

**EFMLG MEETING OF 7 OCTOBER 2004
ITEM 3(C) BRIEFING MATERIAL**

SECURITISATION, BANKING SECRECY AND BANKING MONOPOLY¹

1. Banking monopoly and securitization vehicles

According to certain specific provisions of the French legal framework, credit institutions may assign receivables to the FCC, i.e. the French law securitization vehicles or to similar foreign vehicles. Acquiring receivables on a regular basis constitutes a credit operation since the assignee has to provide sums immediately in respect of which the assignor is a creditor but which only fall due in the future. However, the French 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 these foreign vehicles. Such derogation is currently granted only to the FCC. As a consequence, foreign vehicles acquiring receivables would infringe the banking law rules.

Question for the EFMLG: Are EFMLG members aware of any similar banking monopoly issue in other jurisdictions. Do SPVs need a specific license for the acquisition of receivables?

Another interesting legal issue, in the absence of harmonization of securitization vehicles structures at the EU level, is that some criteria must be defined in order to assess whether vehicles located in other jurisdictions offer “equivalent guarantees to those existing in France” and can therefore benefit from the authorization to acquire receivables. This requires to examine the characteristics of these vehicles the purpose of which is to refinance credit institutions and the safeguards offered to investors acquiring securities issued by the vehicle. The following criteria could be envisaged: autonomy of the management of the vehicle vis-à-vis i.a. the originator (management company; trustee, etc); bankruptcy remoteness of the vehicle; acquisition of receivables and issuance of securities as exclusive social purpose; listing and rating of the debt securities issued by the vehicles. This also raises level playing

¹ This issue will be jointly presented by H. de Vauplane (BNP-Paribas) and Pedro Ferreira Malaquias (Vasconcelos, F. Sà Carneiro, Fontes & Associados).

field issues: should these vehicles (SPVs, conduits) be subject to the same rules applicable to the domestic securitization vehicles? Should these vehicles include CDO funds and also hedge funds?

Question for the EFMLG: Is there a distinction in the respective jurisdictions between domestic and foreign securitization vehicles?

2. Banking secrecy and assignment of receivables

The Paris Europlace Financial Law Committee adopted in December 2003 a White Paper entitled “*Proposals for reforms of the regulatory and legal environment*”. Among these proposals, the Committee examined a suggestion for an amendment of the French Financial and Monetary Code regarding banking secrecy. The Financial and Monetary Code provides that every person involved in the running or the management of a credit institution or who is employed by such institution is bound by professional secrecy obligations. In certain cases, this obligation creates some practical difficulties to banks. Two main cases can be mentioned: the operations of transfer of receivables (securitization, credit derivatives, assignment of receivables) and “due diligence” operations by banks. In both cases, this transfer of receivables requires an ex-ante assessment of receivables and of their quality. Such an assessment can only be performed on the basis of the individual information from customers. Although this assessment can only be performed by other banks themselves bound by these same obligations in terms of banking secrecy, it is difficult to avoid a breach of this rule, except if the customer expressly authorized the assignment of its debt prior to its assignment. This scarcely happens which blocks partially the credit secondary market. It should be however noted that the rights of customers are not really affected by such assignment since the receivable itself can be assigned without its authorization.

Question for the EFMLG: Does banking secrecy raise similar issues in your jurisdiction?