COUNTRY	QUESTION 5: Data Protection And Banking Secrecy
	(I) Does the law permit disclosure, including but not limited to information to third parties (such as investors in asset-backed securities), so as to ensure transparency while preventing abuse of data?
Austria	Restrictions exist with respect to personal data as follows: The Data Protection Act 2000 (*Datenschutzgesetz*), which is based on EC Directive 95/46/EC limits the transfer of data and provides, *inter alia*, for a 'prevailing justified interest' rule in the absence of customer consent. It is not entirely clear how this affects assignments of receivables. Stricter conditions apply when transferring data to a recipient located outside the EU. Under § 38 of the Banking Act 1993(*Bankwesengesetz*, BWG), 'credit institutions, their shareholders, members of their governing bodies , employees as well as other persons acting for credit institutions may not disclose or make use of secrets which have been entrusted or made accessible to them solely due to the business relationships with customers ... The obligation to maintain secrecy applies without any time limit.' In certain cases, the obligation to observe banking secrecy does not apply, e.g. vis-à-vis criminal courts in connection with criminal proceedings and vis-à-vis governmental authorities responsible for punishing fiscal violations in connection with criminal proceedings for intentional fiscal violations, with the exception of fiscal misdemeanours. As regards securitisation, the most important exception is where the customer expressly and in writing agrees to disclose personal data. Under § 2(60) of the BWG(see question 1(I)) 'special securitisation companies' purchasing receivables from credit institutions or assuming risks associated with such receivables are subject to the same banking secrecy obligation as credit institutions. We believe that this provision could be interpreted to allow the disclosure of relevant data to an SPV, which however would be subject to the banking secrecy obligation itself.
Belgium	
Denmark	
England and Wales	Yes, but the SPV may be obliged to notify or register under the Data Protection Act 1998. Under the law, the processing of information about living individuals is controlled by the Data Protection Act. Data includes information kept on computer or in an organised filing system. The Data Protection Act does not cover information about corporations. An SPV acquiring receivables which nevertheless continue to be serviced by the seller/originator is likely to be considered a 'data controller' within the meaning of the Data Protection Act. A data controller must complete an annual notification process before processing any personal data. Data controllers must comply with a set of principles that restrict the processing and keeping of personal data, including the principle that data must not be transferred outside the European Economic Area unless adequate protection is in place. The most basic principle is that processing of personal data must be fair and lawful.
Finland	With regard to securitisation transactions, legal provision relating to banking secrecy, customer and data protection [and the legislative targets regarding these?] may apply. [could it be more detailed?]

COUNTRY	QUESTION 5: Data Protection And Banking Secrecy (I) Does the law permit disclosure, including but not limited to information to third parties (such as investors in asset-backed securities), so as to ensure transparency while preventing abuse of data?
France	The Financial Securitisation Law of 1 August 2003 (*Loi de Sécurité Financièr*) does not contain any specific provisions relating to data protection or disclosure of information. However, the law contains a number of provisions on data protection and banking secrecy aimed at preventing any abuse of data. First, under Law No 78-17 on data protection, (*Loi Informatique et Liberté*) as amended by Law No 2004-182,any transfer of personal information must be disclosed to the French Data Protection Authority (*Commission Nationale Informatique et Liberté)*, a supervisory body responsible for ensuring that such data is adequately kept [stored?] and [treated?]. Second, where the assignor of the receivables is a credit institution, the provisions of the law relating to banking secrecy apply. Article L.511-33 of the Monetary and Financial Code (*Code Monétaire et Financier*, CMF) prohibits banks from transferring any information to third parties without the prior consent of the underlying obligor. An action is taken in France[Does this mean that there is presently a court case pending to do what? – please clarify], however, as of yet, the article has not been amended with respect to the transfer of receivables. [What about the obligations composed to the FCC as regards to data protection and banking secrecy?]
Germany	In accordance with banking secrecy obligations (see No 2(1) of the *General Business Conditions*, published by the Association of German Banks [date?]) and pursuant to § 4 of the Federal Data Protection Act (*Bundesdatenschutzgesetz,)*[date?]) disclosure of banking-related information or private data is only possible: (i) with the consent of a client or debtor; or (ii) if permitted by law. Disclosure of data may be further justified if it is clearly in the interest of the bank, client or debtor (§ 28(1) and (3) of the Federal Data Protection Act). The German Banking Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, hereinafter the 'BaFin') provided guidance on this matter in its Circular 4/97, clarifying the basic principal that debtor-related data should only be disclosed with the relevant debtor's prior approval. The Circular also sets out certain exceptions, [exceptions to what?] which, however, do not address the disclosure of debtor-related data to investors. It is questionable whether the disclosure of, e.g. names and addresses of debtors of securitised debts is required when distributing [Issling] asset-backed securities.
Greece	Under Article 10(22) of Law 3156 of 25 June 2003 (hereinafter the 'Securitisation Law'), an originator is allowed to provide an SPV with any information and data related to the securitised assets and the debtors. Similarly, the SPV may provide such information and data to note holders, its representatives, the services[which services?] and generally to all parties participating in the securitisation procedure in accordance with the Securitisation Law. In relation to securitisation, banking secrecy provisions do not apply between an originator and an SPV or between an SPV and its creditors. An SPV and its creditors, on the other hand, are bound by banking secrecy provisions in relation to each specific category of claims[please clarify what is meant by 'category of claims'?] (Article 20 of the Securitisation Law).
Ireland	To the extent that living individuals are identifiable from certain information, its disclosure is governed by the Data Protection Acts 1988 and 2003. Provided that individuals have been notified that their personal data may be disclosed to certain parties (e.g. as part of the general terms and conditions governing a loan) and provided either that: (i) they have consented to the disclosure; (ii) the disclosure is necessary for the performance of a contract between the individual and the disclosing party; or (iii) the disclosure is necessary for the purposes of legitimate interests pursued by the disclosing party, disclosure is permitted under the Data Protection Acts. No more data should be disclosed than is strictly necessary. In addition, where a third party (hereinafter a 'data processor') processes personal data on behalf of another party (hereinafter a 'data controller') a written contract between the parties is required whereby the

COUNTRY	QUESTION 5: Data Protection And Banking Secrecy (I) Does the law permit disclosure, including but not limited to information to third parties (such as investors in asset-backed securities), so as to ensure transparency while preventing abuse of data?
	data processor agrees to process the data solely in accordance with the instructions of the data controller and to comply with the data security obligations in the Data Protection Acts. Further restrictions apply in respect of the transfer of information outside the European Economic Area. Where any such transfer is proposed, one of a number of conditions must be satisfied including that: (i) the individual has consented to the transfer; (ii) the transfer is necessary for the performance of a contract between the individual and the transferor; or (iii) the transferor and transferee have entered into a data transfer agreement in the form approved by the European Commission. Where the information does not concern individuals, the Data Protection Acts do not apply. However, the banker's duty of confidentiality applies to information relating to individuals and non-individuals. The relationship between a bank and its customer gives rise, under the law, to a duty on the bank to keep secret and confidential information relating to its customers and their accounts. The duty is an implied term of the banker/customer contract, breach of which gives rise to a claim for damages for loss suffered and in certain cases, injunctive relief to prevent disclosure. The duty is not absolute and is subject to the following common law exceptions: • where the customer consents to the disclosure of the information either implicitly or expressly, [What about the obligations imposed to the SPV?] • where there is a duty on the public to disclose, • where it is in the interests of the bank to disclose, and • disclosure under compulsion of law.
Italy	The law governing securitisation (Law 130/99, hereinafter the 'Securitisation Law'), does not address the processing of debtor and guarantor personal data (e.g. names and addresses, amount of receivables, etc.) (hereinafter 'receivable related personal data') in the context of securitisation transactions. Instead, processing receivable related personal data is regulated by Legislative Decree No 196/2003 (hereinafter the 'Data Protection Code') and the Data Protection Authority decision of 4 April 2001 concerning the formalities to be followed by SPVs when serving a 'simplified data protection statement' (*informativa semplificata*) on debtors and guarantors (hereinafter 'data subjects') in the context of securitisation transactions. Under Articles 13 and 23 of the Data Protection Code, private entities are allowed to process personal data (including disclosure and/or dissemination to third parties) only if they have provided the relevant Data Subject with an adequate data protection statement and have obtained the Data Subject's express consent to such processing. However, Article 24 of the Data Protection Code states that the consent of Data Subjects [to be defined] is not required if the processing: (i) is necessary to comply with an obligation imposed by law, regulation or Community legislation; (ii) is necessary for the performance of obligations resulting from a contract to which the Data Subject is a party, or to comply with specific requests made by the Data Subject prior to entering into a contract; (iii) concerns data taken from public registers, lists, documents or records that are publicly available, without prejudice to the limitations and modalities laid down by law, regulation and Community legislation with regard to their disclosure and publicity; (iv) concerns data relating to economic activities that are processed in compliance with legislation applying to business and industrial secrecy; and (v) [is necessary to pursue a legitimate interest of either the data controller or a third party recipient in the cases specified by the Data Protection Authority on the basis of the principles set out under the law, also with regard to the activities of banking groups and subsidiaries or related companies, unless said interest is overridden by the data subject's rights and fundamental freedoms, dignity or legitimate interests, dissemination of the data being ruled out. This section is unclear – input from the author required]

<table>
<tr><th rowspan="2">COUNTRY</th><th>QUESTION 5: Data Protection And Banking Secrecy</th></tr>
<tr><th>(I) Does the law permit disclosure, including but not limited to information to third parties (such as investors in asset-backed securities), so as to ensure transparency while preventing abuse of data?</th></tr>
<tr><td></td><td>In the light of the above provisions, Receivable related personal data may not be disclosed to third parties (such as asset-backed securities investors), unless the Data subjects are first notified of the intent to disclose their Receivable related personal data and they have given prior written consent to such disclosure Receivable related personal data.</td></tr>
<tr><td>Luxembourg</td><td>The Law of 22 March 2004 relating to securitisation (hereinafter the ‘Securitisation Law’), does not contain any specific provisions on disclosure of (protected) data in the context of securitisation. Therefore, general provisions of law apply.
Under the Law of 13 August 2002 on the protection of persons in respect of the use of personal data (implementing 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) disclosure of personal data is only possible under strict conditions, so as to prevent any abuse of such data.
Consideration must also be given to banking secrecy provisions if the assignor/originator of the transferred assets is a credit institution or other professional of the financial sector subject to Article 41 of the Law on the financial sector of 5 April 1993. This article provides that directors, members of the managing and control bodies, managing directors, employees and other persons working for credit institutions may not disclose information confided to them in the course of their professional activities. Disclosure of such information is punishable by the penalties set out in Article 458 of the Criminal Code (i.e. imprisonment for a period of eight days to six months and a fine ranging from EUR 500 to 5 000). The above persons are 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.
The Supervisory Authority for the Financial Sector (Commission de Surveillance du Secteur Financier, CFFS) has long held the view that banking secrecy requirements do not hinder the transfer of, for instance, a portfolio of loans by way of assignment by a Luxembourg bank (or the acquisition by a third party of a [sub-participation?][subordinated interest?] in loans granted [issued?] by a Luxembourg bank). Nonetheless, whether the consent of a relevant client is required will depend on the facts of each individual case.</td></tr>
<tr><td>The Netherlands</td><td>In the Dutch jurisdiction, there is no Banking Secrecy Law. However, ‘good faith’ in general and the standard of due care in article 2 of the General banking Provisions imply that a bank cannot provide third parties personal information about their clients. One could also state that banking secrecy does apply to the relation bank/customer by customary law.

The use or dissemination of data about or provided by debtors may also be subject to the provisions of the Dutch Data Protection Act (Wet Bescherming Persoonsgegevens). This act contains provisions with respect to the processing of personal data – being information on private individuals or information which can be traced back to private individuals – and ‘processing’ including the dissemination or transfer of such data amongst or to third parties. The act sets requirements about the way personal data should be collected and states that such collection is allowed if any of the limitative grounds for assembling such information as mentioned in the act applies. Furthermore, the act indicates what requirements on quality need to be met, which reporting requirements exist and what rights the individuals whose information is colllected may exercise towards the data collector in relation to such data collection.

Like in Germany since the decision of the Oberlandesgericht in Frankfurt on May 25 2004, it cannot totally be excluded that under certain circumstances, article 3:83 (1) Netherlands Civil Code entails that a receivable is not transferable by the nature of the right. This might be the case when client information is disclosed with the transfer of the rights. Hardly ever this will not be the case, since the originator will usually do the servicing of the assets.</td></tr>
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COUNTRY	QUESTION 5: Data Protection And Banking Secrecy (I) Does the law permit disclosure, including but not limited to information to third parties (such as investors in asset-backed securities), so as to ensure transparency while preventing abuse of data?
Portugal	The Securitisation Law introduced by Decree-Law 453/99 (hereinafter the 'Securitisation Law') does not regulate the disclosure of information to third parties. Such disclosure is regulated by Law No 67/98, (hereinafter the 'Data Protection Law'), which implemented 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 dataand regulates the use and transfer of personal data of individuals. Under the Data Protection Law, processing of personal data requires the express consent of an individual unless the processing is necessary in certain specific situations. Companies collecting and processing personal data must obtain prior authorisation from the Data Protection Authority before processing such data. The transfer of personal data to an entity located within an EU Member State does not require authorisation from the Data Protection Authority but must be notified to the relevant data subjects.
Spain	There are restrictions regarding consumer debtors (Law 15/99 [title?]) that do not, however, apply to enterprises [undertakings?]. Also, banking secrecy rules regulate credit institution/customer transactions (D.A.[?] 1ª of Law 26/88 [title?]). [Are there any obligations imposed to SPVs?]
Sweden	Detailed information could be subject to bank secrecy and data protection restrictions relating to private individuals. General information without identification of debtors is normally in order.

COUNTRY	QUESTION 5: Data Protection And Banking Secrecy
	(II) Does the law allow the disclosure of certain asset-specific information to securitisation vehicles [SPVs?] and investor representatives such as note and security trustees?
Austria	There are no specific exceptions other than as described in the answer to question 5(I) (last paragraph). However, disclosure of asset-specific information not relating toor permitting to determine the identity of a specific customer is not restricted.
Belgium	
Denmark	
England and Wales	Yes (insofar as it is not prohibited). [Please provide details]
Finland	See question 5(I).
France	See question 5(I).
Germany	As far as receivables are concerned, there are various situations where the disclosure of debtor-related information could be required. They are as follows: (a) an [arranger?] carries out a due diligence to assess the quality of a portfolio, (b) a rating agency asked to assign a rating to the asset-backed securities 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, (see question 4(V)), 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). It has been discussed in legal literature whether banking secrecy or data protection rules require the non-disclosure of debtor-related information and, as a consequence of a failure to do so, render the transfer void or unenforceable As mentioned at question 5(I), the BaFin provided some guidance in its Circular 4/97, clarifying the basic principal (i.e. that debtor-related data should only be disclosed with the debtors' prior approval) and also defining the following exceptions. (i) no prior approval is required if, and to the extent that, the 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(ii) 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 European UnionEU. The Higher Regional Court (Oberlandesgericht) of Frankfurt am Main decided in May 2004 that the principle of banking secrecy and the contractual obligation to keep client data confidential result in an implicit agreement on the prohibition of assignments (§ 399 of the Civil Code). The abovementioned [where?] initiative of the Federal Ministry of Justice (resulting in the [new approach – what new approach is being referred to?]) addressed this issue by inserting a new § 22c(2) in the Banking Act [year?] pursuant to which receivables are eligible for registration in the refinancing register as long as the parties have not *explicitly* agreed otherwise. However, meanwhile the district courts (*Landgericht*) of Frankfurt am Main and Koblenz have both decided against the Higher Regional Court of Frankfurt am Main [case citations?] – that such an implicit agreement cannot be construed.
Greece	Yes, see question 5(I).

COUNTRY	QUESTION 5: Data Protection And Banking Secrecy (II) Does the law allow the disclosure of certain asset-specific information to securitisation vehicles [SPVs?] and investor representatives such as note and security trustees?
Ireland	See question 5(I).
Italy	As far as disclosure of Receivable related personal data to SPVs is concerned, please see question 5(III). With respect to disclosure of Receivable related personal data to investor representatives (such as note and security trustees) and other entities involved in securitisation transactions, it must be noted that under the law originators may not disclose Receivable related personal data to the abovementioned subjects, without first providing the relevant Data subjects with an adequate data protection statement Data subjectsand obtaining their prior express consent to such disclosure. In the absence of such a statement or consent, any asset-specific information can only be disclosed to investor representatives and other entities involved in securitisation transactions on an anonymous and/or aggregated basis (i.e. in a manner such as to ensure that no debtor and/or guarantor is, directly or indirectly, identifiable).
Luxembourg	See question 5(I).
The Netherlands	
Portugal	As stated at question 5(I), the Securitisation Law does not regulate the disclosure of information to third parties. Instead, such issues are regulated by the Data Protection Law. If the information to be disclosed is related to assets and does not disclose any personal data there are no restrictions on the disclosure of such information to SPVs and investor representatives.
Spain	
Sweden	Yes, but limitations apply. Disclosure consents by debtors are often obtained under general conditions.

COUNTRY	QUESTION 5: Data Protection And Banking Secrecy (III) Does the law allow for securitisation vehicles or service providers other than the originator to hold receivable related data? If there are obstacles in this regard please outline.
Austria	There are no specific restrictions (other than as described in our answer to question 5(I)).
Belgium	
Denmark	
England and Wales	Yes, subject to relevant prohibitions, restrictions and notification requirements under the Data Protection Act as set out in our answer to question 5(I).
Finland	See question 5(I).
France	The Securitisation Law does not contain any specific provision that would allow an originator to transfer personal data to other institutions [undertakings?] acting as service providers in a securitisation transaction [and which would be governed by similar level of secrecy or data protection?] Therefore, the provisions relating to data protection and banking secrecy set out in question 5(I) apply
Germany	See above.[question 5(I)?]
Greece	Yes. Under Article 21 of the Securitisation Law, holding and processing personal data is allowed provided that it is necessary for securitisation purposes and is performed in compliance with Data Protection Law No 2472/1997. Prior consent of the Data Protection Authority is not required.
Ireland	See question 5(I).
Italy	The law does not contain any specific provision allowing originators to disclose to SPVs and/or servicing agents Receivable related personal data without first providing the relevant Data subjects with an adequate data protection statementData subjects and receiving their express consent to such disclosure. Data subjectsThe Data Protection Authority established a specific procedure to facilitate the provision of an adequate data protection statement to the Data subjects by SPVs. The procedure is as follows: (a) The SPV shall address a request for authorisation to the Data Protection Authority. (b) The authorised SPV shall publish an adequate data protection statement in the Official Gazette of the Republic of Italy and at least three other newspapers. (c) The authorised SPV shall disclose [display?] the data protection statement at its premises and/or offices. (d) The authorised SPV shall transmit to [provide?] the Data Protection Authority [with a copy of the?] published text of the data protection statement. Furthermore, consent of the Data subjects is not required when transferring and/or communicating Receivable related personal data to the SPV. This may be inferred from Article 24(ii) of the Data Protection Code, which specifies that the Data Subjects' consent is not required if the processing is necessary for the performance of obligations resulting from a contract to which the Data Subject is a party. However, please note that there is no specific provision contained in the law addressing this particular issue.

COUNTRY	QUESTION 5: Data Protection And Banking Secrecy (III) Does the law allow for securitisation vehicles or service providers other than the originator to hold receivable related data? If there are obstacles in this regard please outline.
	Finally, SPVs, services providers, and other entities that are involved in securitisation transactions and that process Receivable related personal data must comply with the technical security measures contained in the Data Protection Code. In particular, the abovementioned subjects must keep and control the records in a way that minimises (using suitable preventative security measures) *inter alia*: (i) the risk of destruction or loss of such records, whether by accident or not; (ii) the risk of unauthorised access to the data; and (iii) the risk of processing operations that are either unlawful or inconsistent with the purposes for which the data have been collected or with the purposes of the processing.
Luxembourg	Please see question 5(I) for general considerations. There are restrictions in respect of personal data. A securitisation vehicle [SPV?] or a service provider may receive, hold and/or process protected personal data if: (i) it is necessary to perform an agreement; (ii) it is necessary for the realisation of its legitimate interest; or (iii) it is necessary in view of a legal obligation to which it is subject. The relevant data must be lawfully collected. The data may only be collected and used for legitimate purposes and may not be used for any other purpose. The data must be accurate, up-to-date and kept solely for a necessary period of time. The person concerned may oppose the processing of their personal data for 'legitimate and [preponderant what is meant by this - important?] reasons due to their specific situation', unless the law provides for the possibility of processing such data.
The Netherlands	Please read the answer on question 5.1
Portugal	No. Please see question 5(I).
Spain	Securitisation regulations require that an identification of the transferred assets is included in the securitisation documents [(assignment agreement whether on public document or not ?)].
Sweden	Information regarding private individuals must be dealt with withcare and not be disclosed unless required and then in appropriate forms, e.g. to professional third party service providers. We believe the rules are similar to other jurisdictions in Europe. Cross-border disclosures are sensitive. Bank secrecy should not limit similar disclosures on a confidential basis.

COUNTRY	QUESTION 6: Insolvency (I) Does the law provide for the separation of the SPV from the originator in the event of theinsolvency of the latter even where the SPV is part of the same group of companies as the originator?
Austria	The concept of substantialconsolidation[1]' does not exist under the law, in other words, separate legal entities will not be consolidated in insolvency proceedings under any circumstances.
Belgium	
Denmark	
England and Wales	There is no general principle in insolvency law giving a court the power to treat the assets and liabilities of one company as though they were the assets and liabilities of any other for the purposes of a liquidation or administration. The liquidator of a company has general powers to make compromises or arrangements with creditors if the relevant court agrees. There is precedent for court sanction of a compromise or arrangement effectively consolidating the affairs [assets and liabilities?] of two companies in liquidation for the purposes of those liquidations. However, this does not provide any precedent for consolidating the affairs [assets and liabilities?] of a company in liquidation with those of a company not in liquidation. It is unlikely that the court would sanction any such compromise or arrangement unless the affairs of the companies concerned were so inextricably linked that it could not be established which assets and liabilities should be attributed to which company or creditors, and such an arrangement was plainly in the interests of creditors. Thus, there is no doctrine of 'substantial consolidation' in the law, save for the limited circumstances in which the courts may ignore the corporate veil of a company and seek to make members liable for the it's liabilities. This is very rare and examples include: (i) where there is evidence that the company is used to perpetrate a fraud; (ii) where the company is used for an illegal or improper purpose; (iii) where the company in question is regarded as acting as the agent or nominee of its shareholder; and (iv) in cases of overriding public interest and trusteeship (including constructive trusts). Insolvency set-off is mandatory and automatic on liquidation or an administration distribution. It applies to any claim arising out of mutual credits or other mutual dealings before the insolvency which a creditor would be able to prove to be an 'insolvency debt'. These include sums arising from obligations entered into prior to the onset of insolvency, present, future and contingent debts and unliquidated debts ascertainable by fixed rules or as a matter of opinion.
Finland	Legally the receivables and the SPV are not part of the originator group if the sale is a perfected 'true sale' of receivables, which means that they would not form part of the originator's bankruptcy estate.

[1] Vinod Kothari's Securitisation website: "The essential premise of securitisation is the transfer of assets by the originator which will be isolated, such that the originator, a credit or liquidator of the originator cannot interfere with the same in the event of any bankruptcy, potential bankruptcy or distress proceedings against the originator. Consolidation may make isolation meaningless. Consolidation is the power of a Court, in particular, a bankruptcy court, to consolidate the SPV with the originator. In other words, the Court treats the SPV as a subset of the originator, or as an extended arm of the originator, and consolidates the SPV with the originator, such that the assets transferred by the originator, and consolidates the SPV with the originator. Thus, the very purpose of isolation or true sale may be frustrated. Such an action of the Court is referred to as **substantive consolidation, lifting or pierceing of coprate veil**, etc."

COUNTRY	QUESTION 6: Insolvency (I) Does the law provide for the separation of the SPV from the originator in the event of theinsolvency of the latter even where the SPV is part of the same group of companies as the originator?
France	There is no doctrine of substantial consolidation in the law. The Financial Securitisation Law of August 2003 (*Loi de Sécurité Financière,* hereinafter the 'Securitisation Law') provides for a complete separation of the common pool of debts (*fonds commun de créances,* FCC) from the originator in case of bankruptcy of the latter. The seller's insolvency official may not consolidate the assets and liabilities of a purchaser with those of the seller unless it [the purchaser?] is an entity established by the seller to defraud creditors or the purchaser is considered to be a sham or mere fiction. Under these circumstances insolvency proceedings could affect the purchaser's assets.
Germany	For the reasons explained at question 4(IV), in order to avoid any possible consolidation of the SPV's assets [with those of the originator?] for accounting or regulatory purposes, originators generally do not acquire a participation [retain any ownership interest?] in an SPV. Accordingly, if an originator becomes insolvent, the SPV assets do not form part of the bankrupt estate and the originator's receiver does not have access to or the right to dispose of the SPV assets. However, the shares in the SPV itself would be subject to the receiver's administration, under which a shareholders meeting could be convened to decide whether to liquidate the SPV in order to claim any surplus left over following such liquidation. [who is claiming?]
Greece	Law 3156 of 25 June 2003 (hereinafter the 'Securitisation Law'), does not address situations where an SPV could be considered to form part of the same corporate group as an originator. It is impossible to predict with any certainty as to how the courts would rule in a relevant case, particularly if the SPV is used for abusive purposes (e.g. the court may find that the 'piercing-of-the-corporate-veil' doctrine applies). In general, however, i.e. where there is no abusive use of the SPV, each legal entity should be treated as independent.
Ireland	In general, insolvent companies will be wound up separately, even where they are part of the same corporate group. However, there are a number of exceptions to this rule, including: **Contribution orders**: under Section 140 of the Companies Act, 1990, the High Court, if satisfied that it is just and equitable to do so, may order that any company that is or has been related (see below) to a company which is being wound up in Ireland shall pay to the liquidator of that company an amount equivalent to the whole or part of all or any of the debts provable in that winding-up (a 'contribution order'). In deciding whether it is just and equitable to make a contribution order the High Court must have regard (but not exclusively) to: a) the extent to which the related company took part in the management of the company being wound up; b) the conduct of the related company towards the creditors of the company being wound up; and c) the effect which such order would be likely to have on the creditors of the related company concerned. A contribution order cannot be made unless the High Court is satisfied that the circumstances that gave rise to the winding -up are attributable to the actions or omissions of the related company. Further, Section 140 provides that it is not just and equitable to make a contribution order if the only reason for doing so is: a) the mere fact that one of the companies is related to the other; or b) the mere fact that the creditors of the company being wound up have relied on the fact that the other company is or has been related to it. Currently, there is no reported judicial authority which would assist in clarifying the circumstances in which the High Court would exercise its discretion to grant a contribution order in respect of companies which are or have been related. **Pooling orders**: Section 141 of the Companies Act of 1990 provides that, where two or more related (see below) companies are being wound up, and the High

COUNTRY	QUESTION 6: Insolvency
	(I) Does the law provide for the separation of the SPV from the originator in the event of theinsolvency of the latter even where the SPV is part of the same group of companies as the originator?
	Court is satisfied that it is just and equitable to do so, both companies may be wound up together as if they were one company (a 'pooling order'"). A pooling order does not affect the rights of any secured creditor of any companies which are subject to it. In deciding whether it is just and equitable to make a pooling order a court will have regard (but not exclusively) to: a) the extent to which any of the companies took part in the management of any of the other companies; b) the conduct of any of the companies towards the creditors of any of the other companies; c) the extent to which the circumstances that gave rise to the winding- up of any of the companies are attributable to the actions or omissions of any of the other companies; and d) the extent to which the businesses of the companies have been intermingled. Section 141 provides that it is not just and equitable to make a pooling order if the only reason for doing so is: a) the fact that one company is related to another; or that b) the creditors of the company being wound up have relied on the fact that another company is or has been related to the first company. In addition, in deciding the terms and conditions of a pooling order the High Court must have particular regard to the interests of those persons who are members of some, but not all, of the companies. However, the interests of persons who are creditors of one, but not another, company are not expressly required to be taken into account. Currently, there is no reported judicial authority which would assist in clarifying the circumstances in which the High Court would exercise its discretion to grant a pooling order in respect of related companies. **Examinership**: examinership is a court moratorium/protection procedure available under company law. Where an Irish incorporated company is, or is likely to be, unable to pay its debts an examiner may be appointed on a petition to the High Court under Section 3 of the Companies Act if the High Court is satisfied that there is a reasonable prospect of the survival of the company and all or part of its undertaking as a going concern. Where an examiner is appointed to a company under the Companies Act 1990, the company is deemed to be under the protection of the High Court during the period beginning on presentation of the petition and ending at the latest 70 days later (which period may be extended by a further 30 days or, where the High Court needs more time to consider the examiner's final report, such further period as it determines). The effect of the appointment of an examiner is, *inter alia*, to suspend the rights of a secured creditor for the protection period but the appointment does not of itself affect the security itself or the rights of the secured creditor. Section 5 of the Companies Act provides that for as long as a company is under the protection of the High Court, no attachment, sequestration, distress or execution shall be put into force against the property or effects of the company except with the consent of the examiner. The section goes on to provide*inter alia* that, except with the consent of the examiner: a) where any claim against the company is secured by a charge on the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of such security; b) no receiver over any part of the property or undertaking of the company shall be appointed; and c) no proceedings for the winding-up of the company may be commenced or resolution for winding-up passed in relation to that company and no resolution passed shall have any effect. No other proceedings in relation to the company may be commenced except by leave of the High Court and subject to such terms as it may impose.

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	Section 4 of the Companies Act provides that where the High Court appoints an examiner to a company, it may also make an order appointing an examiner to a related company (see below). In order to appoint an examiner to a related company, it must be satisfied that there is a reasonable prospect of the survival of the related company, and the whole or any part of its undertaking as a going concern. **Related companies**: for the purposes of the above, a company is related to another company if, among other circumstances: a) more than half the nominal value of a company's 'equity share capital' (being its issued share capital excluding any part which, [neither as respect dividends nor capital?], carries any right to participate beyond a specified amount in a distribution) is held by another company, and companies related to that other company; or b) more than half the nominal value of the equity share capital of two companies isare held by members of the other; or c) that other company or a company or companies related to that other company or that other company together with a company or companies related to it are entitled to exercise or control more than one half of the voting power at any general meeting of the company; or d) the business of the companies has been so carried on that the separate business of each company, or substantial part thereof, is not readily identifiable; or e) it is a subsidiary or holding company (each as defined in Section 155 of the Companies Act 1963) of that company. For the purposes of the above, a 'company' includes any body (including a body established or incorporated outside of Ireland) which is liable to be wound up under the Companies Acts 1963 to 2003. In order to assist in ensuring that an SPV established for the purposes of a securitisation transaction is not deemed to be a 'related company' of the originator, and thus susceptible to a contribution order, pooling order or the appointment of an examiner, an SPV is usually established outside the originator's corporate group.
Italy	As a general rule, the originator does not own or control the SPV. Even if the SPV is part of the same group of companies as the originator, a declaration of bankruptcy of the latter should not result in the bankruptcy of the SPV. The following are relevant provisions of the law governing securitisation transactions (Law No 130/99, hereinafter the 'Securitisation Law') **(a) Assigned debtors' insolvency** Article 4(3) of the Securitisation Law provides that payments made by the original debtors to the SPV are not subject to the general clawback regime [2]contained in Royal Decree No 267/1942 (hereinafter the 'Bankruptcy Law'). Consequently, in the event that the original debtors are subject to insolvency proceedings, payments made by them to the SPV cannot be claimed. **(b) Clawback provisions** In the event that the originator is subject to an insolvency proceeding, pursuant to Article 4(4) of the Securitisation Law, the assignment of receivables by the originator to the SPV may be clawed back by a receiver of the originator in accordance with Article 67 of the Bankruptcy Law. However, pursuant to Article 4 of the Securitisation Law, the time frame for commencing a clawback action (set out in the Bankruptcy Law) is significantly reduced to three and six months

[2] For a definition of Clawback risk, see Moody's Special Report, Clawback Risk in EMEA Securitisation Transactions, March 2005. Clawback risk is defined as *"the risk that specific contracts entered into by an entity that subsequently becomes insolvent will be annulled upon it insolvency – poses a particular threat to securitisation transactions. (…) any clawback of the assets sold by an originator to a Special Purpose Vehicle as a part of securitisation deal risks triggering a severe loss for the Noteholders."*

COUNTRY	QUESTION 6: Insolvency (I) Does the law provide for the separation of the SPV from the originator in the event of theinsolvency of the latter even where the SPV is part of the same group of companies as the originator?
	[why three **and** six months? Are there two separate causes of action with different filing deadlines?]. Although not clearly mentioned in the Securitisation Law, it is widely recognised that this reduction of the [suspect period?] in relation to clawback is not limited to the assignment of receivables but generally refers to the securitisation transaction as a whole, thus also including the issuance of notes. [Could you please clarify this last statement?] **(c) SPVs' insolvency** The insolvency of an SPV is not expressly regulated under the Securitisations Law. However, normally, in securitisation transactions, several measures will be taken so ensure that the SPV is as 'bankruptcy-remote' as possible (see 'no petition' and limited recourse provisions[which are located where?]). The SPV could also be subject to liquidation proceedings (*liquidazione coatta ammministrativa*) or extraordinary administrative proceedings (*amministrazione straordinaria*) by virtue of Article 107 of the Consolidated Banking Act [No? Year?]. Under this article, companies listed in the special register referred to therein are subject to the provisions of Title IV, I, Sections I and II of the Consolidated Banking Act, relating to liquidation and extraordinary administrative proceedings.
Luxembourg	Such separation would be effective under the law, assuming that the SPV and the originator are both governed by Luxembourg law.
The Netherlands	
Portugal	Under the Decree-Law 453/1999 (hereinafter the 'Securitisation Law') any receivables assigned will not form part of the originator's insolvency estate and any payments made to the originator in respect of receivables that were assigned before the insolvency was declared, will not form part of the originator's insolvency estate even when the maturity date of such payments occurs after such an assignation. Article 8 concerns the insolvency of an originator and provides that: a) the assignment of receivables for securitisation purposes may not be rescinded for the benefit of the bankruptcy estate, unless evidence is produced showing that the parties acted in bad faith; and b) any amounts paid to settle receivables which have been assigned prior to the insolvency of the originator, but which mature only after insolvency is declared, will not be included in the insolvency estate. The insolvency official [administrator?] can only rescind transactions assigning receivables to the purchaser for the benefit of the originator's insolvency estate, if the purchaser and the originator acted in bad faith when assigning the receivables. Furthermore, the assignment of receivables for securitisation purposes can only be the subject of an *actio pauliana* (defence against fraudulent acts performed by the debtor in order to [diminish the guarantees? Claims?] of its creditors), if the creditor (plaintiff) is able to provide evidence *inter alia* of the depletion of the originator's assets and of bad faith in the transaction. The legal presumption of bad faith, which specifically refers to transactions within companies of the same group, contained in the Insolvency Code [year?] does not apply. In the most unlikely event that the insolvency administrator includes an assigned commercial receivable in the insolvency estate, the purchaser is entitled to obtain the separation of the receivable from such estate, under relevant provisions of the Insolvency Code.

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Spain	The law relating to securitisation does not foresee [recognise? deal with? Mention?] SPV's. However securitisation funds are, by their nature, a separate state [legal entity?] and [may not belong to anyone ?].[could this section be clarified?]
Sweden	Yes. However, if the pledgor/transferor is a parent company it could be argued that the pledgor/transferor still has access to the assets which may jeopardize the perfection of the transfer/pledge of the assets.

<table>
<tr><td rowspan="2">COUNTRY</td><td>QUESTION 6: Insolvency</td></tr>
<tr><td>(II) How and when could (i) a security interest granted by an SPV over its assets; (ii) a sale of assets when liquidating them; or (iii) payments to the investors under the debt instrument be challenged and declared void by the receiver of the SPV's estate?</td></tr>
<tr><td>Austria</td><td>Under the bankruptcy law, a bankruptcy administrator may challenge legal acts and transactions (including grants of security interests) that occurred within a specified time frame prior to the opening of the bankruptcy proceedings and that are tied to the assets of the insolvent debtor, in the following circumstances.
• Intent to disadvantage [No, “disadvantage” is the correct word] creditors: this occurs when (i) the debtor's actions have disadvantaged the creditors; (ii) the debtor's intention to disadvantage the creditors is deemed to have been known; and (iii) the legal acts have been carried out within the two-year period prior to the opening of the bankruptcy proceedings. If there is actual knowledge of the intentto cause damage, the relevant time period is extended to ten years.
• Fraudulent transfer: this relates to contracts for the sale, exchange, or delivery of goods entered into within one year prior to the opening of formal insolvency proceedings, where the counterparty to the contract was aware of or should have been aware of the fact that the transaction constituted a squandering of assets detrimental to creditors.
Transactions made without consideration: transfers made by an insolvent debtor for inadequate consideration within the two-year period prior to the formal opening of the bankruptcy proceedings.
• Preferential treatment: this occurs when (i) a creditor has obtained a security or satisfaction which he was not entitled to; or (ii) a security or satisfaction has been granted to a creditor with the intention of giving a preference to the creditor by an insolvent debtor with the intent to defraud the other creditors. This does not apply to legal acts carried out more than one year prior the opening of the insolvency proceedings.
• Knowledge of inability to pay: legal acts or transactions of a debtor which are aimed at satisfying an interest owed to a creditor can be challenged if, the acts or transactions were undertaken during the six months prior to the opening of the insolvency proceedings, provided that the debtor was already insolvent at the point in time such acts were undertaken or concluded. Legal acts of the insolvent debtor are challengeable if, at the time they were undertaken, the counter party knew or should have known of the insolvency. The disadvantage for the other creditors must be objectively foreseeable. Importantly, under this provision an arm's-length transaction could be contested if it was known (or should have been known) to the counterparty that the debtor was insolvent as the courts hold in such situations that the counterparty should be able to foresee that the assets given to the debtor as consideration will be lost or squandered.
If a transaction is successfully challenged by the administrator, earlier transaction will be set aside and the counterparty will be required to refund to the estate what it had unlawfully obtained. Accordingly, the other party will be required to file its claims in the bankruptcy proceeding. This will apply to SPV in the same way as to other creditors/ debtors</td></tr>
<tr><td>Belgium</td><td></td></tr>
<tr><td>Denmark</td><td></td></tr>
<tr><td>England and Wales</td><td>(All section references in this answer are to the Insolvency Act 1986, unless otherwise stated)
Where an administrator is appointed to a company, or the company goes into liquidation, the administrator or liquidator may apply to the court for an order to</td></tr>
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COUNTRY	QUESTION 6: Insolvency (II) How and when could (i) a security interest granted by an SPV over its assets; (ii) a sale of assets when liquidating them; or (iii) payments to the investors under the debt instrument be challenged and declared void by the receiver of the SPV's estate?
	set aside an earlier transaction which meets certain conditions. Such conditions, briefly, are that the transaction was either at an undervalue (Section 238) (unless the court is satisfied that it was entered into by the company in good faith for the purpose of carrying on its business and at the time it did so there were reasonable grounds for believing that the transaction would benefit the company) or was preferential (Section 239) to an existing creditor (and that the company which gave the preference was influenced in deciding to do so by a desire to improve that creditor's position on insolvency). In either case, the transaction must have been entered into within two years (or for a preference where the parties are not 'connected', six months) prior to the commencement of the insolvency proceedings and the company, at the time of the transaction or due to the transaction, was 'unable to pay its debts' within the meaning of Section 123. The court may also make an order in respect of an earlier transaction that was an extortionate credit transaction entered into within three years prior to the commencement of the insolvency proceedings. Even where a company does not enter into insolvency proceedings, a transaction may be set aside if entered into at undervalue for the purpose of putting assets beyond the reach of creditors, or otherwise prejudicing their interests (Section 423). A subjective intent is required. The following transactions may be vulnerable where the Financial Collateral Arrangements (No 2) Regulations 2003 do not apply: transactions made with the knowledge of an impending liquidation or administration, [transactions made between the presentation of a winding-up petition and a winding-up order being made – not clear?]; floating charges (Section 245 of the Insolvency Act) except to the extent that fresh consideration is provided (Clayton's case[3]); and share transfers made after a winding-up resolution. In addition, Section 395 of the Companies Act 1985 states that a security interest that can be registered and is not is void against a liquidator, administrator or other creditors of the company that granted it. Furthermore, a liquidator has the power to disclaim onerous property (Section 178), which includes unprofitable contracts. The contract in its entirety must be disclaimed, - both the obligations and the rights. The counterparty to the contract is deemed to be an unsecured creditor of the insolvent estate to the extent the it suffers loss or damage as a result of the disclaimer. To the extent that receivables are transferred to a purchaser by way of a 'true sale', the receivables cannot themselves be disclaimed by the seller's (originator's) liquidator. However, the liquidator could disclaim the ongoing obligations of the seller under the sale contract with the purchaser. The power to disclaim onerous property does not apply to any financial collateral arrangement falling within the Financial Collateral Arrangements (No 2) Regulations or certain market contracts. Finally, actions for wrongful (Section 214) and fraudulent (Section 213) trading by the directors, while they do not strictly result in transaction being set aside, can have the same economic effect by requiring purchasers to make contributions to the insolvent estate. A purchaser may also be liable for torts, such as

[3] **Clayton's case** (*Devavnes* v *Noble* (1816)) a decision that advances by a lender are deemed to be repaid on a first-advanced-first repaid basis, potentially giving the second secured lender priority, whether the first secured lender makes further advances after receiving notice of the second lender's security. If, however, the first lender has made a break in the loan account, subsequent repayments will be applied first against advances occurring after the break. In addition, Calyton's case will not be applied if there is evidence of a contrary intent. The decision may operate in a lender's favour to create fresh consideration where a floating charge created within 12 months of a liquidation.

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	conversion, or equitable or restitutionary remedies including knowing receipt and knowing assistance.
Finland	The recovery articles of the Bankruptcy Act apply in these cases. [could it be further detailed?]
France	Under Article L.214-43 of the Monetary and Financial Code (*Code Monétaire et Financier*, CMF) an FCC (or a division ("compartiment") of an FCC) may not pledge or discharge the receivables it holds.
Germany	In the case of insolvency of an SPV, the right of the receiver to challenge certain legal acts of the SPV and clawback money paid or assets posted as collateral [for reasons of voidable preference?] (*actio pauliana*). stems from the general insolvency laws. Pursuant to § 129 of the Insolvency Act [year?] (*Insolvenzordnung*), which describes the main rule, the receiver may invalidate any legal act made prior to the commencement of the insolvency proceeding (*Eröffnung des Insolvenzverfahrens*), which adversely affect the positions of other creditors. Relevant legal acts in this regard are any of those described above[where?] (i.e. granting security interests in or disposal of assets or payments). Pursuant to § 130 of the Insolvency Act, transactions providing a creditor with [credit support?] for, or satisfaction of, its claims might be challenged if they were made within the last three months prior to the filing of the petition for insolvency, provided that (i) the insolvent debtor was unable to pay its debts (*zahlungsunfähig*), and (ii) the creditor, when receiving satisfaction or collateral, had knowledge of the SPVs inability to pay. Whether the laws implementing Collateral Directive (Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements) apply to such collateral arrangements depends on the type of collateral at issue and whether the secured claims fall within the scope of § 1(17) of the Banking Act [year?]. For example, claims under derivative transactions secured by pledges or a full title transfer of cash or securities are exempted from § 130 of the Insolvency Act. Under § 131 of the Insolvency Act, transactions [granting credit support – what is meant by this] or satisfaction, to which the creditor was not (yet) entitled might be challenged if they were made (i) within the month prior to the filing of the petition for insolvency; or (ii) within the second and third month before filing the petition; provided that (a) the insolvent party was unable to pay its debts; or (b) the creditor knew that granting credit support or satisfaction adversely affected the position of other creditors. Pursuant to the Government report submitting the bill which became the Act implementing the Collateral Directive, the exemption from § 130 of the Insolvency Act (see above) granted to financial collateral arrangements should also apply to § 131 of the Insolvency Act. However, it is uncertain whether a judge would follow this interpretation. [§ 142 of the Insolvency Act provides a general privilege for cash transactions through which the bankrupt estate receives consideration with a value equal to or higher than the value of the sold asset. – this sentence is unclear? Please clarify] Those transactions may only be challenged if the conditions of § 133 of the Insolvency Act are met (i.e., transactions entered into with the intent of adversely affecting other creditors). Therefore there is only a remote risk that a sale of assets will be voided (assuming that the SPV carried out the transaction before it lost its right to dispose of its assets).
Greece	(i) A security interest created in favour of note holders (by means of a statutory pledge) over the securitised assets and deposits held by the servicing agent is not subject to any challenge by the receiver of the SPV's estate (Article 10(18) of the Securitisation Law). (ii) If securitised assets are liquidated before the expiry of the relevant bond issue, the security interest referred to under (i) has to be respected. In all other cases, the SPV's assets (if the SPV is a Greek entity) can be challenged in accordance with the general principles of bankruptcy law and may be declared

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	null and void, if, for instance, the receiver is of the opinion that the price received for the sale of the receivables was not adequate, etc. (iii) Payments to the investors should not be subject to challenge by the receiver provided that the funds used for such payments are derived from the proceeds of the securitised assets (in the order set forth in Article 10(17) of the Securitisation Law) and the rank provided in Article 10(18) of the Law in conjunction with Articles 975 and 976 of the Law of Civil Procedure [year?] is respected. If not, they would be subject to challenge in accordance with the general principles of the bankruptcy law (if the SPV is a Greek company). However, due to the *lex fori concursus*, the above analysis may differ, depending on the applicable bankruptcy law of a foreign registered SPV..
Ireland	Generally, the creation of a valid and perfected security interest over assets gives secured creditors the right to enforce the sale of the assets that are the subject of the security and to apply the proceeds of the sale towards discharging the secured obligations. However, the following provisions may interfere with the realisation of the security and the application of the proceeds as specified in the security documents: **Improperly transferred assets:** under Section 139 of the Companies Act, 1990, if it can be shown, on the application of a liquidator, creditor or contributory of a company which is being wound up, to the satisfaction of the High Court, that any property of such a company was disposed of (including by transfer, security or mortgage) and the effect of such a disposal was to ‘perpetrate a fraud’ on the company, its creditors or members, the High Court may, if it deems it just and equitable, order any person who appears to have ‘use, control or possession’ of such property or the proceeds of the sale or development thereof to deliver it or pay a sum in respect of it to the liquidator on such terms as the High Court sees fit. The ability to use Section 139 to challenge asset transfer has been extended to receivers and examiners. In deciding whether it is just and equitable to make an order under Section 139, the High Court must consider the rights of persons who hold a bona fide and for value interest in the property at issue. To date, there are no reported decisions relating to the scope and application of Section 139. **Fraudulent preference**: Section 286 of the Companies Act, 1963, provides that any act relating to property made by or against a company, which is unable to pay its debts as they become due within six months of the commencement of a winding-up procedure with a view to giving such creditor (or any surety or guarantor of the debt) a preference over the other creditors, shall be deemed to be a fraudulent preference and invalid. Case-law relevant to Section 286 indicates that a dominant intent on the part of the company to prefer a creditor over the other creditors of the company is necessary in order for Section 286 to apply. Where the act is in favour of a ‘connected person’ (as outlined below) the six-month period is extended to two years. In addition, any such act in favour of a connected person is deemed to be made with a view to giving the connected person a preference over the other creditors and as such is a fraudulent preference and invalid. Consequently, the burden is on the connected person to show that any such act was not a fraudulent preference. A ‘connected person’” is a person who, at the time of the transaction, was: a) a director of the company; b) a shadow director of the company (being a person in accordance with whose directions or instructions directors of the company are accustomed to act); c) a director’s spouse, parent, brother, sister or child; d) a related company (see question 6(I)); or e) a trustee of, or surety or guarantor for the debt due to, any person described above. See also question 6(III).

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Italy	As mentioned above in our answer to question 2(IX), pursuant to Article 3 of the Securitisation Law, receivables relating to each securitisation transaction will be segregated from the assets of the purchasing company or SPV [(whether or not the issuer)?] and from those of any other transaction. Such segregation occurswill be made by operation of law. In addition, no actions by creditors other than the holders of the securitised notes are allowed against the receivable portfolio (please also see our answer to question 6(I) on clawback provisions).
Luxembourg	As regards security interests granted by an SPV over its assets, Article 61(3) of the Law of 22 March 2004 relating to securitisation (hereinafter the 'Securitisation Law'), provides that a securitisation undertaking may not grant security interests over its assets or transfer its assets for guarantee purposes, except to secure obligations assumed for the securitisation or in favour of investors, fiduciary-representatives or the issuing vehicle participating in the securitisation. Security interests and guarantees granted in breach of this article are void by operation of law and could therefore be challenged by a receiver. Payments to investors under debt instruments cannot be challenged and declared void by the receiver of an SPV's estate if they are made in accordance with the issue documentation. Article 65(1) of the Securitisation Law provides that the conditions of issuance and of reimbursement of securities issued by a securitisation undertaking are binding and effective against any other person, including in the case of liquidation of one or more compartments, bankruptcy and generally any proceedings affecting creditor's rights generally, without prejudice to the rights of creditors that have not given their consent thereto.
The Netherlands	According to section 42 of the Dutch Bankruptcy Law, the insolvency official may try to void voluntary executed transactions, provided he can establish that both parties to the transaction knew or should have known that the transaction would have the effect of decreasing the amount the seller' s creditors would have received, had the transaction not taken place. Such knowledge is presumed by section 43 of the Dutch Bankruptcy Law, subject to proof to the contrary, for all transactions performed within one year prior to an adjudication of bankruptcy of the seller and provided it can be established that the transaction falls within certain categories. It is of note that section 47 of the Dutch Bankruptcy Law gives two exceptions to the rule that a *non*-voluntary payment of a due and payable claim that took place during a period before the commencement of the insolvency procedure is valid : 1) if the beneficiary knew that a petition for bankruptcy had been filed, or 2) the debtor and the creditor consulted each other to favour the latter.
Portugal	In accordance with the Securitisation Law, a credit securitisation funds (*fundos de titularização de créditos*, FTC) cannot grant a security interest over the accounts receivables. Nevertheless, as mentioned before, the sole function of the fund is to purchase certain types of receivables for the purpose of securitisation and therefore, due to certain features of the fund as set out below, it also represents some form of security for the investors. (unit holders, for instance?): a) Once purchased, the receivables are owned by the fund and there are no circumstances under which they can be used to offset the debts of fund participants or its managing entity or provided that a 'true sale' has been confirmed for the receivables, of the originator. b) Subsequent to purchase, the fund issues units representing ownership of the fund's assets, for the ultimate benefit of the note holders.

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	c) A separate fund must be established for each securitisation transaction. If the purchaser [of the receivables] is a credit securitisation company (*sociedades de titularização de créditos*, STC) a) Although the same STC may be used concurrently for an unlimited number of separate transactions, each issuance of securitisation notes is segregated to a ring-fenced pool of assets and the PSL [securitisation law?] clearly provides that different pools of assets purchased by the STC are fully segregated. In the light of this there is a complete segregation of assets, and cross-collateralisation across separate issuances is not possible. b) Furthermore, the note holders benefit from a legal security by way of a priority right over the assets ("*privilégio creditório especial*") which at any moment make up the separate, ring-fenced assets allocated to the relevant issuance. Under the legal priority right granted to the note holders they shall be reimbursed before the remaining creditors of the STC. This priority right is not subject to registration. In light of this, if the purchaser is an STC, it makes no sense for additional security to be granted. Regarding points (ii) and (iii), please see the answer to question 6(I)..
Spain	The securitisation fund is not an SPV; it may not go bankrupt [and is not subject to those provisions – not clear?].
Sweden	1. Non-perfection of security interest. 2. Recovery in bankruptcy particularly if assets secure so-called "old debt" and are not provided on a so-called "ordinary" basis.

COUNTRY	QUESTION 6: Insolvency (III) Is there a law/regulation preventing insolvency officers from interfering with cash flows associated with securitised assets or with the disposal by SPVs of such assets (or associated servicing rights) to third parties? Please distinguish the case of insolvency of the originator and of the SPV.
Austria	**Originator insolvency:** there is no specific prohibition to such effect, however under the general insolvency rules, assets (including cash arriving on the accounts of the bankrupt's estate after the start of the proceedings) belonging to third parties (such as the SPV in a securitisation) must be segregated. **SPV insolvency**: the general rules would apply, i.e. the liquidator would have to dispose of the SPV's assets and distribute the proceeds amongst the its creditors.
Belgium	
Denmark	
England and Wales	UK SPVs are usually structured as 'bankruptcy-remote' vehicles. As for insolvency of a UK originator, please see below: **Winding-up**: under Section 127 of the Insolvency Act 1986 (as amended), dispositions of a company's property made after the presentation of a winding-up petition against the company are void unless validated by the court. Under Section 130 of the Insolvency Act, when a winding-up order is made or a provisional liquidator is appointed, no action or proceedings can be proceeded with or commenced against the company concerned or its property, except by leave of the court. A practical effect of this Section is that banks may well impose an immediate freeze upon any accounts which are held in the name of the company in respect of which a winding-up petition has been presented and insist on the 'comfort' of a court order validating any proposed dispositions or continued payments made out of the company's bank account before releasing any funds from the account. In the event that a winding-up petition is presented against any UK originator, this would (at least initially) prevent, for example, the withdrawal by theUK originator of advance payments. However, Section 127 does not prevent dispositions of property which is held on a validly constituted trust. Therefore, if theUK originator is beneficially entitled to 'collections', Section 127 would not prevent incoming collections from account debtors. **Administration:** under Sections 10 and 11 of the Insolvency Act, during the period for which an administration order is in force, or a petition for an administration order is outstanding, no steps may be taken to enforce any security over the company's property and no other proceedings or legal process may be commenced or continued against the company or its property, except with the consent of the administrator or leave of the court. **Use of power of attorney:** consideration should be given to use of the power of attorney granted by a UK originator to an 'operating agent'. Under Section 4 of the Power of Attorney Act 1971, a power of attorney is not revoked by the donor's (i.e. originator's) liquidation, where it is expressed to be irrevocable and is given to secure a proprietary interest, or an obligation owed. Similarly, under common law, a power of attorney coupled with an interest is irrevocable as long as that interest subsists. The use of power of attorney should not be in breach of either Sections 127 and130 of the Insolvency Act and the 'operating agent' may carry out a number of activities, notwithstanding the liquidation of theUK originator, including giving notice to the relevant account debtors, giving instructions as to the redirection of direct debits of the relevant obligors, etc.

COUNTRY	QUESTION 6: Insolvency (III) Is there a law/regulation preventing insolvency officers from interfering with cash flows associated with securitised assets or with the disposal by SPVs of such assets (or associated servicing rights) to third parties? Please distinguish the case of insolvency of the originator and of the SPV.
	The use of a power of attorney on an administration of the UK originator should be effective to the extent that the exercise of such a power does not amount to an 'enforcement of security' or the commencement/continuation of a 'proceeding' or a 'legal process' against the company in administration or its property. **Interruption in collection procedures on winding-up/administration:** in the course of dischargingtheir statutory duties, a liquidator/administrator of a company will often be called upon to investigate the ownership of assets which certain creditors claim are held in trust for them. Whether or not these investigations involved the liquidator/administrator effectively freezing the trust assets, and operation of the trust in relation to those assets, [pending the result of their investigations will depend on the facts of each individual case?], including the practical stance adopted by the particular liquidator/administrator and the complexity of any issues concerning the validity of the trust. Where sums standing on the credit of the collection accounts are subject to a trust the liquidator/administrator appointed to a UK originator would need to verify that such sums are subject to valid and binding trust entitlements and that the operation of the trust in respect of those collections is not prejudicial to the creditors of the UK originator as a whole. **Appointment of an administrative receiver - Enterprise Act 2002:** the ability of a secured creditor with a floating charge to appoint an administrative receiver thereby blocking the appointment of an administrator (who could otherwise impose an automatic stay on legal proceedings and on the security enforcement) has undergone a significant reform. The Enterprise Act amended the Insolvency Act by abolishing the right to appoint an administrative receiver, unless one of the exceptions applies. The relevant exception in the context of securitisation is the 'capital market arrangement'. Thus, a *qualifying floating charge holder* will be able to appoint an administrative receiver if it is pursuant to an agreement which is or forms part of a 'capital markets arrangement'. A 'qualifying floating charge' is one which empowers the holder to appoint an administrator (expressly or by reference to the Act[which?]) or to appoint what would in effect be an administrative receiver under the existing law. Debenture holders are deemed to be holders of a qualifying floating charge if they are secured by one or more qualifying floating charges covering the whole or substantially the whole of a company's property or a combination of charges and other forms of security which do so, provided one is a qualifying floating charge. A 'capital markets arrangement' is broadly a financial scheme where: (i) at least GBP50 000 000 (or its equivalent in another currency) of debt is incurred or expected to be incurred at some stage during the life of the arrangement; (ii) at least one of the parties benefits from a security interest, financial guarantee or derivative contract; (iii) debt securities are issued; and (iv) the securities are or are designed to be rated by an internationally recognised rating agency, admitted to the official list by the UK Listing Authority, or admitted to trading on a recognised market.
Finland	There are no specific provisions in the Bankruptcy Act [year?]for these situations. Normal principles apply.
France	As mentioned earlier[where?], FCCs are not legal entities and, as such, are not subject to the insolvency provisions of the Commercial Code. As far as the insolvency of the originator is concerned, please note that Article L.214-46 of the CMF which relates to dedicated collection accounts provides that the sums credited to such accounts by an originator will not be subject to any claim regarding payment over the sums collected, even when such an entity becomes the subject of insolvency proceedings. Please also refer to question 4(I).

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Germany	In the case of insolvency, the receiver assumes the right to administer the bankrupt estate and dispose of all assets constituting a part of it. Whether a receiver can interfere with cash flows tied to securitised assets depends on whether the monies representing those cash flows would at any given time form part of those assets. As for the bankruptcy of the originator, if the originator is entrusted with the collection of receivables and if the monies paid by the debtors are credited to an account opened and maintained by the originator in its own name, the receiver will have the right to draw on those cash balances and use them to satisfy claims of the originator's creditors. The view would be different if the account used for collection was a fiduciary account maintained for the benefit of the investors. The 'fiduciary approach' (see question 4(I)), which normally requires that the fiduciary (i.e., the account holding bank) acquires the assets from the beneficiary (i.e. the SPV) directly through transfer of assets, has been modified by the Federal Court (BGHZ 11, 37; 109, 47, 51[names of parties? date?]), so that it is sufficient if the fiduciary bank receives the monies from third parties. However, the amounts credited to the fiduciary account must not be commingled with the monies of the originator. As for the bankruptcy of the SPV, the same applies. The SPV receiver has no right to claim cash balances credited to a fiduciary account maintained by it for the benefits of the investors. It is common practice in securitisation transactions that all cash flows related to securitised assets are credited to and maintained in fiduciary accounts.
Greece	Concerning the insolvency of an SPV, insolvency officers may interfere with cash flows tied to securitised assets, however, they are obliged to respect statutory pledges (as set out above [where?]) and their ranking with regard to the securitised assets and bank deposits held by servicing agents. In the event of the insolvency of an originator, the insolvency officer has no right to interfere with the securitised assets (and the associated cash flows), provided that the securitisation agreement has been registered in the public registry as defined in Article 3 of Law 2833/2000 (Article 10 (19) of the Securitisation Law).
Ireland	The general corporate insolvency regime applies to originators and SPVs involved in securitisation transactions. To the extent that assets have been the subject of a 'true sale' to an SPV then, as discussed in question 4(I), they should fall outside the insolvency estate of the originator. To the extent that the SPV has created valid security over the assets in favour of the transaction creditors, then the assets should be available to meet the claims of such creditors ahead of the claims of any unsecured creditors. However, see question 6(II) for a discussion of the risks posed to a 'true sale' of assets and the creation of security. In addition, the following factors may affect the validity of security created over assets: **Fixed or floating charge**: a fixed charge attaches to a particular asset as soon as the charge is created or the chargor acquires the asset, as the case may be. The chargor cannot thereafter dispose of that asset free from the charge without the chargee's consent. A floating charge does not attach to any particular asset which the chargor has or will acquire, leaving the chargor free to deal with any of the assets to which the floating charge is expressed to extend for so long as the floating charge does not crystallise. Upon crystallisation, the floating charge attaches as a fixed charge to all assets over which it previously 'floated'" and to any assets of the specified description in the floating charge subsequently acquired by the charger. A floating charge is more vulnerable than a fixed charge to losing its priority to other rights and interests. A floating charge will take effect subject to: a) third party rights or interests (including rights of set-off) unless the third party concerned had express notice that a term in the security document prohibited the type of transaction which the grantor of the floating charge entered into with the third party him or that the floating charge had crystallised;

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	b) any execution or attachment completed before crystallisation; and c) any distress, whether levied on or after crystallisation. Moreover, amounts realised in a liquidation or a receivership from assets subject to a floating charge must first be used to pay certain preferential debts, for example, money owed to the Revenue Commissioners for tax deducted at source, value added tax (VAT) and remuneration of employees provided that the existence of those debts is notified to the liquidator as provided for in Section 285(14) of the Companies Act, 1963. Such amounts will also go to discharging the costs of the liquidator, generally. In contrast, amounts produced in realising assets subject to a fixed charge will only be subject to a prior claim of a liquidator in respect of their costs, if any, in realising those assets. Furthermore, Section 288 of the Companies Act of 1963, as amended, renders invalid (except to the extent of monies actually advanced or paid or the actual price or value of the goods or services sold or supplied to the company at the time of or subsequently to the creation of the charge, together with interest on that amount at the rate of 5 % per annum) floating charges on the property of a company created within 12 months before the commencement of the winding-up, unless it is proved that the company was solvent immediately after the creation of the charge. Section 288 also provides that where a floating charge is created in favour of a 'connected person' (as outlined in question 6(II) above), the period of 12 months is extended to two years. Section 1002 of the Taxes Consolidation Act 1997: Under Section 1002, any debt due to an entity (including a deposit with a financial institution) may be attached by the Revenue Commissioners to discharge any liabilities of that entity in respect of outstanding tax whether the liabilities are due on their own account or as an agent or trustee. This right of the Revenue Commissioners may override the rights of holders of security in relation to the debt in question. Section 1001 of the Taxes Consolidation Act: Under Section 1001 of the Taxes Consolidation Act of 1997, the holder of a fixed charge over book debts of a company having outstanding VAT liabilities or outstanding liabilities under Chapter IV of Part 42 of the Taxes Consolidation Act (obligation of an employer to deduct and pay to the Revenue Commissioners income tax in respect of employee emoluments) (hereinafter the 'relevant tax liabilities'") may be required by the Irish Revenue Commissioners to pay to them any amount: a) which the company is liable to remit to the Revenue Commissioners in respect of relevant tax liabilities; and b) not exceeding the amount or aggregate amount which the holder has, while the fixed charge over book debts is in existence, received directly or indirectly from that company in payment or part payment of any debts due by the company to the holder (but excluding amounts received by the holder before it receives a written notification from the Revenue Commissioners of the company's default and its liability pursuant to Section 1001). It should be noted that nothing in Section 1001 requires the Revenue Commissioners to effect any apportionment as between holders of fixed charges over book debts in this regard. It appears, therefore, that the Revenue Commissioners can require one such holder to make a payment referred to above to the exclusion of any other such holders. Where within 21 days of the creation of the fixed charge the holder of the fixed charge furnishes to the Revenue Commissioners particulars of the relevant charge, the holder of the fixed charge is only liable to pay amounts equivalent to the relevant tax liabilities arising on or after the date on which it receives the

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	written notification from the Revenue Commissioners. Whilst Section 1001, arguably, is concerned with charges on the book debts of a company generally rather than a charge on a particular book debt or debts only, the position in this regard is not free from doubt.
Italy	Please see questions 6(I) and (II).
Luxembourg	Except in the case of fraud, an originator's insolvency officer should not be able to interfere with cash flows associated with securitised assets or with the disposal by SPVs of such assets. As regards an SPVs liquidator , there is currently no general or specific prohibition concerning insolvency officer's ability to interfere with cash flows associated with securitised assets or with the disposal by SPV of such assets. Some issues are specifically addressed. For example, the liquidator of an authorised securitisation undertaking may not grant security interests over the assets of a securitisation undertaking or transfer such assets for security purposes without the authorisation of a court.
The Netherlands	If the seller of the securitised assets becomes subject to insolvency proceedings following the sale and transfer of ownership rights, the purchaser is free to exercise any ownership rights over the assets, including collection and transfer. However, if an assignment of receivables was done in the undisclosed way, and the purchaser does not notify the debtor of the assignment, the insolvency officer is the one to collect.
Portugal	Under Article 5 of the Securitisation Law, in the case of insolvency of the servicing agent, any amounts in its possession which are payments related to the assigned receivables for securitisation purposes shall not be deemed to form part of the insolvency estate. As mentioned [where?] before, Article 8 of the Securitisation Law (which addresses the insolvency of the originator) specifically provides that any amounts paid [to settle?] receivables which have been assigned prior to the insolvency of the originator but which mature only after insolvency is declared shall not be included in the insolvency estate. As for insolvency of an SPV, please note the following. ▪ The insolvency of an FTC or credit securitisation companies (*sociedades de titularização*, STC) will not affect the payment obligations of the obligors [under?] the receivables. ▪ Obligors will have to continue to make payments due to the FTC/STC. ▪ The receivables will not become immediately due and payable and will continue to perform as usual. The fact that an FTC/STC is declared insolvent does not mean that it will necessarily be wound up and dissolved. If certain conditions are met, the FTC/STC may still undergo a recovery process aimed at getting it back into business. Please note that under the Insolvency Code, the insolvency administrator and the assembly of creditors have wide powers to set-up and execute an insolvency plan aimed at either recovering the fund/company or winding it up. Under the Insolvency Code, with the declaration of insolvency, notes become immediately due and payable in full. (Article 91(1)). However, in contrast with

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	what was established in the Bankruptcy Code [year?]: ▪ the insolvency administrator/assembly of creditors may decide that further regular payments of interest and principal are allowed, i.e. they can be made to the note holders by the fund/company until the insolvency procedure has come to an end., and ▪ if payments are suspended, penalty interests will, in principle, accrue and be due to note holders. Units under an FTC structure do not however enjoy the benefit of Article 91(1), as units are not credits of the unit holders but undivided ownership interests of such holders over the fund's assets. Therefore the units will only be paid-up in full if and when the FTC is liquidated. If winding-up the fund/company is the purpose of the insolvency proceedings, then the receivables will be sold by a judicial administrator, once an estimate is made of all of the FTC/STC assets. It is not clear whether the legal restrictions on the transferability of receivables set out underthe Securitisation Law will apply under these circumstances. [If they do apply,?, in which case] the receivables can only be sold to an STC/FTC, except if default occurs with respect to the receivables, in which case no restrictions apply. Moreover, the fact that no active and liquid secondary market for receivables of this type exists may result in the judicial liquidator finding it difficult to to liquidate the receivables on appropriate terms. As for an STC's insolvency, the receivables backing each issue will constitute a completely segregated (ring-fenced) pool of assets and the note holders' claims will rank senior within their specific pool of assets. Funds areautonomous pools of assets, therefore they are segregated by their nature. As a separate fund is established for each transaction, no cross-collateralisation issues arise. The note holders/unit holders have no claims over assets located outside their related pool of assets.
Spain	There are no SPVs.[does it mean: in Spain, there are only securitisation funds?] In the case of insolvency of an originator, the law prevents insolvency officers from interfering with cash flows except in the case where the assignment of assets was made fraudulently.
Sweden	Swedish insolvency laws apply generally to originators and SPV's. If the transfer/pledge is perfected and claw-back is not relevant, the insolvency officers may generally not interfere (with some minor exceptions and except in relation to sale of real property subject to a security interest only).

<table>
<tr><th rowspan="2">COUNTRY</th><th>QUESTION 6: Insolvency</th></tr>
<tr><th>(IV) Does the law recognize contractual arrangements between debtors and creditors or between groups of creditors concerning the extent of their rights in respect of the securitised assets or the SPV?</th></tr>
<tr><td>Austria</td><td>Yes, such arrangements would be recognized at least inter partes. We would normally also expect that a bankruptcy administrator would adhere to such arrangements although the law does not specifically address them.</td></tr>
<tr><td>Belgium</td><td></td></tr>
<tr><td>Denmark</td><td></td></tr>
<tr><td>England and Wales</td><td>Yes.

Administrative receivership: see question 6(III).

Administration (Insolvency Act 1986, Part II): this mechanism is designed to protect companies from their creditors while a restructuring plan is completed. The administration mechanism has been subject to quite significant changes as a result of the Enterprise Act, which amended the Insolvency Act. Under the new law it is possible for the company and its directors to apply to the court to place the company into administration through a new streamlined process that obviates much of the need for an expensive application to the High Court. But the law still requires that any finance provider, with the appropriate security, is contacted and the aims of the administration be discussed. The charge holder will need to give permission for the process to go ahead.

For an administration to take place, the company must be of a reasonable size, have reasonably predictable cash flows and must be able to predict profitability. The administration process requires a licensed insolvency practitioner to act as the administrator appointed by the court. The new law refers tothree objectives for the administration. The company rescue (as a going concern) is the primary objective; If that is not possible (or if the second objective would clearly be better for the creditors as a whole), then the administrator can achieve a better result for the creditors than would be obtained through an immediate winding-up of the company possibly by trading on for a while and selling the business(es) as a going concern. Only if neither of the first two objectives is possible can the administrator realise any property to make a distribution to secured and/or preferential creditors.

Previously there was a requirement for an application to court and a hearing was required to grant the administration order. Now additionally there is the ‘out of court order’ appointment route for holders of qualifying floating charges, companies and directors.

When holders of floating charges make the application, the only notice that a floating charge holder will have to give will be to the holders of any prior floating charges, who will be required to consent to the appointment, or make alternative arrangements to appoint their own administrator. This will enable the holder of the most senior floating charge to determine which administrator is appointed.

The filing of such a notice will bring into effect an interim moratorium on insolvency proceedings and other legal processes being taken against the company. Companies and directors will only be able to appoint an administrator through the ‘out of order court’ order route if the company has not had the benefit of a moratorium within the previous 12 months. (Where a company is in liquidation or in a company voluntary arrangement CVA then the court order route must still be used).</td></tr>
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COUNTRY	QUESTION 6: Insolvency (IV) Does the law recognize contractual arrangements between debtors and creditors or between groups of creditors concerning the extent of their rights in respect of the securitised assets or the SPV?
	On the making of an Administration order, the moratorium comes into full effect (preventing, *inter alia*, any petition/resolution for winding-up, enforcement of security, legal actions against the company in administration, etc.) and the Administrator manages the company's affairs, business and property in accordance with the proposals that have been agreed by the creditors. **CVA (Insolvency Act 1986 Part I)**: a CVA is a deal between the company and its creditors to repay them from future profits (or a deal may be written to sell assets and pay back creditors from the proceeds). The deal is based on preserving the company, with directors remaining in control, rebuilding sales and profits and paying something back over a period of time to be agreed. The CVA may be proposed by the directors of the company. When the company is either in liquidation or administration, the liquidator or administrator can propose a CVA. A CVA can only be proposed if a company is insolvent or contingently insolvent. The Insolvency Act of 2000 amended the Insolvency Act of 1986 by introducing changes to the CVA. Under Section 1(A), directors may apply to the court for a moratorium to protect the company before and during the creditors' meeting process, provided it is a 'small' company that meets the requirements of Section 247 of the Companies Act 1985 (i.e., assets of less than GBP1 400 000, sales less than GBP2 800 000 and fewer than 50 employees). During the moratorium process no petition may be presented for winding-up of the company (subject to the court), the company cannot enter a voluntary liquidation, cannot propose administration and bank(s) or floating charge holders may not appoint a receiver. However, the Insolvency Act 2000 allows for new security to be granted by a company during the time when a moratorium is in force. The CVA is approved at the creditors' meeting provided a 75 % majority of the total value of creditors at the meeting (whether in person or by proxy) vote in favour. The effect of the CVA being approved is that the company's creditors can all be bound whether the notice is given. This removes the risk of not including creditors who subsequently take legal action. **(4) Creditors voluntary liquidation (CVL) (Insolvency Act 1986, Part IV, Chapter IV)**: a CVL is appropriate when the company is insolvent; it does not appear to be viable - even if restructured; and the directors do not believe that they have the determination needed to rescue the company. <u>Shareholders' meeting</u>: In CVL, the directors of an insolvent company elect call an extraordinary general meeting (EGM)where directors report that the company is insolvent, there is no reasonable prospect of paying existing creditors, they believe it would be wrong to take further credit and they advise the members that the company should voluntarily enter liquidation. At this EGM the shareholders pass a resolution to cease trading and to nominate a liquidator. <u>Creditors' meeting</u>: The liquidator conducts a relatively quick investigation into the statement of affairs of the company and calls the creditors to a meeting. The liquidator must place an advert in the London Gazette and in the local press calling this meeting and write to the creditors inviting all known creditors to submit a claim for their debts. The liquidator is then appointed by the creditors at a creditors meeting (Section 98 of the Insolvency Act 1986). If required the creditors can elect to form a creditor's committee to monitor the activities of the liquidator during the course of the liquidation. <u>Role of the liquidator</u>: The liquidator has four main tasks: (i) to convert the assets of the business into cash (hence liquidation); (ii) to adjudicate the claims of the creditors; (iii) to investigate and report upon the conduct of the officers of the company (directors and shadow directors); and (iv) to make payments (where dividends are available) to creditors in order of priority.

COUNTRY	QUESTION 6: Insolvency (IV) Does the law recognize contractual arrangements between debtors and creditors or between groups of creditors concerning the extent of their rights in respect of the securitised assets or the SPV?
Finland	The law does not recognise such arrangements but neither does it prohibit them.
France	Limited recourse and non-recourse clauses by which an FCC's creditors[usually?] renounce their right over the assets of an FCC could be considered unlawful as Article 2092 of the Civil Code provides for the "droit de gage general" [translation?] of creditors over the assets of their debtors. However these clauses are commonly accepted in securitisation transaction documentation. Clauses providing that a party will not commence insolvency proceedings [against an FCC?]are irrelevant to the extent that an FCC is considered to be a 'bankruptcy-remote' vehicle with no legal personality and thus cannot be subject to any insolvency proceedings by virtue of law.
Germany	Subject to the receiver's right to invalidate certain contractual arrangements, which adversely affects the position of other creditors (see question 6(II)), or other general principles of substantive law limiting the principle of freedom of contract (§§ 305 and 241 of the Civil Code) by voiding contracts that, for instance, constitute a violation of law or the good faith principle (§§ 134 and 138 of the Civil Code), there is nothing that would prevent parties from contractually extending creditors' rights in respect of the SPV's assets.
Greece	Arrangements between the bankrupt debtor and the majority of its creditors are recognized under bankruptcy law. Such arrangements, which must be validated by the competent bankruptcy court, must not, however, have a negative impact on note holders to the extent that they are protected by a statutory pledge (with regard to the statutory pledge, please see the answers to questions 3(V) and 4(I)).
Ireland	Provisions in contractual documents pursuant to which creditors of an SPV limit their right of recourse to specific assets, or available funds, or the proceeds of realisation of security, are recognised and enforced by the law.
Italy	The Securitisations Law does not expressly regulate contractual arrangements between debtors and creditors or between groups of creditors. In most securitisation transactions regulated by the Securitisations Law, however, such arrangements are normally agreed upon in the intercreditor agreement, which is entered into among, *inter alia*, the issuer of the notes, the representative of the note holders, the paying agents, the agent bank, the computation agent, the account bank, the custodian, the swap counterparty (if any), and the servicing agent. Pursuant to the Intercreditor Agreement, the abovementioned subjects agree to the limited recourse nature of the obligations of the issuer and to the priority of payments made by the SPV of the funds received in relation to the portfolio.
Luxembourg	Yes, Article 64 of the Securitisation Law provides that the articles of incorporation and management regulations of a securitisation undertaking and any agreement entered into by the securitisation undertaking may contain provisions by which investors and creditors agree to subordinate their maturity or the enforcement of their rights to the payment of other investors or creditors or undertake not to seize the assets of the securitisation undertaking, or, as the case may be, of the issuing or acquisition vehicle, and not to petition for the bankruptcy thereof or request the opening of any other collective or reorganisation proceedings. Proceedings initiated in breach of such provisions shall be declared inadmissible.
The Netherlands	Yes, although the Dutch Bankruptcy Law does not give specific rules about the recognition or treatment of such arrangements.
Portugal	The terms and conditions of each issue of units/bonds may provide for different rights attached to the bonds/units issued.

COUNTRY	QUESTION 6: Insolvency (IV) Does the law recognize contractual arrangements between debtors and creditors or between groups of creditors concerning the extent of their rights in respect of the securitised assets or the SPV?
Spain	
Sweden	Generally yes, subject to perfection of security, if the SPV becomes insolvent.

COUNTRY	QUESTION 6: Insolvency (V) Are methods of enhancement provided for in the law (subordination, guarantee, etc)? Does law/regulation permit the originator to provide credit enhancement to securitised transactions without prejudicing the legal ‘true sale’?
Austria	There is currently no securitisation-specific regulation of these matters. The general provisions ofthe law apply. Normally we would not expect that a credit enhancement provided by the originator would prejudice a ‘true-sale’.
Belgium	
Denmark	
England and Wales	(i) No. (ii) Yes. Regarding banks, the Financial Service Authority (FSA) Handbook (Vol. 2, Chapter SE, Section 9) states inparagraph 9(6)(1) ‘Restrictions upon an originator’ that ‘an originator should only make a one-off contribution to enhance the credit-worthiness of a vehicle. Any transaction should be funded at the initiation of the scheme and disclosed in the offering circular…An originator may not hold any of the securities issued by the SPV unless it has received a waiver to deal, as detailed [below: - is this correct – it does not seem to follow on?] (a) any holding in excess of the agreed dealing limits will be deducted from capital…’ Paragraphs 9(6)(2) and 9(6)(3) prescribe the policy of treatment of the first and second loss. In general, under the law, for a sale of receivables to be a ‘true sale’, it must avoid being characterised as a sham transaction or re-characterised as a secured loan. It must also not be vulnerable on insolvency as discussed above [where?]. The courts look at the substance of a transaction, rather than just the label given to it by the parties. In other words, it will look at the description of the agreement and determine whether the actual rights and obligations of the parties created by the agreement are consistent with this description. Underthe law, there are no ‘safe harbour’ provisions in relation to a ‘true sale’.
Finland	Yes.
France	Article 5 of the Decree [which Decree? Hereinafter the ‘Decree’] sets out the various credit enhancement techniques available to FCCs and broadens the type of guarantee/collateral which may be granted to or transferred in favour of FCCs. The following credit enhancement techniques can be used to cover risks borne by FCCs relating to their management strategy.: - Issuing units and debt securities bearing such risks provided that such units and debts securities are subscribed to by certain limited categories of investors. - Assigning and transferring to the FCC an amount of receivables (or debt securities) greater than the principal amount of units and debt securities issued by the FCC. - Assigning and transferring securities, guarantees and related ancillary rights which secure the securitised receivables. - Granting guarantees by the entities listed in Article 6 of the Decree. - Granting one or more subordinated loans. - Entering into forward financial agreements.

COUNTRY	QUESTION 6: Insolvency (V) Are methods of enhancement provided for in the law (subordination, guarantee, etc)? Does law/regulation permit the originator to provide credit enhancement to securitised transactions without prejudicing the legal 'true sale'?
Germany	Providing credit enhancements, for instance, by granting a subordinated credit facility or a guarantee, could mean that the originator would have to consolidate the SPV for accounting purposes. This is not the case under German generally accepted accounting principles (GAAP), but it might be the case under US GAAP or international financial reporting standards. The Banking Act [year?], as construed by the the German Banking Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, hereinafter the 'BaFin'), would not recognise the risk mitigating effect of a 'true sale'. There will be a different approach under Basel II.
Greece	The Securitisation Law does not specifically list any enhancement methods; it contains, however, references to guarantees to be provided in relation to the securitised assets. Since the Securitisation Law does not exclude the provision of guarantees or other forms of credit enhancement by the originator, such enhancement should not prejudice a legal 'true sale'.
Ireland	The law recognises contractual methods of credit enhancement such as subordination and guarantees. However, when analyzing the legal effect of a purported sale of assets by an originator, it is necessary to consider whether any credit enhancement provided by the originator may lead to a court re-characterising the purported sale of the assets as a secured loan (see question 4(I)).
Italy	Credit enhancement mechanisms (such as subordination, guarantee) are not expressly mentioned by the Securitisation Law. However, such enhancement mechanisms may be indirectly inferred by Article 2, 3(f) and (i), pursuant to which, in the event that the notes issued under a securitisation are offered to professional investors, the relevant prospectus must indicate: (i) any financial transaction ancillary to the securitisation transaction and aimed at the completion of the transaction; and (ii) any participation relationships between the originator and the SPV. In light of the above, although not expressly provided by the Securitisations Law, credit enhancement mechanisms are allowed and also widely used in current market practice. In particular, the most common forms of credit enhancement are cash reserves, subordinated loans from the originator, guarantees, letters of credits and insurance policies and derivative transactions.
Luxembourg	Not as such, please see question 6(IV). The Securitisation Law fails to address this issue explicitly but the originator should be able to provide credit enhancement to securitised transactions without prejudicing a legal 'true sale', which is enshrined in the Securitisation Law. Thus, Article 56(1) of the Securitisation Law provides that a claim assigned to a securitisation undertaking becomes part of its property as from the date on which the assignment became effective, notwithstanding any undertaking by the securitisation undertaking to reassign the claim at a later date. The assignment cannot be re-characterised on grounds relating to the existence of such an undertaking. This is subject to a few general exceptions, such as fraud.
The Netherlands	
Portugal	The Securitisation Law specifically provides that an assignor or any [affiliate?] of an assignor shall not be allowed to grant any guarantees or undertake any obligations with respect to the assigned debts. The issued notes, however, may be of different classes with different [risk characteristics/rankings amongst themselves?]. Credit lines granted by the originator to the SPV have, nonetheless, been put in place when an originator is a bank. The credit line must be granted on regular

COUNTRY	QUESTION 6: Insolvency (V) Are methods of enhancement provided for in the law (subordination, guarantee, etc)? Does law/regulation permit the originator to provide credit enhancement to securitised transactions without prejudicing the legal 'true sale'?
	commercial terms, otherwise it may impact on the 'true sale' nature of the assignment, [specifically for capital relief purposes – what does this refer to?]. Although not specifically provided for in the law, the originator is also allowed to subscribe to [the most subordinated series of units/notes – lowest ranking units/notes?] issued by the SPV. From a prudential (capital relief) point of view, the Banco de Portugal regulations only, under limited circumstances, allow the originator to provide credit enhancement to securitised transactions only under limited circumstances, without prejudicing a legal 'true sale'.
Spain	To be a 'true sale' under securitisation regulations, the assignment of assets must be definitive, not subject to any conditions, for the remaining term of the asset, and the seller may not provide a guarantee to the purchaser.
Sweden	a) General law facilitate generally all types of enhancements (b) Could affect true sale qualification. In such case the sale could be qualified as a security assignment.