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PRELIMINARY ASSESSMENT OF THE REPLIES TO THE EFMLG QUESTIONNAIRE ON LEGAL OBSTACLES TO CROSS-BORDER SECURITISATIONS IN THE EU:

EFMLG Working Group on securitisation

QUESTION 1: Securitisation laws
- Summary -

The following assessment of the replies to the EFMLG questionnaire covers 15 national jurisdictions within the EU (the surveyed jurisdictions) and was prepared by the EFMLG Working Group on Securitisation[1]. It relates to the Member States prior to enlargement in May 2004. As regards the United Kingdom, reference is made only to the law of England and Wales.

(I) Is there specific legislation applicable to securitisation in your jurisdiction? If not, please specify the relevant legal provisions which apply.

Eight jurisdictions have enacted specific legislation.[2] In passing, it would appear that of the new Member States only Poland[3] and Malta[4] have adopted a specific framework on securitisation. In seven jurisdictions specific legislation has not been enacted.[5] Some specific provisions relating to securitisation may however be found, notably in the tax and regulatory areas. In England and Wales a wide range of existing provisions and the law relating to charge and assignment as well as the trust concept provide the necessary flexibility, thus facilitating securitisation without recourse to specific legislation. In Germany, legislation on the creation of a refinance register[6] was enacted in September 2005 which is intended to facilitate securitisation transactions. It enables originators to sell assets to a special purpose vehicle (SPV) for securitisation purposes without physically transferring them. The SPV's claim over the assets is entered into a refinance register maintained with a German credit institution, thus segregating these assets from those of the originator. A variety of structures

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2 Belgium, France, Germany, Greece, Italy, Luxembourg, Portugal and Spain.

3 The provisions on securitisation were introduced to the Polish Banking Law by the Act of 1 April 2004 (entered into force on 1 May 2004; Title 8; Article 92 to Article 93a). Securitisation-related matters are also regulated by the Investments Funds Act of 27 May 2004 (entered into force on 1 July 2004; Articles 183 to 187).

4 Act Nº.V of 11 April 2006

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

6 Law on the reform of the federal finance administration and on the creation of a refinance register of 22 September 2005 (*Gesetz zur Neuorganisation der Bundesfinanzverwaltung und zur Schaffung eines Refinanzierungsregisters*).

ranging from the use of offshore SPV to the use of trust schemes (in jurisdictions such as England and Wales or Austria which recognise those structures) or fiduciary arrangements have been utilised in most of the surveyed jurisdictions, regardless of whether domestic law contains specific provisions governing securitisation transactions or securitisation vehicles. The most common feature of such structures is that they are market driven and ever more innovative. The exact structure used differs according to various factors such as the type of vehicle permitted (a securitisation fund requiring a management company and/or custodian or a company) and the method of transfer of risks ('true sale', sub-participation, etc.).

(II) Does national law provide any definition of securitisation? Please specify.

In a majority of the surveyed jurisdictions,[7] national law does not provide any definition of securitisation.

In four jurisdictions, national legislation provides a definition of securitisation:

- In Greece, the securitisation of claims is defined as 'the transfer of business claims under a sale agreement concluded in writing between the "transferor" and the "transferee" combined with the issue and distribution, through private placement only, of bonds of any type and form, the redemption of which is effected: (a) by the proceeds of the business claims transferred; or (b) by loans, credit agreements and derivative instrument contracts'.[8]
- In Italy, the securitisation legislation applies to: 'securitisation transactions carried out by way of non-gratuitous assignment of pecuniary receivables, whether already in existence or arising in the future, and identifiable as a pool ("*blocco*") where the assignment of more than one receivable is involved'.[9]
- In Luxembourg, securitisation means 'the transaction by which a securitisation undertaking acquires or assumes, directly or through another undertaking, risks relating to claims, other assets, or obligations assumed by third parties or inherent to

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

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

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

all or part of the activities of third parties and issues securities, whose value or yield depends on such risk'.[10]

- In Spain, securitisation is defined as 'a financial process whereby cash flows arising from the underlying assets (mortgage loans or others) are converted into fixed income securities'[11].

The scope of the definitions varies substantially from one jurisdiction to another. In Luxembourg, the concept of securitisation expressly includes synthetic securitisations. In Greece, securitisations governed by national legislation are limited to those concerning the issue and distribution of bonds through private placement.

(III) Which securitisation techniques are governed by national law (traditional securitisation, synthetic securitisation and recourse to credit derivatives, whole business securitisation, etc.?) In the absence of a specific national framework, please specify whether and if so, how, these techniques can be used in your jurisdiction.

National law governs a range of securitisation techniques. In the absence of specific legislation a wide range of techniques is used in so far as no specific prohibition applies. In France and Luxembourg, national legislation expressly governs both traditional and synthetic securitisation, including provisions dealing with recourse to credit derivatives. In the Netherlands, traditional and synthetic securitisations are used. Although specific legislation only governs traditional securitisation techniques, other techniques may be used in so far as these are permitted by the general law. In Portugal, techniques other than traditional securitisation may be used pursuant to the general provisions of national law. In Italy and in Greece, synthetic securitisation is excluded from the scope of the specific legislation and there is no mention of whether other techniques may be used. Synthetic securitisations, and in particular credit derivatives used as part of synthetic securitisations, are not specifically known to Belgian law and are, in practice, rarely used.

(IV) Are there any limitations in terms of types of securitised assets? Please specify. Does national law provide for the securitisation of future cash flows? If so, please give the definition of future cash flows according to legislation or case-law.

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[10] Article 1(1) of the Luxembourg Securitisation Law.

[11] In Malta, which is not covered by present assessment, a securitisation under the Act of 11 April 2006 (Part I, Article 2) means a transaction or an arrangement whereby a securitisation vehicle, directly or indirectly: (a) acquires securitisation assets from an originator by any means, or (b) assumes any risk from an originator by any means or (c) grants secured loan or other secured facility or facilities to an originator and finances any or all of the above, directly or indirectly, in whole or in part, through the issue of financial instruments, and includes any preparatory acts carried out in connection with the above.

Assessment of the national legal frameworks tends to indicate that, although specific legislation generally does not restrict expressly the type of assets which may be securitised, in practice, application and interpretation of such provisions results in the scope of assets included within national frameworks varying substantially from one jurisdiction to another. Although most jurisdictions provide for the securitisation of future cash flows, the concept of future cash flows and its interpretation are not consistent across jurisdictions, thus giving rise to divergent case-law.

Limitations in terms of types of securitised assets

In Austria, Belgium, England and Wales, Finland, Germany, Ireland, Sweden, there is no express limitation in terms of assets. In France, legislation makes reference to receivables arising from an existing or future agreement. Such receivables may be governed either by French law or by foreign law, and can be non-matured receivables, future receivables (the amount and maturity of which are not yet determined on the relevant transfer date) or illiquid/defaulted receivables, uncertain/doubtful receivables or disputed receivables/receivables subject to litigation. That legislation also applies to debt securities. The scope of the Luxembourg legislation is very wide and provides for the securitisation of risks relating to the holding of assets, whether movable or immovable, tangible or intangible, as well as risks resulting from the obligations assumed by third parties or relating to all or part of the activities of third parties.

In Greece, the legislation applies to claims against third parties, including consumers. Such claims can be future claims or claims whose materialisation depends upon the fulfilment of certain contractual conditions. In Italy, the legislation applies to monetary claims, that is receivables, and will require amendment before certain other categories of assets can be securitised (for instance, future receivables – as discussed below – or in respect of synthetic securitisations).[12] In Portugal, the legislation covers receivables which are monetary in nature, not subject to any conditions, and not encumbered, pledged or seized under litigation. In Spain, the assets grouped in a *fondo de titulización de activos* must be of a "homogeneous nature" with the exception of private funds (*fondos institucionales*) which correspond to transactions where the securities are targeted at institutional investors only and are not admitted to trading.[13] Whilst that concept is interpreted non-restrictively by the Spanish financial markets supervisor, market participants have contested its continued existence for

[12] See the European Securitisation Forum's letter to the Italian authorities of 9 June 2004 (available on the ESF's website: www.europeansecuritisation.com).

[13] See the ESF letter to the Spanish authorities of 28 October 2005, p. 5. (available on the ESF website at: www.europeansecuritisation.com/pubs/CartaCNMV_Filing_En_Version.pdf).

commercial and legal reasons. From a legal viewpoint, the concept of homogeneity is not defined and as a result uncertainties arise as to its exact subject-matter (debtors assets, types of risks, etc.).[14]

Future cash flows

In France, future receivables may be securitised. In Greece, future claims can be securitised if they are ascertained or in any way ascertainable. In Italy, it is doubtful whether future receivables arising from future agreements may be securitised (transactions involving such receivables are usually structured via revolving purchase agreements). In Austria, it is possible to securitise future cash flows unless the contract underlying the receivable has been entered into after the start of the debtor's insolvency proceedings. German law does not lay down specific provisions governing the securitisation of future cash flows. In Luxembourg, the legislation also permits future cash flows to be securitised stating that: 'a future claim, which arises out of an existing or future agreement, is capable of being assigned to or by a securitisation undertaking, provided that it can be identified as being part of the assignment at the time it comes into existence or at any other time agreed between the parties'. In Sweden, future cash flows may be securitised provided that the originator has performed its related obligations at the point of funding. If the originator has not yet performed the obligations which are consideration for the receivable, however, should the originator become subject to an insolvency order, the receivable will belong to the estate of the insolvent (and not to the assignee/pledgee).

In Portugal, future receivables may be securitised provided that the amount of the receivables to be assigned is established or quantifiable at the moment of the assignment and that the contractual relationship from which they arise is already in existence at that time. In Denmark, legislation does not provide for the securitisation of future cash flows. Future cash flows may be assigned, however, if they can be individually identified in advance, although the assignment may be avoided/annulled in the event of the assignor's insolvency.

In the Netherlands, under certain provisions of the Netherlands Civil Code, assignment of a future receivable has to be notified to the relevant debtors. In Italy, securitised assets are defined as 'pecuniary receivables, where already in existence or arising in the future and identifiable as a pool ("*blocco*")'. From that definition it would appear that there are two issues which constitute an obstacle to the transfer of future receivables. First, the identification of the necessary requirements permitting those receivables not yet existing to be

14 Ibid., p. 7.

transferred through a transfer agreement (and in particular the notion of a '*blocco*') and second, the enforceability of such a transfer in the event of the transferor's insolvency.

In Denmark, certain assets of future cash flows belonging to individuals are unassignable (social security entitlements, claims for damages for personal injury, etc.). Spain has recently introduced legislation permitting the securitisation of future credit rights. The assets to be securitised must appear in the balance sheet of the originator and the future credit rights may be securitised if the assignment agreement sufficiently evidences the assignment of title[15].

[15] In the Securitisation Law of Malta, which is not covered by the present assessment, securitisation asset means any asset, whether existing or future, whether movable or immovable, and whether tangible or intangible, and where the context so allows, includes risks (Part I, Article 2). As regards future debts, the *Civil Code* provides that: "future debts, or classes thereof, may also be assigned provided that the debtor and the latest date by which the future debts shall come into existence be identified in the contract of assignment. In such cases an assignment is effective at the time of the conclusion of the contract without a new assignment being required when such debt comes into existence.

QUESTION 2: Special Purpose Vehicles
- Summary -

(I) Is it possible to segregate or ring-fence effectively assets of the originator on his balance sheet, for example, by entering them into a register,without the need to transfer the assets and the related ancillary rights (securities interests, pledges, etc.) to a SPV?

In most jurisdictions, it is not possible to segregate the assets of the originator on its balance sheet without the need to transfer them. Effective segregation or ring-fencing of the transferred assets from those of the originator may not be achieved without a transfer of the assets and of related ancillary rights and title to a separate legal entity or, as in Germany, without segregating them on behalf of such separate legal entity by means of an entry in the new refinance register established under recent legislation.[16] According to those provisions originators may sell assets to a SPV for securitisation purposes without physically transferring them. The SPV's claim to the transfer of the assets is entered into a refinance register which is maintained by credit institutions and certain specified entities such as the Deutsche Bundesbank, the *Kreditanstalt für Wiederaufbau* (KfW), and the public debt administration of a State. A refinancing enterprise that is not a credit institution may use the refinance register of a bank or the KfW.

Such segregation/ring-fencing is possible by means of a trust scheme (England and Wales) or fiduciary arrangements (*Treuhandschaft* in Austria) or by means of a floating charge in Sweden (although this has not been used yet for securitisation purposes) and potentially in Denmark if its law is amended.

(II) What types of SPV are available in your jurisdiction for the purpose of securitisation transactions, whether or not provided for by specific legislation ? Please specify whether SPVs can be set up as securitisation funds (with or without legal personality) or companies, and provide a brief description.

Various types of entities are available in the different jurisdictions for the purpose of securitisation transactions. The main distinction concerns SPVs which are established as a company with legal personality and those which are established as funds without legal personality. That distinction is reflected in the different legal regimes. Some jurisdictions permit both types of structure whilst others permit only one type of structure. Certain

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16 See above, footnote 3.

jurisdictions, such as France, Belgium, Luxembourg, Spain, Portugal and to a lesser extent Italy, have by means of legislation created dedicated investment vehicles in the form of securitisation funds devoid of legal personality and with independent management companies available to acquire and securitise assets. Although distinct from mutual investment funds (undertakings for collective investment in transferable securities or 'UCITS'), rules applicable to securitisation funds often fall under the umbrella of the relevant national legislation applicable to collective investment undertakings as in France and in Belgium or borrow certain features of UCITS legislation (as is the case according to Luxembourg law). By way of an example, the Belgian Law of 20 July 2004 permits the creation of an undertaking for investment in receivables (UIR). The object of a UIR must relate exclusively to collective investment in receivables of third parties which are transferred to a UIR under a transfer agreement. A UIR may take a contractual form, that is, a fund for investment in receivables (FIR) or it may take a statutory form, as a company for investment in receivables (CIR). The Belgian legislation also distinguishes between two types of UIRs depending on the source of their financing: a public UIR and an institutional UIR.

The most common legal form used to establish SPVs as a company in the jurisdictions surveyed is that of a joint stock company incorporated as a public limited company. In the Netherlands, the SPV is usually established as a corporation (private company with limited liability) with a limited charter for the sole purpose of the securitisation transaction. The shares of the corporation are held by a foundation (*stichting*).

(III) Does national law provide any specific restrictions on the place of establishment of the SPV?

In certain jurisdictions (generally those which have created dedicated vehicles for securitisation purposes), it is a requirement that the SPV must be established in that jurisdiction. In other jurisdictions there are no restrictions on the SPV's place of establishment. Tax reasons generally dictate, however, a need to establish the SPV abroad (See also Question 7).

In France, in the absence of harmonisation of securitisation vehicles structures at the EU level, certain regulations of the Banking Commission[17] refer to the notion of securitisation vehicles located in other jurisdictions than France. In order to assess whether foreign vehicles offer 'equivalent guarantees to those existing in France' and can therefore benefit from the authorization to acquire receivables under French law, it must be determined whether those vehicles, the purpose of which is to refinance credit institutions, offer sufficient safeguards to

17 See, for example, Regulation No 93-06 of the French Banking Commission regarding the posting ('*comptabilisation*') of securitisation transactions.

investors acquiring securities issued by the vehicle. The criteria for determining the equivalence of the vehicle are currently under review by the French authorities[18].

(IV) Are SPV considered to be credit institutions in your jurisdiction?

In most jurisdictions, SPVs created for the purpose of securitisation are not considered as credit institutions and thus fall outside the scope of the local banking monopoly. As a consequence they do not have to be authorised as credit institutions in accordance with the principles of the Banking Directive.[19] In Austria, it was considered prior to 1 June 2005 that SPVs conducted banking business pursuant to domestic banking legislation. Following legislative amendment, that is no longer the case, hence this should encourage the use of Austrian SPVs. In Denmark, a SPV acquiring receivables is not considered to be a credit institution within the meaning of the banking legislation. If it funds itself from deposits or other resources received from the general public, however, this will require permission to act as a financial institution under the supervision of the Danish Financial Services Authority. In Finland and in Italy, although not considered as a credit institution, the SPV is defined as a financial institution. In particular, in Italy, SPVs must be registered in the special register of financial intermediaries held by Banca d'Italia and are subject to the prudential supervision of Banca d'Italia.

Is the activity of acquiring receivables considered a credit operation within the meaning of national banking legislation? What formalities are required to exercise the activities of acquiring receivables and issuing securities? Is a specific licence required? Please specify.

In France, although French securitisation funds are not considered to be credit institutions, the Monetary and Financial Code expressly provides that such funds may purchase non-matured receivables. Credit institutions may assign receivables to a *fonds commun de créances* or to 'similar' foreign vehicles. However, under French law, acquiring receivables on a regular basis constitutes a credit operation[20] since the assignee has to provide sums immediately in respect of which the assignor is a creditor but which only fall due in the future. Furthermore, the Monetary and Financial Code does not provide for an exception to the banking monopoly

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18 They might include the following aspects: autonomy of the management of the vehicle vis-à-vis the originator (management company, trustee, etc); insolvency remoteness of the vehicle; the exclusive purpose of the vehicle should be the acquisition of receivables and the issuance of securities; listing and rating of the debt securities.

19 Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (the Banking Directive), OJ 2000 L 126 p. 1.

20 Article L. 511-1 of the French Monetary and Financial Code (*Code Monétaire et Financier*) defines credit institutions as 'legal entities whose customary business activity is the carrying out of banking transactions within the meaning of Article L. 311-1.' These banking transactions comprise, inter alia, the receipt of funds from the public and credit operations.

principle (i.e. the obligation to be licensed as a credit institution) in respect of foreign securitisation vehicles. Such derogation is currently granted only to French securitisation vehicles. As a consequence, there is some uncertainty as to whether foreign vehicles acquiring receivables might be considered as infringing French banking law.

In the Netherlands, a SPV issuing bonds falls within the definition of credit institution. The SPV is not subject to any requirement to obtain a licence because the notes are offered solely to professional market operators.

In Luxembourg, the legislation distinguishes between securitisation undertakings which issue securities to the public on a continuous basis and are therefore authorised by the Luxembourg financial sector supervisory authority (*Commission de Surveillance du Secteur Financier* or 'CSSF'), those which fall within the scope of the Luxembourg legislation, although they do not require an authorisation from the CSSF and the others. Only securitisation undertakings (either companies or funds) which issue securities to the public 'on a continuous basis' need to be authorised by the CSSF.[21]

In Belgium, by issuing securities (which can be considered as repayable funds), an SPV could in principle be considered a credit institution if it is seen as soliciting the 'public'. The criteria determining the public nature of solicitation of repayable funds are provided for by the Royal Decree of 7 July 1999 on the public nature of financial transactions. That Royal Decree makes it clear that where a person, company or institution publicly offers securities as evidence of the receipt of repayable funds (e.g. bonds) under the Belgian public offering regime, even if the offering of securities is exempt from the obligation to publish a prospectus, such activity does not constitute a public solicitation of repayable funds within the meaning of the Law of 22 March 1993. In the light of those observations, an SPV acquiring receivables and issuing securities would not be considered a credit institution under Belgian banking law.

There is also a possibility that other forms of licensing may be required, especially for securitisations purchasing consumer credit receivables, such as is the case in England and Wales.

(V) What are the supervisory authorities for SPVs in your jurisdiction?

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21 It should be noted in this respect that certain provisions of the Luxembourg legislation appear to apply only to 'authorised' securitisation undertakings, for example the obligation of securitisation undertakings to entrust the custody of their liquid assets and securities to a credit institution established or having its registered office in Luxembourg.

Depending both on the legal form of the SPV and on the activities conducted by the securitisation vehicle, most jurisdictions impose a form of supervision on the securitisation vehicle which may be performed both by national banking supervisory authorities and financial markets authorities. The nature of the supervision appears, however, to vary substantially from one jurisdiction to another. In Belgium, public UIRs are subject to the supervision of the Belgian Banking, Finance and Insurance Commission (the 'BFIC'). Prior to commencing activities, public UIRs must be registered with the BFIC. Any amendment to the articles of association or fund regulations of a public UIR requires the BFIC's prior approval. An institutional UIR is subject to a legal framework which is less strict and not subject to the supervision of a regulatory authority.

(VI) In the context of securitisation transactions is recourse usually made to an offshore SPV or to a SPV in the local jurisdiction of the originator? Is it possible to use a SPV in the same company group as the originator? Is the SPV normally owned by such a group or by a trust or by a management company?

In the jurisdictions where specific legislation regarding securitisation transactions has been enacted, it is a requirement for securitisation transactions under local law to use a local SPV, as is the case, for example, in Luxembourg. In other jurisdictions, changes in the legislation make recourse to offshore SPVs less relevant, such as, for example, in France, where a securitisation fund is entitled to issue debt instruments directly. In Greece, by contrast, recourse to local SPVs is still very uncommon due to cumbersome and costly regulations relating to the creation of a local securitisation vehicle. In Portugal, the majority of transactions are two-stage transactions, which usually involve a *fundo de titularização de créditos* (FTC) and an offshore SPV. The SPV issues units which are then bought by an offshore SPV which thereafter issues bonds and places them on the international market.

There are generally no formal restrictions on using an affiliate or a subsidiary of the originator as the SPV. However, such a structure is strongly discouraged as it does not ensure full insolvency remoteness in the event of the originator's insolvency. From an accounting and banking supervisory perspective, this may also trigger the originator's obligation to consolidate the SPV's assets and liabilities (including the transferred receivables) on its own balance sheet. SPV are in most cases owned by trusts. The use of an 'orphan' company[22] whose shares are held on trust is quite common in the majority of the surveyed jurisdictions, such as is the case in England and Wales and in Ireland.

[22] An orphan company is one which is not corporately related to any other. This is usually achieved by the SPV's shares being held on trust for charitable purposes by a professional corporate services provider.

(VII) Does national legislation distinguish between SPVs which acquire receivables and SPVs which issue securities?

Although it is common practice in various securitisation transactions to use two different SPVs, one which holds the assets and one which issues the notes, in the surveyed jurisdictions there is, except in Luxembourg and in Italy, generally no distinction set out in law between SPVs which acquire receivables and SPVs which issue securities. The Luxembourg securitisation law defines securitisation undertakings[23] as undertakings which carry out securitisation transactions *and* undertakings which participate in such a transaction by assuming all or part of the securitised risks (the acquisition vehicles) or by issuing securities to finance the transaction (the issuing vehicles).[24] The Italian securitisation law refers to the SPV as the purchasing company or the company issuing the notes, if other than the purchasing company, and provides that the SPV shall have as its sole purpose the realisation of one or more securitisation transactions.[25].

(VIII) Do laws and regulations permit SPVs to raise a wide range of finance? Can SPVs issue debt instruments directly? If so, what types of notes are issued by SPVs? Are there any specific restrictions on the issuance of securities in the case of securitisation? Please specify.

In most jurisdictions securitisation SPVs may finance their activities through the issue of debt securities provided that they are established as a public limited company. Securitisation funds may issue either only units or both units and debt instruments depending on the jurisdiction.

Regulatory requirements on public offerings (where permitted), including the preparation of a prospectus and on private placement of securities apply in principle to securitisation SPVs, in the same manner as they apply to all other issuers. It must be noted that in Greece and Spain no public offer of securities issued by a securitisation SPV is permitted. In Spain, save under exceptional circumstances, a strict balance must be maintained between the securitised assets and the liabilities represented by the investors' collection rights over the flows originated by such assets. More than 50% of those liabilities must be represented by an issue of securities. Furthermore, Spanish legislation contains a requirement that all bonds issued by a *fondo de*

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[23] Article 1(2) of the Luxembourg Securitisation Law.

[24] It should be noted that under Article 2 of the Luxembourg Securitisation Law, its provisions only applies to securitisation undertakings established in Luxembourg. As a consequence, in the case of a securitisation involving an acquisition vehicle and an issuing vehicle, only one of which only is established in Luxembourg, the Luxembourg legislation will only apply to the vehicle established in Luxembourg. The legislation is silent on the consequences of the existence of two vehicles (acquisition and issuing) established in two different jurisdictions.

[25] Article 3 of the Italian Securitisation Law.

titulización de activos must have a rating.[26] In Italy, the tax regime on interest paid on short-term notes issued by SPVs constitutes a serious practical hindrance to the issuance of notes.[27]

(IX) Does national law permit the creation of segregated compartments or cells of assets and liabilities within the SPV which are ring-fenced from other assets or liabilities? Can the compartments/cells of SPV be replenished? How?

In the majority of the surveyed jurisdictions national law does not expressly permit the creation of segregated compartments or cells of assets and liabilities within the SPV which are ring-fenced from other assets or liabilities.

Such segregation is explicitly permitted, however, in France, Italy, Luxembourg and Portugal. In Spain, the *fondo* (*fondo de titulización hipotecaria* or *fondo de titulización de activos*) is characterised as a SPV per transaction and, as a general rule, each securitisation requires a separate *fondo* to be established. Those *fondos* cannot currently operate as multi-transaction securitisation vehicles with segregated compartments recognised in law as is the case with a *fonds commun de créances* under French law.[28] In Belgium, creation of segregated compartments is permitted under Belgian UCITS legislation for CIRs, but not for FIRs

Luxembourg law provides that the rights of investors and creditors are limited to the assets of the securitisation undertaking. Where such rights relate to a compartment or have arisen in connection with the creation, operation or liquidation of a compartment, they are limited to the assets of that compartment. The legislation also provides that the assets of a compartment are available to satisfy exclusively the rights of investors in relation to that compartment and the rights of creditors whose claims have arisen in connection with the creation, operation or liquidation of that compartment. It provides further that, as between investors, each compartment shall be treated as a separate entity, unless the instruments constituting the securitisation undertaking provide otherwise.[29] Similarly, French law provides that, unless otherwise stipulated in the instruments incorporating the securitisation fund[30], the assets of a given compartment may only be used to meet that compartment's debts, undertakings and obligations, and only benefit from that compartment's receivables.[31]

A similar result may be achieved through the use of a charge in England and Wales or of a special pledge in Greece. In Ireland, ring-fencing of specific pools of assets and liabilities within an SPV is achieved by a combination of appropriate security interests over the relevant assets to secure the relevant liabilities and of contractual undertakings concerning limited

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26 See ESF's letter to the Spanish authorities of 28 October 2005, p. 9, cited in footnote 9.
27 See Question 7, below, for further details concerning tax issues.
28 See ESF's letter to the Spanish authorities of 28 October 2005, p. 6, cited in footnote 9.
29 Article 62(1) of the Luxembourg Securitisation Law.
30 By way of an exception to Article 2093 of the *code civil*.
31 Article L. 214-43(2) of the Monetary and Financial Code.

recourse and non-petition obtained from the SPV's creditors. In the Netherlands, it is possible to make a contractual arrangement agreeing that noteholders will only have recourse to a specific portion of the SPV's assets. In addition, effective segregation may also be achieved through the adoption of appropriate structural measures.

Can the compartments/cells of SPV be replenished? How?

Most jurisdictions permit SPVs to be replenished. In Ireland, it is possible for a SPV to acquire assets on a rolling basis. Assets acquired in that manner will become subject to the security created by the SPV at the inception of the transaction. Luxembourg law provides that securitisation undertakings may acquire and, subject to certain conditions provided for in the legislation, transfer claims and other assets, existing or future, in one or more transactions or on a continuous basis.[32] In the Netherlands, substitution of assets is possible, although subject to certain limits. In Portugal, the compartments of a *fundo de titularização de créditos* (FTC, securitisation fund) or of a *sociedades de titularização de créditos* (STC, securitisation company) may be replenished according to different rules.

In Spain, it is not possible to manage actively portfolios of securitised assets and a *fondo*'s deed of incorporation does not permit, either directly or through a professional third party acting on their behalf (i) acquisition of new assets; (ii) resale of the portfolio assets; (iii) their reinvestment; (iv) creation of pledges or guarantees in respect of the assets; and (v) execution of repurchase agreements involving those assets.[33]

Master trusts are a structure commonly used in England and Wales whereby receivables are assigned to a receivables trustee declares a trust over the receivables, which it from time to time may own, in favour of the beneficiaries of the trust, usually the seller/originator and an investor beneficiary. The trustees issue multiple series of securities backed by a single pool of assets, with the cash flow generated by the assets being allocated between the series according to a predetermined formula.[34]

(X) Does domestic legislation impose any rules regarding the management of excess cash belonging to the SPV?

Although in many jurisdictions, such as Portugal, detailed rules govern the SPV's use of the sale proceeds obtained from notes or units, in none of the surveyed jurisdictions, except France do there appear to be specific rules regulating the management of excess cash. In Italy,

32 Article 54 of the Luxembourg Securitisation Law.

33 See ESF's letter to to the Spanish authorities of 28 October 2005, p. 9, cited in footnote 9.

34 Master trust structures are commonly used in prime residential mortgage-backed security (RMBS) and credit card markets.

it is a requirement that the prospectus sets out the conditions upon which the SPV intends to reinvest the funds deriving from management of the assigned receivables that do not serve the immediate satisfaction of the rights incorporated in the notes.

(XI) What, if any, type of entity manages the SPV?

The provision of a management company is a regulatory prerequisite for the establishment of securitisation funds in the jurisdictions that provide for this form of securitisation SPV (France, Belgium, Luxembourg, Italy, Portugal, and Spain). Those management companies must generally obtain an authorisation from the domestic supervisory authorities. In France, it is a requirement that securitisation funds are jointly created by the management company and the entity responsible for the safe custody of fund assets. In the majority of the surveyed jurisdictions, SPVs established under a corporate form are managed by their own board and there is no obligation to establish a management company. In the case of corporate SPVs (especially offshore SPVs), specialised corporate service providers supply the directors and other officers of the SPV.

In Luxembourg, management companies of securitisation funds are in principle entitled also to manage UCITS funds,[35] whereas in France and Spain the exclusive purpose of management companies is to manage the respective *fonds communs de créances* and *fondos*.

In Belgium, the appointment of a management company is not mandatory for a Belgian CIR. As a consequence, a CIR may be self-managed provided that it has the appropriate management structure. The appointment of a Belgian management company is, however, mandatory for a Belgian FIR. A Belgian management company acting for a Belgian public undertaking for investment in receivables (UIR), or a foreign UIR offering its securities in Belgium, must be licensed by the BFIC.

(XII) What requirements does national law impose concerning the management of SPVs? Are there any restrictions in terms of establishment? Please specify.

In the majority of surveyed jurisdictions, no specific requirements going beyond those of company law in general are imposed on companies managing corporate securitisation SPVs. In Italy, only credit institutions and financial intermediaries enrolled in a special register kept by the Banca d'Italia may qualify as managers of securitisation vehicles. In a number of jurisdictions, such as Ireland, a management company may require a regulatory licence to the extent that its activities are deemed to be regulated activities in the field of financial services.

35 See the explanatory memorandum to the draft Luxembourg law on securitisation and commentary on its draft articles of 23 September 2003, Article 14, p. 24 and the opinion of the Luxembourg Council of State of 19 December 2003, p. 6.

Companies managing securitisation funds are subject to specific regulatory requirements in Belgium, France, Luxembourg, Portugal, and Spain, including the requirement to be established, or have their registered or head office in the jurisdiction concerned.

In France, if management strategy includes active asset management or entry into credit derivatives transactions as protection seller, the management company is required to meet certain additional specific requirements such as obtaining a new licence and putting appropriate management and organisational procedures into place.

(XIII) Are there any limitations on shareholding in management companies or SPVs?

In most of the surveyed jurisdictions there are no strict limitations as to the composition of the shareholder body of management companies and SPVs, except where pursuant to national provisions the management company is required to be a financial institution, as is the case in Italy. Where the SPV is incorporated as a public limited company, it is subject to general company law restrictions governing the establishment and operation of such companies. In Ireland, the rules applicable depend on the nature of the SPV, whether it is incorporated as a public limited company or structured as an orphan company. In the Netherlands, shares in the SPV are usually held by a foundation in order to ensure the insolvency remoteness of the SPV.

QUESTION 3: Other parties involved in securitisation transactions

- Summary -

<u>**Originators**</u>

(I) Are there any restrictions imposed in terms of the nature or location of the originator? Please specify.

Except in Greece, where the originator must be registered in Greece or at least have an establishment in Greece, none of the other jurisdictions surveyed imposes any rules in terms of the location of the originator. Portugal requires the originator to be a credit institution, financial company, insurance company, pension fund, fund manager, the State any other public entity or any other entity holding accounts from the previous three fiscal years legally certified by an auditor.

(II) Are market-wide limits imposed on the extent to which assets may be securitised by an individual originator with regard to the total volume and/or types of assets securitised and in relation to the total asset base of that originator?

In general there are no such market-wide limits imposed in the jurisdictions surveyed with the exception of England and Wales where the Financial Services Authority examines these aspects on a case-by-case basis and of Greece where banks, as originators, have to follow certain rules stipulated by the Bank of Greece.

<u>**Servicers**</u>

(III) Can an originator or a qualified third party undertake servicing functions in respect of securitised assets?

With the exception of Italy, where in order to act as a servicer the originator must be licensed as a bank or a financial intermediary, the servicing function in respect of the receivables transferred to the securitisation vehicle can be assumed by the originator or by suitably qualified third parties (generally banks). In Sweden, a third party servicer is subject to data protection requirements and a licence may be required for collection services/enforcement. In Luxembourg, legislation permits a securitisation undertaking to entrust the assignor or a third party with the collection of claims it holds and any other tasks relating to the management thereof, without such persons having to apply for authorisation under the Luxembourg financial sector legislation.

(IV) Does national law impose regulatory requirements or limitations, for example, on establishment?

Most jurisdictions do not impose any limitations on establishment or regulatory requirements in order for an originator to act as servicer. However certain jurisdictions, such as England and Wales and Italy, impose regulatory requirements where the servicer is a bank. In Italy this is also true where the servicer is a financial intermediary. Other jurisdictions, such as Greece, impose requirements in terms of the establishment of the servicer. In the Netherlands, the SPV will only be exempt from obtaining a licence under the financial services legislation if the SPV has entered into a servicing agreement with an entity regulated under that legislation. Where the originator is the servicer, its liability is generally limited by agreement to those risks arising out of the servicing agreement.

(V) How is the 'commingling risk' treated in your jurisdiction?

The 'commingling risk' is defined as that risk that cash belonging to an issuing SPV is mixed with cash belonging to a third party (for instance, the originator or servicer) or goes into the account in the name of a third party in such a way that, in the event of the third party's insolvency, it cannot be separately identified or becomes frozen in the third party's accounts. Strategies available to reduce the commingling risk are extremely diverse and range from the simple implementation of short-term payment cycles, a declaration of trust by the originator over its accounts through which SPV monies flow, a charge over the originator's accounts, to the creation of 'lock-box accounts' which isolate the assets of the securitisation vehicle from that of the originator. France, Luxembourg and Portugal have introduced specific provisions which appear to be designed to mitigate or avoid the commingling risk in securitisation transactions. Guidelines of the Governor of the Banca d'Italia adopted in 2000 also mitigate the commingling risk by stating that the SPV in particular is required to ensure permanent separation of the assets of the different securitisation transactions and the separation of the latter from the assets of the SPV itself.[36] In the Netherlands, any payments on the securitised assets which are made to a bank account held by the originator or servicer but not yet distributed to the SPV will in the event of such originator or servicer being declared insolvent fall into the insolvent's estate. The issuer, however, has a preferential right to receive such amounts once general insolvency expenses have been deducted.

[36] See Annex 1, Paragraph 1 of the Guidelines of the Governor of the Banca d'Italia, 23 August 2000.

Custodians or bank depositories

(VI) What is the role of bank depositories or custodians in relation to securitisation transactions?

Not all of the surveyed jurisdictions have provisions governing the role of the custodian for assets of the securitisation. In Portugal, legislation provides that the portfolio of receivables transferred to the securitisation fund must be held by a custodian which is a credit institution authorised by Banco de Portugal. The custodian is responsible for (i) holding the interest and principal payments received from the servicing agent; (ii) investing the fund assets; (iii) holding any securities acquired on behalf of the securitisation fund; (iv) holding any loans obtained for the fund by the manager of the securitisation fund; and, where applicable, (v) entering into swap agreements on behalf of the fund. The custodian allocates fund assets according to the instructions of the fund manager. In certain jurisdictions, the role of the custodian of the assets of the SPV is extended to include the statutory function of 'founder' of the SPV and supervisor of the management company of the securitisation funds, such as is the case in France.

In Belgium, public UIRs must appoint a custodian. Only Belgian credit institutions, EU credit institutions with a branch in Belgium registered with the BFIC, Belgian stock-broking firms, and licensed foreign investment firms may act as custodians for public UIRs. For institutional UIRs, foreign UIRs or other types of SPVs Belgian law does not impose any obligation to appoint a custodian.

(VII) What obligations are imposed in terms of custody of assets?

Most of the surveyed jurisdictions do not impose any obligations in terms of custody of assets and refer in the main to general laws on this matter. However, jurisdictions that have adopted specific legislation on securitisation, in particular, France and Portugal, tend to impose specific obligations regarding the custody of assets of the securitisation vehicle.

(VIII) Are there any specific restrictions on the place of establishment of the custodian?

In jurisdictions other than France, Portugal, Luxembourg and Greece, where the custodian has to be registered in the jurisdiction concerned, there are no restrictions on the place of establishment of the custodian.

Rating agencies

(IX) Does national law expressly refer to the role of rating agencies in respect of securitisation transactions?

In most jurisdictions no reference is made to the role of rating agencies. In certain jurisdictions, however, there is an obligation when notes issued by the securitisation vehicle are placed in the public domain for the issuer to provide investors with ratings for information purposes. In France, a rating is required by law when issuing units and/or debt instruments under the French securitisation vehicle programme. In Italy, a rating is required when the notes issued are offered to non-professional investors. In Belgium, in order to obtain a licence, a public CIR (or its management company, where applicable) or the management company of a public FIR must appoint a rating agency which is responsible for delivering a report on each securitisation transaction for which the UIR issues a separate class of securities. That report must address such matters as the sustainability of the underlying receivables, the quality of the financial plan, the fit and proper nature of the legal structure, the administrative organisation, the value of the guarantees and security interests provided to the investors, and an estimate of the solvency risk for each type of security issued by the UIR (which must be reflected in a rating for each type of security). In order to obtain a licence, the rating agency must be appointed pursuant to a contract approved by the BFIC. The BFIC may grant an exemption from the requirement to appoint a rating agency if the conditions of the transaction justify such an exemption and if adequate disclosure is made in the issue prospectus.

QUESTION 4: Transfer and Ring-Fencing of Assets

- Summary -

(I) Does national law permit the ring-fencing of assets that are the subject of a securitisation by removing them from the legal reach of the originator, its creditors and its insolvency or administration officers, thus making such assets available for the sole benefit of the parties to the securitisation?

All jurisdictions permit the ring-fencing of assets for the sole benefits of the investors. There are different techniques to achieve such segregation, which may be described as follows:

(1) True Sale: Sale and transfer of the receivables ('true sale') is the most commonly used approach taken by parties to a securitisation. True sale is recognised in all jurisdictions, but may be subject to certain formal requirements such as the need for the transaction to be documented in writing, notification of the debtor or registration. There are also different legal techniques for effecting a transfer (see below under 4(II)).

(2) Common Pool of Debts: In some jurisdictions, such as France, Italy, Luxembourg, Portugal and Spain, securitisation funds[37] are used to achieve segregation of assets. Such funds differ from corporate SPVs, in that they have no legal personality. They are pools of assets administered by the originator or by a management company. However, all assets transferred to the fund are deemed to be assets of the beneficiaries (the investors) and are thereby removed from the legal reach of the originator. In some jurisdictions (Italy and Luxembourg) reference is made to the legislation on mutual investment funds (undertakings for collective investment in transferable securities, UCITS) or constitutes the template used in order to provide a similar legal framework for the funds (although they do not qualify as UCITS and possess other attributes). In other jurisdictions, such as Austria, Germany or Greece, funds can not be used for investment in assets other than securities.

(3) Trust: In some jurisdictions, such as England and Wales and Ireland, ring-fencing may also be achieved by a trust arrangement between the originator and the SPV. Although the originator retains legal title to the assets, in the case of its insolvency the assets are segregated

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[37] Belgium: *fonds de placement en créances,* France: *fonds commun des créances* (FCC), Luxembourg: *fonds de titrisation*; Italy: *fondi communi di crediti,* Portugal: *fundo de titularização de créditos* (FTC) and Spain: *fondo de titulización.*

from its estate and the beneficiary (the SPV) has the right to claim separation and recovery of those assets. The trust concept is mainly limited to common law jurisdictions. While Sweden has also implemented trust legislation, it does, however, differ from the English law concept.

(4) Fiduciary Arrangements: In some jurisdictions, such as Austria, Germany or Luxembourg, fiduciary arrangements between the originator and the SPV are recognised for ring-fencing purposes, but in some jurisdictions this is subject to certain requirements being met. If the fiduciary arrangement is recognised, a similar outcome can be achieved to that arising under a trust. In Austria, fiduciary arrangements permit segregation only if they are not structured or construed as a secured transaction. In Germany segregation is only recognised if the trustee (the originator) obtains the assets directly from the beneficiary (the SPV), which requires a cumbersome back and forth transfer of assets and, where the receivables are collateralised by mortgages, if the relevant registrations in the land register have been effected.

(5) Registration: In order to facilitate securitisations without a 'true sale' transfer of assets, in 2005 Germany introduced the concept of a refinance register, into which SPVs' claims to the transfer of the assets may be entered. Although the originator retains legal title, the assets thus registered are deemed to be SPV assets and, in the event of the originator's insolvency, the SPV has the right to claim separation and recovery of those assets.

(II) What are the available methods of sale and transfer of assets to SPVs (assignment of receivables, etc.)? Can an assignment for security purposes in your jurisdiction be considered as ring-fencing the assets? Are these arrangements unique to the legislation on securitisation? Please specify.

In all jurisdictions, the sale and transfer ('true sale') of receivables can be effected by a bilateral assignment agreement between the originator and the SPV. In some jurisdictions, consent or notification of the debtor (see below under 4(III)) or other formality is required (see below under 4(VI)). An alternative but not commonly used technique is the assignment of the contractual relationship or its novation by a trilateral arrangement between debtor, originator and SPV. The assignment or novation of the contractual relationship is recognised in all jurisdictions.

In almost all jurisdictions the transfer is governed by the general rules of the substantive civil law. Only the securitisation frameworks in France and Portugal provide for specific rules applicable to assignments of receivables made between an originator and an FCC (France) or a financial institution (Portugal).

An assignment for security purposes is either void (Greece) or, in other jurisdictions on account of the additional risks inherent to collateral or in the absence of an intention on the part of the originator to transfer ownership and risk wholly and fully it is generally held that an assignment for security purposes does not result in any ring-fencing of assets (Austria, England and Wales, Finland, Ireland, the Netherlands, Portugal) nor is it successful in achieving the balance sheet reduction intended by the originator (Germany).

(III) Can the transfer of assets by the originator be effected without (i) the consent of debtors; or (ii) notifying the debtors or relevant third parties? When is the sale considered effective vis-à-vis third parties?

Provided that provisions on data protection and banking secrecy are observed (see below Question 5) and unless the agreement between the assignor and debtor provides otherwise (see below under 4(VIII)), in most jurisdictions, the assignment of receivables can be effected without the debtor's prior consent. In Belgium, however, consent requirements exist as far as receivables resulting from certain insurance contracts (credit insurance, life insurance, export insurance) are concerned.

In most but not all jurisdictions the assignment of receivables can be effected without notification of the debtor. Under the French legislation, where a 'bordereau' – a memorandum detailing the receivables – is delivered to the *fonds commun de créances*, notification of the debtor is not required. In Austria, Germany and Luxembourg notification is only required to ensure that the debtor loses its right to discharge its obligation to the assignor (the originator) by payment or set-off. In Belgium notification of the debtor also ensures that a second assignee cannot acquire a better rank than the first assignee. Similar rules apply in England and Wales and Ireland where 'silent' assignments are effective as a matter of equity. However, in order to avoid the obligation being discharged vis-à-vis the old creditor and to ensure enforceability against third parties, notification of the debtor is nonetheless required. In the Netherlands 'silent' assignments are valid where the written assignment has been registered with the competent Netherlands tax authority or where a public notary was used. However, in order to avoid the obligation being discharged vis-à-vis the old creditor notification of the debtor is required.

In Denmark, Italy, Finland, Greece, Spain and Sweden, notification of the debtor is mandatory. In Italy, notification of each individual debtor can be dispensed with if notification is effected by public means under the relevant legislation. In Greece, a failure to notify may be cured by registration in the public register. In Belgium, notification by registered mail is required to the extent that receivables arising from consumer credit transactions are concerned. UIRs are exempt, however, from that requirement. Even if the consumer has been notified in such manner, he is still entitled to invoke claims against the transferor or to apply set-off.

In almost all jurisdictions the assignment is valid once the agreement between the assignee and the assignor has been perfected or, in those cases where notification is required, upon notification. Under the French securitisation framework, if a 'bordereau' is delivered to a *fonds commun de créances* (FCC), assignment is effective upon such delivery. In Greece, assignment is valid upon registration.

(IV) Are originators permitted to retain the economic benefits of the assets transferred?

Generally speaking, there are only very limited circumstances in which the originator can retain some economic benefits in the transferred assets, for example, by acquiring asset-backed securities (ABS) issued by the SPV, by holding shares in the SPV, by having the right or obligation to buy back the assets transferred or by earning fees for the servicing of assets. In Greece, any retention of benefits is prohibited.

If economic benefits are retained it is likely that the originator would have to keep the receivables on its balance sheet or consolidate the SPV for accounting purposes or, if it is a bank, would have to deduct acquired ABS from its own capital. Such consequences reduce the economic effect the originator intended to achieve.

(V) Is segregation of assets legally possible on the basis of the provision of general characteristics or general information (without the need for detailed individual identification of assets on each occasion)?

One requirement that can be found in all jurisdictions is that the assignment must be specific enough to identify at any time with a sufficient degree of certainty whether or not a particular receivable is subject to the assignment. As regards the identity of the debtors, under the French securitisation framework, if a 'bordereau' for securitisation purposes is used (the FCC bordereau), the debtors must be named in the list of receivables, whereas in all other jurisdictions the relevant receivable may also be identified by other means.

(VI) Are there any formalities imposed on transfers of assets? Is there a requirement to use a notary or produce similar evidence of the transfer of assets?

Other than in the case of receivables that are secured by rights in real property (see below under 4(VII)), in Austria, Denmark, Germany, Finland and Sweden an assignment of receivables may be affected without any formalities.

In some jurisdictions, such as England and Wales, Greece, Ireland, the Netherlands, Portugal and Spain, the assignment agreement must be in writing. Under the French securitisation framework, the 'FCC bordereau' has to be referred to in the agreement and must be delivered to the FCC. Under the Italian securitisation legislation, public notice and registration in the companies register is required. The requirement to use a notary only applies to obligations owed by public entities. In Greece, registration of the assignment agreement in the public register is required.

(VII) In order to effect the transfer of ancillary rights attached to the assets (e.g., security interests, pledges, guarantees, credit insurance) does national law demand compliance with any further formalities or registration requirements?

In some jurisdictions (for instance, Austria, Belgium, France, Germany and the Netherlands), the assignment of receivables has the effect that all ancillary rights are automatically assigned to the assignee without the need for further action. There are, however, exemptions to this rule or at the very least there is legal uncertainty as regards ancillary rights in real property (as in the Netherlands).

In other jurisdictions, such as France, Italy, Luxembourg and Portugal the same legal result can be achieved if the securitisation is effected pursuant to the relevant securitisation framework. In such a case all ancillary rights are assigned automatically to the assignee upon acquiring the receivables.

The transfer of receivables that are secured by rights in real property, such as mortgages requires in almost all jurisdictions compliance with specific formalities. In Germany the assignment agreement must be in writing. In Belgium and Portugal the use of a notary is required. In Austria, Belgium, England and Wales, France, Germany, Greece, Ireland, Portugal, the transfer of the mortgage or the transfer of the receivable must be registered in the land or mortgage register or notified to the registrar. In Belgium, however, a special legal regime applies to UIRs, which are not required to register the assignment in the mortgage register. In Germany, if a mortgage certificate in bearer form is issued, transfer of the certificate can substitute for registration in the land register. In Sweden, transfer of the certificate is recommended.

In England and Wales and Ireland registration may also be required if other charges or mortgages are to be transferred to the assignee. In Denmark and Finland, the transfer of ancillary rights can only be effected with prior approval of the relevant party (for example, the guarantor in case of a guarantee).

In Belgium a special legal regime applies to the assignment of receivables resulting from consumer credit transactions; they may be transferred only to the Banque Nationale de Belgique, credit insurers and UIRs.

(VIII) Can segregation be achieved notwithstanding the fact that the underlying documentation creating the respective assets contains contractual restrictions?

In some jurisdictions, such as Austria, agreements between creditors and debtors prohibiting the transfer of a receivable do not affect assignments thereof. In other jurisdictions, such as Greece, the same result is achieved where the securitisation is effected pursuant to the securitisation legislation: any non-assignability clause is null and void. Under the terms of the securitisation legislation in Portugal and the new German legislation on a refinance register, assignment or registration of receivables is possible, provided that transferability has not been explicitly excluded.

In most jurisdictions, a contractual prohibition on transfer without prior consent must be observed, as failure to do so makes the assignment ineffective, at least vis-à-vis the debtor. In Greece, however, the absence of consent can be cured by registration in the public register. In Germany, in addition to the possibilities created by the new legislation, a further exception to this rule applies: where the debtor is a merchant (not a consumer) or a public entity, even if the debtor does not give his consent the transfer will be effective. The debtor is permitted, however, to discharge its obligation vis-à-vis the old creditor. In all other cases, where securitisation is effected under the 2005 legislation, a contractual prohibition on assignment is only valid if it is explicitly agreed between the parties. Another exception to the rule is in Italy where, if the debtor is a public entity, under certain circumstances, its formal approval is required.

(IX) Does national law effectively provide for the segregation of a buyer's assets within a multi-seller SPV, thus ensuring that only those parties benefit on whose behalf the assets were acquired?

In most jurisdictions, such as Austria, England and Wales, Finland, Germany, Greece, Ireland and Spain, assets acquired by an SPV from different originators are automatically commingled into one single asset pool and in the event of the SPV's insolvency, all assets would be liable to meet all claims, whether the investors or other participants in the securitisation have acquired their rights only in respect of receivables of a specific originator or not. In some jurisdictions segregation within the asset pool can be achieved by appropriate structuring, for example, by granting security interests in specific assets to specific creditors or by agreeing with them the principle of limited recourse.

In some jurisdictions, however, such as Belgium, France, Italy, Luxembourg, Portugal and Spain, where a securitisation fund (see above under 4(I)) may be used, segregation within the asset pool can be achieved by establishing separate compartments within the fund.

QUESTION 5: Data protection and banking secrecy
- Summary -

(I) Does national law permit data disclosure, including information disclosed to third parties (such as investors in asset-backed securities), in order to facilitate transparency whilst at the same time preventing the improper use of data?

Generally speaking, national law on securitisation does not make specific provision in respect of the data protection issues which are connected to securitisation transactions. Therefore, in most jurisdictions, the general rules on data protection apply. Those rules reflect the provisions of the Data Processing Directive[38] and allow for the disclosure of personal data only in certain conditions, namely if the individual has given his consent, the data transfer is necessary for the performance of a legal obligation to which the data holder is subject, the data transfer is necessary for the performance of a contract with the individual or the data processing is necessary for the purposes of the parties' legitimate interests.[39]

As far as receivables are concerned, there are various situations in which the disclosure of debtor-related information could be required. These include: (a) an arranger performs a due diligence analysis 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 performs a due diligence analysis, (c) disclosure of personal data is required to perfect an assignment that would otherwise lack the required certainty, and (d) an originator ceases to be responsible for servicing assets and collecting claims (for example, when an originator is a party to insolvency proceedings and, as a result, the servicing agreement is terminated). The question has arisen in the legal literature whether banking secrecy or data protection rules mandate non-disclosure of debtor-related information and, if so, whether infringement of that obligation renders the transfer void or unenforceable.

In Germany, the financial supervisory authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* or 'BaFin') has provided guidance[40] which emphasises the basic principle that debtor-related data should only be disclosed with the debtor's prior approval whilst setting out exceptions to that rule: according to the guidance, no prior approval by the debtor is required (i) where, and if so, to the extent that, disclosure of debtor-

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[38] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281 p. 31.

[39] Ibid., Article 7.

[40] Circular 4/97 on asset-backed securities transactions.

related information is required to perfect a transfer of assets, or where it is necessary to provide rating agencies, accounting firms or trustees with the required information; and (ii) where the servicing is done by the originator, or if the substitute service agent is a credit institution established within the European Union. In May 2004, the Higher Regional Court, Frankfurt am Main (*Oberlandesgericht*) held that the principle of banking secrecy and the contractual obligation to keep client data confidential result in an implicit agreement prohibiting assignment. The new legislation on a refinance register has addressed this issue by amending the banking legislation such that it is now permitted to register receivables in the refinancing register unless the parties have *explicitly* agreed otherwise. In any event, case-law on this matter is inconsistent, with the district courts (*Landgericht*) of Frankfurt am Main and Koblenz holding, contrary to the view taken by the the Higher Regional Court of Frankfurt am Main,that an implicit agreement prohibiting assignment cannot be construed.
As is the case in Germany following the judgment of the Higher Regional Court, Frankfurt, in 2004, also in the Netherlands it cannot be excluded that, under certain circumstances, the Netherlands Civil Code regards a receivable as not transferable because the prohibition on the third party disclosure of client information must be construed as a tacit non-assignment clause. That may be the case if client information is disclosed with the transfer of rights. In practice, however, it will be a rare occurrence, as originators usually service the assets.

In France, the Monetary and Financial Code[41] prohibits banks from transferring any information to third parties without the prior consent of the underlying obligor. The *Fédération des Banques Françaises* has commenced lobbying for legislative change in France to challenge those provisions having regard to the specificity of securitisation transactions using FCCs. At the present time, however, the legislation has not yet been amended with respect to the transfer of receivables.

In general, banking secrecy rules do not pose major obstacles to securitisation transactions. In certain jurisdictions, such as Austria, SPVs purchasing receivables from credit institutions or assuming risks associated with such receivables are subject to the same banking secrecy obligation as credit institutions. This provision is interpreted as allowing the disclosure of relevant data to an SPV, which however would be subject to the banking secrecy obligation itself.

Under the Greek securitisation legislation,[42] an originator is permitted to furnish the SPV with information and data related to the securitised assets and the debtors. Similarly, the SPV may

[41] Article L. 511-33 of the Monetary and Financial Code.
[42] Article 10(22) of the Greek Securitisation Law.

provide such information and data to noteholders, its representatives and generally to all parties participating in the securitisation transaction in accordance with the legislation. In relation to securitisation, banking confidentiality provisions do not apply between an originator and an SPV or between an SPV and its creditors. An SPV and its creditors are bound, however, by banking confidentiality provisions in relation to each specific category of claims.[43]

(II) Does national law permit disclosure of certain asset specific information to securitisation vehicles and investor representatives such as note and security trustees?

Provided that the information disclosed does not permit the identity of specific customers to be determined, there is, generally speaking, no prohibition on such disclosure (at the very least, there are no specific provisions governing the matter).

(III) Does national law allow for securitisation vehicles or service providers other than the originator to hold data relating to the receivables? If there are obstacles in this regard, please outline.

Generally speaking, the answer is identical to the one given to the previous question. In France, the securitisation framework provides that all or part of the servicing of the securitised receivables may be entrusted to a credit institution or to the French *Caisse des dépôts et consignations*, provided that the debtor is informed thereof by ordinary letter. That obligation to notify is construed by certain authors as implicit authorisation to transfer data.

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[43] Article 20 of the Greek Securitisation Law.

QUESTION 6: Insolvency

- Summary -

(I) Does national law provide for separation of the SPV from the originator in the event of the latter's insolvency even where the SPV belongs to the same group of companies as the originator?

In general, the SPV or equivalent segregated fund remains separate from the originator in the event of the insolvency of the issuer. There is minor residual uncertainty regarding Germany, Ireland and England and Wales where the originator retains a controlling interest in the SPV.

Similarly, most jurisdictions allow for separate insolvencies of companies within the same group and therefore the fact that the SPV or fund belongs to the originator group will not preclude its segregation from the originator for insolvency purposes. Greek law does not make provision for the situation where the SPV remains within the same group as the originator. Swedish law does not allow for segregation if the transferor remains as parent.

(II) How and when can (i) a security interest by an SPV over its assets, (ii) a sale of assets on liquidation, or (iii) payments to the investors under the debt instrument be challenged and declared void by the receiver of the SPV's estate?

Jurisdictions are generally split between two approaches. Those jurisdictions which have legislated specifically for securitisations allow for no or very limited challenge to the securitisation security structure provided that such structures are in full compliance with the relevant legislation. Those jurisdictions which use existing legislation and/or rules of the common law permit challenges in accordance with general insolvency provisions. For example, transactions can be challenged if they are considered to be preferential (that is to say, preferring one creditor over others within a given time period prior to the onset of insolvency). In this second category of jurisdictions, transactions are generally structured to fit around national insolvency provisions.

(III) Does national law prevent insolvency officers from interfering with cash flows associated with securitised assets or with third party disposals of such assets (or associated servicing rights) by SPVs? Please distinguish between insolvency of the originator and that of the SPV.

In all jurisdictions, the answer to this question largely depends on whether the securitised assets associated with the cash flows form part of the originator's estate. If the true sale is effective, insolvency officers generally cannot touch the securitised assets. There is a range of challenges to a disposal of securitised assets which are available, however, to insolvency officers. For example, in a winding-up in England and Wales, the liquidator can freeze all cash flows in and out of accounts held in trust for the securitisation pending a determination that the trusts over those accounts are validly constituted. In the Netherlands, if the transferor is still receiving cash flows from debtors which are actually for the securitisation and the debtors have not been notified of the transfer, the SPV will have preference on those cash flows subject to the insolvency expenses of the transferor. In all jurisdictions legislative provisions or structuring techniques provide effective protection against potential challenges to the cash flows.

(IV) Does national law recognise contractual arrangements between debtors and creditors or between groups of creditors concerning the extent of their rights in respect of the securitised assets of the SPV?

Such contractual arrangements are recognised across all jurisdictions. In England and Wales contractual arrangements may be subject to interference where the company goes into administration, as the primary object of the process is maintenance of the company, or where other insolvency proceedings are commenced, except for administrative receivership, since the distribution of payments etc. has to be negotiated between the creditors. Generally, transactions are structured such that administrative receivership is, however, the most likely form of insolvency proceeding and, in any event, in other forms of proceedings the majority creditor is usually the trustee for the noteholders.

(V) Does national law provide for methods of enhancement (subordination, guarantee, etc.)? Is the originator permitted to provide credit enhancement for securitised transactions without prejudicing the legal 'true sale'?

Enhancement of some form or other can be provided by originators across all the jurisdictions. Restrictions vary according to the jurisdiction. For example, England and Wales permits only a one-off support from the originator, Spain and Portugal do not permit the granting of guarantees, and in Sweden, England and Wales and Ireland enhancement could, if not structured properly, lead to secured transactions being recharacterised. In general though, national law allows for or is silent on credit enhancement and/or structures have been adapted to fit around national provisions. In France, legislation expressly provides for possible methods of enhancement.[44]

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[44] See Article 5 of the French Decree No 2004-1255 of 24 November 2004 issued in application of Articles L. 214-5 and L. 214-43 to L. 214-49 of the Monetary and Financial Code regarding *fonds communs de créances*.

QUESTION 7: Tax treatment
- Summary -

(I) Are there any specific tax provisions in relation to securitisation in your jurisdiction?

All jurisdictions that have implemented specific securitisation acts, such as France, Italy, Luxembourg and Portugal, also have specific tax provisions in relation to securitisation transactions entered into under those acts. Under such securitisation acts, one or more of the following exemptions usually applies:

(i) a sale and transfer of receivables by the originator to the SPV is exempt from any stamp duty, VAT or other tax that would otherwise be charged on a transfer of assets,

(ii) the issuance of notes by the SPV is exempt from any stamp duty,

(iii) the SPV itself (or certain cash flows) is exempt from any income tax, corporate tax or business tax that would otherwise be charged on income ('tax neutrality'),

(iv) fees paid for the collection of receivables or the management of the SPV are VAT-exempt.

Some jurisdictions, such as Austria, England and Wales, Ireland and Germany, only regulate specific tax aspects of securitisation, e.g. by exempting transfers of receivables from stamp duties (Austria and Ireland), by allowing full deductibility of certain costs and expenses incurred by a SPV from profits (England and Wales, Ireland and Germany) or allowing an exemption from taxes that would otherwise be withheld from interest paid on notes (Ireland).

Some jurisdictions, such as Finland, the Netherlands and Sweden, have no specific tax provisions.

(II) Do SPVs have a different tax treatment/status compared with other companies/legal entities of the same type?

In most jurisdictions the tax treatment of SPVs differs from other legal entities.

In some jurisdictions, such as France or Italy, the principle of tax neutrality is followed, which means that the SPV itself or certain cash flows relating to the payment of interest on the notes are completely exempt from any income, corporate or business tax. In

Luxembourg, only those SPVs organised as securitisation funds are exempt from income tax, whereas companies are exempt from wealth tax only, but not from income tax.

In other jurisdictions, such as England and Wales, Ireland, Luxembourg (with respect to companies) and Germany, a similar effect is achieved by allowing the SPV to set off expenses and costs relating to the securitisation transaction against profits, which means that only the net amount –of any profit is taxable as income. However, the type of costs and expenses and the extent to which they may be allocated to profits varies and can (as in England and Wales and Ireland) depend, for example, on the type of company or type of assets involved in the securitisation transaction. Deductible expenses usually include: (i) the purchase price paid for the receivables, (ii) servicing fees, (iii) interest paid on the notes, and (iv) interest paid in respect of other funding facilities.

In some jurisdictions such as Luxembourg, SPVs benefit from a lower maximum income tax rate than that applicable to companies.

In Finland, the Netherlands, Portugal and Sweden there is no specific tax treatment of SPVs.

(III) What taxes, if any, are imposed on, or have been explicitly declared as non-applicable to, the following transactions: (i) conclusion of contracts entered into for the implementation of securitisation (e.g. contract(s) for sale and transfer of securitised assets and related security rights; service, management and custody agreements; loans; other financial contracts and security agreements, etc.); (ii) cash flows both into and out of the SPV; (iii) registration of the abovementioned contracts; and/or (iv) issuance, distribution/placement, registration and transfer of securities?

The sale and transfer of receivables by the originator to the SPV may attract a stamp duty charge in England and Wales. In Austria, a transfer of receivables to a securitisation company is exempt from stamp duty, but it is uncertain whether such transfers could be recharacterised as factoring loans, which would then be subject to stamp duty (of 0.8 %). There is no stamp duty in France or Germany.

The sale and transfer of receivables by the originator to the SPV is exempt from VAT in most jurisdictions, such as England and Wales, France and Germany. In Luxembourg, a transfer of assets is subject to transfer tax if they consist of real estate located in Luxembourg.

The issuance of notes by the SPV is subject to stamp duty in Sweden, but only if the notes are mortgage certificates.

In almost all jurisdictions, the issuance and distribution of notes is exempt from VAT. In Italy, the issuance is tax-exempt, but not the transfer of notes, which is subject to a special tax.

Fees paid for the collection of receivables or the administration of an SPV are subject to VAT in most jurisdictions, such as England and Wales, Germany, Italy and Sweden, but may be avoided if the service provider is located abroad. Collection fees are exempt from VAT in France and Luxembourg. In Luxembourg, management fees are also exempt from VAT.

Interest paid on notes is subject to income tax or withholding tax in most jurisdictions. However, in England and Wales tax can be avoided if the 'quoted Eurobond' exemption applies. In Austria interest payments are only subject to withholding taxes if the underlying receivables are collateralised by rights in real estate. In France, interest is exempt from withholding tax if paid by a *fonds commun de créances.*

(IV) Does the transfer of assets (and related security rights, if applicable) have an impact on the assets' (and related security rights', if applicable) tax treatment (e.g. if the originator enjoys a privileged tax regime in relation to the assets (and related security rights, if applicable), is such a privilege also transferred?)

In almost all jurisdictions, a transfer of assets has no impact on the tax treatment of the assets. There are, of course, exemptions if the originator enjoys a special tax privilege that is linked to his individual status, which itself is not transferable.

(V) In multi-jurisdictional transactions, do the pertinent tax provisions introduce any difference in the tax treatment depending on the country of the registered seat or office?/nationality of: (i) the originator; (ii) the SPV; (iii) the manager; (iv) the custodian; and/or (v) any other relevant party to the securitisation transaction

Despite existing double taxation treaties and provisions defining the circumstances that constitute residency for taxation purposes, in most jurisdictions there are no specific tax provisions that address cross-border securitisation issues. In Portugal, however, certain cash flows received from or by non-residents are exempt from income tax, provided that the originator or holder is not located in certain 'tax havens' and that 75% or more of their capital is not directly or indirectly held by Portuguese residents.

QUESTION 8: Rights of investors
- Summary -

(I) Are investors required to be represented in an on-going securitisation transaction by a professional trustee or trust company or a similar participant which is independent of the originator and which has control of the assets? Please describe these mechanisms and indicate whether national law makes specific provision for them.

In most jurisdictions a trustee equivalent is not required by law to represent investors.Transactions, however, generally include such a party to represent investors. Exceptions are Austria, Italy and Sweden, where certain transactions require such representatives. Several jurisdictions require the managing company of the transaction to act in the best interests of the investors. Such a requirement does not necessarily preclude additional representation by an independent third party.

(II) Do the legal framework and structural characteristics in your jurisdiction encourage and support the development of a secondary market in securitisation instruments?

In almost all markets there are no restrictions on the development of a secondary market except for Greece, where securitisations can only be marketed to a maximum of 150 people. Certain jurisdictions place restrictions, however, on the nature of the investor, notably at the very least in England and Wales, Ireland and France, although it is likely that other jurisdictions also place restrictions on the nature of the investor too. It must be noted that in Sweden, although there are no obvious restrictions on such a development, a significant secondary market does not currently exist.

(III) Are investors or potential investors entitled to continue to receive or obtain relevant information following their investment on a regular basis without legal or regulatory impediment in a format which enables comparison to be made with other securitisation transactions of a similar type?

Most jurisdictions have either legislated for the provision of ongoing information to investors or such provision is contractually agreed between the parties.