfer of receivables that are secured by rights in real property (e.g. mortgages) requires, in almost all jurisdictions, compliance with specific formalities¹²⁹. These aspects are not examined further in the Report.

The EFMLG is of the view that any regulatory restrictions on the types of assets that can be securitised should be closely circumscribed, proportionate and objectively justified. Should the Commission consider taking legislative action in the securitisation field, it may wish to consider introducing a notification system, whereby draft legislative provisions that involve restrictions on the types of assets that can be securitised would require (prior) notification to the Commission. This should help ensure transparency and a level playing field across the EU¹³⁰.

126 See the answers to the EFMLG questionnaire and also the Letter of the ESF to the Italian authorities of 9 June 2004. Available on the ESF’s website at www.europeansecuritisation.org.

127 See the Letter of the ESF to the Spanish authorities of 28 October 2005, p. 7. Available on the ESF’s website at www.europeansecuritisation.org.

128 Ibid.

129 For instance, in Austria, Belgium, England and Wales, France, Germany, Greece, Ireland, Italy, Luxembourg and Portugal, the transfer of a mortgage or the transfer of a receivable must be registered in the land register or mortgage register or notified to the registrar.

130 For an example of a comparable mechanism, see the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L376, 27.12.2006, p. 36).

Recommendation No 12:

Any regulatory restrictions on the types of assets that can be securitised should be closely circumscribed, proportionate and objectively justified. A requirement that such restrictive provisions be notified to the Commission could be set up with a view to ensuring transparency and a level playing field across the EU.

3.2. Identification of the transferred assets

One requirement that can be found in all jurisdictions is that the assignment of receivables must be specific enough to identify, at any time, with sufficient certainty, whether or not a particular receivable is the subject of an assignment. In France, the assignment of debt is made solely by delivery of the deed of transfer and takes effect between the parties and binds third parties on the date stated on the note on delivery, whatever the date of creation, maturity or payment of the debt, without any further formality being required¹³¹. The law describes the information required on the deed of transfer.¹³² In Belgium, a transfer of receivables requires the receivable to be determined or determinable and the receivables must exist or must be able to exist. A receivable is determined or determinable if it is clear which receivables the parties intended to transfer at the moment of execution of the sale and purchase agreement. In Italy, no individual identification of the assigned receivables is required; however, these receivables must be ‘identifiable as a pool’. The Italian authorities consider that, to be a ‘pool’, the receivables should be capable of being distinguished by a common feature such as, for instance, the type of financing, the kind of counterparty, the economic sector, the territorial area involved, etc.¹³³

Under the UNCITRAL Convention (see above Box 3), an ‘existing receivable’ means a receivable that arises upon or before conclusion of the assignment contract.

In order to facilitate receivables financing¹³⁴, the UNCITRAL Convention sets aside statutory and other legal limitations with respect to the assignability of certain types of receivables (e.g. future receivables) or the effectiveness of certain types of assignment (e.g. bulk assignments) that are typical in receivables financing transactions. The Convention provides that ‘[a]n assignment is not ineffective...on the ground that it is an assignment of more than one receivable, future receivables, provided that the receivables are described: (a) Individually as receivables to which the assignment

131 Article L. 214-43 of the French Financial and Monetary Code.

132 Ibid. at Article L. 214-43 to L. 214-48. A deed of transfer must include a statement that it constitutes a ‘claims assignment instrument’ (*acte de cession de créances*) and that the assignment is subject to specific provisions of the French Monetary and Financial Code. The deed of transfer includes in particular ‘the designation and details of the assigned debt and the means by which they are designated or individualised; for example, by specifying the debtor, place of payment, amount of the debts or their value and, where applicable, the payment date’ (Article R.214-109 of the French Monetary and Financial Code, Regulatory part).

133 See the answers to the EFMLG questionnaire, Question 4, ‘Transfer and ring-fencing of assets’.

134 Explanatory note by the UNCITRAL Secretariat, paragraph 26 of the UNCITRAL Convention.

relates; or (b) In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of conclusion of the original contract, be identified as receivables to which the assignment relates'¹³⁵.

3.3. The issue of future receivables

The assessment of national laws highlights the diversity and heterogeneity of rules applicable to future receivables. These rules are closely related to the features of the respective civil law frameworks (and are not only of specific relevance in the context of securitisation) and depend also on the types of assets concerned. Although most of the jurisdictions provide for the securitisation of future receivables, the application of the legislation is not homogeneous across jurisdictions and may also give rise to divergent case law.

In France, receivables arising from an existing or future agreement can be assigned and future receivables (the amount and maturity of which are not determined on the relevant transfer date) may be securitised¹³⁶. In Greece, future claims can be securitised if they are ascertained or ascertainable in any way. In Italy, it is doubtful whether future receivables arising from future agreements may be securitised (transactions involving such receivables are usually structured via revolving purchase agreements). In Austria, future cash flows are covered unless the contract underlying the receivable has not been entered into before the start of the debtor's bankruptcy proceedings. In Luxembourg, future cash flows are also covered by the law, which provides that 'a future claim, which arises out of an existing or future agreement, is capable of being assigned to or by a securitisation undertaking, provided that it can be identified as being part of the assignment at the time it comes into existence or at any other time agreed between the parties'¹³⁷. In Sweden, future cash flows may be securitised provided that the originator has performed its related obligations at the point of funding. If the originator has not yet performed the obligations which are consideration for the receivable, when the originator becomes subject to a bankruptcy order, the receivable will belong to the bankruptcy estate (and not to the assignee or pledgee). In Portugal, future receivables may be securitised provided that the amount of the receivables to be assigned is established or quantifiable at the moment of the assignment and that they arise from the contractual relationships existing at the moment of the assignment. In Denmark, the law does not provide for the securitisation of future cash flows. Future cash flows may be assigned if they can be individually identified in advance. However, the assignment may be the subject of avoidance or annulment in case of the assignor's bankruptcy. In the Netherlands, under certain provisions of the Dutch Civil Code, the assignment of a future receivable has to be notified to the relevant debtors if the legal relationship from which it results does not already exist in

¹³⁵ Chapter III, Article 8(1) of the UNCITRAL Convention.

¹³⁶ On the distinction between '*créances futures*' and the '*créances à exécution successive*' under French law, see J-C. Cabotte, '*Les établissements de crédit créanciers: dix ans d'évolution législative*' in *La Semaine Juridique Entreprises et Affaires* (3.A), No 41, 12 October 2006, p. 2454.

advance of the time of the assignment. In Italy, securitised assets are defined as ‘pecuniary receivables, which where already in existence or arising in the future and identifiable as a pool (*blocco*)’ and two issues seem to constitute an obstacle to the transfer of future receivables, i.e. (a) the identification of the necessary requirements to make those receivables not yet existing being transferred through a transfer agreement (and in particular the notion of ‘*blocco*’); and (b) the enforceability of such transfer against the bankruptcy of the transferor. Spain has introduced legislation to provide for the possibility of securitising future credit rights. Spanish law provides that, among the different assets that may be incorporated into an asset securitisation fund, are ‘future credit rights, consisting of income or receipts of a known or estimated amount, the transmission of which is contractually formalised, evidenced in unequivocal form the full assignment of the title’¹³⁸. The one exception is that the securitisation of these assets is subject to authorisation from the Spanish Ministry of Finance. A specific order lists a wide variety of future flows that are expressly authorised to be securitised without further Government approval¹³⁹.

Future cash flows should be eligible for securitisation. Although this would constitute a challenging task, the Commission should consider adopting a common definition for future cash flows at the EU level and thus ensure a more harmonised treatment across EU Member States of the transfer of such assets to an SPV. This should increase legal certainty and contribute to the development of securitisation markets.

Under the UNCITRAL Convention, an ‘existing receivable’ means a receivable that arises upon or before conclusion of the contract of assignment and a ‘future receivable’ means a receivable that arises after conclusion of the contract of assignment¹⁴⁰. To facilitate receivables financing¹⁴¹, the UNCITRAL Convention sets aside statutory and other legal limitations with respect to the assignability of certain types of receivable (e.g. future receivables) or the effectiveness of certain types of assignment (e.g. bulk assignments) that are typical in receivables financing transactions. It is sufficient if receivables are identifiable as receivables to which the assignment relates at the time of assignment or, in the case of future receivables, at the time of conclusion of the original contract. One act is sufficient to assign several receivables, including future receivables¹⁴².

137 Article 55(2) of the Luxembourg Law on securitisation.

138 See the ESF’s response to the Croatian Law on securitisation consultative document, 20 November 2006, Answer to question 6. Available on the ESF’s website at www.europeansecuritisation.org.

139 Spanish Order of 10 November 2005. See also the above ESF’s response to the Croatian Law on securitisation consultative document.

140 Article 5(b) of the UNCITRAL Convention.

141 Explanatory Note by the UNCITRAL Secretariat, paragraph 26 of the UNCITRAL Convention.

142 Chapter III, Article 8 of the UNCITRAL Convention.

Recommendation No 13:

An EU legal act on securitisation should include the principles set out in the UNCITRAL Convention with respect to bulk assignments as well as a common definition of future cash flows, with a view to ensuring legal certainty and the harmonised treatment of these assets across EU Member States.

3.4. Consumer credit

Current Community legislation on consumer credit dates back to 1986 and does not specifically take into account securitisation-related issues. For instance and as further detailed below, it does not address the issue of whether consumers should be informed in case of the assignment of consumer credits to third parties. This is currently being examined in the context of the discussion on the amendments to the Consumer Credit Directive¹⁴³. Against this background, domestic consumer credit laws may provide, in some Member States, for some peculiarities in the context of securitisation of consumer credits. For instance, for securitisations purchasing consumer credit receivables, there is a possibility that some forms of licensing may be required, especially in England and Wales and in the Netherlands. In Belgium, a special legal regime applies to the assignment of receivables resulting from consumer credits¹⁴⁴.

In Italy, with reference to the sale of consumer loans, a consumer is entitled to raise against a purchaser any exception that it could raise against a seller, including, by way of derogation to the Italian Civil Code, any right of set-off. In Luxembourg¹⁴⁵, if debtors of assigned receivables are consumers, the law on consumer credit provides that all exceptions and defences that a consumer could hold against an initial lender can also be held against a purchaser of receivables to which the consumer is the debtor, and in particular those arising from the law on consumer credit. More generally, a debtor of an assigned receivable can hold against the purchaser of the receivable all exceptions and defences that are available against the seller, provided that such exceptions and defences became effective prior to the perfection of the assignment¹⁴⁶.

143 Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48).

144 i.e. consumer credits falling within the scope of the Belgian Law of 12 June 1991 on consumer credits. These credits may only be transferred to the Nationale Bank van België/Banque Nationale de Belgique, credit insurers and undertakings for the investment in receivables (UIR) provided that they are issued by a recognised consumer credit provider or an EU credit institution licensed to provide consumer credits). In Belgium, an assignment is only enforceable against consumers if the consumer is notified of the assignment by registered mail, unless the assignment and the identity of the assignee have been explicitly referred to in the initial credit agreement. However, this notification requirement has been abolished for transfers to Belgian UIRs. A further difficulty for consumer credit securitisation is that consumer credit receivables may only be assigned if the credit provider has explicitly provided for such assignment in the consumer credit agreement. Otherwise, consumer credit receivables cannot be assigned.

145 *The International Comparative Legal Guide to: Securitisation 2006, A practical insight to cross-border Securitisation Law*, Global Legal Group Ltd, 2006, Chapter 29, p. 217.

146 Ibid. at Chapter 22, p. 155.

At the EU level, the modified proposal for a Consumer Credit Directive (hereinafter the ‘modified proposal’)¹⁴⁷ currently under discussion by the Council and the Parliament provides, in this respect that ‘where the creditor’s rights under a credit agreement or surety agreement or the agreement itself are assigned to a third party, the consumer shall be entitled to plead against the assignee any defence which was available to him against the original creditor, including set-off where the latter is permitted in the Member State concerned’¹⁴⁸. According to the Commission, the rationale for this provision is that the transfer of the creditor’s rights under a credit agreement should not have the effect of placing the consumer in a less favourable position¹⁴⁹.

Furthermore, the modified proposal provides that ‘the consumer should be properly informed when the credit agreement is assigned to a third party’¹⁵⁰. The modified proposal introduces an exception where the assignment is only effected for securitisation purposes and ‘where the original creditor, in agreement with the assignee, still acts on behalf of the assignee as a creditor vis-à-vis the consumer’¹⁵¹. In such case, the Commission considers that the consumer does not have an important interest in being informed about the assignment. Therefore, a requirement at EU level to inform the consumer about the assignment in such cases would be excessive, but Member States should remain free to maintain or introduce such requirements in their national legislation¹⁵².

The EFMLG shares the view that a requirement at EU level to inform consumers about an assignment in such cases would be excessive, in particular because where a credit is assigned for securitisation purposes, the original creditor frequently continues to act as the servicer vis-à-vis the consumer. The proposal discussed by the Council (the Council compromise proposal) reflects this view, considering that where an initial creditor, in agreement with an assignee, still services the credit vis-à-vis the consumer, the consumer does not have an important interest in being informed about the assignment¹⁵³. Furthermore, the Council compromise proposal provides that ‘a requirement at EU level to inform the consumer about the assignment in such cases would be excessive’.¹⁵⁴ More specifically, the Council compromise proposal provides that ‘the consumer shall be informed of the assignment referred to in paragraph 1 except where the original creditor, in agreement with the assignee, still services the credit vis-à-vis the consumer’¹⁵⁵. The wording discussed by the Council should be supported. However, the EFMLG considers more generally that the amendments to the

147 Modified proposal for a Directive of the European Parliament and of the Council on credit agreements for consumers amending Council Directive 93/13/EC, 23.11.2005, COM (2005) 483 final/2 (hereinafter the ‘modified proposal’).

148 Ibid. at Article 16, first paragraph.

149 Ibid. at Recital 27.

150 Ibid. at Recital 27 and Article 16, second paragraph.

151 Ibid. at Article 16, second paragraph.

152 Ibid. at Recital 27.

153 See Recital 27 and Article 16(2) of the German Presidency compromise text, 5 April 2007, 8306/07 (the Council compromise proposal).

154 Ibid at Recital 27 of the Council compromise proposal.

155 Article 16(2) of the Council compromise proposal. In the context of the discussion at the Council, the above provisions are not limited to assignments for securitisation purposes but also cover other types of assignments.

Consumer Credit Directive should remove any ambiguities as to the issue of the notification of an assignment to consumers and its possible impact on the enforceability of the assignment.

Recommendation No 14:

The amendments to the Consumer Credit Directive should remove any ambiguities as to the issue of the notification of assignment to consumers and its possible impact on the enforceability of the assignment.

C. Other legal obstacles relating to securitisation

1. Data protection and banking secrecy

1.1. Data protection

There are various situations where the disclosure of debtor-related information can be required in the context of a securitisation deal, for instance, when (a) an arranger carries out a due diligence to assess the quality of a portfolio of receivables; (b) a rating agency asked to assign a rating to the ABS collateralised by a portfolio carries out a due diligence; (c) the disclosure of personal data is required to perfect an assignment that would otherwise lack the required certainty, and (d) an originator is no longer responsible for servicing assets and collecting claims (e.g. when an originator is a party to an insolvency proceeding and, as a result, the servicing agreement is terminated).

The issue of dissemination of debtor-related data in the context of securitisation is addressed differently in the various EU jurisdictions. In certain Member States, the law expressly refers to the application of data protection rules in the case of securitisation¹⁵⁶. In Germany, the issue has given rise to case law and the BaFin provided some guidance¹⁵⁷ clarifying the basic principle, i.e. that debtor-related data should only be disclosed with the debtors' prior approval and also defining some exceptions. According to the BaFin, (a) no prior approval is required if, and to the extent that, the

¹⁵⁶ For instance, in Malta, the Act on securitisation (Act No V of 11 April 2006, part V. Miscellaneous, Article 21) provides that any data or information transferred between persons within the context of a securitisation must be transferable without any restriction or limitation, although such data or information shall retain its secret or confidential status for other effects or purposes. Any transfer of personal data shall be deemed to be for a purpose that concerns a legitimate interest of the transferor and transferee of such data, unless it is shown that such interest is overridden by the interest to protect the fundamental rights and freedoms of the data subject and in particular the right to privacy. The Securitisation Act enumerates the different parties which may be concerned by this information or data transfer and the types of transfers, i.e. the originator, the securitisation vehicle(s), any person that has been delegated administrative duties and functions, a representative of investors, any credit rating agency, any counterparty in a derivative contract, lender, liquidity provider or credit support provider. The Act refers to the transfer of data or information between an originator and a securitisation vehicle, between one securitisation vehicle and another, between a securitisation vehicle and any person that has been delegated administrative duties and functions, or between a securitisation vehicle and an investors' representative, between an originator or securitisation vehicle and any credit rating agencies, or between an originator or securitisation vehicle and any counter-party in a derivative contracts, lender, liquidity provided or credit support provider.

disclosure of debtor-related information is required to perfect a transfer of assets, or if it is necessary to provide rating agencies, accounting firms or trustees with required information; and (b) no prior approval is necessary if the servicing is done by the originator, or if the substitute service agent is a credit institution within the EU. The German Law on the creation of refinance registers amended the Law on banking pursuant to which receivables are eligible for registration in the refinancing register as long as the parties have not explicitly agreed otherwise. Some German banks have also amended their standard business terms and the debtor's approval for the transfer of relevant data is contained in the general consent to the sale and assignment of receivables for refinancing purposes¹⁵⁸. In certain circumstances, under the Dutch Civil Code, a receivable may not be transferable because of the prohibition on providing personal information about clients to third parties, which must be regarded as a tacit no-assignment clause. This may be the case when client information is disclosed with the transfer of rights. This will occur very rarely, as originators usually service assets.

The Data Protection Directive¹⁵⁹ applies to all processing of personal data by any person whose activities are governed by Community law¹⁶⁰ and allows for the disclosure of personal data only under certain conditions, namely if (a) an individual has unambiguously given their consent; (b) it is necessary for the performance of a contract to which the data subject is party; (c) it is necessary for compliance with a legal obligation to which the controller is subject; or (d) it is necessary for the purposes of the legitimate interests pursued by the controller, or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the fundamental rights and freedoms of the data subject¹⁶¹. The Data Protection Directive also establishes the purpose limitation principle, which means that personal data must only be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes¹⁶². The European Commission has recently examined the application of the purpose limitation principle in the context of discussions on a possible European procedure for the attachment of bank accounts. The information held by banks about the account(s) of debtors constitutes personal data which are protected by the Data Protection Directive. The information is processed by the bank for the purpose of fulfilling the contract of deposit between the debtor and the bank. The disclosure of this information to a court serves the purpose of facilitating the recovery of money by creditors, which although legitimate, is a purpose different from the original one and incompatible with it. Therefore, according to the Commission, the disclosure of the information to a court would constitute an exception to the purpose

157 Circular (Rundschreiben) 4/97, 19 March 1997.

158 See the 2006 version of the Global Legal Group Ltd. Report, 'The International Comparative Legal Guide to: Securitisation 2005, A practical insight to cross-border Securitisation Law', contribution on Germany, answer to questions 2.2 and 8.1, pp. 109 and 115.

159 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L281, 23.11.1995, p. 31).

160 Recital 12 of the Data Protection Directive.

161 Ibid. at Article 7.

162 Ibid. at Article 6.

limitation principle. Such exceptions are permissible, as long as they comply with the certain requirements set out the Directive¹⁶³.

When data relating to debtors is transferred in the context of assignments for securitisation purposes, certain practices could be in conflict with the Data Protection Directive. For instance, the purpose limitation principle could be breached since the data relating to debtors were provided in the context of a contractual relationship between the debtor and its creditor and the disclosure of the data to third parties in case of assignment of the loan serves purposes that are different from the original one and incompatible with it. Against this background and also with a view to ensuring a level playing field within the EU, the EFMLG considers that, should the Commission decide to take an initiative at the European level with respect to securitisation, it would be necessary to clarify under which conditions disclosure of debtor-related information would not constitute an infringement of data protection rules.

1.2. Banking secrecy

Every person involved in running or managing a credit institution or who is employed by such institution is bound by professional secrecy obligations and banking secrecy rules may require the non-disclosure of debtor-related information. As pointed out by the ESF, banking secrecy is generally seen to be essentially parallel to general data protection laws so that the transfer of data relating to receivables originated by a bank is generally subject to the same level of protection as any personal data, regardless of whether it relates to an individual or a company¹⁶⁴. In France, the Monetary and Financial Code¹⁶⁵ prohibits banks from transferring any information to third parties without the prior consent of the underlying obligor¹⁶⁶. In Luxembourg, if an originator of transferred assets is a credit institution or other financial sector professional, persons working for these institutions may not disclose information confided to them in the course of their professional activities. These persons are

163 See the Commission staff working document – Annex to the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts, COM(2006) 618 final. The Commission considers that “Article 13 of the Data Protection Directive provides that Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for, in among others, Article 6 of the Directive if such a restriction is necessary to safeguard the protection of the data subject or of the rights and freedom of others. In addition, according to the ECJ, the communication of data to third parties, including public authorities interferes with the right to privacy protected by Article 8 of the European Convention of Human Rights (ECHR). Any legislation permitting derogations from the principle of purpose limitation therefore also needs to be justified from the point of view of Article 8 of the ECHR. In this respect, the Strasbourg Court has repeatedly recalled that ‘the law providing for the interference must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference’ (5.1.5. Information to be provided by the bank on the debtor’s accounts)”.

164 ‘A Framework for European Securitisation’, ESF White Paper, May 2002, p. 55.

165 Article L.511-33 of the French Financial and Monetary Code.

166 The French Banking Federation has taken an action in France to modify this article in order to take into account the specificity of securitisation transactions, however, as of yet, the article has not been amended with respect to the transfer of receivables. In December 2003, the Paris Europlace Financial Law Committee has also adopted a White Paper entitled ‘Proposals for reforms of the regulatory and legal environment’, in which the Committee also examined a suggestion for an amendment of the French Financial and Monetary Code regarding banking secrecy.

only relieved from their obligation of secrecy when the disclosure of information is authorised or prescribed by law or when a client has expressly requested or authorised such disclosure.

In the context of securitisation, a breach of the non-disclosure obligation, may render the transfer of receivables to an SPV void or unenforceable. In certain situations, this obligation creates some practical difficulties for banks. Two main cases can be mentioned: (a) the operations of transfer of receivables (securitisations, credit derivatives, assignment of receivables); and (b) due diligence operations by banks. In both cases, the transfer of receivables requires an ex-ante assessment of receivables and of their quality¹⁶⁷. Such an assessment needs to be performed on the basis of the individual customer information. Although this assessment can only be performed by other banks that are also bound by banking secrecy obligations, it is difficult to avoid a breach of this rule, except, in certain cases, if a customer expressly authorised the assignment of its debt prior to the assignment. Moreover, investors need information on the evolution of their portfolios on a regular basis. Lastly, in case a credit event occurs, it is necessary to check whether these (sometimes non-public) events effectively occurred (such as a default in relation to a payment obligation).

The concerns relating to banking secrecy rules affect all types of securitisation techniques. For instance, such concerns may also arise in the context of synthetic securitisation, which are not based on the legal transfer of receivables, but instead on the transfer of risk related to assets through the use of credit derivatives such as credit default swaps (CDS) or credit-linked notes (CLN). In so far as the protection seller with respect to a CDS and/or holders of CLN bear the credit risk related to the securitised assets, it is necessary to inform the bank and the investors of the risks attached to these assets. However, the disclosure of information to investors may incur liability for banks since the disclosure obligation imposed on banks needs to be reconciled with banking secrecy. A distinction can be made between ‘blind pool’ transactions and ‘full disclosure’ transactions. ‘Full disclosure’ operations do not usually raise any specific concerns since the securitised assets are, for instance, securities traded on a regulated market or since the debtors are public entities. By contrast, in the case of ‘blind pool’ transactions resulting in claims issued from bilateral contracts, access to information is reduced. Banking secrecy prohibits the disclosure of confidential information regarding the portfolio of assets. As a consequence, while investors may know about the characteristics of claims, a reference portfolio is by its own nature necessarily ‘blind’ and investors should not be informed of the names of entities belonging to a reference portfolio¹⁶⁸.

¹⁶⁷ Similar concerns arise in the context of monetary policy operations and the assignment of claims for collateral purposes. One of the legal requirements imposed on credit claims, in order to ensure that a valid security is created over credit claims and that a credit claim can be swiftly realised in the event of the counterparty’s default, is the absence of restrictions related to banking secrecy and confidentiality (see Chapter 6.2.3. of the Annex to Guideline ECB/2006/12 of 31 August 2006 amending Guideline ECB/2000/7 on monetary policy instruments and procedures of the Eurosystem, OJ L 352, 13.12.2006, p. 1).

¹⁶⁸ See Paris Court of Appeal, 31 October 2003, *Adis association v Crédit Lyonnais* and the analysis of H. de Vauplane and J.J Daigre in *Banque et Droit*, No 103, September-October 2005, pp. 40-42.

Recommendation No 15:

A directive on certain legal aspects of securitisation should ensure the uniform and proportionate application of data protection rules with respect to assignments of receivables for securitisation purposes so that parties to a securitisation are able to transfer confidential data without breaching data protection laws. Similarly, it is important to ensure that banking secrecy obligations are not an obstacle to the necessary exchange of information in the context of securitisation transactions.

2. Conflicts of law rules

2.1. Perfection of an assignment vis-à-vis third parties

A key issue in structuring a securitisation transaction involving receivables owed by obligors established in foreign jurisdictions is the enforceability of the assignment of such receivables against third parties (e.g. any party other than the assignor and the assignee, including the debtor itself and any creditor(s) or liquidator of the originator). These aspects need to be examined in the context of the Community rules on the law applicable to contractual obligations. In this respect, the Commission's proposal for a Regulation on the law applicable to contractual obligations (Rome I) ¹⁶⁹ introduces a new conflict of laws rule, which intends to remedy a lacuna of the current legislation, i.e. under which conditions an assignment can be invoked against third parties¹⁷⁰. This provision clarifies under what conditions an assignment of a claim or a transfer of property is effective¹⁷¹. Under the proposed provision, the question of whether an assignment may be relied on against third parties is governed by the law of the country in which the assignor has his habitual residence at the material time. The European Commission considered several options, including applying the law applicable to (a) the transfer contract; (b) the original claim; (c) the assignment debtor's place of residence; and (d) the assignor's place of residence. The Commission favours the last option since this solution is best suited

169 Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, 15.12.2005. This proposal, once adopted, is supposed to replace the Rome Convention of 1980. The Rome I Convention (OJ C27, 26.01.98, p. 34) is currently silent with regard to the formalities required to perfect an assignment vis-à-vis all other third parties (e.g. general creditors, liquidator, etc.).

170 Article 13(3) of the proposal on voluntary assignment and contractual subrogation reads as follows:
'1. The mutual obligations of assignor and assignee under a voluntary assignment or contractual subrogation of a right against another person shall be governed by the law which under this Regulation applies to the contract between the assignor and assignee.
2. The law governing the original contract shall determine the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged.
3. The question whether the assignment or subrogation may be relied on against third parties shall be governed by the law of the country in which the assignor or the author of the subrogation has his habitual residence at the material time'.

171 Commission's Green Paper on the conversion of Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002) 654 final, 14.01.2003, p. 40.

to satisfy the criterion of foreseeability for third parties and since it corresponds to the position adopted in the UNCITRAL Convention¹⁷². The Commission discarded the view that an assignment contract contains a tacit choice of law clause as regards an assigned claim since, ‘in the event of a multiple assignment, this solution is likely to submit the assignments between assignor and assignee to different laws even though they are a single business operation’¹⁷³. Similarly, the Commission rejected the place of residence of the assignment debtor option since ‘it would further complicate the multiple credit assignments when debtors are resident abroad, a single business operation being subject to several laws’¹⁷⁴.

The UNCITRAL Convention provides, with some exceptions, that ‘the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant’. The Explanatory note to the UNCITRAL Convention notes, in this respect, that: ‘The Convention removes the existing uncertainty with respect to the law applicable to conflicts as to who is entitled to receive payment as between an assignee and a competing claimant, such as another assignee, creditors of the assignor or the administrator in the insolvency of the assignor. This is achieved by subjecting priority conflicts to a single law, one that is easy to determine and is most likely to be the place in which the main insolvency proceeding with respect to the assignor will be opened (i.e. the place of the assignor’s place of business and, in the case of places of business in more than one State, the law of the State in which the assignor has its central administration)’¹⁷⁵.

This provision of the UNCITRAL Convention has given rise to abundant comments in the legal literature and it was considered that ‘this single, easily determinable law to govern priority issues will resolve an issue over which great uncertainty exists in law and literature’¹⁷⁶. It was noted in particular that ‘this Convention applies not only to the assignment of an existing and specifically identified receivable but also to any other kind of assignment. Thus, an assignment may relate to a pool of present and future receivables. In such a case, selecting the *lex situs* of the law governing priorities would not be an efficient policy decision: different priority rules might apply with respect to the various assigned receivables. Moreover, where future receivables are included in an assignment, it would not be possible for the assignee to ascertain the extent of its priority rights at the time of the assignment, since the *situs* of those future receivables is unknown at such time. Therefore, the law of the location of the assignor appears to be the best choice of law rule in order to achieve predictability

172 See Article 22 of the Law on competing rights. In Luxembourg, which has signed the UNCITRAL Convention (with reservations), the Law provides that the law of the State in which the assignor is located governs the conditions under which the assignment is effective against third parties (Article 58, second subparagraph of the Luxembourg Law on securitisation).

173 Commission’s Green Paper on the conversion of Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, pp. 39-40.

174 Ibid. at p. 41.

175 Explanatory Note by the UNCITRAL Secretariat, the UNCITRAL Convention. It is also mentioned that ‘[o]ne of the most important parts of the Convention deals with the impact of assignment on third parties, such as competing assignees, other creditors of the assignor and the administrator in the insolvency of the assignor’ and that ‘the value of these rules lies in the fact that, deviating from traditional approaches, they centralize all priority conflicts to the law of the assignor’s location’ (paragraphs 47 and 48).

176 Spiros V. Bazinas, ‘UNCITRAL’s contribution to the unification of receivables financing law: the United Nations Convention on the assignment of receivables in international trade’, *Unif. L.Rev.* 2002-1, p. 60.

and cost-savings¹⁷⁷. Another author considered that '[t]o the extent that the matter is relevant to a priority dispute, whether the assignee has only a contractual right with respect to assigned receivables or has a property interest in the assigned receivables is governed by the internal laws of the State in which the assignor is located (under the UNCTIRAL Convention's party location rules). Likewise, whether the assignment is a 'true sale' or is for security purposes governed by the internal laws of that State'¹⁷⁸.

For these reasons, the solution adopted in the context of the UNCITRAL Convention has been considered by the Commission as the preferable option with respect to the issue of the perfection of an assignment vis-à-vis third parties in the context of the review of Article 12 of the Rome I Convention. This approach is generally supported by academics and market practitioners¹⁷⁹, the other options being difficult to apply, especially in case of bulk assignments which are the rule in the case of securitisation 'in the increasingly common case of bulk assignments of all present and future receivables. The law chosen by the parties would result in the application of several laws (and, in any case, it would be inappropriate to submit third party effects to the law chosen by the parties). The law governing the receivable would present the same problem. Furthermore, it would not allow parties to determine the law applicable at the time of assignment'¹⁸⁰. Despite this support, some suggestions have been made to improve the imperfections of the drafting of this provision regarding the notion of 'habitual residence' of the assignor and 'at the material time'¹⁸¹. The Council relayed these criticisms and suggested to delete the reference to 'at the material time' and to clarify the meaning of habitual residence¹⁸².

2.2. Transfer of ancillary rights

During the European Parliament's discussion on the Commission's proposed Rome I Regulation, a Member of Parliament proposed introducing a provision that would specify the law that determines

177 M. Deschamps, 'The priority rules of the United Nations Receivables Convention: A comment on Bazinas', *Duke Journal of Comparative & International Law*, 2002, Vol. 12, p. 394.

178 H. C. Sigman and E. E. Smith, 'Towards facilitating cross-border secured financing and securitization: An analysis of the United Nations Convention on the assignment of receivables in international trade', *The Business Lawyer*, Vol. 57, February 2002, p. 754.

179 See, for instance, G. Affaki, 'L'apport de la Convention CNUDCI sur la cession de créances aux opérations de banque', *Banque et Droit*, July-August 2003, p. 7 ; M-E. Angel, E-M. Kieninger and H. C. Sigman, 'La proposition de règlement Rome I et les effets sur les tiers de la cession de créances', *Banque et Droit*, No 107, May-June 2006, pp. 39-46 ; and P. Lagarde, 'Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)', *Rev. Crit. DIP*, 95(2), April-June 2006, pp. 344-345. The London Financial Markets Law Committee (FMLC), by contrast, challenges the Commission's approach and suggests an alternative rule, namely, that the law governing the contract to be assigned be effective against third parties, which, according to the FMLC, would be more consistent with the principle of party autonomy (Issue 121, April 2006, pp. 20-21).

180 See Spiros V. Bazinas, 'UNCITRAL's contribution to the unification of receivables financing law: the United Nations Convention on the assignment of receivables in international trade', *Unif. L.Rev.* 2002-1, p. 61; and S. V. Bazinas 'Key policy issues of the United Nations Convention on the assignment of receivables in international trade', *Tulane J. of International & Comparative Law*, Vol. 11, p. 295, footnote 156.

181 See, in particular, on these aspects, E. Angel, E-M. Kieninger, H. C. Sigman, 'La proposition de règlement Rome I et les effets sur les tiers de la cession de créances', *Banque et Droit*, No 107, May-June 2006, pp. 39-46.

182 See the German Presidency proposal, 2 March 2007, 6935/07.

whether and to what extent ancillary rights are automatically transferred to an assignee¹⁸³. The reason underlying the proposal was that, according to him, a clear conflict-of-law rule that applies ‘especially to contractual relationships that form part of true sale securitisation transactions where the SPV acquires title to the assigned loans or receivables’ would achieve legal certainty and reduce costs for legal due diligence and litigation.¹⁸⁴ The EFMLG notes that this amendment raises a number of issues, which should be further considered by the Commission, the European Parliament and the Committee on civil law matters of the Council before introducing such a provision in the context of the proposed Rome I Regulation. First, the notion of ‘ancillary rights’ is broadly defined covering also for instance, mortgages and its exact scope should be further considered (as another example, it is not clear whether reference is specifically made to ancillary rights ‘attached to assigned receivables’). Second, the proposed conflict-of-law rule, as currently drafted, would not be confined to securitisation and it should be further examined whether a directive covering certain legal aspects of securitisation would not be a more appropriate instrument to define specific rules applicable in the context of securitisation.

Recommendation No 16:

The Commission, the European Parliament and the Committee on civil law matters of the Council should further examine whether it is more appropriate to consider the proposed amendment regarding the conflict of law rule applied to ancillary rights attached to assigned receivables in the context of an EU directive covering certain legal aspects of securitisation.

3. Protection of note holders

3.1. Safeguarding of note holders’ interests

The safeguarding of note holders’ interests is structured differently in the Member States. Safeguarding includes functions such as monitoring an SPV, representing the investors, and in case of difficulties, taking enforcement action, as opposed to, measures taken by an SPV aimed at improving

183 The amendment proposed by MEP Klaus-Heiner Lehne to the proposed Rome I Regulation (Proposed amendment 80, 7.12.06) would introduce a new Article 13, paragraph 3 as follows: ‘[t]he transition of ancillary rights (including, but not limited to, a security interest, mortgage, suretyship or guarantee) or the assignee’s right to claim transfer of such ancillary rights shall be governed by the law that applies to the contract and, if the ancillary right is owed by a third party, by the law that applies to the obligation of the third party’.

184 In this respect the notion of ‘ancillary rights’ in the UNCITRAL Convention covers the transfer of security rights, i.e. ‘a personal or property right securing payment of the assigned receivables’ (See Article 10 of the UNCITRAL Convention and p. 35 of the Explanatory Note by the UNCITRAL Secretariat). See also p. 55 of S. V. Bazinas, ‘UNCITRAL’s Contribution to the unification of receivables financing law: The UN Convention on the assignment of receivables in international trade’, *Rev. dr. unif.* 2002-1, which states that ‘[a]n accessory, personal or property, security right (e.g. a guarantee or a pledge) securing payment of the assigned receivable is transferred with the receivable without a new act of transfer’.

the investor position, which might include guarantees from third parties, the issuance of subordinated units and over collateralisation. In most jurisdictions, a trustee equivalent¹⁸⁵ is not required by law to represent investors, but transactions generally include such a party; the exceptions are Austria, Italy and Sweden, where certain transactions require such representatives. Several jurisdictions require the managing company of a transaction to act in the best interests of the investors, whilst not necessarily excluding representation by an independent third party as well. In the framework of securitisation, note holders do not, in principle, interfere with the management of an SPV and, very often, a separate legal entity may be entrusted with the task of protecting note holders' interests and assuring the proper payment of principal and interest as and when it is due to the note holders. Annex IV provides a brief overview of structures that are used in certain EU Member States to protect the note holders in a securitisation transaction.

In some Member States, the law defines the roles of the legal entities involved in a securitisation transaction and imposes obligations aimed at safeguarding investor interests. For instance, French legislation imposes a duty on an FCC's management company to safeguard investor interests. In other jurisdictions, safeguarding investor interests is delegated to a legal entity separate from an SPV's management to avoid any possible conflict of interest between an SPV and its note holders. For example, the Luxembourg law has adapted the concept of 'fiduciary representative' (*représentant-fiduciaire*) to represent note holders, which is similar to the common law concept of trust. In addition, the law also imposes obligations on management companies.¹⁸⁶ There are also jurisdictions in which the law does not impose any specific requirements in relation to safeguarding interests of an SPV's note holders (e.g. requiring that a separate legal entity be established to protect note holders' interests). For instance, in the UK, there is no specific legislation concerning the establishment of a legal entity for the protection of note holders, but in practice a note trustee is appointed to represent the investors.

Rating agencies have recognised the importance of the entities created to represent note holders for the assessment of a securitisation transaction's credit strength. These agencies monitor, for example, a trustee's ability to perform its core functions, which include monitoring, representation, enforcement and distribution. If a trustee is considered not competent to conduct its functions, this may have a negative impact on a transaction's rating¹⁸⁷. Notably, 'most of the large trust corporations ceased providing directors [for the management of SPVs] because of the prevalent view that there is a clear

185 A trustee is a third party, often a specialist trust corporation or part of a bank, appointed to act on behalf of investors. In the case of securitisation, a trustee is entrusted with responsibility for reaching certain key decisions that may arise during the life of the transaction. The role of a trustee may also include holding security over the securitised assets and control over cash flows. Trustees receive regular reports on the performance of the underlying assets in order to check whether, for instance, cash flow procedures are being followed. Subject to appropriate indemnity and other protections, a trustee is also typically responsible for finding a replacement servicer when necessary, taking up legal proceedings on behalf of the investors, and, as the case may be, for selling the assets in order to repay investors (see Standard & Poor's glossary of securitisation terms, 2003, p. 31).

186 According to Article 16 of the Luxembourg Law on securitisation, a management company must perform its duties in an independent manner and in the sole interest of the securitisation fund and the investors.

187 See 'The role of trustees in EMEA Structured Finance Transactions', *Moody's Special report*, 9 February 2005, pp. 1-8.

conflict of interest in acting as trustee for the investors while at the same time directing the activities of SPVs¹⁸⁸.

In a cross-border context, safeguarding note holders' interests in a securitisation transaction may raise some difficulties because of the lack of recognition of foreign entities, the absence of legislation on trusts in all countries and the application of domestic insolvency rules. If there is a structure created by law to protect note holders, such as the Luxembourg fiduciary representative or the UK note trustee, domestic rules will usually not apply if this body is situated in a Member State other than the place where the SPV is located. As an example, the Luxembourg Law on securitisation¹⁸⁹ only applies to fiduciary-representatives having their registered office in Luxembourg. Therefore, if a trustee is registered abroad and appointed to represent the note holders, the Law would not necessarily provide sufficient protection and the foreign trustee would not benefit from the rights granted to a Luxembourg fiduciary representative¹⁹⁰.

Recommendation No 17:

An EU legal act on securitisation should provide that Member States are required to ensure that entities representing note holders' interests in securitisation transactions can be clearly identified by investors and that a precise description of their rights and obligations is provided to investors (including possible restrictions in terms of legal capacity vis-à-vis foreign investors).

3.2. The role of rating agencies and rating requirements

The role of ratings in the context of securitisation markets, the methodologies of rating agencies in the field of structured finance, as well as the identification of legal risks in securitisation transactions is increasingly under scrutiny¹⁹¹. For instance, the European Commission invited, inter alia, the Committee of European Securities Regulators (CESR) to examine the quality of the ratings process of structured finance instruments¹⁹². In a recent report (the report)¹⁹³, the French Financial Markets Authority (AMF) examined the role of ratings in the context of structured finance on the French

188 'Special Purpose companies and their importance within the securitisation markets', SPV Management Limited, Wilmington Trust's SP Services Firm for Europe, in The Global Legal Group Ltd. Report, 'The International Comparative Legal Guide to: Securitisation 2005, A practical insight to cross-border Securitisation Law', 20 April 2005, p. 10.

189 Article 67 of the Luxembourg Law on securitisation.

190 See Article 74 and Article 75 of the Luxembourg Law on securitisation. These rights include e.g. the possible right to request in court replacement of the management bodies of the management company or acting as a liquidator on behalf of the investors. The Law ensures the soundness of the fiduciary representative by setting minimum capital requirements and mandatory authorisation (Article 80 of the Law on securitisation).

191 CESR's Report to the European Commission on the compliance of credit rating agencies with the IOSCO Code, CESR/06-545, December 2006.

192 Letter to the CESR formally requesting a report on the CRAs compliance with the IOSCO Code, 17 May 2006. The Commission invited, in particular, the CESR to examine whether sufficient resources are devoted to make proper rating assessments of these complex instruments and to monitor on an ongoing basis the developments in the area of structured finance.

193 'La notation en matière de titrisation', AMF, 31 January 2006 (the AMF report). See also the Annual Report of the AMF on rating agencies, 'Notation crédit des entreprises et des financements structurés', 26 January 2007 (part I).

securitisation market and pointed out in this respect the central role played by lawyers because of the inherent risks in securitisation in the rating process. Lawyers chiefly advise participants during negotiations and provide a legal opinion on the sale of the assets, often focusing on bankruptcy law issues. They are also called on to provide an opinion on particular parts of the transaction.¹⁹⁴ Given how complex these transactions can be, the rating agency and the transaction's documentation (especially the prospectus and legal opinions) need a precise description of the legal risks in relation to the deal's core components and the rights of investors, notably as opposed to the rights of the seller's creditors. As part of the process of preparing their opinion, which is needed to secure the desired rating and hence the success of the transaction, lawyers have to say at the outset (often at the agency's request) whether there are any impediments and must indicate any reserves that they might include in their opinion. Similarly, rating agencies specify, as early as possible, which aspects require a legal opinion¹⁹⁵. The legal opinions concern first and foremost the matter of achieving a 'true sale'. If there is a danger that the bankruptcy rules or sureties applicable to the vehicle or the seller could result in the sale being challenged or the vehicle's assets being seized by the seller's creditors, the rating agencies will naturally reflect this in the rating. For this reason, they may discuss the content of the opinions and usually request a copy. Furthermore, when a proposed transaction is presented to a rating agency, the agency will ask the lawyers about the content of their opinion, because this will have a bearing on the credit enhancement obtained¹⁹⁶.

Having regard to the French securitisation market, which is concentrated around three main bank arrangers and a small group of legal counsels used alternately or jointly by the banks and rating agencies, the AMF considers that, although it may be seen 'as a factor that helps to build experience and professionalism', this situation also 'comes with risks, especially if there are weaknesses in the adversarial process used to structure the deal and prepare the legal documentation for these inherently complex transactions'. The supervisory authority also noted that there is real potential for conflicts of interest in transactions where participants play multiple roles¹⁹⁷ and there are questions over how the factors relating to this type of risk are reflected in the rating process and in the transaction's legal documentation.

In most jurisdictions, the law does not impose any specific requirements in terms of ratings. However, in certain jurisdictions, the law requires issuers to provide ratings for investor information purposes when notes issued by the securitisation vehicle are placed in the public. For instance, in France, a

194 According to the AMF, law firms are usually selected based on the jurisdiction in which the underlying assets are located, especially because the analysis of bankruptcy issues is so crucial, and on other criteria, including the location of the vehicle and tax-related constraints.

195 In the above report, the AMF finds that most often law firms advise the arrangers, because the main rating agencies do not make much use of outside counsel. In principle, after a fairly non-adversarial process, lawyers deliver their opinions to the arrangers, who are the sole recipients. The AMF also mentions that, even when the agencies do not use outside counsel, they will sometimes ask the arranger's lawyers to provide an opinion on a question that concerns all of the parties. Indeed, some lawyers act as lawyers for the deal and not for any one party.

196 See the AMF report of 31 January 2006, p.15.

197 For instance, the AMF notes that, if an arranger, which is often in charge of placing the transaction, invests in the equity tranche or manages the assets over an extended period, there is an inherent possibility that its interests might be

rating is required by the law for the public issuance of units and/or debt instruments under an FCC programme. In Italy, a rating is required when issued notes are offered to non-professional investors. Spanish legislation also contains a requirement that all bonds issued by a *fondo de titulización de activos* must have a rating¹⁹⁸. In Belgium, in order to obtain a licence, a public CIR (or its management company, if any) or the management company of a public FIR must appoint a rating agency, which is responsible for delivering a report on each securitisation transaction for which the UIR issues a separate class of securities. This report must cover topics such as the sustainability of the underlying receivables, the quality of the financial plan, the fit and proper character of the legal structure, the administrative organisation, the value of the guarantees and security interests provided to the investors, and an estimate of the solvency risk for each type of security issued by the UIR (which must be reflected in a rating for each type of security). In order to obtain a licence, the rating agency must be appointed by a contract which must be approved by the BFIC. The BFIC may grant an exemption from the requirement to appoint a rating agency if the conditions of the transaction justify such exemption and if adequate disclosure is made in the issued prospectus.

Recommendation No 18:

To ensure a level playing field across the EU Member States, it is important that an EU legal act on securitisation abolishes domestic rules imposing rating requirements for asset-backed securities issued to the public.

D. The limits of the domestic legal frameworks

Most existing securitisation laws apply to the transfer of assets to domestic securitisation SPVs; thus it is unclear whether provisions relating to taxation, bankruptcy remoteness or ring-fencing would also benefit foreign SPVs wishing to exercise their activity on the domestic territory. Many of the multi-jurisdictional transactions carried out to date have required setting up an intermediary SPVs in those jurisdictions where pools of assets were located to achieve legal certainty for the transfer under the local securitisation or civil law. This has greatly increased the costs and complexity of these transactions, and, as a result, has limited their growth¹⁹⁹. These legal barriers and uncertainties can be illustrated by the following examples.

different from those of its client investors from the point at which it structures the product and selects the underlying pool.

198 See the ESF's letter to the Spanish authorities of 28 October 2005, p. 9. Available on the ESF's website at www.europansecuritisation.org.

199 See the ESF's response to the Croatian Securitisation Law Consultative Document, 20 November 2006, Answer to question 12. Available on the ESF's website at www.europansecuritisation.org.

In Germany, the Law on the creation of refinancing registers of 2005 facilitates ‘true sale’ securitisation and introduces a new legal instrument, i.e. the refinancing trust (see box 2 above), which enables refinancing enterprises selling assets from their business operations to segregate sold assets without actually transferring title, by simply registering the assets in a refinance register. Eligible assets for registration are receivables governed either by domestic or foreign law, as well as collateral on real property, i.e. land charges and mortgages, provided that the transfer can be claimed by a special purpose entity, refinancing intermediary or mortgage bank. The registration of foreign receivables in the register, however, does not substitute any applicable provisions as to form that may be required for an effective transfer of receivables under foreign law. In case of a transfer of receivables not subject to German law, an originator needs to have the legal capacity to transfer title to such assets and the transfer may not be effective vis-à-vis foreign debtors²⁰⁰.

The Luxembourg securitisation law applies to securitisation undertakings situated in Luxembourg, i.e. securitisation companies having their registered office in Luxembourg and securitisation funds whose management company has its registered office in Luxembourg²⁰¹. The substantive regime for assigning receivables is a special regime for securitisation undertakings governed by the Law and the conflict of law rules laid down in the law²⁰², which only apply if the securitisation undertaking is established in Luxembourg. In this context, the law provides the possibility of distinguishing between ‘acquisition vehicles’ and ‘issuing vehicles’²⁰³. However, if an acquisition vehicle is not subject to the Luxembourg law, then regardless of the robustness of the agreements between the acquisition vehicle and the issuing vehicle, legal certainty as regards the transfer of assets between the two securitisation vehicles cannot be guaranteed²⁰⁴.

In France, an assignment takes effect between the parties and binds third parties on the date stated on the deed of transfer on delivery, whatever the date of creation, maturity or payment of the debt, without any further formality being required, and regardless of the law governing the receivables or the law of the country of residence of the debtors²⁰⁵. In the context of insolvency proceedings started in France against an originator, such a provision is binding on the competent French courts. However, should a dispute as to the enforceability of the assignment be brought before a foreign court, such provision may not bind such a court if the relevant local conflict of laws rules would designate another

200 ‘The introduction of a Refinance Register provides additional comfort to German True sale securitisations’, *Banking & Finance Update*, Mayer, Brown, Rowe & Maw Gaedertz, July 2005; and *The Law on the refinancing register (Refinanzierungsregistergesetz) about to become effective*, Baker & McKenzie, July 14, 2005.

201 Article 3 of the Luxembourg Law on securitisation.

202 Ibid. at Article 58.

203 Ibid. at Article 1(2).

204 This analysis is based on a presentation by Prof. Hervé Synvet prepared for the EFMLG, ‘Conflicts of law aspects of debt securitisation’, 4 October 2004.

205 Article L. 214-43 of the French Financial and Monetary Code.

law²⁰⁶. Moreover, from a French law perspective, cumbersome formalities applicable in the country where the debtor resides, in principle, no longer constitute an obstacle to the securitisation of receivables held over debtors located in foreign countries. However, in practice, foreign rules affecting an international receivables assignment still need to be complied with²⁰⁷.

In Malta, the securitisation law adopts an open approach towards the use of securitisation vehicles established under a foreign law²⁰⁸. Moreover, the law provides that parties to a securitisation transaction are free to choose any law to govern contracts relating to or ancillary to a securitisation transaction. However, the practical application of domestic legislation could raise some uncertainties when applied to these ‘extraterritorial’ entities.²⁰⁹ Lastly, Community legislation and national laws on securitisation sometimes refer to the notion of a securitisation SPV that is ‘equivalent’ to that existing under the domestic framework²¹⁰. However, Community legislation and domestic law fail to define what the minimum applicable requirements for equivalence are.²¹¹

The above examples highlight the territorial constraints of domestic securitisation laws and the resulting risks of providing diverging solutions to identical issues in the EU jurisdictions and stress the need for European rules enabling the development of truly European securitisation. The implementation of the EFMLG recommendations proposed in the Report should contribute to overcoming these territorial constraints and providing harmonised solutions at the EU level on the most critical issues.

206 See ‘A new scope of French securitisation legislation’, Clifford Chance, April 2005, p. 7.

207 See ‘Asset securitisation: European legal developments’, Freshfields Bruckhaus Deringer, December 2003, p. 16.

208 The law provides that a securitisation vehicle may be established under the laws of Malta ‘or those of a jurisdiction recognised by the competent authority’ (Article 3(1)). The law also provides that a securitisation transaction may take place through the use of more than one securitisation vehicle, whether established under the laws of Malta or otherwise, and the provisions of the Act must be construed accordingly (Article 4(1)).

209 For instance, the Minister may ‘make rules on the law applicable to matters relating or ancillary to securitisation transactions, where the law of a country, other than Malta, may be applicable including, without limitation (a) rules on the proper law of any contract; (b) the formal validity of any contract; (c) rights of third parties upon the completion of any contract; (d) proprietary issues relating to securitisation transactions; and (e) the priorities of rights of third parties’ (Article 17 of the Maltese Law on securitisation).

210 For instance, the Banking Directive refers to the notion of ‘equivalent’ securitisation entities governed by the laws of a Member State without defining it. Similarly, in France, certain regulations of the Banking Commission (Regulation 93-06 of the French Banking Commission regarding the posting of securitisation transactions) refer to the situation of securitisation vehicles located in jurisdictions other than France. In order to assess whether foreign vehicles offer ‘equivalent guarantees to those existing in France’ and can therefore benefit from the authorisation to acquire receivables under French law, it must be determined whether these vehicles, the purpose of which is to refinance credit institutions, offer sufficient safeguards to investors acquiring securities issued by the foreign vehicle.

211 Ibid. part II, 2.1. Capital requirements applicable to securitisation under the Banking Directive.

Part III The treatment of securitisation under current EU legislation

Part III of the Report describes how some aspects of securitisation are addressed under certain parts of EU legislation.

1. Capital requirements applicable to securitisation

The most important piece of legislation at the EU level dealing with securitisation-related matters is the Banking Directive, which was considerably amended in the context of the review of the Basel Capital Accord²¹². The Banking Directive introduces, for the first time, a harmonised set of rules for capital requirements for securitisation activities and investments²¹³. The Commission considers that these new rules will provide a significantly improved capital requirements framework, allowing credit institutions to take advantage of the funding, balance-sheet management and other advantages that such transactions can deliver and that it will also reduce the extent to which securitisation has been seen as an instrument of capital arbitrage²¹⁴. The Banking Directive contains several definitions of securitisation-related concepts such as originator, securitisation special purpose entity (SSPE), sponsor, tranche and credit enhancement.

In this context, securitisation means a ‘transaction or scheme, whereby the credit risk associated with an exposure or pool of exposures is tranching, having the following characteristics: (a) payments in the transaction or scheme are dependent upon the performance of the exposure or pool of exposures; and (b) the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme.’²¹⁵

The Banking Directive distinguishes:

- traditional securitisation defined as ‘a securitisation involving the economic transfer of the exposures being securitised to a securitisation special purpose entity which issues securities. This shall be accomplished by the transfer of ownership of the securitised exposures from the originator credit institution or through sub-participation. The securities issued do not represent payment obligations of the originator credit institution’²¹⁶;
- and

212 See Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L177, 30.6.2006, p. 1), (the ‘Banking Directive’).

213 See Articles 94 to 101 of the Banking Directive and the relevant technical provisions at Annex IX to the Banking Directive.

214 The Banking Directive, Comments on Articles 94-101, p. 7 of the Explanatory memorandum of 2004.

215 Article 4(36) of the Banking Directive.

216 An SSPE means a ‘corporation trust or other entity, other than a credit institution, organised for carrying on a securitisation or securitisations, the activities of which are limited to those appropriate to accomplishing that objective, the structure of which is intended to isolate the obligations of the SSPE from those of the originator credit institution, and the holders of the beneficial interests in which have the right to pledge or exchange those interests without restriction’ (Article 4(44) of the Banking Directive).

- synthetic securitisation defined as ‘a securitisation where the tranching is achieved by the use of credit derivatives or guarantees, and the pool of exposures is not removed from the balance sheet of the originator credit institution’²¹⁷.

The Banking Directive defines the minimum requirements respectively applicable for recognition of significant credit risk transfer in a traditional and synthetic securitisation.

As regards traditional securitisation, the originator credit institution of a traditional securitisation may exclude securitised exposures from the calculation of risk-weighted exposure amounts and expected loss amounts if ‘significant credit risk’ associated with the securitised exposures has been transferred to third parties. The transfer must comply with certain conditions:

- (a) the securitisation documentation reflects the economic substance of the transaction;
- (b) the securitised exposures are put beyond the reach of the originator credit institution and its creditors, including in bankruptcy and receivership and this shall be supported by the opinion of qualified legal counsel;
- (c) the securities issued do not represent payment obligations of the originator credit institution;
- (d) the transferee is an SSPE; and
- (e) the originator credit institution does not maintain effective or indirect control over the transferred exposures²¹⁸.

In the case of synthetic securitisation, an originator credit institution may calculate risk-weighted exposure amounts and, as relevant, expected loss amounts for the securitised exposures if ‘significant credit risk’ has been transferred to third parties either through funded or unfunded credit protection²¹⁹ and if the transfer complies with the following conditions:

- (a) the securitisation documentation reflects the economic substance of the transaction;
- (b) the credit protection by which the credit risk is transferred complies with the eligibility and other requirements for the recognition of such credit protection; and

217 These rules do not apply to covered bonds referred to in the Banking Directive as defined in Article 22(4) of Directive 85/611/EEC (UCITS) and collateralised by the eligible assets defined in the Banking Directive (Annex VI, part 1, points 65 to 67).

218 The Banking Directive provides that an originator is considered to have maintained effective control over the transferred exposures if it has the right to repurchase from the transferee the previously transferred exposures in order to realise their benefits or if it is obligated to re-assume transferred risk. The originator credit institution’s retention of servicing rights or obligations in respect of the exposures does not of itself constitute indirect control of the exposures (Annex IX, part 2, 1.1(e)).

219 The Banking Directive also defines the notions of funded or unfunded credit protection. Article 1(31) defines funded credit protection as a ‘technique of credit risk mitigation where the reduction of the credit risk on the exposure of a credit institution derives from the right of the credit institution - in the event of the default of the counterparty or on the occurrence of other specified credit events relating to the counterparty - to liquidate, or to obtain transfer or appropriation of, or to retain certain assets or amounts, or to reduce the amount of the exposure to, or to replace it with, the amount of the difference between the amount of the exposure and the amount of a claim on the credit institution’. Article 1(32) defines unfunded credit protection as a ‘technique of credit risk mitigation where the reduction of the credit risk on the exposure of a credit institution derives from the undertaking of a third party to pay an amount in the event of the default of the borrower or on the occurrence of an other specified events’.

- (c) an opinion is obtained from qualified legal counsel confirming the enforceability of the credit protection in all relevant jurisdictions.

As pointed out by the doctrine, although economic substance over legal form is the underlying principle of the securitisation framework in the Banking Directive, one of the great gaps is precisely the lack of definition of the actual legal forms to which economic substance attaches. 'Basel II has attempted to fill this obvious gap by providing 'operational requirements' for the various instruments which would be allowed favourable risk weights and credit conversion factors (for example, guarantees and credit derivatives) but these operational requirements do not in themselves define the legal instruments in question. It should be considered whether the 'legal substance' of the economic forms should be given increased weight involving appropriate regulatory standards'²²⁰. This is particularly true since legal opinions from qualified legal counsels are requested in order to assess whether securitised exposures are put beyond the reach of the originator credit institution and its creditors, including in bankruptcy and receivership (traditional securitisation) or to confirm the enforceability of the credit protection in all relevant jurisdictions (synthetic securitisation).

In the absence of a common understanding of these notions, certain concepts such as the notion of 'significant risk transfer' might give rise to diverging interpretation. One other area where need for improvement of the current framework was identified is the treatment of 'maturity mismatches'²²¹. Defining the maturity of a securitised loan portfolio by reference to the longest maturity of any of the receivables that form part of the portfolio²²² means that only one single outlier would constitute a maturity mismatch and a partial derecognition of the credit risk mitigation otherwise achieved under the securitisation transaction. This will constitute an economically unnecessary oversubscription of the credit risk²²³.

The Banking Directive is currently being implemented in the EU Member States. It is regrettable that, unlike the Directives adopted under the Lamfalussy approach in the securities sector, the European legislator did not yet seize the opportunity to clarify, under the form of implementing measures (Level 2), the principles laid down in the Banking Directive²²⁴. A number of technical aspects currently covered in the Directive would be more adequately dealt with under the form of Level 2 measures. Against this background and in order to further increase the legal certainty attached to the securitisation-related concepts contained in the Banking Directive, the European Commission should mandate the Committee of European Banking Supervisors (CEBS) to examine how to ensure a

220 See J. Tanega, *Securitisation Disclosures and Compliance under Basel II*, *Journal of International Banking Law and Regulation*, 2005, p. 617.

221 See the Banking Directive, Annex VIII 'Credit risk mitigation', part 4.

222 Ibid. at Annex IX, part 2, point 6.

223 A meaningful alternative would be to simply exempt the outlying loan from the risk mitigation and, instead, apply a specified capital surcharge to cover the risk position.

224 See the views expressed in this regard by the ECB in ECB Opinion CON/2005/4 of 17 February 2005 at the request of the Council of the European Union on a proposal for directives of the European Parliament and of the Council recasting Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions and Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions (OJ C 52, 2.3.2005, p. 37), points 6 to 10.

homogeneous interpretation of the rules applicable to securitisation contained in the Banking Directive and avoid a risk of divergence in the implementation of the Directive.

Recommendation No 19:

The European Commission should mandate the CEBS to examine how to further increase legal certainty with regard to securitisation-related concepts contained in the Banking Directive and avoid the risk of divergent implementation across the EU Member States.

2. Accounting rules on securitisation and company law

Two major issues regarding securitisation are discussed under both the International Financial Reporting Standards (IFRS), formerly known as International Accounting Standards (IAS), and the US generally accepted accounting principles (US GAAP):

- **Derecognition:** Can the securitisation be accounted as a ‘true sale’ or is it, at least partly, to be considered as financing? If a securitisation fails to qualify as sale, the proceeds raised by the originator will be accounted as liability (secured borrowing) and the assets will remain on the originator’s balance sheet.
- **Consolidation:** Is the originator required to consolidate the SPV, which was set up to effect the securitisation? Consolidation means that the rights and obligations of the SPV are to be included in the parent companies financial statement. It would not just increase the parent companies balance sheet; it would also impact on the size and nature of the reported income and cash flows.

The issue of derecognition is generally dealt with in the revised IAS 39²²⁵. The terms ‘financial instruments’, ‘financial assets’ and ‘financial liabilities’ used therein are defined in IAS 32; they include most types of assets commonly used for securitisation. Consolidation is generally covered by IAS 27²²⁶ and the IASB’s Standing Interpretations Committee’s (SIC) issue No. 12²²⁷. The European Commission adopted IAS 27 and SIC 12 in September 2003²²⁸. IAS 39 was adopted in November 2004²²⁹, but only partly; the provisions dealing with hedge accounting and fair value accounting have been eliminated.

225 ‘Financial Instruments: Recognition and Measurement’, released in December 2003.

226 ‘Consolidated and Separate Financial Statements’.

227 ‘Consolidation - Special Purpose Entities’ (SIC 12).

228 Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council, (OJ L 261, 13.10.2003, p. 1) (Regulation 1725/2003).

229 Commission Regulation (EC) No 2086/2004 of 19 November 2004 amending Regulation (EC) No 1725/2003 on the adoption of certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards the insertion of IAS 39 (OJ L 363, 9.12.2004, p. 1) (Regulation 2086/2004).

Companies whose securities are admitted to trading on a regulated market within the EU are required to apply IFRS/IAS in their consolidated accounts for annual periods beginning on or after the 1st January 2005²³⁰. Exemptions are provided for companies whose securities are also listed in third countries outside the EU and which, for that purpose, already use other internationally accepted standards like the US GAAP; those companies are required to apply the IFRS/IAS for annual periods beginning on or after 1st January 2007²³¹. The application of the IFRS/IAS to non-consolidated accounts varies from Member State to Member State.

The Commission Regulation adopting certain international accounting standards²³² addresses the issue of consolidation rules applicable to special purpose entities (SPEs). The Regulation provides that an entity may be created to accomplish a narrow and well-defined objective (e.g. to effect a lease, research and development activities or a securitisation of financial assets). Such an SPE may take the form of a corporation, trust, partnership or unincorporated entity. SPEs often are created using legal arrangements that impose strict and sometimes permanent limits on the decision-making powers of their governing board, trustee or management over the operations of the SPE. Frequently, these provisions specify that the policy guiding the ongoing activities of the SPE cannot be modified, other than perhaps by its creator or sponsor, i.e. they operate on ‘autopilot’²³³.

The Commission’s initiatives to revise the accounting directives are aimed at enhancing confidence in financial reporting by companies. This includes, in particular, improving the provision of information about off-balance-sheet arrangements, including information about offshore SPVs²³⁴. The Directive on Company Accounts²³⁵ provides that off-balance-sheet arrangements may expose a company to risks and benefits, which are material for an assessment of the financial position of the company and when the company belongs to a group, the financial position of the group as a whole²³⁶. Such off-balance-sheet arrangements could be any transaction or agreement companies may have with entities, even unincorporated ones, which are not included in the balance sheet. They may be associated with the creation or use of one or more SPEs and offshore activities designed to address, inter alia, economic, legal, tax or accounting objectives. According to the Directive on Company Accounts, examples of such off-balance-sheet arrangements include securitisation arranged through separate companies and unincorporated entities. Appropriate disclosure of the material risks and benefits of such arrangements

230 Article 4 of Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1) (Regulation 1606/2002).

231 Article 9 of Regulation 1606/2002.

232 Regulation 1725/2003.

233 Standing Interpretations Committee Interpretation (SIC)-12, Consolidation - special purpose entities, Issue, paragraph 1.

234 See European Commission Directorate General for Internal Market and Services Consultation on future priorities for the Action Plan on modernising company law and enhancing corporate governance in the European Union, 20 December 2005, IP/05/1639.

235 Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the accounts and consolidated accounts of insurance undertakings, (OJ L 224, 16.8.2006, p. 1) (hereinafter the ‘Directive on Company Accounts’).

236 Ibid. at Recital 6.

that are not included in the balance sheet should be set in the notes to the accounts or the consolidated accounts²³⁷.

The EU has, over the years, also developed a substantial body of rules in the field of company law. Although these aspects were not examined further by the EFMLG, these rules may be of relevance in the context of securitisation, essentially where a securitisation vehicle takes the form of a company and not of a securitisation fund and it should be considered whether clarification in certain instances might not be required in order to take account of the specific nature of securitisation companies and the scope of their disclosure or accounting obligations. Any new initiative at the EU level in this area should be taken and, when appropriate, in close consultation with the International Accounting Standards Board.

Recommendation No 20:

There should be a level playing field across Europe as regards the application of accounting rules in the case of securitisation and no discrepancy between Community and national rules. Therefore, a specific provisions applying to securitisation SPVs (under a corporate form) could be introduced in the Company law Directives with a view to clarifying their status and their disclosure or accounting obligations.

3. Disclosure requirements applicable to asset-backed securities

The Prospectus Directive provides that any offer of securities to the public requires the prior publication of a prospectus and seeks ‘to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member States’²³⁸ (which means that the Directive does not apply in the context of over-the-counter markets). The obligation to publish a prospectus does not apply to an offer of securities addressed solely to qualified investors. It also does not apply to an offer of securities (a) addressed to qualified investors who acquire securities for a total consideration of at least EUR 50 000 per investor, for each separate offer; (b) whose denomination per unit amounts to at least EUR 50 000; or (c) with a total consideration of less than EUR 100 000, which limit is calculated over a period of 12 months²³⁹. Since securities are generally only sold to qualified investors and are denominated in amounts of at least EUR 50 000, securitisations very often falls within one or both of these exemptions.

237 Article 7(a) of the Directive on Company Accounts provides that the nature and business purpose of the company’s arrangements not included in the balance sheet and the financial impact on the company of those arrangements, provided the risks or benefits arising from such arrangements are material and in so far as the disclosure of such risks or benefits is necessary for assessing the financial position of the company. See also Recital 7 of the same Directive.

238 Article 1(1) of the Prospectus Directive.

239 Ibid. at Articles 3(2) (a), (c), (d) and (e).

Furthermore, the Prospectus Directive is mainly concerned with securities²⁴⁰, equity²⁴¹ and non-equity securities. Asset-backed securities (ABS) are defined in the Commission Regulation implementing the Prospectus Directive (hereinafter the ‘Prospectus Regulation’)²⁴² as ‘securities which: (a) represent an interest in assets, including any rights intended to assure servicing, or the receipt or timeliness of receipts by holders of assets of amounts payable hereunder; or (b) are secured by assets and the terms of which provide for payments which relate to payments or reasonable projections of payments calculated by reference to identified or identifiable assets’²⁴³; this is the first time the concept of ABS appears in Community legislation. The Prospectus Regulation points out that the ABS registration document should not apply to such mortgage bonds as provided for in Article 5(4)(b) of the Prospectus Directive²⁴⁴ and other covered bonds.

The genesis of the ABS definition highlights the uncertainties as to its exact scope, and in particular whether it should cover synthetic ABS²⁴⁵. The ESF suggested an ABS definition which includes synthetic securitisation²⁴⁶. The main proposed change to the Commission’s proposed definition was the introduction of the notion of ‘specified risk’ or ‘pool of risks’ in case the debt securities are secured by assets and by their terms, provide for payments of principal and interest calculated by reference to an identified or identifiable asset or specified risk or a pool of such assets or risks.

240 Article 2(1)(a) of the Prospectus Directive defines Securities as ‘transferable securities as defined by Article 1(4) of Directive 93/22/EEC with the exception of money market instruments as defined by Article 1(5) of Directive 93/22/EEC, having a maturity of less than 12 months’.

241 Article 2(1)(b) of the Prospectus Directive defines Equity securities as ‘shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer’.

242 Article 2(5) of the Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (OJ L 149, 30.4.2004, p. 1) (hereinafter the ‘Prospectus Regulation’).

243 The first version proposed by the CESR was the following: ‘debt securities of a type which either: represent an ownership interest in a pool of discrete assets (including any rights designed to assure servicing, or the receipt or timeliness of receipts by holders of assets of amounts payable thereunder); or are secured by assets and the securities, which by their terms, provide for payments of principal and interest (if any) relating to payments or reasonable projections of payments calculated by reference to a pool of those identified or identifiable assets’ (See the addendum to the Consultation Paper (Ref. CESR/02-185b) on CESR’s advice on possible Level 2 Implementing Measures for the Proposed Prospectus Directive and the annexes to the addendum (Ref. CESR/02-286) to the Consultation Paper on possible implementing measures of the proposed Prospectus Directive.

244 Recital 13 of the Prospectus Regulation. They are defined as non-equity securities issued in a continuous or repeated manner by credit institutions: (a) where the sums deriving from the issue of the said securities, under national legislation, are placed in assets which provide sufficient coverage for the liability deriving from securities until their maturity date; and (b) where, in the event of the insolvency of the related credit institution, the said sums are intended, as a priority, to repay the capital and interest falling due, without prejudice to the provisions of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

245 Certain provisions of the Regulation could be construed as confirming such hypothesis. Item 3.6 of the ‘additional building block’ for ABS, Annex VIII to the Prospectus Regulation, Minimum Disclosure Requirements for the ABS additional Building Block indicates the following: ‘where the return on, and/or repayment of the security is linked to the performance or credit of other assets which are not assets of the issuer’.

246 ‘Debt securities of a type which either:

1. (a) represent an ownership interest in, or (b) are secured by, a discrete pool of discrete assets or a single asset (including any rights designed to assure servicing, or the receipt or timeliness of receipts by holders of assets of amounts payable thereunder); or
2. (a) are secured by assets, and (b) by their terms, provide for payments of principal and interest (if any) calculated by reference to an identified or identifiable asset or specified risk or a pool of such assets or risks’ (see the ESF contributions to CESR available on the CESR’s website at www.cesr-eu.int).

The definition of ABS adopted in the EU presents some similarities to the definition adopted by the US Securities Exchange Commission (SEC) on 22 December 2004 in relation to the new disclosure requirement applicable to ABS (Regulation AB)²⁴⁷. The SEC defines an ABS as a ‘security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders.’²⁴⁸ The SEC considers that, given the definition ‘a discrete pool of financial assets that by their terms convert into cash within a finite time period’, synthetic securitisation is not included in Regulation AB’s basic definition of ABS for the purpose of determining whether the security qualifies for the specific registration, disclosure and reporting regime applicable under the Securities Act of 1933 and Securities Exchange Act of 1934. Furthermore, synthetic securitisation is designed to create exposure to an asset that is not transferred to or otherwise part of the asset pool²⁴⁹.

During the consultation process relating to the preparation of Level 2 measures for the Prospectus Directive, the CESR suggested gathering more input from the market and experience on the application of the requirements applicable to ABS²⁵⁰ before deciding whether any improvements were necessary²⁵¹. Furthermore, while the Prospectus Directive defines an issuer as ‘a legal entity which issues or proposes to issue securities’²⁵², an SPV, i.e. not necessarily a securitisation vehicle, is defined as ‘an issuer whose objects and purposes are primarily the issue of securities’²⁵³. Securitisation funds are usually devoid of legal personality. As a consequence and in view of the specific nature of such funds, the above rules create legal uncertainty as to when the disclosure requirements are applicable to ABS issued by these vehicles²⁵⁴. Further consideration should also be given to whether the requirements applicable to underlying assets offer an appropriate level and quality of disclosure and how synthetic securitisation is covered.

Moreover, since the disclosure requirements applicable to ABS are open to interpretation, the EFMLG supports developing a harmonised approach towards the treatment of disclosure requirements, an exercise for which CESR could play a key role and provide, in particular, clarification in relation to areas of uncertainty for the benefit of all competent authorities.

It should be ensured that public offers of securities issued by a securitisation SPV are allowed in every Member State. Moreover, in line with the Commission’s proposals in its White Paper on

247 Regulation AB (17 CFR §§ 229.1100 through 229.1123) is the source of various disclosure items and requirements for ‘asset-backed securities’ filings under the Securities Act of 1933 (15 U.S.C. 77a et seq.) and the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.). Regulation AB is located in a subpart of Regulation S-K as Items 1100-1123.

248 Item 1101(c) of Regulation AB [17 CFR part 229, § 229.1101(c)].

249 See III. A. 2.b. Basic definition, of the SEC Final Rule, p. 39.

250 Annex VII to the Prospectus Regulation, Minimum Disclosure Requirements for Asset Backed Securities Registration Document (schedule) and Annex VIII to the Prospectus Regulation, Minimum Disclosure Requirements for the Asset Backed Securities additional building block.

251 CESR’s recommendations for the consistent implementation of the European Commission’s Regulation on Prospectuses No 809/2004, Consultation Paper, June 2004, CESR/04-225b, June 2004.

252 Article 2(1)(h) of the Prospectus Directive.

253 Ibid. at Article 2(4).

254 See, for instance, Annex VII to the Prospectus Regulation.

enhancing the single market framework for investment funds²⁵⁵, the regime applicable to the private placement of ABS should be clarified.

Recommendation No 21:

The EFMLG recommends:

- **clarifying whether the current definition of ABS in the Prospectus Regulation covers synthetic ABS;**
- **clarifying whether the notion of issuer/SPV covers securitisation funds devoid of a legal personality;**
- **undertaking a review of the terminology used in relation to ABS contained in the implementing measures of the Prospectus Directive;**
- **that the Commission request the CESR to contribute to developing a harmonised approach towards the treatment of disclosure requirements applicable to ABS; and**
- **examining whether a harmonised disclosure regime for private placement should also be considered.**

4. Eligibility of asset-backed securities for UCITS investment purposes

The UCITS Directive deals, in particular, with the obligations concerning the investment policies of UCITS²⁵⁶ and provides that the investments of UCITS must consist solely of certain categories of assets, inter alia, transferable securities, money market instruments, units of UCITS, deposits with credit institutions and financial derivative instruments, eligible under certain conditions specified in the UCITS Directive. The question has arisen of whether ABS (including asset-backed commercial paper, ABCP), which may fall either under the category of transferable securities²⁵⁷ or of money market instruments²⁵⁸ depending on their type, could be eligible for UCITS investments purposes.

ABS are, in principle, eligible without restriction for UCITS investments purposes if they meet the applicable criteria, for instance, to transferable securities admitted to or dealt in on a regulated market²⁵⁹ or another regulated market in a Member State which operates regularly and is recognised and open to the public²⁶⁰.

UCITS can also invest, without any limitation, in money market instruments that are not dealt in on a regulated market²⁶¹, provided that the issuers of such instruments fulfil certain conditions. Among the

255 COM(2006) 686 final, 15.11.2006, p. 13.

256 Article 19 of the UCITS Directive.

257 Article 1(8) of the UCITS Directive defines transferable securities as ‘shares in companies and other securities equivalent to shares in companies (‘shares’), bonds and other forms of securitised debt (‘debt securities’).’

258 Article 1(9) of the UCITS Directive defines money market instruments as instruments normally dealt in on the money market which are liquid, and have a value which can be accurately determined at any time. Article 2(1)(a) of the Prospectus Directive defines ‘securities’ as transferable securities as defined by Article 1(4) of Directive 93/22/EEC with the exception of money market instruments as defined by Article 1(5) of Directive 93/22/EEC, having a maturity of less than 12 months. For these instruments national legislation may be applicable. Article 4(1)(19) of the MiFID defines ‘money market instruments’ as those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment.

259 Article 19(1)(a) of the UCITS Directive.

260 Ibid. at Article 19(1)(b).

261 Ibid. at Article 19(1)(h).

categories of eligible issuers are the entities ‘dedicated to the financing of securitisation vehicles which benefit from a banking liquidity line’²⁶². As pointed out by CESR²⁶³, this unfortunate wording of the Directive is restrictive since it corresponds only to a specific ‘category of asset backed commercial paper that is built on a two-tier structure and is secured by banking credit enhancement’²⁶⁴. The Directive would need to be amended on this aspect in order to cover money market instruments (including ABCP) or transferable securities under the form of ABS or synthetic ABS (a) which are issued by any type of securitisation vehicle; and (b) which are not dealt in on a regulated market²⁶⁵.

Recommendation No 22:

The UCITS Directive should be amended to clarify the issue of the eligibility of ABS (including ABCP) for UCITS investment purposes and ensure harmonised treatment across Europe.

Part IV Tax obstacles to cross-border securitisations

Taxation consequences of securitisation transactions can vary significantly depending upon the type of securitisation arrangements adopted and the nature of the underlying assets being securitised. Tax considerations also have a significant impact on the legal structure adopted and the location of the legal entities participating in the transaction²⁶⁶. In this respect, although the choice of jurisdiction for an SPV can be influenced by many factors, tax considerations in the form of both potential liabilities and potential benefits at the issuer level or in relation to payments received on the underlying assets, can often be significant considerations affecting the choice of jurisdiction by the transaction parties for the establishment of an SPV. Whether an SPV is exposed to corporate tax liabilities in its jurisdiction of incorporation or whether taxes will be imposed to reduce the cash flows or other income or proceeds available from the underlying assets will have a consequential impact on the ability of an SPV issuer to service its rated debt²⁶⁷.

262 Ibid. at Article 19(1)(h), fourth indent.

263 CESR’s advice to the European Commission on clarification of definitions concerning eligible assets for investments of UCITS, January 2006, CESR/06-005 (hereinafter the ‘CESR’s final advice’).

264 Box 8 of the CESR’s final advice, p. 34. Article 7 of Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions, (OJ L 79, 20.3.2007, p. 7) contains a provision aimed at clarifying the notion of ‘entity dedicated to the financing of securitisation vehicles which benefit from a banking liquidity line’ contained in Article 19(1)(h) of Directive 85/611/EEC. The reference to ‘securitisation vehicles’ as referred to under Article 19 (1)(h) last indent last alternative is meant to refer to ‘structures, whether in the corporate, trust or contractual form, set up for the purpose of securitisation operations’. However, since Level 2 implementing measures can only clarify provisions of the Directive, the Commission Directive cannot rectify the deficiencies of the provisions of the UCITS Directive.

265 See, in this respect, the joint ACI-EFMLG communication regarding the draft Advice on clarifications of definitions concerning eligible assets for investments of UCITS, 10 March 2005. Available on the EFMLG’s website at www.efmlg.org.

266 M. Barling and S. Coleclough, *A practitioner’s Guide to Securitisation*, City & Financial Publishing, 2006, Chapter 6, pp. 95-128.

267 Special-Purpose Vehicles in Structured Finance Transactions, Structured Finance Criteria Report, *Fitch Ratings*, 13 June 2006, p. 3.

Tax neutrality and certainty of tax treatment are two key objectives in any securitisation. The taxation issues arising in connection with a typical asset sale securitisation can be discussed under the following main headings: (a) corporation tax issues; (b) stamp duty issues; (c) value added tax issues; and (d) withholding tax issues.

The tax treatment of securitisation in the EU Member States is characterised by its extreme heterogeneity. All jurisdictions that have implemented specific securitisation laws, such as France, Italy, Luxembourg and Portugal, have specific tax provisions in relation to securitisation transactions entered into under those laws. Under such securitisation laws, one or more of the following exemptions usually applies:

- the SPV itself (or certain cash flows) is exempt from any income tax, corporate tax or business tax that would otherwise be charged on income (tax neutrality),
- a sale and transfer of receivables by an originator to an SPV is exempt from any stamp duty, VAT or other tax that would otherwise be charged on a transfer of assets,
- the issuance of notes by an SPV is exempt from any stamp duty,
- fees paid for the collection of receivables or the management of an SPV are VAT-exempt.

While some jurisdictions, such as Austria, England and Wales, Ireland, Germany and Greece, only regulate specific tax aspects of securitisation, e.g. by exempting transfers of receivables from stamp duties (Austria, Ireland and Greece), by allowing full deductibility of certain costs and expenses incurred by an SPV from profits (England and Wales, Ireland and Germany) or by allowing an exemption from taxes that would otherwise be withheld from interest paid on notes (Ireland), some jurisdictions, such as Finland, the Netherlands and Sweden, have no specific tax provisions in relation to securitisation²⁶⁸.

1. Tax treatment of SPVs

In most jurisdictions the tax treatment of SPVs differs from other legal entities. In some jurisdictions, such as France or Italy, the principle of tax neutrality is followed, which means that an SPV itself or certain cash flows relating to the payment of interest on the notes are completely exempt from any income, corporate or business tax. In Luxembourg, only those SPVs organised as securitisation funds are exempt from income tax, whereas companies are exempt from wealth tax only, but not from income tax. In other jurisdictions, such as England and Wales, Ireland, Luxembourg (with respect to

268 The EFMLG survey addressed the issue of whether the pertinent tax provisions introduce any difference in the tax treatment depending on the country of the registered seat or office or on the nationality of: (a) the originator; (b) the SPV; (c) the manager; (d) the custodian; and/or (e) any other relevant party to the securitisation transaction. Despite existing double taxation treaties and provisions defining the circumstances that constitute residency for taxation purposes, in most jurisdictions there are no specific tax provisions that address cross-border securitisation issues. In Portugal, however, certain cash flows received from or by non-residents are exempt from income tax, provided that the originator or holder is not located in certain 'tax havens and that 75% or more of their capital is not directly or indirectly held by Portuguese residents'.

companies) and Germany, a similar effect is achieved by allowing the SPV to set off expenses and costs relating to the securitisation transaction against profits, which means that only the net amount of any profit is taxable as income. However, the type of costs and expenses and the extent to which they may be allocated to profits varies and can depend (as in England and Wales and Ireland), for example, on the type of company or type of assets involved in the securitisation transaction. Deductible expenses usually include (a) the purchase price paid for the receivables; (b) servicing fees; (c) interest paid on the notes; and (d) interest paid in respect of other funding facilities. In some jurisdictions such as Luxembourg, SPVs benefit from a lower maximum income tax rate than that applicable to companies. In Finland, the Netherlands, Portugal and Sweden there is no specific tax treatment of SPVs.

2. Stamp duties

The sale and transfer of receivables by an originator to an SPV may attract a stamp duty charge in England and Wales. In Austria, a transfer of receivables to a securitisation company is exempt from stamp duty, but it is uncertain whether such transfers could be re-characterised as factoring loans, which would then be subject to stamp duty. In Greece, an explicit exemption from stamp duties (and other taxes, duties and contributions) regarding the transfer of receivables to an SPV is provided by the Law on securitisation. There is no stamp duty in France or Germany. The issuance of notes by an SPV is subject to stamp duty in Sweden, but only if the notes are mortgage certificates.

3. VAT treatment

The sale and transfer of receivables by an originator to an SPV is exempt from VAT in most jurisdictions, such as England and Wales, France, Germany and Luxembourg. In Luxembourg, a transfer of assets is subject to transfer tax if they consist of real estate located in Luxembourg. In almost all jurisdictions, the issuance and distribution of notes is exempt from VAT. In Italy, the issuance is tax-exempt, but not the transfer of notes, which is subject to a special tax.

Fees paid for the collection of receivables or the administration of an SPV are subject to VAT in most jurisdictions, such as England and Wales, Germany, Italy and Sweden, but may be avoided if the service provider is located abroad. Collection fees are exempt from VAT in France and Luxembourg. In Luxembourg, management fees are also exempt from VAT. In Germany, the prevailing view is that the purchase of the receivables by an SPV is not subject to VAT as long as the originator remains responsible for servicing. If an SPV or a third party assumes responsibility for the collection of the assets, this service is, depending on the individual structure, probably taxable.

4. Withholding taxes

Interest paid on notes issued by an SPV is subject to income tax or withholding tax in most jurisdictions. However, in England and Wales tax can be avoided if the 'quoted Eurobond' exemption

applies. In Austria, interest payments are only subject to withholding taxes if the underlying receivables are collateralised by rights in real estate. In France, interest is exempt from withholding tax if paid by an FCC. In Italy, the tax regime on interest paid on short-term notes issued by an SPV constitutes a serious practical hindrance to the issuance of notes.

Recommendation No 23:

Securitisation SPVs should be fiscally transparent and achieve tax neutrality since the complex tax treatment of securitisation transactions discourages the use of securitisation techniques.

Part V Regulatory options and proposals for further action

1. Scope of and legal basis for a proposal for an EU Directive on certain legal aspects of securitisation

The full harmonisation of securitisation laws in the EU would not be a realistic and even desirable objective, since such exercise would affect a number of areas of law which are, in many cases, closely related to the roots of domestic legal systems (for instance, in the field of civil law and insolvency law).

The implementation of some of the recommendations put forward by the EMFLG in the Report would require amendments to existing EU legal acts. In certain instances, the assessment of Community legislation has revealed the need for common terminology and a better understanding of legal concepts related to securitisation at the European level. These amendments or clarification, although important, would be limited in scope and would not affect the core rules applicable in the context of securitisation, which are still anchored in national legal frameworks and need to converge²⁶⁹.

The EMFLG has identified a number of critical legal areas where convergence of Member State domestic securitisation legislation is required at an EU level. Most of the EFMLG recommendations correspond to a number of high-level principles, which need to be applied consistently across EU jurisdictions in order to ensure a high level of transparency, efficiency and legal certainty for securitisation transactions, and in particular, for those with a cross-border dimension.

The EFMLG is of the view that most of these high-level principles should be enshrined in an EU legal act, most preferably an Internal Market directive in order to increase the convergence of securitisation laws in the EU.

²⁶⁹ Although the EFMLG considers that taxation issues constitute a major obstacle for the development of cross-border securitisation, these aspects are not further assessed in the context of the Report, having regard to the more limited powers of the EU legislator in this field.

The EFMLG recommendations described above define the outline of what could constitute the main elements of an EU directive on certain legal aspects of securitisation. In the EFMLG's view, this directive would need to cover, in particular, the following aspects:

- (a) the scope of securitisation and definitions;**
- (b) the regulatory and supervisory environment for securitisation funds (and their management companies if any);**
- (c) the conditions for the creation of an European passport for management companies of securitisation funds;**
- (d) the clarification of the status under EU company law of corporate securitisation SPVs and of the applicable framework for their cross-border activities;**
- (e) the framework principles applicable to the transfer of assets to SPVs and the transfer of ancillary rights attached to these assets;**
- (f) the framework principles applicable in view of ensuring the insolvency remoteness of securitisation SPVs (including issues relating to commingling risk);**
- (g) the rules relating to data protection and banking secrecy;**
- (h) the legal treatment of underlying assets (for instance, the treatment of bulk assignments or future cash flows); and**
- (i) the specific provisions applicable to other parties to a securitisation (servicers, originators, custodians, rating agencies, etc).**

Should the Commission decide to opt for the above approach, further legal investigation as to the scope of the directive would be necessary. Specific issues may require additional consideration depending on the types of securitised assets covered by the directive (consumer loans, mortgage loans, etc), for instance, how to facilitate the cross-border transferability of pools of assets at the European level.

In case a directive on certain legal aspects of securitisation would be adopted, the technique of implementing measures under the Lamfalussy comitology approach would allow the development of technical rules relating to securitisation, which take into account financial innovation and regulatory developments in this field. The committees having an interest in the development of securitisation in the EU financial sector, i.e. the CESR, the Committee of European Banking Supervisors and, possibly, the Committee of European Insurance and Pensions Supervisors could be involved in this process and could provide useful technical advice on the regulatory and supervisory aspects relating to securitisation markets. An appropriate balance would need to be struck between the objective of ensuring a level playing field across EU securitisation markets and the need to respect the diversity of national legal systems.

The extension of the scope of the UCITS Directive to cover securitisation vehicles was not considered a practicable solution by the EFMLG. At first sight, this option had the advantage of making use of existing EU rules. In view of the similarities of certain types of securitisation vehicles with UCITS, securitisation vehicles and other collective investment vehicles could have been covered under the same umbrella. Furthermore, the UCITS Directive already provides common basic rules for the authorisation, supervision, structure and activities of collective investment undertakings situated in the Member States; certain aspects of this framework could have been reasonably extended to securitisation vehicles. However, this solution was discarded for a number of reasons. First, on the basis of the definition of UCITS²⁷⁰, securitisation funds could not be considered as collective investment undertakings since the objective of securitisation vehicles is not the collective investment in financial instruments. Second, the activities performed by securitisation vehicles and the principles organising their functioning are fundamentally different from the activities of UCITS and do not carry the same types of risks²⁷¹. Third, securitisation vehicles are subject to specific rules concerning, for instance, the transfer of securitisation assets or the management of risks, which substantially differ from the rules applicable to UCITS. Fourth, the rules relating to investment policies of UCITS are clearly not applicable in the case of securitisation vehicles.

Over the past years, a number of directives have been adopted in the financial sector under the aegis of the EU Financial Services Action Plan, to foster the creation of a single market for financial services. The degree and method of harmonisation vary depending on the directives, but lessons can be drawn for the elaboration of a specific directive, which would enshrine the high-level principles applying to European securitisation. In such case and as described above, a directive covering certain legal aspects of securitisation would need to provide in particular for:

- (a) measures aimed at improving conditions for the establishment and functioning of the internal market in relation to securitisation and contributing to the elimination of obstacles to the freedom to provide services (including those resulting from the heterogeneous development of national securitisation laws) and to the removal of distortions of competition;
- (b) measures necessary to enable securitisation SPVs and/or their management companies, where appropriate, to provide services throughout the EU; this includes defining minimum regulatory requirements and a minimum level of oversight to be imposed on securitisation funds SPVs and

270 Article 1(2) of the UCITS Directive defines undertakings for collective investment in transferable securities (UCITS) as ‘undertakings the sole object of which is the collective investment in transferable securities and/or in other liquid financial assets...of capital raised from the public and which operates on the principle of risk-spreading and the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings’ assets. UCITS may be constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies)’.

271 To paraphrase the definition provided in the Luxembourg legislation, a securitisation undertaking acquires or assumes risks relating to claims, other assets, or obligations assumed by third parties or inherent to all or part of the activities of third parties and issues securities, whose value or yield depends on such risks. Furthermore, securitisation funds do not operate on the principle of risk-spreading within the meaning of the UCITS Directive. This becomes obvious if investments in equity tranches are concerned, which provide for a considerable risk concentration. There is, in principle, no obligation for securitisation funds to repurchase or redeem the units or debt purchased by investors.

their management companies when these SPVs operate in Member States other than the Member State in which they are established and/or licensed; and

- (c) coordination of provisions laid down by law, regulation or administrative action in Member States concerning the taking-up or pursuit of certain types of securitisation-related activities (such as servicing, for instance).

As a consequence, a joint legal basis, i.e. Article 47(2), Article 55 and Article 95 of the Treaty establishing the European Community would seem to be appropriate in this context²⁷². This would correspond to the legal basis adopted for certain Internal Market Directives such as the Directive on the activities and supervision of institutions for occupational retirement provision²⁷³ or the Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market²⁷⁴.

2. A European passport for domestic securitisation SPVs

Recent studies have shown that, in addition to the current fragmentation of securitisation legal frameworks across Europe, certain domestic securitisation markets tend to be highly concentrated with only a limited number of market participants active on these markets (e.g. arrangers, SPV management companies, law firms, etc.)²⁷⁵. The activities of securitisation vehicles in the EU very often remain limited to the domestic context. Although domestic laws may expressly provide for the possibility of securitising foreign receivables²⁷⁶, opportunities to develop pools of securitised assets from other jurisdictions are not yet fully realised.

Against this background, a more effective and homogeneous application of Single Market principles to the European securitisation industry would contribute to creating new opportunities for professionals and investors involved in the securitisation market across the EU Member States. This would be particularly beneficial in the Member States that have not developed a specific legal framework on securitisation and/or in those where the securitisation market still remains underdeveloped.

As mentioned above, in case the Commission would consider adopting a proposal for a directive on certain legal aspects of securitisation, one important aspect would be to develop the possibility for

272 Article 95 of the Treaty enables the adoption of measures ‘which have as their object the establishment and functioning of the internal market’. Article 47(2) of the Treaty empowers the Council to issue directives for the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons. Article 55 of the Treaty applies to Articles 45 to 48 of the Treaty in the field of services. The UCITS Directive which is based on Article 47(2) of the Treaty covers structural and supervisory aspects of the UCITS market and also imposes a number of obligations on the national competent authorities.

273 Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).

274 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000, p. 1).

275 See the above Annual Report of the AMF on rating agencies, ‘*Notation crédit des entreprises et des financements structurés*’, 26 January 2007.

276 For instance, receivables may be governed by French law or foreign law (Article R. 214-93 of the French Financial and Monetary Code).

securitisation vehicles to operate on a pan-European level and to provide services in other EU Member States, provided that they meet the minimum requirements defined in the directive.

The exact scope of the proposed European passport and the nature of the covered activities would need to be further examined by the Commission in cooperation with market participants, lawyers and supervisory authorities. For instance, it would require the assessment of whether and how securitisation funds management companies authorised in one Member State would be entitled to perform their activities in other Member States (e.g. through the establishment of a branch or under the freedom to provide services) and whether they would be entitled to manage securitisation funds subject to other domestic laws. Guidance could be drawn from the on-going discussion on the review of the UCITS Directive, the proposed improvements to the European passport for UCITS management companies and the possible options identified by the Commission²⁷⁷. Moreover, clarification should also be sought as to how corporate SPVs can operate cross-border in the various Member States.

Taking into account the above EFMLG recommendations, the Commission may also consider the possibility and the conditions under which a European passport for other parties involved in securitisation transactions (e.g. servicers) could be introduced.

Recommendation No 24:

The EFMLG invites the Commission to mandate the relevant Lamfalussy committees to define, in cooperation with market participants, the nature and scope of a European passport for management companies of securitisation SPVs and to clarify how corporate securitisation SPVs can operate cross-border.

3. Towards the creation of optional European forms of securitisation SPVs?

A European passport for securitisation SPVs, once defined by the Commission with the assistance of supervisory authorities and market participants, is an important first step towards a directive on certain legal aspects of securitisation, aimed at contributing to the integration of European securitisation markets.

As an alternative, or complement, to the proposed European passport for domestic securitisation SPVs and as a further step in the development of the European legal environment for securitisation, the EFMLG also discussed the possibility of creating optional legal forms such as a European

²⁷⁷ Commission's White Paper on enhancing the Single Market Framework for investment funds, COM(2006) 686 final. In its staff working document accompanying the White Paper on enhancing the Single Market Framework for investment funds, SEC(2006)1451, 15.11.2006, 17, the Commission defines the 'management company passport with respect to UCITS as the possibility a) for a UCITS to appoint a management company in another Member State or b) for a management company to establish a UCITS in another Member State'. The Commission proposes amendments to the UCITS Directive to allow an authorised management company to manage corporate and contractual funds in other Member States (see the working document of the European Commission/DG Internal Market services, 'Initial orientations of possible adjustments to UCITS Directive (85/611/EEC), Overview of key features' and in particular 'Exposure draft: 2. Management company passport', 22 March 2007).

securitisation SPV, a European management company or even European structures similar to trusts to facilitate the development of pan-European securitisation.

There are already some precedents for new legal structures proposed at the EU level. The examples of the European trademark²⁷⁸ and the proposed European patent²⁷⁹ are often mentioned and, with regard to new legal corporate forms, examples are the European Company Statute²⁸⁰, the European Cooperative society²⁸¹ and the current discussion on the European private company statute²⁸².

Generally, one of the expected benefits of such new and optional instruments²⁸³ is that these structures would be available at the EU level on the basis of a Community legal act and would not affect or not significantly affect existing domestic rules and would develop in parallel with and independently of these rules²⁸⁴.

In the context of the adoption of a Statute on the European cooperative society (ECS)²⁸⁵, the European Court of Justice (ECJ) concluded that ‘the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms’²⁸⁶. The ECJ specified in this respect that: ‘[t]hat finding is not affected by the fact that the contested regulation does not lay down exhaustively all of the rules applicable to European cooperative societies and that, for certain matters, it refers to the law

278 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark (OJ L 11, 14.1.94, p. 1).

279 Proposal for a Council Regulation on the Community patent, COM(2000) 412 final, 1.8.2000.

280 Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ L 294, 10.11.2001, p. 1).

281 Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1).

282 See the European Parliament (EP) resolution with recommendations to the Commission on the European private company statute (EPC), 1 February 2007. The EP suggests that the EPC should offer companies ‘an additional, voluntary option, alongside national company forms’ and that ‘an EPC statute should be based as far as possible on rules of Community law and should thus dispense with references to national law’.

283 On the issues relating to optional instruments or the so-called ‘28th regime’ (since Bulgaria and Romania joined the EU on 1 January 2007), see A. Sáinz de Vicuña, ‘*Optional instruments for the integration of European financial markets, in Legal aspects of the European System of Central Banks*’, December 2005. This different methodology is ‘aimed at facilitating financial integration via the creation of pan-European regimes which are non-mandatory for market participants. Under this regime, Community institutions should provide market participants with the option of using financial instruments that benefit from a European passport, i.e. ones that can be used equally throughout all... Member States, if necessary by way of a Community legal act or with the support of Community bodies. Such instruments would not need the prior harmonisation of national laws, but would instead represent an additional option on top of the financial instruments already covered by national legislation’.

284 For instance, under the regulation on the Community trademark, although ‘trade marks need to be created which are governed by a uniform Community law directly applicable in all Member States’, it is also clarified that ‘the Community law relating to trade marks does not replace the laws of the Member States on trade marks’. Similarly, the proposed Community patent which will be subject to the rules set out in the Regulation and to the general principles of Community law, will coexist with national patent laws and the European patent system (see the above proposal for a Council Regulation on the Community patent, ‘Individual provisions Article by Article’, p. 19).

285 Case C-436/03 *European Parliament v Council of the European Union* [2006] ECR I-3733.

286 Ibid. at paragraph 44. The Court of Justice also pointed out that ‘it is apparent from the content and the purpose of the contested regulation that it aims to introduce a new legal form in addition to the national forms of cooperative societies’ (paragraph 40) and that ‘the European cooperative society is a form which coexists with cooperative societies under national law’ (paragraph 43).

of the Member State in the territory of which the European cooperative society has its registered office, since...that referral is of a subsidiary nature'²⁸⁷.

In the same case, the Advocate General acknowledged that the regulation in question made 'various references to national law and affords its application in wide areas relating to an [ECS]'²⁸⁸ and that 'it is therefore true to say that the regulation provides for many aspects by reference to national law'²⁸⁹.

On the basis of the above ECJ case law²⁹⁰, it is doubtful that the adoption of Community rules applicable to new European legal structures, such as European securitisation companies, management companies or trustees could be adopted in the context of a Directive aimed at approximating laws of the Member States applicable to securitisation. In the European cooperative society case, the ECJ considered that Article 308 of the Treaty was the appropriate legal basis since the Regulation in question has 'as its purpose the creation of a new form of...entity in addition to the national forms'²⁹¹. Therefore, these provisions may need to be adopted separately on the basis of Article 308 of the Treaty which requires Council unanimity and simple consultation of the European Parliament²⁹².

The EFMLG considers that, taking into account the legal traditions of common law and civil law countries, as well as the current structure of the European securitisation markets, the idea of creating new European legal forms, although attractive, is premature. Although civil law countries increasingly tend to adopt, in their respective legal systems, instruments such as the *fiducie* as a corollary to the trust mechanism found in common law countries²⁹³, the EFMLG survey demonstrates that a number of rules regarding, for instance, the transfer of assets from originators to securitisation vehicles or the insolvency remoteness of SPVs, are still profoundly anchored in national legal systems. In the context of the European company statute, some experts considered that 'there is an important risk that the objective (a) to liberate [the *Societas Europaea*] from the legal and practical constraints resulting from the coexistence of [twenty-seven] distinct legal orders and (b) to create a supranational

287 Ibid. at paragraph 45.

288 See the Opinion of Advocate General Stix-Hackl of 12 July 2005, Case C-436/03, *European Parliament v Council of the European Union*, paragraph 84.

289 Ibid. at paragraph 85.

290 Case C-436/03 *European Parliament v Council of the European Union* [2006] ECR I-3733.

291 Ibid. at paragraph 44.

292 In Case C-336/00 *Republik Österreich v Martin Huber* [2002] ECR I-7699, at paragraph 31, the ECJ held that '[i]f examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component. Exceptionally, if it is established that the act simultaneously pursues a number of objectives, indissociably linked, without one being secondary and indirect in relation to the other, such an act may be founded on the various corresponding legal bases'. However, the ECJ also specified that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other. (Case C-94/03, *Commission of the European Communities v Council of the European Union* [2006] ECR I-1, paragraph 52).

293 See, for instance, the Luxembourg Law of 27 July 2003 on trust and fiduciary contracts and the French Law No 2007-211 of 19 February 2007 instituting the *fiducie*, OJ No 44 of 21 February 2007.

form of company²⁹⁴, cannot be achieved. A similar conclusion might be drawn when considering the possibility to adopt a new European and supranational legal form of securitisation vehicle.

Against this background, the EFMLG concluded that it would not be appropriate to take a legal stance on this matter at this stage. This issue itself requires a separate and in-depth economic and legal assessment aimed at determining the expected benefits of new European legal forms and examining the obstacles to the creation of such structures and possible solutions. Moreover, taking into account the motivations underlying the choice of jurisdiction for an SPV (e.g. taxation, applicable laws, etc.) it should be ensured that the adoption of such European structures be commensurate with the benefits expected from the development of pan-European securitisation involving market participants from different EU Member States and multi-jurisdictional portfolios of assets.

Recommendation No 25:

The EFMLG invites the Commission to launch a study on the need for European optional forms of securitisation (impact assessment, legal feasibility, etc.).

4. Proposed follow-up

The EFMLG trusts that the recommendations contained in the Report will increase the awareness of legislators to the need to take legislative action to promote the development of an integrated European securitisation market. Market forces alone cannot achieve pan-European integration of this promising financial sector.

Securitisation market and legal practitioners (law firms, originators, SPV management companies, rating agencies, relevant market associations, etc.) and supervisory authorities would be instrumental in translating the core high-level principles identified in the Report into a proposed EU directive on certain legal aspects of securitisation and providing for the legal effectiveness to these principles. The Commission may wish to consider these recommendations in its action programme relating to the integration of EU financial markets. The EFMLG stands at the Commission's disposal to provide legal assistance on these matters.

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294 See, for instance, M. Bouloukos '*Le régime juridique de la société européenne (SE) : vers une société européenne « à la carte » ?*', *IBLJ*, No 4, 2004. See also J-P. Brouillaud, '*La SAE : la « société approximativement européenne »*', *La Semaine Juridique, Edition Entreprise et Affaires*, JCP, No 3, 18 January 2007, pp. 39-44.

SECURITISATION LAWS IN THE EUROPEAN UNION

EU MEMBER STATE	SECURITISATION LAW
Austria	No §33(21)(2)(7) of the Law on stamp duty and §2(60) of the Law on banking.
Belgium	Yes Law of 20 July 2004 on certain forms of collective management of investment schemes (<i>Loi relative à certaines formes de gestion collective de portefeuilles d'investissement</i>) (fully entered into force in December 2005), as amended by the Law of 16 June 2006 on the public offering of investment instruments and the admission to trading of investment instruments on a regulated market (entered into force on 1 July 2006). Royal Decree of 15 September 2006 implementing certain provisions relating to undertakings for collective investment in receivables Other implementation measures still need to be adopted; therefore Royal Decrees implementing the Law of 4 December 1990, and in particular the Royal Decree of 29 November 1993 on undertakings for investment in receivables and the Royal Decree of 8 July 1997 on certain implementing measures concerning undertakings for investment in receivables, remain applicable to a certain extent, despite the introduction of the Law of 20 July 2004 replacing the framework of the 1990 Law.
Cyprus	No
Czech Republic	No
Denmark	No
Estonia	No
Finland	No
France	Yes Relevant provisions of the Financial and Monetary Code, as last amended by the Law on financial security (<i>Loi Sécurité Financière</i> No 2003-706 of 1 August 2003 amending the Law No 88-1201 of 23 December 1988 (<i>Loi relative aux organismes de placement collectif en valeurs mobilières et portant création des fonds communs de créances</i>) Decree No 2004-1255 of 24 November 2004 taken in application of Articles L. 214-5 and L. 214-43 to L. 214-49 of the Monetary and Financial Code relating to <i>fonds communs de créances</i> , OJ No 275 of 26 November 2004, p. 20067 Ministerial Order of 1 September 2005 endorsing amendments to the General Regulations (<i>Règlement Général</i>) of the French Financial Markets Authority (AMF) regarding the provisions applicable to the management companies of <i>fonds communs de créances</i> and prospectus for FCC units.

EU MEMBER STATE	SECURITISATION LAW
Germany	No No single specific law applies to securitisation. Law on the creation of refinancing registers of 2005; special tax provisions.
Greece	Law 3156 of 25 June 2003 published in the Government Gazette of the Greek Republic (Issue A, No 1567); Article 14 of Law 2801/2000 regarding specific provisions applicable to public sector securitisation.
Hungary	No
Ireland	No Special tax regime for SPVs.
Italy	Yes Law No 130 of 30 April 1999 published in the Official Gazette of the Republic of Italy of 14 May 1999; special provisions for public sector securitisation. Legislative Decree No 58 of 24 February 1998; Decree No 228 of 24 May 1999; Banca d'Italia Governor's Decision of 20 September 1999 (<i>fondi comuni di credito</i>).
Latvia	No
Lithuania	No
Malta	Yes Act No V of 2006, 11 April 2006.
Luxembourg	Yes Law of 22 March 2004 on securitisation.
The Netherlands	No. 'Solvency Regulation on Securitisation' by De Nederlandsche Bank N.V.
Poland	Yes Law of 1 April 2004 (entered into force on 1 May 2004) amending the Law on banking and the Law on investments funds of 27 May 2004 (entered into force on 1 July 2004).
Portugal	Yes Decree-Law 453/99 of 26 October 1999. Decree-Law 219/2001 of 4 August 2001 (Law on securitisation tax). Share Capital Regulations (Regulation 284/2000 of 23 May 2000 and Regulation 676/2002 of 19 June 2002). Banco de Portugal and Securities Commission Regulations.
Slovakia	No

EU MEMBER STATE	SECURITISATION LAW
Slovenia	No Law on banking, Official Gazette No 131/2006, valid from 1.1.2007 onwards, implementing Banking Directive No 2006/ 48 and Capital Adequacy Directive No 2006/ 49.
Spain	Royal Decree 926/1998 of 14 May 1998 on Asset-Backed Securitisation Funds (<i>Fondo de Titulización de Activos</i>); 3 rd Additional Provision of Law 1/1999 of 5 January 1999 on capital-risk entities; specific provisions applicable to public sector securitisation.
Sweden	No
England and Wales	No – Common law system based on statute and case law.

TYPOLOGY OF SECURITISATION VEHICLES IN THE EU

	LEGAL NATURE		COMPANIES														FUND STRUCTURE			
	Type of SPV		Type of legal structure							Minimum number of shareholders / minimum capital							Independent compartments*		Independent compartments*	
	Company	Fund	Public limited company	Private limited company	Joint-stock company	Partnership limited by shares	Société organisée comme une société anonyme	Sociedades de titularização de créditos (STCs)	Public company	limited company	Private company	limited company	Joint-stock company	Partnership limited by shares	Société organisée comme une société anonyme	Sociedades de titularização de créditos (STCs)	Name	Independent compartments*		
Austria	✓		✓					/ 35.000€												
Belgium	✓	✓	✓			✓		61.500+variable part						61.500+variable part			✓	Fond de placement en créances/Fonds voor belegging in schuldbijlagen		
Denmark	✓		✓														✓			
England and Wales	✓		✓					21/ 50.000€												
Finland	✓				✓					✓										
France		✓																Fonds commun de créance	✓	
Germany	✓		✓		✓	✓		/ 25.000€				/ 50.000€	/ No minimum capital							
Greece	✓		✓					/ 60.000€												
Ireland	✓		✓					71/ 40.000												
Italy	✓	✓	✓		✓	✓		✓			✓	✓	✓				✓	Fondi comuni di credito	✓	
Luxembourg	✓	✓	✓	✓		✓		✓		✓		✓	✓		✓		✓			
The Netherlands	✓			✓																
Portugal	✓	✓					✓									11/ 250.000€	✓	Fundos de titularização de créditos (FTC)	✓	
Spain		✓																Fondo de Titulización de Activos (FTA)		
Sweden	✓		✓	✓				/SEK 500.000		/SEK 100.000							✓			

OVERSIGHT OF SECURITISATION VEHICLES IN THE EU

EU MEMBER STATE	Legal nature	Is there a supervisory authority for the SPV?		Competent supervisory authority	Supervisory aspects
		Yes	Only if securities are issued to the public		
Austria	✓				There is no specific supervisory authority for SPVs. The Law on banking clarifies that special securitisation companies do not conduct any banking business.
Belgium	✓	✓	✓	Commission Bancaire, Financière et des Assurances/ Belgian Banking, Finance and Insurance Commission (BFIC)	The law distinguishes public undertakings for investment in receivables (UIRs) and institutional UIRs. Public UIRs are subject to the supervision of the BFIC; institutional UIRs are not subject to supervision but must register with the Federal Public Service Finance. The SPV is not considered as a credit institution.
Denmark	✓			<i>Finanstilsynet (FSA)</i>	An SPV whose activity is to acquire receivables is not considered to be a credit institution.
Finland	✓	✓		<i>Rahoitustarkastus</i> (Finnish Banking Supervision Office)	In principle, an SPV is not considered to be a credit institution but is considered a financial institution. In most cases the Rahoitustarkastus supervises SPVs.
France	✓			<i>Autorité des Marchés Financiers Comité des établissements de crédit et des entreprises d'investissement</i> (CECEI)/ <i>Commission Bancaire</i>	Only the founders of the <i>Fonds Commun de Créances</i> (FCC), i.e. the management company and the custodian are supervised by the French Financial Markets Authority (AMF) since a fund does not have any legal personality. Custodians are supervised by the authorities in charge of the supervision of credit institutions. FCC are not considered as credit institutions. However, an SPV incorporated outside France cannot be used because they do not benefit from the exemption to the 'banking monopoly'. The CECEI/ <i>Commission Bancaire</i> supervises custodians.

EU MEMBER STATE	Legal nature		Is there a supervisory authority for the SPV?		Competent supervisory authority	Supervisory aspects
	Company	Fund	Yes	Only if securities are issued to the public		
Germany	✓					Until very recently, no German entities were used as purchaser vehicles in securitisation transactions. This may change now with the Law on the creation of refinancing registers of 2005, which enables refinancing enterprises to segregate sold assets without transferring title simply by registration. No need for a license for SPVs. They are not considered to be credit institutions under the Law on banking.
Greece	✓					SPVs are not considered to be credit institutions. No prudential supervision of SPVs given that securitisation only takes place through private placements. SPVs of banks are subject to the consolidated supervision of the Bank of Greece.
Ireland	✓			✓	Irish Financial Services Regulatory Authority	Typical securitisation SPVs fall outside the financial services regulatory regime and are not subject to supervision by Irish financial or banking regulators. Irish SPVs are subject to the jurisdiction of the Office of the Director of Corporate Enforcement with respect to their compliance with general company law. If an SPV has listed securities on a regulated stock exchange, it will be subject to the rules of that exchange.
Italy	✓	✓	✓		Banca d'Italia	SPVs are subject to the supervision of the Banca d'Italia and are required to disclose certain information related to the performance of the securitisation transaction with reference to both the securitised assets and the issued notes.
Luxembourg	✓	✓		✓	<i>Commission de surveillance du secteur financier</i> (CSSF)	SPVs are not considered to be credit institutions. SPVs/securitisation undertakings (both funds and companies), which issue securities to the public on a regular basis must be authorised by the supervisory authority, i.e. the CSSF. This does not apply to securitisation undertakings that only affect a single issue of securities or issue securities on an irregular basis.
The Netherlands	✓					An SPV issuing bonds falls within the definition of 'credit institution' under the Law on the Supervision of the Credit System 1992 (LSCS). In principle, an SPV requires a license and falls under the supervision of De Nederlandsche Bank. However, the LSCS contains a few exemptions, inter alia, if the notes will be offered solely to professional market participants. The Law on financial services came into force on 1 January 2006. Pursuant to this Law, a person who becomes the legal owner of loan receivables outstanding on consumers, i.e. private individuals not conducting a business or trade, are required to hold a licence as of the moment legal title is transferred. An SPV will, however, be exempt from obtaining a license under the Law on financial services, provided that the SPV enters into a servicing agreement with an entity regulated under the Law.

EU MEMBER STATE	Legal nature		Is there a supervisory authority for the SPV?			Competent supervisory authority	Supervisory aspects
	Company	Fund	Yes	Only if securities are issued to the public	No		
Portugal	✓	✓	✓			<p><i>Comissão do Mercado de Valores Mobiliários (CMVM)</i></p> <p>SPVs, under the Law on securitisation, are not considered to be credit institutions. The activity of acquiring receivables is not considered that of a credit institution.</p> <p>FTCs (funds)</p> <p>The establishment of an FTC must be authorised by the CMVM, which also supervises the FTC's activities. Where the originator is a credit or financial institution, the FTC's establishment is also subject to the Banco de Portugal's approval. Incorporation of a management company of a FTC must also be authorised by both the Banco de Portugal and the CMVM.</p> <p>STCs (companies)</p> <p>The incorporation of an STC is subject to authorisation by CMVM. Each issuance of notes is subject to prior registration with the CMVM for public placements or subsequent communication to the CMVM, for private placements.</p>	
Spain		✓		✓		<p><i>Comisión Nacional del Mercado de Valores (CNMV)</i> Central Mercantile Register</p> <p>A securitisation fund is not a credit institution. A Spanish public limited company (sociedad anónima) duly incorporated and authorised by the CNMV is responsible for the incorporation, management and representation of the <i>Fondo de Titulización de Activos (FTA)</i>.</p>	
Sweden	✓		✓			<p><i>Finansinspektionen</i></p> <p>If an SPV is funded publicly, it is supervised by the Swedish Financial Supervisory Authority (<i>Finansinspektionen</i>), which also supervises banks and credit companies, etc. According to the Global Legal Group Report, if a financing business is deemed to be conducted in Sweden, there is a recent licensing exemption for securitisation SPVs. This exemption only applies for SPVs acquiring receivables a limited number of times (no more than three to five times). Thus, in transactions where financial assets are acquired on a revolving basis, the exemption cannot be relied upon.</p>	
England and Wales	✓			✓		<p>Financial Services Authority / UK Listing Authority</p> <p>SPVs are not generally considered as credit institutions and do not usually require a licence.</p>	

FOCUS ON SPECIFIC ASPECTS OF THE LEGAL FRAMEWORK ON SECURITISATION IN CERTAIN JURISDICTIONS

Structural safeguards protecting the note holders in a securitisation transaction

a. The example of England and Wales

In England and Wales, there is no law governing securitisation or the status of SPVs. SPVs are public limited companies and there is no requirement to establish a separate management company, but in practice there can be a corporate services provider to facilitate the incorporation of an SPV and to provide, for example, directors, a company secretary, a registered office and bookkeeping. SPVs do not fall under the FSA's regulatory power unless they are listed on the London Stock Exchange. In this case, the FSA and UK Listing Authority are responsible for their supervision. The FSA regulates banks and building societies when they are involved in a securitisation transaction but not the operation of SPVs. Safeguarding note holder's interests usually take place in the form of a Trust. A note trustee is established to represent a group of investors²⁹⁵.

The London Financial Markets Law Committee pointed out that trusts are highly important for the whole sale financial markets and that there is a trust relationship behind most situations of ownership.²⁹⁶ In terms of securitisation, trusts play different roles depending on, in which part of the transaction they are used. The decision of whether to appoint a trustee depends largely on whether an issuer considers it sufficiently advantageous.²⁹⁷ In a structured finance transaction, a trustee's main function is to represent the investors' interests and the interests of other secured parties. Trustees also have administrative functions; they monitor the issuer and can exercise power if needed. The trust deed defines a trustee's obligations in each case. An issuer appoints a trustee to represent the holders and it owes its duties to them although its fees and expenses are paid by the issuer.

Both investors and issuers benefit from the role played by a trustee in securitisation transactions. A trustee acts as the investors' representative and serves as a central coordinator, which allows individual investors to remain anonymous. A trustee usually has more information and is therefore in a

²⁹⁵ See 'The role of trustees in EMEA structured finance transactions', *Moody's Special report*, 9 February 2005, pp. 1-8.

²⁹⁶ Financial Markets Law Committee: Issue 62 - Trustee exemption clauses, analyses of the role of the trustee in the wholesale financial markets and of the proposals contained in the Law Commission's consultation paper No 117, 'Trustee Exemption Clauses', p. 1.

better position to assess whether an issuer complies with relevant covenants. Trustees also have better resources to act than individual investors and are generally in better negotiating positions since they represent a large portion of the debt. On the other hand, issuers usually benefit from trustees in the form of lower transaction costs. It costs less and is more efficient to deal with only one counter party.²⁹⁸ In some cases, a trustee may be necessary (e.g. because of a listing requirement, or the need to hold security on behalf of the holders). In most cases, however, the decision is based on whether the advantages of having a trustee are sufficiently attractive.

b. The French example

In France, a securitisation vehicle is called *fonds commun de créances* (FCC), which is a mutual debt fund. It is regulated by the Monetary and Financial Code and its implementing rules²⁹⁹. An FCC is not a separate legal entity and has no share capital, board of directors or employees. It is jointly established by a management company (*société de gestion*) and a depositary (*dépositaire*). The depositary is responsible for the custody of an FCC's assets and also for the supervision of the management company which manages the fund.³⁰⁰ The law sets criteria on how the management company should conduct its business. A management company's structure and management must enable it to conduct its business with honesty, diligence, fairness and impartiality for the sole benefit of the holders, consistent with the integrity and transparency of the market.³⁰¹ Unit holders' interests are guarded by a management company, which must avoid conflicts of interest and resolve any that arise equitably in the interest of the holders of securitisation fund units. If there is a conflict of interest, the unit holders must be informed in the most appropriate manner. A management company must take all necessary measures, particularly with regard to the separation of fields of activities and tasks, to guarantee the autonomy of its management³⁰². It must promote the interests of the unit holders of the securitisation funds it manages or whose management it outsources. To this end, it should perform its duties in manner consistent with the integrity, transparency and security of the market. The transactions carried out in the context of fund management, and the frequency thereof, must be decided on solely in the interests of the unit holders and made known to them. A management company must refrain from any initiative intended to favour its own interests, or those of its partners, shareholders or members, to the detriment of the unit holders' interests³⁰³.

297 Ibid. at p. 15.

298 Ibid. at p. 16-17.

299 Decree and the General Regulation of the French Financial Markets Authority, the AMF General Regulation.

300 Art L. 331-7 of the AMF General Regulation.

301 Ibid. at Article L. 331-25.

302 Ibid. at Article L. 331-8.

303 Ibid. at Article L. 331-19.

Besides guarding unit holders' interest vis-à-vis third parties, a management company must ensure that all holders of units or debt securities, giving entitlement to identical rights are treated equally³⁰⁴. The choice of investments and intermediaries must be made independently, in the holders' interests³⁰⁵. A management company must ensure that the rights attached to the securities held by a securitisation fund that it manages are exercised in the holder's interests. These rights include the right to participate in meetings, to exercise voting rights and to institute legal proceedings.³⁰⁶ In addition, a management company's conditions of remuneration must not be such as to create a conflict of interest between it and the holders. The company's organisational structure and management must enable it to conduct its business with honesty, diligence, fairness and impartiality for the sole benefit of the holders, consistent with the integrity and transparency of the market. A management company must adopt an organisational structure that reduces the risk of conflicts of interest. Functions that could give rise to conflicts of interest must be strictly separated. Management of a securitisation fund must be completely independent from the management activities that the management company carries out on its own account³⁰⁷.

c. The Luxembourg example

In Luxembourg, securitisation vehicles are called securitisation undertakings by the Law of 22 March 2004 on securitisation (hereinafter the 'Law on securitisation'). They may be set up either in the form of a company or as a fund in pure contractual form governed by management regulations. Funds are managed by a management company and do not have any legal personality. Securitisation companies have a legal personality and manage themselves.³⁰⁸ These structures differ in that the law imposes specific requirements on a management company of a securitisation fund in order to safeguard investors' interests.

In the fund structure, a management company acts on behalf of a securitisation fund and its investors vis-à-vis third parties. This includes in relation to all judicial proceedings, whether as a plaintiff or defendant.³⁰⁹ The law imposes obligations on management companies to take investor interests into consideration when acting vis-à-vis third parties. Article 16 states that a 'management company must perform its duties in an independent manner and in the sole interest of the securitisation fund and the investors.'

In order to protect the interests of the note holders, the Law on securitisation also defines the concept of fiduciary-representative (*représentant-fiduciaire*). A fiduciary-representative's role can be compared to the role of a trustee. The Law applies only to fiduciary-representatives whose registered

304 Ibid. at Article L. 331-21.

305 Ibid. At Article L. 331-22.

306 Ibid at Article L. 331-23.

307 Ibid. at Article L. 331-24 to 331-26.

308 Title II of the Luxembourg law on securitisation.

309 Ibid. at Article 15.

office is located in Luxembourg.³¹⁰ According to the Law, investors and creditors of a securitisation undertaking may entrust the management of their interests to one or more fiduciary-representatives. The Law imposes certain requirements to make sure that fiduciary-representatives are sound and stable.³¹¹ A Fiduciary-representative has to be authorised by the Minister with responsibility for the CSSF.³¹²

Authorisation for the exercise of the activity of a fiduciary-representative can only be granted to stock companies which have a share capital and own funds of at least equal to €400 000.³¹³ The instrument by which a fiduciary-representative accepts its mission must define its rights and its powers, in particular its powers of representation, specify the groups of investors or creditors on behalf of which it acts and provide for a procedure for its replacement.³¹⁴ A fiduciary-representative can delegate to a third party the exercise of the rights and duties assigned to it by the securitisation undertaking. They may not exercise any activities other than their principal activity except on an accessory and ancillary basis.³¹⁵ They can accept and hold all sureties and guarantees on behalf of its clients and make sure that the securitisation vehicle correctly manages the securitisation transactions. A fiduciary-representative has the right to petition the court, on serious grounds, to order the permanent or temporary replacement of the management bodies of a securitisation undertaking, or as the case may be, its management company. This right has to be authorised in the articles of incorporation or the internal rules of a securitisation undertaking.³¹⁶ For as long as the investors and creditors are represented by a fiduciary-representative, they cannot individually exercise any rights entrusted to the fiduciary-representative and they are represented in all their relations with the securitisation undertaking and third parties connected to the securitisation by the fiduciary-representative.³¹⁷

The Law on securitisation enables the use of the Anglo-Saxon trust concept in the organisation of a securitisation structure. Trusts are defined in the Luxembourg Law of 27, July 2003³¹⁸. Article 71(1) of the Law on securitisation states that a ‘fiduciary-representative may also be granted by the investors and the creditors the power to act in their interest in a fiduciary capacity, in accordance with the legislation on the trust and on fiduciary contracts. The assets and rights which it acquires for the benefit of investors and creditors form a fiduciary property separate from its own assets and liabilities as well as from any other fiduciary property it may hold.’

A fiduciary-representative may, in such capacity accept, take, hold and exercise all security interests and guarantees and receive all payments to be made to the investors and the creditors that have granted such powers to it.

310 Ibid. at Article 67.

311 Ibid. at Articles 68, 79 and 80.

312 Ibid. at Article 79.

313 Ibid. at Article 80.

314 Ibid. at Article 68.

315 Ibid. at Article 79(2).

316 Ibid. at Article 74.

317 Ibid. at Article 69.

318 Luxembourg Law of 27 July 2003 relating to trust and fiduciary contracts (relative au trust et aux contrats fiduciaires).

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