European Financial Markets Lawyers Group

CONFIDENTIAL

DRAFT

EFMLG
Working Group on securitisation

LEGAL OBSTACLES TO CROSS-BORDER SECURITISATIONS IN THE EU

10 October 2006

REPORT ON LEGAL OBSTACLES TO CROSS-BORDER SECURITISATIONS IN THE EU

ANNEXES

NOTICE

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

EXECUTIVE SUMMARY

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Part I Introduction

1.1. The regulatory environment of securitisation markets in Europe

In a report devoted to the current state of financial integration in Europe, the International Monetary Fund (IMF)[1] considers that the securitisation market in Europe virtually non-existent in the mid-1990s, has been expanding rapidly but remains underdeveloped. The IMF noted that one of the main obstacles to achieving an integrated market is the absence of a common legal framework for pan-European securitisation programs. The securitisation landscape in Europe appears more like an aggregation of local markets, based on the use of different techniques and instruments. The IMF also observed that, in the securitisation market, maybe more than in other market segments in Europe, the need to overcome differences in legal frameworks and market fragmentation has translated into the development of 'high-tech' financial products, based on sophisticated financial engineering.

In a May 2004 report commissioned by the European Commission in the context of preparing the post-Financial Services Action Plan policy, the Securities Expert Group noted that one of Europe's most innovative and rapidly growing financial market sectors is securitisation, which has developed as an alternative capital markets financing, funding, arbitrage and risk-shifting mechanism and that considerable progress could still be made in terms of convergence of market practices, instruments and legal rules (regulation, capital, tax and accounting)[2]. The Expert Group also pointed out that, while several Member States have taken steps to create a more hospitable environment for securitisation[3], more coordination of certain aspects of the legal framework applicable to these operations is necessary at the EU level, thereby facilitating a more harmonised framework and simultaneously encouraging innovation in securitisation markets across Europe.

The European Central Bank (ECB) is regularly consulted on Member State draft national laws which contain rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets[4]. In two opinions concerning draft laws on securitisation in Luxembourg and France[5], the ECB indicated that it supported the views expressed by the Expert Group and stressed that, looking beyond the Financial Services Action Plan, it saw merit in a strategy of increased harmonisation in the area of securitisation at the EU level.

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1 Euro area policies, Selected Issues, as approved by the IMF European Department, July 6, 2005, 'IV.B The Integration of European Financial Markets', 'The Current State of Financial Integration in Europe', paragraph 107, pp. 91-92 (www.imf.org).

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

3 As pointed out by the European Securitisation Forum (ESF) in its Report of May 2002, 'A Framework for European Securitisation', p. 1, (hereinafter the ESF Report).

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

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

1.2. Assumptions

In Europe, few systematic studies have been undertaken aimed at assessing the various features of national securitisation legislation[6]. One of the main reasons for the scarcity of such studies could be 'owing to the almost limitless combination of jurisdictions, structures, asset types, laws and transaction parties that one might encounter in the European structured finance market, it is not possible to have detailed criteria that cover every issue in every jurisdiction'[7].

In May 2002, the European Securitisation Forum (ESF) produced a document entitled 'A Framework for European Securitisation' stating that 'the lack of a more uniform and harmonized legal, regulatory, tax, capital, accounting and market practice regime among individual jurisdictions has hindered the growth of securitisation on a broader, pan-European scale' and took the view that there was 'no clearly articulated or widely-acknowledged blueprint for the types of legal, regulatory and other provisions needed to facilitate securitisation on a broader scale throughout Europe'[8].

Over the past years, both at the national and European level, securitisation markets have witnessed important legislative and regulatory developments. At the Member States level, a number of initiatives have been introduced (for instance, the adoption of specific frameworks in Luxembourg, in Greece or more recently in Malta, the reform of the French legal framework in 2003, and the German law of 28 September 2005 on the creation of a refinancing register) in order to establish an appropriate legal and regulatory environment to facilitate the development of domestic securitisation markets across Europe (see also Annex 1 on domestic legal frameworks in Europe).

At the European level, the development of securitisation techniques is increasingly reflected in financial services legislation, albeit in a fragmented, inconsistent and legally incoherent manner. Until recently, EU financial law contained few references to securitisation concepts and there is a lack of substantive harmonisation of market practices, instruments and legal rules in the area of securitisation across Europe. At the same time, the expansion of securitisation across Europe has led the European regulators to reflect this development and introduce securitisation-related concepts within EU legislation. This was the case, in particular, in the context of the review of the Banking Directive in relation to capital requirements[9], for the accounting rules and in respect of the Prospectus Directive[10]

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6 See however, the ESF White Paper, 'A Framework for European Securitisation', May 2002 and the Global Legal Group Ltd. Report, 'The International Comparative Legal Guide to: Securitisation 2005, A practical insight to cross-boarder Securitisation Law', 20 April 2005. The Guide was enriched and up-dated in 2006.

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

8 The ESF Report, p. 1.

9 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (hereinafter the 'Banking Directive'), EU OJ L177/1 of 30 June 2006. See also Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (the Capital Adequacy Directive), EU OJ L177/201 of 30 June 2006.

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

and more recently in the context of the Reinsurance Directive[11]. In 2005, the ECB also amended its collateral framework to take into account the peculiarities of asset-backed securities (ABS) as an important growing class of assets eligible as collateral in the context of monetary policy operations. Further, a number of texts currently under consideration at the EU level, for instance regarding consumer credit or the rules applicable to UCITS investments incorporate considerations relating to securitisation, which raises legal issues in a number of instances.

1.3. Methodology of the EFMLG Working Group on securitisation

Against this background, the EFMLG agreed to set up a working group (the Working Group) with a view to identifying the most pressing obstacles to cross-border securitisations across the EU[12].

Having examined the existing EU legislation dealing with certain aspects of securitisations in detail the Working Group put forward recommendations in order to further improve this framework and remove certain legal uncertainties (see Part Two of the Report). Furthermore, the Working Group prepared a questionnaire comprised of eight sections covering the following topics:

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

The purpose of this questionnaire was to assess the main features of domestic securitisation frameworks across the EU (i.e. the 15 old Member States). The full text of the country-specific replies to the questionnaire is attached as a separate report. It is available on the EFMLG's website (www.efmlg.org).

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

12 The EFMLG Working Group on securitisation is comprised of the following lawyers: Mrs. Sandrine Conin, Kredietbank Luxembourg, Mr. Pedro Ferreira Malaquias, Uria & Menéndez (on behalf of Euribor Portuguese banks), Mr. Holger Hartenfels, Deutsche Bank, Mr. Stéphane Kerjean, ECB (as co-ordinator), Mrs. Susan O'Malley, HSBC, Mr. Dimitris Tsibanoulis and Mrs. Elena Bailas (replaced by Mr. Emilios Avgouleas), Tsibanoulis & Partners (on behalf of Euribor Greek banks) and Mrs. Sophie Vidal-Lemière, BNP-Paribas (replaced by Mr Philippe Nugue).

The present report (the Report) is the outcome of the investigation undertaken by the Working Group with the EMFLG's assistance. The Working Group covered the following jurisdictions: France, Germany, Greece, Luxembourg, Portugal and the United Kingdom and the contributions for the nine other jurisdictions were directly provided by EFMLG members (the list of the other contributors is attached at Annex VI).

1.4. Scope and structure of the Report

The EFMLG agreed to examine, in more detail, the main features of the existing rules applicable across the various EU Member States. The Report and Annexes do not provide an exhaustive overview on any of these aspects, however they do provide insight into certain legal obstacles which appear to be a reason for the existence of a fragmented securitisation markets within the EU internal market.

The ten new EU Member States are not covered by this survey. Annex I of the Report indicates that, except in Poland and in Malta, there are no specific legal frameworks on securitisation[13], although a number of these countries have already adopted specific legislation on covered bonds.

The focus of the Report is on securitisation techniques and does not cover the assessment of instruments such as covered bonds[14] or structured covered bonds[15], which present some comparable legal features but for which distinct legal frameworks are generally in place in most EU jurisdictions[16]. In early 2006, the Commission created a stakeholders working group entrusted with the task to

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

14 Defined as 'full recourse debt instruments secured against a pool of mortgage assets and/or public sector claims, to which investors have preferential claim in the event of a bankruptcy of the issuing institution' (footnote 42 of the report by the Forum Group on Mortgage Credit, 'The integration of the EU mortgage credit markets', p. 40, 2004). Article 22(4) of Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended by Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS (OJ L 41, 13.2.2002, p. 35) (hereinafter the 'UCITS Directive') refers to 'bonds that are issued by a credit institution which has its registered office in a Member State and is subject by law to special public supervision designed to protect bond-holders. In particular, sums deriving from the issue of these bonds must be invested in conformity with the law in assets which, during the whole period of validity of the bonds, are capable of covering claims attaching to the bonds and which, in the event of failure of the issuer, would be used on a priority basis for the reimbursement of the principal and payment of the accrued interest'.

15 According to the Forum Group report on Mortgage Credit, 'The integration of the EU Mortgage Credit Markets', December 2004 (point 170), they constitute a new type of covered bond being introduced into the European market place and could be defined as: (i) a covered bond where securitisation techniques are used to enhance the rating of covered bonds; or (ii) a secured bond issued against a pool of assets in a jurisdiction where no specific covered bond law has been established. In 2003, as recalled by the Forum Group report, structured covered bonds were issued for the first time in the UK, in the context of the absence of a specific regulatory framework (HBOS Plc).

16 On these aspects, see the publications of the European Mortgage Federation and, for instance, 'Mortgage banks and mortgage bonds in Europe', 4th edition, November 2003 (www.hypo.org). Reference should also be made to the on-going activities of the Commission's Expert Group on mortgage funding (http://www.europa.eu.int/comm/internal_market/finservices-retail/home-loans/integration_en.htm).

examine the need for and nature of action on the funding aspects (primary and secondary) of mortgage credit[17].

The EFMLG is aware that synthetic securitisations constitute a very important and growing part of the securitisation market. The Report in the first place focuses primarily on 'true sale' securitisations, albeit, to a certain degree, the Report examines whether specific domestic rules apply to synthetic securitisations and how they are covered in the respective EU national legal frameworks.

The EFMLG also took note of the adoption of the Reinsurance Directive which is currently implemented by EU Member States and will also require certain amendments to national securitisation frameworks[18]. As pointed out by a report of the Group of Thirty, insurance securitisation is expected to be an important area of development in the near future[19]. Although the EFMLG is concerned that the flexibility offered by certain provisions of the Reinsurance Directive to the EU Member States might reinforce the heterogeneity of the domestic legal frameworks on securitisation in Europe, the aspects relating to the implementation of the Reinsurance Directive are not addressed specifically in the context of the Report.

The Report is composed of four main parts and seven annexes.

Part One introduces and provides an overview of EU securitisation markets and of their regulatory environment. It also provides a description of the Working Group's assumptions and methodology, and outlines the scope of the Report.

Part Two assesses the treatment of securitisation under current EU legislation (or legislation under discussion).

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

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17 In its Green Paper on mortgage credit in the EU, the Commission pointed out that a further assessment should be made on how the further integration of the EU mortgage markets could be enhanced by the emergence of a pan-European funding market, Green Paper, Mortgage Credit in the EU, 19.7.2005, COM(2005) 327 final, p.13, points 49 to 51. The Commission considers that further integration of the secondary markets in loan funding is linked to the integration of the primary market and that a key aspect cutting across both areas is the transferability of mortgage loans. In its contribution to the public consultation, the Eurosystem expressed the view that domestic regulatory frameworks should facilitate transferability of mortgage loans and that any obstacle which might impede the transfer of mortgage loans should be lifted at both the national and, where possible, cross-border level (Eurosystem contribution to the public consultation, 1 December 2005).

18 The Member States have until 10 December 2007 to implement the Directive. In France, draft legislation is currently under discussion which would lead to the creation of a new entity within the domestic securitisation framework, i.e. Fonds Commun de Titrisation in addition to the current existing securitisation funds (Fonds Commun de Créances). This is also the case in the United Kingdom.

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

Part Four sets out possible options identified by the Working Group for the implementation of these recommendations.

1.5. The proposals of the EFMLG

On 12 June 2006, the EFMLG organised a hearing with securitisation legal experts from various market associations (and in particular from the European Securitisation Forum), practitioners involved in the field of securitisation (rating agencies, international law firms, public authorities) and foundations/associations specialised in structured finance and securitisation. The list of participants is attached at Annex VII.

The ideas and input received from the participants to the hearing have contributed to enrich the analytical content of the Report as well as the recommendations made for the further integration of European securitisation markets and possible options for their implementation.

Based on the analytical work undertaken by the EFMLG working group and the findings of the hearing, the EFMLG has proposed a number of recommendations concerning the current Community legislation (Part Two). The assessment of national laws has also enabled to identify a number of recommendations regarding the main critical legal areas where convergence of domestic rules of Member States on securitisation would be required at the European level (Part Three). An overview of the possible options for further action are detailed in the Part Four of the Report.

Part II The treatment of securitisation under current EU legislation

Part II of the Report describes how certain aspects of securitisation are addressed under current EU legislation (Sections 2.1 to 2.3), on-going initiatives (Section 2.4) and presents EFMLG recommendations aimed at further improving the current EU regulatory framework applicable to this financial technique and removing certain legal uncertainties.

2.1. The Banking Directive

The most important piece of legislation at the EU level dealing with securitisation-related matters is the Banking Directive which was recently considerably amended in the context of the review of the Basel Capital Accord[20]. The Banking Directive introduces, for the first time, a harmonised set of rules for capital requirements for securitisation activities and investments[21]. The Commission considers that these new rules will provide a significantly improved capital requirements framework – allowing credit institutions to take advantage of the funding, balance-sheet management and other advantages that such transactions can deliver and that it will also reduce the extent to which securitisation has been seen as an instrument of capital arbitrage[22]. The Banking Directive contains several definitions of securitisation-related concepts such as originator, securitisation special purpose entity, sponsor, tranche and credit enhancement.

In this context, securitisation means a 'transaction or scheme, whereby the credit risk associated with an exposure or pool of exposures is tranched, having the following characteristics: (a) payments in the transaction or scheme are dependent upon the performance of the exposure or pool of exposures; (b) the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme.'[23]

The Banking Directive distinguishes:

- <u>traditional securitisation</u> defined as 'a securitisation involving the economic transfer of the exposures being securitised to a securitisation special purpose entity which issues securities. This shall be accomplished by the transfer of ownership of the securitised exposures from the originator credit institution or through sub-participation. The securities issued do not represent payment obligations of the originator credit institution'[24];

  and

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20 See footnote 9.
21 See Articles 94 to101 and the relevant technical provisions at Annex IX to the Banking Directive.
22 The Banking Directive, Comments on Articles 94-101, p.7 of the Explanatory memorandum of 2004.
23 Article 4(36) of the Banking Directive.
24 A securitisation special purpose entity (SSPE) means a 'corporation trust or other entity, other than a credit institution, organised for carrying on a securitisation or securitisations, the activities of which are limited to those appropriate to accomplishing that objective, the structure of which is intended to isolate the obligations of the SSPE from those of the originator credit institution, and the holders of the beneficial interests in which have the right to pledge or exchange those interests without restriction' (Article 4(44) of the Banking Directive).

- synthetic securitisation defined as 'a securitisation where the tranching is achieved by the use of credit derivatives or guarantees, and the pool of exposures is not removed from the balance sheet of the originator credit institution'[25].

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

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

(a) the securitisation documentation reflects the economic substance of the transaction;

(b) the securitised exposures are put beyond the reach of the originator credit institution and its creditors, including in bankruptcy and receivership and is supported by the opinion of qualified legal counsel;

(c) the securities issued do not represent payment obligations of the originator credit institution;

(d) the transferee is a securitisation special-purpose entity (SSPE); and

(e) the originator credit institution does not maintain effective or indirect control over the transferred exposures[26].

In the case of synthetic securitisation, an originator credit institution may calculate risk-weighted exposure amounts and, as relevant, expected loss amounts for the securitised exposures if significant credit risk has been transferred to third parties either through funded or unfunded credit protection[27] and if the transfer complies with the following conditions:

(a) the securitisation documentation reflects the economic substance of the transaction;

(b) the credit protection by which the credit risk is transferred complies with the eligibility and other requirements for the recognition of such credit protection; and

25 It is noted that these rules do not apply to covered bonds referred to in the Banking Directive as bonds as defined in Article 22(4) of Directive 85/611/EEC (UCITS) and collateralised by the eligible assets defined in the Banking Directive (Annex VI, Part 1, points 65 to 67).

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

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

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

In both cases, legal opinions are requested in order to assess whether securitised exposures are put beyond the reach of the originator credit institution and its creditors, including in bankruptcy and receivership (traditional securitisation) or to confirm the enforceability of the credit protection in all relevant jurisdictions.

The doctrine has pointed out that, although economic substance over legal form is the underlying principle of the securitisation framework in the Banking Directive, one of the great gaps is the lack of definition of the actual legal forms to which economic substance attaches[28]. As an example, the definition of covered bonds refers inter alia to bonds collateralised by loans secured by senior units issued by French fonds communs de créances (FCC) or 'by equivalent securitisation entities governed by the laws of a Member State securitising residential real estate exposures (…)'. The Directive does not provide any indication regarding the criteria for determining whether the securitisation entity is 'equivalent' to a FCC[29].

One other area where need for improvement of the current framework was identified is the treatment of maturity mismatches. Defining the maturity of the securitised loan portfolio by reference to the longest maturity of any of the receivables that form part of the portfolio[30] means that only one single outlier would constitute a maturity mismatch and a partial de-recognition of the credit risk mitigation otherwise achieved under the securitisation transaction. This will constitute an economically unnecessary oversubscription of the credit risk[31].

The current structure of the Banking Directive, unlike the Directives adopted under the Lamfalussy approach in the securities sector, does not offer the flexibility required to clarify the Level 1 framework principles[32] at the level of the implementing measures (Level 2), since the technical aspects are already covered in the Directive. Furthermore, the Directive is currently being implemented in the various EU Member States. It is therefore suggested that the European Commission mandates the Committee of European Banking Supervisors (CEBS) to examine how to ensure a homogeneous

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28 See J. Tanega, Securitisation Disclosures and Compliance under Basel II, Journal of International Banking Law and Regulation, 2005, p. 617: '[…] Basel II has attempted to fill this obvious gap by providing "operational requirements" for the various instruments which would be allowed favourable risk weights and credit conversion factors (for example, guarantees and credit derivatives) but these operational requirements do not in themselves define the legal instruments in question. It should be considered whether the 'legal substance' of the economic forms should be given increased weight involving appropriate regulatory standards'.

29 See Item 12. 68 (d) of Annex VI ('Standardised approach').

30 Annex IX, Part 2, point 6 of the Banking Directive.

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

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

interpretation of the securitisation-related concepts contained in the Banking Directive and avoid a risk of divergence in the implementation of the Directive.

Recommendation nº1

The EFMLG recommends that the European Commission mandates the CEBS to examine how to further increase the legal certainty attached to the securitisation-related concepts contained in the Banking Directive and avoid the risk of divergent implementation across the EU Member States.

2.2. Accounting rules on securitisation and company law

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

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

The issue of derecognition is generally dealt with in the revised IAS 39[33]. The terms 'financial instruments', 'financial assets' and 'financial liabilities' used therein are defined in IAS 32; they include most types of assets commonly used for securitisation. Consolidation is generally covered by IAS 27[34] and the IASB's Standing Interpretations Committee's (SIC) issue No. 12[35]. The European Commission adopted IAS 27 and SIC 12 in September 2003[36]. IAS 39 has been adopted in November 2004[37], but only partly: the provisions dealing with hedge accounting and fair value accounting have been eliminated.

Companies which securities are admitted to trading on a regulated market within the European Union (EU) are required to apply IFRS/IAS in their consolidated accounts for annual periods beginning on or

33 Entitled "Financial Instruments: Recognition and Measurement", which was released in December 2003.
34 Entitled "Consolidated and Separate Financial Statements".
35 Entitled "Consolidation – Special Purpose Entities" (SIC 12).
36 Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council, EU OJ L 261, 13.10.2003, p. 1 ("Regulation 1725/2003").
37 Commission Regulation (EC) No 2086/2004 of 19 November 2004 amending Regulation (EC) No 1725/2003 on the adoption of certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards the insertion of IAS 39 ("Regulation 1606/2002").

after the 1st January 2005[38]. Exemptions are provided for companies whose securities are also listed in third countries outside the EU and which, for that purpose, already use other internationally accepted standards like the US GAAP; those companies are required to apply the IFRS/IAS for annual periods beginning on or after 1st January 2007[39]. The application of the IFRS/IAS to non-consolidated accounts varies from Member State to Member State.

The Commission Regulation adopting certain international accounting standards[40] addresses the issue of consolidation rules applicable to SPEs. The Regulation provides that an entity may be created to accomplish a narrow and well-defined objective (e.g. to effect a lease, research and development activities or a securitisation of financial assets). Such an SPE may take the form of a corporation, trust, partnership or unincorporated entity. SPEs often are created using legal arrangements that impose strict and sometimes permanent limits on the decision-making powers of their governing board, trustee or management over the operations of the SPE.

The Commission's initiatives to revise the accounting directives are aimed at enhancing confidence in financial reporting by companies. This includes, in particular, improving the provision of information about off-balance-sheet arrangements, including information about offshore SPVs[41]. The Directive on Company Accounts[42] provides that off-balance-sheet arrangements may expose a company to risks and benefits, which are material for an assessment of the financial position of the company and when the company belongs to a group, the financial position of the group as a whole[43]. Such off-balance-sheet arrangements could be any transaction or agreement companies may have with entities, even unincorporated ones, which are not included in the balance sheet. Such off-balance-sheet arrangements may be associated with the creation or use of one or more Special Purpose Entities (SPEs) and offshore activities designed to address, *inter alia*, economic, legal, tax or accounting objectives. According to the Directive on Company Accounts, examples of such off-balance-sheet arrangements include securitisation arranged through separate companies and unincorporated entities. Appropriate disclosure of the material risks and benefits of such arrangements that are not included in the balance sheet should be set in the notes to the accounts or the consolidated accounts[44].

The EU has also developed over years a substantial corpus of rules in the field of company law. These rules might be of relevance in the context of securitisation, essentially where the securitisation vehicle

38 Article 4 of Regulation 1606/2002.
39 Article 9 of Regulation 1606/2002.
40 Regulation 1725/2003.
41 See European Commission Directorate General for Internal Market and Services Consultation on future priorities for the Action Plan on modernising company law and enhancing corporate governance in the European Union, 20 December 2005, IP/05/1639.
42 Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC concerning the annual accounts of certain types of companies and consolidated accounts, EU OJ L224/1 of 16 August 2006.
43 Recital 6 of the Directive on Company Accounts.
44 Article 7(a) of the Directive on Company Accounts provides that the nature and business purpose of the company's arrangements not included in the balance sheet and the financial impact on the company of those arrangements, provided

takes the form of a company and not of a securitisation funds. It is noted in this respect that certain EU Directives contain already some exemptions for investment companies with variable capital[45], for instance in relation to requirements applicable to annual accounts[46]. Clarification should probably also be brought in order to acknowledge the specific nature of securitisation companies.

> **Recommendation nº2**
>
> **The EFMLG suggests introducing specific provisions applicable to securitisation SPVs (under a corporate form) in the Company law Directives with a view to clarifying their status and the specific obligations applicable to them.**

2.3. Asset-backed securities and the Prospectus Directive

The Prospectus Directive provides that any offer of securities to the public requires the prior publication of a prospectus and seeks to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member States (which means that the Directive does not apply in the context of OTC markets)[47]. The obligation to publish a prospectus does not apply to an offer of securities addressed solely to qualified investors. It also does not apply to an offer of securities: (i) addressed to qualified investors who acquire securities for a total consideration of at least EUR 50 000 per investor, for each separate offer; (ii) whose denomination per unit amounts to at least EUR 50 000; and/or (iii) with a total consideration of less than EUR 100 000, which limit is calculated over a period of 12 months[48].

The Prospectus Directive is mainly concerned with securities[49], equity[50] and non-equity securities. Asset-backed securities (ABS) are defined in the Commission Regulation implementing the

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the risks or benefits arising from such arrangements are material and in so far as the disclosure of such risks or benefits is necessary for assessing the financial position of the company. See also recital 7.

45 For instance, the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, provides that the Member States may decide not to apply this Directive to investment companies with variable capital defined as ‘those companies: - the exclusive object of which is to invest their funds in various stocks and shares, land or other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets, which offer their own shares for subscription by the public, and the statutes of which provide that, within the limits of a minimum and maximum capital, they may at any time issue, redeem or resell their shares (Article 1(2)).

46 Article 5 of the fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies provides, that as derogation, the Member States may prescribe special layouts for the annual accounts of investment companies and of financial holding companies provided that these layouts give a view of these companies equivalent to that provided for in Article 2 (3).

47 Article 1(1) of the Prospectus Directive.

48 Article 3(2) (a), (c), (d) and (e) of the Prospectus Directive.

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

50 Equity securities is defined as ‘shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer’.

Prospectus Directive (hereinafter the 'Prospectus Regulation')[51] as 'securities which: (a) represent an interest in assets, including any rights intended to assure servicing, or the receipt or timeliness of receipts by holders of assets of amounts payable thereunder; or (b) are secured by assets and the terms of which provide for payments which relate to payments or reasonable projections of payments calculated by reference to identified or identifiable assets'[52]; this is the first time the concept of ABS appears in Community legislation. The Prospectus Regulation points out that the ABS registration document should not apply to such mortgage bonds as provided for in Article 5(4)(b) of the Prospectus Directive[53] and other covered bonds.

The genesis of the ABS definition highlights the uncertainties as to its exact scope, and in particular whether it covers synthetic ABS[54]. The European Securitisation Forum (ESF) suggested an ABS definition which includes synthetic securitisation[55]. The main proposed change to the Commission's proposed definition was the introduction of the notion of 'specified risk' or 'pool of risks' in case the debt securities are secured by assets and by their terms, provide for payments of principal and interest calculated by reference to an identified or identifiable asset *or specified risk or a pool of such assets or risks*.

The definition of ABS adopted in the EU presents some similarities with the definition adopted by the US Securities Exchange Commission (SEC) on 22 December 2004 in relation to the new disclosure requirement applicable to ABS (Regulation AB)[56]. The SEC defines an asset-backed security as a

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

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

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

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

55 'Debt securities of a type which either:

1. (a) represent an ownership interest in, or (b) are secured by, a discrete pool of discrete assets or a single asset (including any rights designed to assure servicing, or the receipt or timeliness of receipts by holders of assets of amounts payable thereunder); or

2. (a) are secured by assets and (b) by their terms, provide for payments of principal and interest (if any) calculated by reference to an identified or identifiable asset or specified risk or a pool of such assets or risks' (see the ESF contributions to CESR; www.cesr-eu.int).

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

‘security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders.’[57] The SEC considers that, given the definition ‘a discrete pool of financial assets that by their terms convert into cash within a finite time period’, synthetic securitisations are not included in Regulation AB’s basic definition of ABS for the purpose of determining whether the security qualifies for the specific registration, disclosure and reporting regime applicable under the Securities Act and Exchange Act. Furthermore, synthetic securitisations are designed to create exposure to an asset that is not transferred to or otherwise part of the asset pool[58].

During the consultation process relating to the preparation of Level 2 measures for the Prospectus Directive, the Committee of European Securities Regulators (CESR) suggested gathering more input from the market and/or experience on the application of ABS schedules and building blocks[59] before deciding whether any improvements were necessary[60]. It should be noted in this respect that the Prospectus Directive defines an issuer as “a legal entity with issues or proposes to issue securities”[61]. This is not the case of securitisation funds which are usually devoid of legal personality. As a consequence, the above rules create legal uncertainty in the case of ABS issued by securitisation funds as to their applicability to such types of SPVs and to the nature and the appropriate level of disclosure applicable[62]. Further consideration should also be given to whether the requirements applicable to underlying assets offer an appropriate level and quality of disclosure and how synthetic securitisation is covered.

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

57 Item 1101(c) of Regulation AB [17 CFR Part 229, § 229.1101(c)].
58 See III. A. 2.b. Basic definition, p.39 of the SEC Final Rule.
59 Annex VII to the Prospectus Regulation, Minimum Disclosure Requirements for Asset Backed Securities Registration Document (schedule) and Annex VIII to the Prospectus Regulation, Minimum Disclosure Requirements for the Asset Backed Securities additional building block.
60 CESR’s recommendations for the consistent implementation of the European Commission’s Regulation on Prospectuses nº 809/2004 Consultation Paper June 2004, CESR/04-225b, June 2004.
61 Article 2(1)(h) of the Prospectus Directive.
62 See, for instance, Annex VII to the Prospectus Regulation.

Recommendation nº3:

The EFMLG recommends:

- **clarifying whether the current definition of ABS in the Prospectus Regulation covers or not synthetic ABS;**
- **undertaking a review of the terminology used in relation to ABS contained in the implementing measures of the Prospectus Directive;**
- **the Commission to request the CESR to contribute to developing a harmonised approach towards the treatment of disclosure requirements applicable to ABS.**

2.4. Other EU relevant legislation

2.4.1. Draft Implementing measures for the UCITS Directive

Article 19 of the UCITS Directive (obligations concerning the investment policies of UCITS)[63] provides that the investments of UCITS must consist solely of certain categories of assets, eligible under certain conditions specified in the UCITS Directive, *inter alia*, transferable securities, money market instruments, units of UCITS, deposits with credit institutions and financial derivative instruments.

In the context of the elaboration of the Level 2 implementing measures for the UCITS directive and at the Commission's request, the issue of the eligibility of ABS for UCITS investment purposes was examined by CESR[64]. Article 1(8) of the UCITS Directive defines transferable securities as 'shares in companies and other securities equivalent to shares in companies ('shares'), bonds and other forms of securitised debt ('debt securities').' As a consequence, ABS are, in principle, eligible if they meet the applicable criteria, for instance, to transferable securities admitted to or dealt in on a regulated market within the meaning of the MiFID[65] or another regulated market in a Member State which operates regularly and is recognised and open to the public[66].

Under Article 19(1)(h) of the UCITS Directive, UCITS can also invest, without any limitation, in money market instruments other than those dealt in on a regulated market, which fall under Article 1(9)[67], provided that the issuers of such instruments fulfil certain conditions. Among the categories of eligible issuers are the entities 'dedicated to the financing of securitisation vehicles which benefit from

63 See above the footnote 13.
64 CESR's advice to the European Commission on clarification of definitions concerning eligible assets for investments of UCITS, January 2006, CESR/06-005, (hereinafter 'CESR's final advice').
65 Article 19(1)(a) of the UCITS Directive. See Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1) (hereinafter the 'MiFID').
66 Article 19(1)(b) of the UCITS Directive.
67 Article 1(9) of the UCITS Directive defines money market instruments as instruments normally dealt in on the money market which are liquid, and have a value which can be accurately determined at any time.

a banking liquidity line'[68]. CESR was invited to clarify which instruments would be covered by this provision, and, in particular, whether and under what conditions it would encompass ABS and synthetic ABS. In its final advice, CESR points out that at this stage, the only specific entities falling under the fourth indent of Article 19(1)(h) of the UCITS Directive are a specific category of asset backed commercial paper[69] that is built on a two-tier structure and is secured by banking credit enhancement[70]. As a result, ABS and synthetic ABS do not fall in the category defined by that indent. ABS and synthetic ABS may be eligible under other provisions of the UCITS Directive. This may be the case for instance, if, as mentioned above, they are dealt in on a regulated market[71].

In the absence of objective justifications for discrimination between specific types of securitisation vehicles under Article 19(1)(h), fourth indent of the UCITS Directive and since Level 2 measures cannot remedy the current drafting of this provision, the Directive itself would need to be amended on this aspect in order to cover any type of securitisation vehicle[72]. More generally, the issue of the eligibility of ABS as investments for UCITS purposes (including ABCP) should be clarified[73].

Recommendation nº4:

The EFMLG is of the view that the UCITS Directive should be amended in order to clarify the issue of the eligibility of ABS (including ABCP) for UCITS investment purposes and ensure a harmonised treatment across Europe.

2.4.2. Consumer credit

Article 16 of the modified proposal for a Consumer Credit Directive (the modified proposal)[74] provides, 'where the creditor's rights under a credit agreement or surety agreement or the agreement itself are assigned to a third party, the consumer and, where applicable, the guarantor, shall be entitled to plead against the assignee of the creditor's rights under that agreement any defence which was available to him against the original creditor, including set-off where the latter is permitted in the Member State concerned'[75]. According to the Commission, the rationale for this provision is that the transfer of the creditor's rights under a credit agreement should not have the effect of placing the consumer or guarantor in a less favourable position[76].

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68 Article 19(1)(h), fourth indent of the UCITS Directive.

69 Article 2(1)(a) of the Prospectus Directive defines 'securities' as transferable securities as defined by Article 1(4) of Directive 93/22/EEC with the exception of money market instruments as defined by Article 1(5) of Directive 93/22/EEC, having a maturity of less than 12 months. For these instruments national legislation may be applicable. Article 4(1)(19) of the MiFID defines 'money market instruments' as those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment.

70 Box 8 of the CESR's final advice, p. 34.

71 Box 8 of the CESR's final advice, p. 34.

72 See in this respect the joint ACI-EFMLG communication regarding the draft Advice on clarifications of definitions concerning eligible assets for investments of UCITS, 10 March 2005 (www.efmlg.org).

73 These recommendations were already contained in the joint ACI-EFMLG communication of 10 March 2005 regarding the draft CESR Advice on clarifications of definitions concerning eligible assets for investments of UCITS.

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

75 Article 16, first paragraph of the modified proposal.

76 Recital 27 of the modified proposal.

Furthermore, the consumer should be properly informed when the credit agreement is assigned to a third party[77]. However, the modified proposal introduces an exception where the assignment is only effected for securitisation purposes and where the original creditor, in agreement with the assignee, still acts on behalf of the assignee as a creditor *vis-à-vis* the consumer[78]. In such case, the Commission considers that the consumer does not have an important interest to be informed about the assignment. Therefore, a requirement at EU level to inform the consumer about the assignment in such cases would be excessive, but Member States should remain free to maintain or introduce such requirements in their national legislation'[79].

The EFMLG shares the view that a requirement at EU level to inform the consumer about the assignment in such cases would be excessive, in particular because where credit is assigned for securitisation purposes, the original creditor frequently continues to act as a servicer vis-à-vis the consumer. In this respect, the EFMLG makes the following two specific drafting suggestions. First, the reference in Article 16 of the modified proposal to securitisations 'where the original creditor, in agreement with the assignee, still acts on behalf of the assignee as a creditor vis-à-vis the consumer' is liable to give rise to confusion. In securitisation transactions it is vital for an assignment of receivables to be recognised as giving rise to a genuine sale of the assets concerned, which are then insulated from the original creditor's estate for insolvency purposes. In order to reflect these important dynamics in a securitisation transaction, Article 16 could be redrafted to refer to securitisations 'where the original creditor, in agreement with the assignee, still services the credit vis-à-vis the consumer'. Second, there is a tension between the exemption to the requirement to inform the consumer of assignments effected for securitisation purposes under Article 16 of the modified proposal and recital 27 to the modified proposal: 'Member States should remain free to maintain or introduce such requirements in their national legislation'. If it is accepted that there is no specific need for a consumer to be informed of an assignment, especially when the original creditor remains the servicer, the directive should seek to ensure a level playing field in this domain and facilitate the assignments of credit agreements in the EU. The EFMLG therefore proposes either redrafting recital 27 or deleting this statement altogether.

Recommendation nº5:

The EFMLG invites the Council and the Commission to take account of the EFMLG above drafting suggestions regarding the modified proposal for a Consumer Credit Directive.

77 Recital 27 and Article 16, second paragraph of the modified proposal.
78 Article 16, second paragraph of the modified proposal.
79 Recital 27 of the Consumer proposal.

2.4.3. Data protection

Directive 95/46/EC of 24 October 1995[80] (the Data Protection Directive) allows for the disclosure of personal data only in certain conditions, namely if the individual has given its consent or the transfer is necessary for the performance of a legal obligation or of a contract with the individual, the processing is necessary for the parties' legitimate interests. The Directive which applies to all processing of personal data by any person whose activities are governed by Community law[81] does not provide for any specific rules in the case of transfer of data relating to debtors in the context of assignments for securitisation purposes[82]. Albeit domestic laws taken in implementation of the Data Protection Directive should comply with the above principles, original approaches have been developed in the various EU jurisdictions in order to address the issue of dissemination of debtors-related data in the context of securitisations, a distinction being usually made between individuals and companies. For instance, in Malta, the Act on securitisation provides that any data or information transferred between persons within the context of a securitisation must be transferable without any restriction or limitation, although such data or information shall retain its secret or confidential status for other effects or purposes[83]. Any transfer of personal data shall be deemed to be for a purpose that concerns a legitimate interest of the transferor and transferee of such data, unless it is shown that such interest is overridden by the interest to protect the fundamental rights and freedoms of the data subject and in particular the right to privacy.

In France, the Monetary and Financial Code[84] prohibits banks from transferring any information to third parties without the prior consent of the underlying obligor[85]. In Germany, the issue has given rise to case law and the BaFin provided some guidance[86] clarifying the basic principle (i.e. that debtor-related data should only be disclosed with the debtors' prior approval) and also defining some exceptions[87]. The Act on the Creation of a Refinance Register of 22 September 2005 amended the

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80 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, EC OJ L281/31 of 23 November 1995.

81 Recital 12 of the Data Protection Directive.

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

83 Act nºV of 11 April 2006, Part V. Miscellaneous, Article 21. The Act expressly refers to the transfer of data between the following parties to a securitisation transaction, i.e. the originator, the securitisation vehicle(s), any person delegated with administration duties and functions, a representative of investors, any credit rating agency, any counterparty in a derivative contract, lender, liquidity provider or credit support provider.

84 Article L.511-33 of the Code Monétaire et Financier.

85 The French Banking Federation has taken an action in France to modify this article in order to take into account the specificity of securitisation transactions using FCCs, however, as of yet, the article has not been amended with respect to the transfer of receivables.

86 Circular 4/97.

87 According to the BaFin, (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

Banking Act pursuant to which receivables are eligible for registration in the refinancing register as long as the parties have not *explicitly* agreed otherwise. Some German banks have also amended their standard business terms and the approval of the debtor for the transfer of relevant data is contained in a general consent to a sale and assignment of receivables for refinancing purposes[88]. In the Netherlands, it cannot be excluded that, under certain circumstances, the Dutch Civil Code entails that a receivable is not transferable because the prohibition to provide personal information about clients to third parties must be regarded as a tacit no-assignment clause. This may be the case when client information is disclosed with the transfer of rights. This will occur very rarely, as the originators usually service assets.

Recommendation nº6:
The EFMLG is of the view that the application of data protection and banking secrecy rules in the context of assignments for securitisation purposes should be clarified at the EU level in order to ensure a level playing field and legal certainty for the various parties to a securitisation transaction. Laws should allow confidential data to be transferred to parties in a securitisation such as a servicer, substitute servicer and trustee without breaching data protection or bank confidentiality laws.

2.4.4. Law applicable to contractual obligations

On 15 December 2005, the European Commission published its proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) which is supposed to replace the Rome Convention of 1980[89]. It is recommended to use the opportunity to clarify the conflict of law rules applicable to voluntary assignments and contractual subrogation specified in Article 13 of the proposal for a Regulation[90] by inserting a new provision specifying the law that shall determine whether and to what extent ancillary rights attached to assigned receivables are automatically transferred to the assignee.

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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 Union.

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

89 Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, 15.12.2005.

90 Article 13 of the proposal – Voluntary assignment and contractual subrogation provides that:

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

Although the European Community lacks the competence to fully harmonise the substantive private law, it must be noted that the fragmentation of the civil laws of the Member States governing the assignment of receivables constitutes a severe obstacle for cross-border securitisation. It is therefore recommended to impose certain minimum standards for securitisation transactions.

Member States should especially not require that the perfection, admissibility in evidence or the enforceability against the debtor, the debtor's creditors or any third party of an assignment or a contractual subrogation is dependent on the performance of a formal act or the consent or notification of the debtor or the filing of the transfer with a public register. Member States should also ensure that an assignment or a contractual subrogation is enforceable irrespective of any otherwise applicable principle of banking secrecy or data protection.

Recommendation nº7:
The EFMLG is of the view that Article 13 of the proposal for a Regulation should be reviewed by inserting a new provision specifying the law that shall determine whether and to what extent ancillary rights attached to assigned receivable are automatically transferred to the assignee.

3. Asset-backed securities and the Eurosystem collateral framework

On 13 January 2006, the ECB published amendments to its General documentation on monetary policy instruments and procedures of the Eurosystem (hereinafter the 'General Documentation') in order to clarify the criteria on which the eligibility of ABS for use in Eurosystem credit operations is assessed[91]. In the past, the Eurosystem had not applied specific eligibility criteria to ABS, which belong to the debt instruments category. Instead, it interpreted the general eligibility criterion applicable to tier one assets to mean that debt instruments must have 'a fixed, unconditional principal amount' and, as a result, excluded those ABS in which the credit risk had been transferred to an SPV using credit derivatives.

To increase the overall transparency of the ECB collateral framework, amendments have been introduced specifying the precise criteria to be fulfilled by ABS, in addition to the criteria applicable to debt instruments in general[92]. Notably, these criteria do not apply to covered bank bonds issued in accordance with Art 22(4) of the UCITS Directive[93].

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91 Guideline ECB/2005/17 of 30 December 2005 amending Guideline ECB/2000/7 on monetary policy instruments and procedures of the Eurosystem, (OJ L 30, 2.2.2006, p. 26). The General Documentation including the above amendments is an annex to Guideline ECB/2005/17 of 30 December 2005, amending Guideline ECB/2000/7 on monetary policy instruments and procedures of the Eurosystem (OJ L 30, 2.2.2006, p. 26). The amendments to the General Documentation apply from 1 May 2006.

92 Which means that instruments such as units of securitisation funds under the French model of securitisation funds are not eligible since they do not constitute debt instruments. For this reason, the Governing Council of the ECB has decided that units of French fonds communs de créances (FCCs) in the tier one list will remain eligible for a transitional period until 30 December 2008. This exclusion does not apply to debt instruments issued by the same funds.

93 See footnote 13.

Under the new Eurosystem eligibility criteria for ABS, cash flow generating assets must be legally acquired, in accordance with the laws of a Member State, from the originator or an intermediary by the securitisation SPV in a manner which the Eurosystem considers to be a ‘true sale’ that is enforceable against any third party and beyond the reach of the originator and its creditors, including in the event of the originator’s insolvency. Furthermore, they may not consist, in whole or in part, actually or potentially, of credit-linked notes or similar claims resulting from the transfer of credit risk by means of credit derivatives.

Furthermore, ABS issued by entities established in the G10 countries that are not part of the EEA – currently the United States, Canada, Japan and Switzerland – are not eligible. This criterion was introduced to avoid the additional legal complexities that would arise if the Eurosystem needed to assess whether its rights were sufficiently protected under the laws of such countries. The General Documentation provides that the Eurosystem reserves the right to request from any relevant third party (such as the issuer, originator or arranger) any clarification and/or legal confirmation that it considers necessary to assess the eligibility of the ABS[94].

94 The General Documentation also addresses the issue of the seniority of tranches in the case of ABS and the non-eligibility of subordinated debt instruments.

Part III Assessment of the national legal frameworks on securitisation in the EU

This Part of the Report provides an overview of legal aspects of domestic securitisation frameworks of the Member States which have been identified by the EFMLG as requiring further convergence at the EU level in order to increase the legal certainty and transparency of the markets or as giving rise to serious or potential legal obstacles to cross-border securitisations and to access to foreign securitisation markets across the EU. The detailed assessment of these different frameworks is provided for in a separate report. Where relevant, the EFMLG recommendations for convergence of these rules are set out following each of the sections of this Part of the Report.

3.1. Securitisation laws: definition and material scope

3.1.1. Definition of securitisation

In a majority of the surveyed jurisdictions[95], the law does not provide any definition of securitisation. In England and Wales, the glossary to the Financial Services Authority Handbook defines securitisation as “a process by which assets are sold to a bankruptcy remote special purpose vehicle in return for immediate cash payment through the issue of debt securities in the form of tradable notes or commercial paper”.

In the following countries, the law 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”.[96]
- In Italy, the law applies to: “securitisation transactions carried out by way of non-gratuitous assignment of pecuniary receivables, whether already in existence or arising in the future, and

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

96 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.

identifiable as a pool ('blocco') where the assignment of more than one receivable is involved"[97].

- 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 all or part of the activities of third parties and issues securities, whose value or yield depends on such risk'[98].
- In Spain, securitisation is defined as "a financial process whereby cash flows arising from the underlying assets (mortgage loans or others) are converted into fixed income securities".
- In Malta, securitisation is defined as 'a transaction or an arrangement whereby a securitisation vehicle, directly or indirectly: (a) acquires securitisation assets from an originator by any means, or (b) assumes any risks 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'[99].

Recommendation nº8:

The EFMLG is of the view that any EU definition of securitisation should be sufficiently precise in order to ensure legal certainty and sufficiently wide not to cover only certain types of securitisation techniques.

3.1.2. Material scope of the securitisation laws

In the old EU Member States, seven countries have passed a specific law[100]. Eight countries have not passed a specific law[101]. Some specific provisions relating to securitisation may however be found, notably in the tax and regulatory areas. In the United Kingdom, a host of provisions and the English law of charge and assignment as well as the concept of trust provide the necessary flexibility and facilitate the conduct of securitisations without recourse to specific legislation[102]. In Germany, on 28 September 2005, a new Act on the creation of a Refinance Register was enacted, which is intended to facilitate securitisation transactions.

A variety of structures ranging from the use of offshore Special Purpose Vehicles (SPVs) to the use of trust schemes (in jurisdictions such as the United Kingdom or Austria where such structures are

97 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'.

98 Article 1(1) of the Luxembourg Securitisation Law.

99 Act nºV of 2006, 11 April 2006, Part I, Article 2.

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

101 Austria, Denmark, England and Wales, Finland, Germany, Ireland, Sweden and The Netherlands.

102 In the ten new Member States, it seems that Poland and Malta are the only jurisdictions which have adopted a specific framework on securitisation.

recognized by law) have been utilized in most of the surveyed countries, regardless of whether the domestic law provides specific provisions dealing with securitisation transactions or securitisation vehicles. The most common structures also differ depending on various factors such as the type of vehicle allowed (e.g. 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).

3.1.3. Securitisation techniques covered by the securitisation framework

The various securitisation techniques are covered by national law, or, in the absence of specific legislation, widely used since no provision prohibits them. In France and Luxembourg, the law expressly covers both traditional and synthetic securitisation, including provisions dealing with the recourse to credit derivatives. In the Netherlands, traditional and synthetic securitisations are used. Although the law covers only traditional securitisation techniques, other techniques may be used outside the scope of the law**.** In Portugal, other techniques than traditional securitisation may be used under the general provisions of national law. In Italy and in Greece, synthetic securitisation is excluded from the scope of the law and there is no mention of whether other techniques may be used[103]. Synthetic securitisations, and in particular credit derivatives used as part of synthetic securitisations, are not commonly documented and governed under Belgian law.

Recommendation nº9:

The EFMLG is of the view that national laws should remove regulatory obstacles to the development of synthetic securitisations.

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

The types of financial assets which can be securitised are very diverse and comprise in principle receivables, debts, claims, present and future, performing and non-performing, including claims against governmental und quasi-governmental entities. The assessment of the respective legal frameworks tends to indicate that, although the law usually does not restrict expressly the type of assets, in practice, the scope of the assets covered by the domestic frameworks which may be securitised may vary substantially from one country to another as a result of the provisions of the law or of its application and/or interpretation. Although most of the jurisdictions provide for the securitisation of future cash flows, the notion of future cash flows and the application of the legislation are not homogeneous across jurisdictions and may also give rise to divergent case law:

In Austria, Belgium, United Kingdom, Finland, Germany, Ireland, Sweden, there is no specific limitation in terms of assets. In France, the law covers receivables arising from an existing or future agreement. Such receivables may be governed by French law or foreign law, and can be non-matured

103 In Greece, the securitisations covered by the law are limited to the issue and distribution of bonds, through private placement.

receivables, future receivables (the amount and maturity of which are not determined on the relevant transfer date) or illiquid/defaulted receivables, uncertain/doubtful receivables or disputed receivables/receivable subject to litigation. The law also covers debt securities. The scope of the Luxembourg law is very wide and provides that risks relating to 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 are capable of being securitised.

In Greece, the law covers claims against third parties including consumers. Such claims can be future claims or claims whose materialisation depends on the fulfilment of certain contractual conditions. In Italy, the law covers monetary claims, i.e. receivables and should be amended in order for certain categories of assets to be securitised (for instance, future receivables -see below- or in respect of synthetic securitisations[104]). In Portugal, the law covers receivables which are monetary in nature, not subject to any conditions, and not encumbered, pledged or seized under litigation. In Spain, the assets grouped in the *fondo de titulizaciòn de activos* must be of "homogeneous nature" with the exception of private fondos (fondos institucionales), transactions where the securities are targeted at institutional investors only and are not admitted to trading[105]. Although this notion is interpreted non-restrictively by the Spanish financial markets supervisor, this concept is challenged by market participants for commercial and legal reasons. From a legal viewpoint, the concept of homogeneity is not defined and seems to give rise to an uncertainty as to what it is referenced (i.e. debtors assets, types of risks)[106].

Recommendation nº10:
The EFMLG is of the view that national laws should not unduly restrict the types of assets to be securitised.

3.1.5. The issue of future cash flows

In France, future receivables may be securitised. In Greece, future claims can be securitised if they are ascertained or ascertainable in any way. In Italy, it is doubtful whether future receivables arising from future agreements may be securitised (transactions involving such receivables are usually structured via revolving purchase agreements). In Austria, future cash flows are covered unless the contract underlying the receivable has not been entered into before the start of the debtor's bankruptcy proceedings. In Germany, future cash flows may be securitised in compliance with the provisions of the Insolvency Code. In Luxembourg, future cash flows are also covered by the law, which provides:

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104 See the Letter of the European Securitisation Forum to the Italian authorities of 9 June 2004 (available on the ESF's website).
105 See the Letter of the ESF to the Spanish authorities of 28 October 2005, p.7. (available on the ESF website).
106 Ibid.

‘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, when the originator becomes subject to a bankruptcy order, the receivable will belong to the bankruptcy estate (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 they arise from contractual relationships existing at the moment of the assignment. In Denmark, the law does not provide for the securitisation of future cash floes. Future cash flows may be assigned if they can be individually identified in advance. However, the assignment may be the subject of avoidance/annulment in case of the assignor’s bankruptcy. In the Netherlands, under certain provisions of the Dutch Civil Code, the assignment of a future receivable has to be notified to the relevant debtors. In Italy, securitised assets are defined as “pecuniary receivables, where already in existence or arising in the future and identifiable as a pool (‘blocco’) and two issues seem to constitute an obstacle to the transfer of future receivables, i.e. the identification of the necessary requirements to make those receivables not yet existing being transferred through a transfer agreement (and in particular the notion of ‘blocco’) and the enforceability of such transfer against the bankruptcy of the transferor. In Denmark, certain assets of future cash flows belonging to individuals are unassignable (social security, claims for damages for personal injury, etc.). Spain has recently introduced legislation in order to provide for the possibility to securitise future credit rights. The assets to be securitised must appear in the balance sheet of the originator and future credit rights may be securitised if the assignment agreement is sufficient evidence of the assignment of title.

Recommendation nº11:
The EFMLG is of the view that a more harmonised definition of the notion of future cash flows at the EU level might contribute to increase legal certainty and the development of securitisation markets.

3.2. Special Purpose Vehicles

The types of entities available in the different jurisdictions for the purpose of securitisation transactions are of a various nature. The main distinction is between the special purpose vehicles (SPVs) which are set up under the form of a company with the legal personality and those which set up under the form of funds without legal personality and identifies the countries where these two types of structures are provided and those where only one of the two structures is provided for.

Certain jurisdictions, e.g., France, Belgium, Luxembourg, Spain and Portugal and also Italy –although it is less used in this country- have created by law dedicated forms of vehicles, i.e. securitisation funds devoid of legal personality with independent management companies available for the purpose of acquiring assets and securitise them. Although distinct from UCITS, rules applicable to these funds often fall under the umbrella of the national legislation applicable to collective investment undertakings (for instance, in France and Belgium) or borrow some features of UCITS (this is case with the Luxembourg law). As an example, the Belgian Law of 20 July 2004 permits the creation of an undertaking for investment in receivables (UIR). The purpose of a UIR must exclusively consist of the collective investment in receivables of third parties that are transferred to a UIR by a transfer agreement. A UIR may take a contractual form, being a fund for investment in receivables (FIR) or it may take a statutory form, as a company for investment in receivables (CIR). The Law 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 for the establishment of SPVs under the form of a company in the surveyed countries is that of the joint stock company incorporated as a Public Limited Company (PLC). In the Netherlands, the SPV is usually set up under the form of a corporation (private company with limited liability) with a limited charter and brought into existence only for the securitisation transaction. The shares of the corporation are held by a foundation (stichting).

Although it is common practice to use in various securitisation transactions two different SPVs, one holding the assets, another one issuing the notes, there is usually no distinction enshrined in the law between SPV which acquire receivables and SPV which issue securities in the surveyed jurisdictions, except in Luxembourg and in Italy. Article 1(2) of the Luxembourg securitisation law defines securitisation undertakings as undertakings which carry out the securitisation transaction, and undertakings which participate in such a transaction by assuming all or part of the securitised risks (the acquisition vehicles) or by issuing of securities to finance the transaction (the issuing vehicles)[107]. 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 exclusive object the realisation of one or more securitisation transactions[108].
There are normally no formal restrictions in using an affiliate or a subsidiary of the originator as the SPV. However, such structure is strongly discouraged as it does not ensure full bankruptcy remoteness in the event of the originator's bankruptcy, and if the originator is a credit institution, the SPV is

107 It is noted that, under Article 2 of the Luxembourg Securitisation Law, the law 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, one of which only is situated in Luxembourg, the Luxembourg law will only apply to the vehicle situated in Luxembourg. The law is silent on the consequences of the existence of two vehicles (acquisition and issuing vehicles) in two different jurisdictions.

subject to consolidated supervision. SPVs are in most cases owned by trusts. The use of an 'orphan' company[109] whose shares are held on trust is quite common in the majority of the surveyed jurisdictions, e.g., England, Ireland**.**

Recommendation nº12:
The EFMLG is of the view that "thin cap" requirements for SPVs in the context of cross-border securitisations should be removed.

3.2.1. Place of establishment of SPVs

In some jurisdictions (usually the jurisdiction which has created dedicated vehicles for securitisation purposes), the SPV must be established in the country of the jurisdiction creating those vehicles. The other legislations do not provide for any restriction regarding the place of establishment of the SPV. Tax reasons however usually dictate the need for establishing the SPV abroad (*Cf*. below).

In Greece the recourse to local SPV is still very uncommon due to cumbersome and costly regulation relating to the creation of a local securitisation vehicle. In Portugal, the majority of transactions are two-step transactions, which usually involve the *fundo de titularização de créditos* (FTCs) and an off-shore SPV. The SPV issues units which are then bought by an offshore SPV which will thereafter issue bonds and place them in the international market.

In France, certain regulations of the Banking Commission[110] in the absence of harmonization of securitisation vehicles structures at the EU level, 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 these vehicles the purpose of which is to refinance credit institutions offer sufficient safeguards to investors acquiring securities issued by the vehicle. These criteria are currently under review by the French authorities and the following criteria seem to be envisaged: autonomy of the management of the vehicle vis-à-vis the originator (management company; trustee, etc); the bankruptcy remoteness of the vehicle; the acquisition of receivables and the issuance of securities should be the exclusive purpose of the vehicle; and listing and rating of the debt securities.

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108 Article 3 of the Italian Securitisation Law.

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

110 See, for instance, Regulation 93-06 of the French Banking Commission regarding the posting ('comptabilisation') of securitisation transactions.

Recommendation nº13:

The EFMLG is of the view that a system of common recognition of securitisation SPVs offering sufficient safeguards could be considered by the Commission. It should be examined whether this system could allow the transfer of assets to a 'recognised' SPV established in another EU jurisdiction whilst retaining benefits of domestic securitisation legislation.

3.2.2. Treatment of SPVs under banking law

In most jurisdictions, SPV created for the purpose of securitisation are not considered as credit institutions and benefit from an exemption to the local banking monopoly regulation (in application of the principles set up by the Banking Directive). In Austria, until 1 June 2005, it was considered that SPV conducted a banking business pursuant to the Banking Act. This change in the legislation might enable the use of Austrian SPVs. In Denmark, a SPV acquiring receivables is not considered as a credit institution within the meaning of the banking legislation. However, if it funds itself from deposits or other means from the general public, this will require a permission to act 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 intermediary held by Banca d'Italia and are subject to the prudential supervision of Banca d'Italia.

In France, although French securitisation funds are not considered as credit institutions, the Financial and Monetary Code expressly provides that these 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[111] 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 Financial and Monetary Code does not provide for an exception to the banking monopoly principle (i.e. the obligation to be licensed as a credit institution) for the foreign securitisation vehicles. Such derogation is currently granted, on an implicit basis, only to the French securitisation vehicles. As a consequence, there is some uncertainty as to whether foreign vehicles acquiring receivables might be considered as infringing the French banking law rules.

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

In the Netherlands, a SPV issuing bonds falls within the definition of credit institution. The SPV will not be subject to any license requirement due to the fact that the notes will be offered solely to professional market parties.

In Luxembourg, the legislation distinguishes the securitisation undertakings which issue securities to the public on a continuous basis and are therefore authorised by the CSSF from those which are not licensed but fall under the scope of the law 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 Luxembourg Financial Sector Supervisory authority (CSSF)[112]. The wording of this provision mirrors recital 6 of the Banking Directive[113] which refers to 'all institutions whose business is to receive repayable funds from the public, whether in the form of deposits or in other forms such as the continuing issue of bonds and other comparable securities and to grant credits for their own account'[114]. Although securitisation undertakings, to qualify as credit institutions, must meet the two cumulative criteria of a credit institution under the Banking Directive which is, according to Article 1.1 of the Banking Directive, "to receive deposits or other repayable funds from the public and to grant credits for its own account", Article 3 of the Banking Directive provides for the prohibition for undertakings other than credit institutions from carrying on the business of taking deposits or other repayable funds from the public[115]. The drafters of the Luxembourg law expressed the concern that the issuance of bonds by securitisation undertakings might fall under the above prohibition[116]. It should be noted in this respect that the Directive also provides that the prohibition does not apply to "cases expressly covered by national or Community legislation, provided that those activities are subject to regulations and controls intended to protect depositors and investors and applicable to those cases"[117]. It is not clear whether such provision could apply in the case of securitisation activities.

In Belgium, by issuing securities (which can be considered repayable funds), an SPV could in principle be considered a credit institution if it is seen as soliciting the 'public'. The criteria for the public nature of solicitation of repayable funds are determined by the Royal Decree of 7 July 1999 on the public nature of financial transactions ('RD 1999'). RD 1999 makes it clear that there is not public solicitation of repayable funds within the meaning of the Law of 22 March 1993 if a person, company

112 It is noted in this respect that certain provisions of the Luxembourg law seem to only apply to "authorised" securitisation undertakings, for instance the obligation of securitisation undertakings to entrust the custody of their liquid assets and securities with a credit institution established or having its registered office in Luxembourg.

113 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, EC OJ L126/1 of 26 May 2000 (the Banking Directive).

114 Recital 6 of the Banking Directive.

115 In the context of the Prospectus Directive, securities 'issued in a continuous or repeated manner' means 'issues on tap or at least two separate issues of securities of a similar type and/or class over a period of 12 months' (Article 2(1)(l)).

116 Article 3, first paragraph of the Banking Directive.

117 Article 3, second paragraph of the Banking Directive.

or institution publicly offers securities as evidence of the receipt of repayable funds (e.g. bonds) under the Belgian public offering regime, even if the offering of securities is exempt from the obligation to publish a prospectus. In the light of the above, an SPV acquiring receivables and issuing securities would not be considered a credit institution under Belgian banking law.

There is also a possibility that other forms of licensing may be required, especially for securitisations purchasing consumer credit receivables, e.g., England**.**

Recommendation nº14:
The EFMLG is of the view that any requirement under national law that the securitisation SPV should be a licensed credit institution should be removed.

3.2.3. Supervision of SPVs

Depending both on the legal form of the SPV and on the activities conducted by the securitisation vehicle, most jurisdictions impose a form a supervision on the securitisation vehicle. As mentioned above, national banking supervisory authorities as well as financial markets authorities may therefore play a supervisory role which seems to vary substantially however 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 change 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 less strict legal framework and is not supervised by a regulatory authority.

Recommendation nº15:
Subject to recommendation nº14, the EFMLG is of the view that the Commission should consider what should be the appropriate level of oversight/regulatory treatment of SPVs at the EU level.

3.2.4. Financing of SPVs

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

Regulatory requirements on the public offer (where permitted) and the private placement of securities, including the preparation of a prospectus, where requested, apply to securitisation SPVs, in the same way that they apply to all other issuers. It is noted that, in Greece and Spain no public offer of securities issued by a securitisation SPV is allowed. 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, the Spanish legislation contains a requirement that all bonds issued by a *fondo de titulización de activos* must have a rating[118]. In Italy, the tax regime on interests paid on short-term notes issued by the SPVs constitutes a serious practical hindrance to the issuance of the notes[119].

Although many jurisdictions (e.g., Portugal) provide detailed rules regarding the use by the SPV of the proceeds obtained by its sale of notes or units, none of the surveyed jurisdictions (except in France) seems to have specific rules regulating the management of excess cash. In Italy, the prospectus must contain the conditions upon which the SPV intends to reinvest the funds deriving from management of the assigned receivables that do not immediately serve the satisfaction of the rights incorporated in the notes.

Recommendation nº16:
The EFMLG is of the view that there should be no undue restrictions on the possibility for securitisation SPVs to issue financial instruments.

3.2.5. Segregation of assets within the SPV

In the majority of the surveyed jurisdictions the law does not expressly provide for the possibility to create segregated compartments or cells of assets and liabilities within the SPV, which are ring-fenced from other assets or liabilities.

The law explicitly allows such segregation 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 to set up a separate fondo. These fondos currently cannot be multi-transaction securitisation vehicles through the legal recognition of segregated compartments in terms similar to those provided for the French *fonds commun de créances*[120]. In Belgium, the creation of segregated compartments is permitted under Belgian UCITS legislation for CIRs, but not for FIRs

118 See the Letter of the ESF to the Spanish authorities of 28 October 2005, p.9. (available on the ESF website)
119 See chapter 3.6 for further details concerning tax issues.

The Luxembourg law provides that the rights of the investors and of the 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, the operation or the liquidation of a compartment, they are limited to the assets of that compartment. The law also provides that the assets of a compartment are exclusively available to satisfy the rights of investors in relation to that compartment and the rights of creditors whose claims have arisen in connection with the creation, the operation or the liquidation of that compartment. Under the Luxembourg legislation, as between investors, each compartment shall be treated as a separate entity, except if otherwise provided for in the constitutional documents of the securitisation undertaking[121]. Similarly, French law provides that, as an exception to Article 2093 of the *code civil* and unless otherwise stipulated in the instruments incorporating the securitisation fund, the assets of a given compartment shall be liable only for the debts, undertakings and obligations, and entitled only to the debt related to such compartment[122].

A similar result may be achieved through the use of a charge in England 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 contractual limited recourse and non-petition undertakings from the SPV's creditors. In the Netherlands, it is possible to make a contractual arrangement pursuant to which it is agreed that the noteholders will only have recourse on a specific part of the SPV's assets. In addition, effective segregation may also be achieved through the adoption of appropriate structural measures.

Recommendation nº17:

The EFMLG is of the view that securitisation laws should promote the 'best practice' of segregation of compartments within the SPV.

3.2.6. Replenishment

Most jurisdictions permit the SPVs to be replenished. In Ireland, it is possible for an SPV to acquire assets on a rolling basis, which assets 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 defined in the law, transfer claims and other assets, existing or future, in one or more transactions or on a continuous basis[123]. In the Netherlands, substitution of assets is possible, although with certain limits. In Portugal, the compartments of a *fundo de titularização de*

120 See the Letter of the ESF to the Spanish authorities of 28 October 2005, p.6. (available on the ESF website).
121 Art. 62. (1) of the Luxembourg Securitisation Law.
122 Article L.214-43(2) of the Financial and Monetary Code.
123 Article 54 of the Luxembourg Securitisation Law.

créditos (FTC, securitisation fund) or of a *sociedades de titularização de créditos* (STC, securitisation company) can be replenished according to different rules.

In Spain, there is no possibility to actively manage the portfolios of securitised assets and the fondo's deed of incorporation does not allow, either directly or through a professional third party acting on their behalf (i) acquire new assets; (ii) resell the assets in the portfolio; (iii) re-invest them; (iv) create pledges or guarantee them; and (vi) execute re-purchase agreements involving those assets[124].

Master Trusts are a structure commonly used in the United Kingdom whereby the receivables will be assigned to a receivables trustee who will declare a trust over the receivables which it may own from time to time in favour of the beneficiaries of the trust, usually the seller/originator and an investor beneficiary. They issue multiples 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[125].

Recommendation nº18:

The EFMLG is of the view that securitisation laws should promote the 'best practice' of replenishment.

3.2.7. Management of SPVs

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 (e.g., France, Belgium, Luxembourg, Italy, Portugal, and Spain). These management companies must usually obtain a license from their respective domestic supervisory authorities. In France, the securitisation funds must be jointly created by the management company and the entity responsible for the safe custody of funds assets. In the majority of the surveyed jurisdictions, SPV established under a corporate form are managed by their own board and there is no obligation to set up a management company. In the case of corporate SPV (especially offshore SPV), specialised corporate service providers supply the directors and the other officers of the SPV.

124 See the Letter of the ESF to the Spanish authorities of 28 October 2005, p.9 (available on the ESF website).

125 Master Trusts structures are commonly used with RMBS prime and credit card markets, which are almost entirely composed of issuances from master trust structures.

In Luxembourg, management companies of securitisation funds are in principle entitled to manage UCITS funds[126], whereas the exclusive purpose of French and Spanish management companies is to manage French *fonds communs de créances* and Spanish fondos respectively.

In Belgium, the appointment of a management company is not compulsory for a Belgian CIR. A CIR may consequently be self-managed (if it has the appropriate management structure). The appointment of a Belgian management company is mandatory for a Belgian 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.

No specific requirements are imposed, in the majority of surveyed jurisdictions, on companies managing corporate securitisation SPV, other than general company law provisions. In Italy, only credit institutions and financial intermediaries enrolled in a special register kept by the Bank of Italy may qualify as managers of securitisation vehicles. In a number of jurisdictions (e.g., Ireland) the management company may require a regulatory license, to the extent that its activities are deemed as regulated activities in the field of financial services. Companies managing securitisation funds are subject to specific regulatory requirements (e.g., Belgium, France, Luxembourg, Portugal, and Spain), including a requirement to establish, or have the registered or head office in the jurisdiction concerned. In France, when the management strategy includes active asset management or the entry into credit derivatives transactions as protection seller, the management company must comply with certain additional specific requirements such as a new license and appropriate management and organisational procedures.

In most of the surveyed jurisdictions there are no strict limitations as to the composition of the shareholder body of management companies and SPVs, unless the management company is, by operation of law, a financial institution (e.g., Italy). Where the SPV is incorporated as a PLC, it is subject to general company law restrictions governing the establishment and operation of PLCs. In Ireland, the rules applicable will depend on the nature of the SPV, if it is incorporated as a PLC or structured as an orphan company. In the Netherlands, the shares in the SPV are usually held by a foundation in order to ensure the bankruptcy remoteness of the SPV.

Recommendation nº19:

The EFMLG is of the view that the Commission might consider the adoption of minimum standards for management companies of securitisation funds.

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

3.2.9. Insolvency of SPVs

The survey addressed the issue under what circumstances the receiver of the SPV's estate could challenge and declare void (i) a security interest by an SPV over its assets, (ii) a sale of assets when liquidating them, or (iii) payments to the investors under the debt instrument.

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 such structures are in full compliance with the relevant statutes. Those jurisdictions which use existing legislation/common law allow for challenges in line with their usual insolvency law. For example, transactions can be challenged if considered to be preferences (preferring one creditor over others within a given time period prior to the onset of insolvency). In the second type of jurisdictions, transactions are usually structured around the insolvency provisions.

Recommendation nº20:

The EFMLG is of the view that securitisation laws should clearly permit the isolation of securitised assets from the originator, its creditors and insolvency officials and which prevent consolidation of SPV with originator for insolvency purposes.

3.3. Other parties involved in a securitisation transaction

3.3.1. Originators

Except in Greece where the originator must be registered in Greece or have at least an establishment in Greece, none of the other jurisdiction in the surveyed jurisdictions imposes any rules in terms of location of the originator. Portugal on its part imposes that the originator be either a credit institution, financial company, insurance company, pension funds, funds manager, the State and other public entity or other entities with accounts from the previous three fiscal years legally certified by an auditor.

An issue addressed by the survey was whether any market-wide limits are imposed on the extent to which assets may be securitised by an individual originator on the total volume and/or types of assets securitised, in relation to the total asset base of that originator. In general there are no such limits imposed in the jurisdictions surveyed with the sole exception of the United Kingdom 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.

Recommendation nº21:

The EFMLG is of the view that any restrictions affecting the originator in relation to securitisations should be removed.

3.3.2. Servicers

Apart from Italy (where the originator in order to be authorised to act as servicer must be licensed as a bank or a financial intermediary) the servicing function of the receivables transferred to the securitisation vehicle can be assumed by the originator or by qualified third parties (generally banks).

Most jurisdictions do not impose any limitations either on establishment or regulatory requirement in order for an originator to act as servicer. However certain jurisdictions such as the United Kingdom and Italy impose regulatory requirements where the servicer is a bank and, in the case of Italy, a bank or a financial intermediary and other jurisdictions such as Greece have requirements in terms of establishment of the servicer. In the Netherlands, the SPV will only be exempt from obtaining a license under the Financial Services Act (FSA) if the SPV has entered into a servicing agreement with an entity regulated under the FSA. In case the originator is the servicer, an agreement limits the liability of the servicer to those risks ensuing from the servicing agreement. In Sweden, a third party servicer would be subject to data protection requirements and a license may be required for collection services/enforcement. In Luxembourg, the law provides that the securitisation undertaking may entrust the assignor or a third party with the collection of claims it holds as well as any other tasks relating to the management thereof, without such persons having to apply for an authorisation under the Luxembourg financial sector legislation.

3.3.4. Custodians or bank depositories

The role of custodian for the assets of the securitisation vehicle is not enshrined in the law in all the surveyed jurisdictions. In Portugal, 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 will allocate fund assets according to the instructions from the fund manager. In certain jurisdictions, the role of the custodian of the assets of the SPV is extended to the statutory function of “founder” of the SPV and of supervisor of the management company of the securitisation funds (i.e. France)[127].

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

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

licensed foreign investment firms may act as custodians for public UIRs. For institutional UIRs, foreign UIRs or other types of SPVs there is no obligation to appoint a custodian under Belgian law.

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

Apart from France, Portugal, Luxembourg and Greece where the custodian should be registered in the relevant jurisdiction, there are no restrictions as regard to the place of establishment of the custodian in the other jurisdictions.

3.3.5. Rating agencies

In most jurisdictions the law does not refer to the role of rating agencies. However in certain jurisdictions, the law refers to the obligation for the issuer to provide ratings for a purpose of information of investors when the notes issued by the securitisation vehicle are placed in the public. In France, a rating is required by the law for the public issuance of units and/or debt instruments under s French securitisation vehicle programme. In Italy, the 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, if any) or the management company of a public FIR must appoint a rating agency, which is responsible for delivering a report on each securitisation transaction for which the UIR issues a separate class of securities. This report must cover topics such as the sustainability of the underlying receivables, the quality of the financial plan, the fit and proper character of the legal structure, the administrative organisation, the value of the guarantees and security interests provided to the investors, and an estimate of the solvency risk for each type of security issued by the UIR (which must be reflected in a rating for each type of security). In order to obtain a licence, the rating agency must be appointed by a contract which must be approved by the BFIC. The BFIC may grant an exemption from the requirement to appoint a rating agency if the conditions of the transaction justify such exemption and if adequate disclosure is made in the issue prospectus.

3.4. Transfer and Ring-Fencing of Assets

3.4.1. Overview of the segregation techniques

All jurisdictions permit the ring-fencing of assets that are subject of a securitisation, i.e. the removal of these assets from the legal reach of the originator, its creditors and its insolvency or administration officers and thus making them available for the sole benefit of the parties to the securitisation[128]. The different techniques to achieve such segregation might be described as follows:

(1) **True Sale**: Sale and transfer of the receivables (the "true sale") is the most commonly used approach taken by the parties to a securitisation. The true sale is recognised in all jurisdictions, but may be subject to certain formal requirements like documentation in writing, notification of the debtor or registration. There are also different legal concepts of how to achieve a transfer (see below under 4.II).

(2) **Common Pool of Debts**: In some jurisdictions like France, Italy, Luxembourg, Portugal and Spain, securitisation funds[129] are used to achieve segregation of assets. Different from corporate SPVs, such funds have no legal personality. They are pools of assets administrated 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 thereby removed from the legal reach of the originator. In some jurisdictions (Italy and Luxembourg) the laws on mutual investment funds (undertakings for collective investment in transferable securities, UCITS) are referred to or used as scheme copied in order to provide a similar legal framework for those funds (although they do not qualify as UCITS and present other features). In other jurisdictions like Austria, Germany or Greece, funds can not be used for the investment in assets other than securities.

(3) **Trust**: In some jurisdictions like 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 in the assets, in case of its bankruptcy they are segregated from its estate and the beneficiary (the SPV) has the right to claim separation and recovery of those assets. The trust concept is mainly

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

129 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 titulizaciòn.

limited to Anglo-Saxon jurisdictions. Sweden has also implemented trust legislation, which, however, differs from the English concept.

(4) **Fiduciary Arrangements**: In some jurisdictions like Austria, Germany or Luxembourg, fiduciary arrangements between the originator and the SPV are recognised for ring-fencing purposes, but in some countries only if certain requirements are met. If recognised, the consequence is similar to what applies to trusts. In Austria, fiduciary arrangements provide for segregation only, if they are not structured or construed as secured transaction. In Germany segregation is only recognised if the trustee (the originator) obtains the assets directly from the beneficiary (the SPV), which would require a cumbersome back and forth transfer of assets and, if the receivables are collateralised by mortgages, related registrations in the land registers.

(5) **Registration**: In order to facilitate securitisations without true sale transfer of assets, in 2005 Germany introduced the right to maintain refinance registers. 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 (e.g., the Deutsche Bundesbank, the Kreditanstalt für Wiederaufbau KfW, the public debt administration of a State). A refinancing enterprise that is not a credit institution may use the refinancing register of a bank or the KfW. Although the originator retains legal title, the assets so registered are deemed to be SPV assets and, in the event of insolvency of the originator, the SPV has the right to claim separation and recovery of those assets. The evolution that led to the creation of the German framework is discussed in more detail in Annex IV.2 of the Report.

In all jurisdictions, the sale and transfer (the "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 or other formality is required. An alternative but not commonly used technique is the transfer of the contractual relationship or its novation by a tri-lateral arrangement between debtor, originator and SPV. The transfer or novation of the contractual relationship is recognised in all jurisdictions.

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

On the other hand, an assignment for security purposes is either void (Greece) or, in other jurisdictions it is held that, given the additional risks inherent to collateral or because of the lack of originator's intention to fully and definitely transfer ownership and risk, an assignment for security purposes does not result in any ring-fencing of assets (England and Wales, Finland, Ireland, the Netherlands, Portugal) or is not eligible to achieve the balance sheet reduction intended by the originator (Germany). In Austria, a security assignment is subject to more onerous formalities as compared to a normal assignment but it will grant the assignee a priority right with respect to the assigned receivable which will remain effective in the assignor's bankruptcy.

Recommendation nº22:

The EFMLG is of the view that the Commission could consider the adoption of a system of mutual recognition of techniques of transfer of assets to the SPVs.

3.4.2. Consent or notification of the debtor

Apart from applicable provisions on data protection or banking secrecy or agreements between the assignor and the debtor that provide otherwise, in most jurisdictions, the assignment of receivables can be effected without the prior consent of the debtor. There are, e.g., consent requirements in Belgium 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 Securitisation Act, if a 'bordereau' is delivered to the *fonds commun de créances*, a notification of the debtor is not necessary. In Austria, Germany and Luxembourg a notification is only required to ensure that the debtor loses its right to discharge the obligation with the assignor (the originator) by payment or set-off. In Belgium notification of the debtor would also ensure that a second assignee would not assume a better rank than the first assignee. Similar rules apply in England and Wales and Ireland where 'silent' assignments are effective under equity law. However, in order to avoid any discharge of obligation vis-à-vis the old creditor and ensure enforceability against third parties, notification of the debtor is required. In the Netherlands 'silent' assignments are valid, if the written assignment has been registered with the competent Dutch tax authority or if a public notary was used. However, in order to avoid any discharge 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, the notification of each individual debtor is dispensable if the notification is done under the Securitisation Act by public means. In Greece, a lacking notification is cured by the registration in the public register. In Belgium notification by registered mail is required as far as receivables resulting from consumer credits are concerned; only undertakings for the investment in receivables (UIR) are exempted. Even when so notified, the consumer is still entitled to invoke claims against the transferor or operate set-off.

Recommendation nº23:

The EFMLG is of the view that the perfection, admissibility in evidence or the enforceability against the debtor, the debtor's creditors or any third party of an assignment should not dependent on the performance of a formal act or the consent or notification of the debtor.

3.4.3. Other requirements with respect to the transfer of assets

One requirement that can be found in all jurisdictions is that the assignment must be specific enough to identify at any time with sufficient certainty whether or not a particular receivable is subject of the assignment. The French securitisation legal framework describes the information which should be contained in a 'bordereau' for securitisation purposes (i.e. the FCC bordereau). This includes 'the designation and details of the assigned debt and the means by which they are designated or individualised; for example, by indicating the debtor, place of payment, amount of debts or their value and where applicable their payment date'[130].

Apart from receivables that are secured by right in real property (see below), in Austria, Denmark, Germany, Finland and Sweden an assignment of receivables may be affected without any formalities.

In some jurisdictions like England and Wales, Greece, Ireland, the Netherlands, Portugal and Spain the assignment agreement must be in writing. Under the French securitisation legal framework, the FCC bordereau must include the statement that it constitutes a 'claims assignment instrument' ('acte de cession de créances') and that the assignment is subject to specific provisions of the Monetary and Financial Code[131]. Under the Italian Securitisation Act, public notice and registration in the companies register is required. The requirement to use a notary is only given for obligations owed by public entities. In Greece registration of the assignment agreement with the public register is required.

In almost all jurisdictions the assignment is valid upon the perfection of the agreement between the assignee and the assignor or, where notification is required, upon notification. Under the French securitisation legal framework, if a "bordereau" is delivered to the fonds commun de créances (FCC), the assignment is effective upon such delivery. In Greece the assignment is valid upon registration.

In most jurisdictions like Austria, England and Wales, Finland, Germany, Greece, Ireland and Spain assets acquired by an SPV from different originators are automatically commingled into one single

[130] Article R.214-109 of the French Monetary and Financial Code (Regulatory part).

asset pool and in case of an insolvency of the SPV, all assets would be liable for 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 could be achieved by appropriate structuring, e.g. through the granting of securities interests in specific assets to specific creditors or by agreeing on limited recourse with them. However, in some jurisdictions like Belgian, France, Italy, Luxembourg, Portugal and Spain, where a securitisation fund may be used, segregation within the asset pool is achieved by establishing separate compartments within the fund.

In most European jurisdictions, the segregation of the assets of the originator on its balance sheet without transferring them is not possible. An effective segregation or ring-fencing of the transferred assets from those of the originator may not be ensured 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 entry into the new refinance register as set up by the German Act of 22 September 2005 (the Act). Such segregation/ring-fencing is possible in by way of a trust structure in Austria (Treuhandschaft) and the United Kingdom or by way of a charge in England, Sweden and possibly soon in Denmark, because these jurisdictions respectively recognize the legal constructions of trust and of charge.

3.4.4. The transfer of ancillary rights attached to the assets[132]

In some jurisdictions the assigning of receivables has the effect that all ancillary rights (Austria and the Netherlands) or all accessory rights (Belgium and Germany) are automatically transferred to the assignee without further requirement. There are, however exemption or at least legal uncertainty (like in the Netherlands) for ancillary rights in real property (see below).

In other jurisdictions like France, Italy, Luxembourg and Portugal the same legal consequence is achieved if the securitisation is done under the applicable securitisation legal framework: all ancillary or accessory rights are transferred automatically to the assignee upon acquiring the receivables.

The transfer of receivables that are secured by rights in real property (e.g., 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 register or mortgage register or notified to the registrar. However, in Belgium a special legal regime applies to undertakings for the investment in

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[131] Articles L. 214-43 to L. 214-48 of the Financial and Monetary Code.

receivables (UIR), for which no registration with mortgage register is required. In Germany, if a mortgage certificate in bearer form is issued, the registration with the land register can be substituted by transferring the certificate. In Sweden, the 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 (e.g., the guarantor in case of a guarantee).

In Belgium a special legal regime applies to the assignment of receivables resulting from consumer credits; they may only transferred to the National Bank of Belgium, credit insurers and undertakings for the investment in receivables (UIR).

Recommendation nº24:
The EFMLG is of the view that the best practice of automatically transferring, for the assigning of receivables, all ancillary rights to the assignee without further requirement should be promoted.

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

In some jurisdictions like Austria, agreements between creditors and debtors prohibiting the transfer of a receivable do not affect the assignments. In other jurisdictions like Greece, the same legal consequence is achieved if the securitisation is done under the applicable Securitisation Act: any non-assignability clause is null and void. Under the Securitisation Act in Portugal and under the new German Act on the Creation of a Refinance Register, assignment or registration of receivables is possible, if the transferability is not explicitly excluded.

In most jurisdictions like Belgium, Denmark, England and Wales, Finland, Germany, Greece, Ireland, Italy, the Netherlands, Spain and Sweden, the prohibition of transfer without prior consent is of relevance and any deviation makes the assignment ineffective, at least vis-à-vis the debtor. However, in Greece a lacking consent is cured by the registration in the public register. In Germany outside the new German Act on the Creation of a Refinance Register, another exemption applies: if the debtor is a merchant or public entity, the transfer is effective, although not consented by the debtor, which, however is authorised to discharge its obligation vis-à-vis the old creditor. In all other cases, if the securitisation is done under the 2005 German Act on the Creation of a Refinance Register, any prohibition of assignment is only relevant if it is explicitly agreed between the parties. Another exemption is Italy where, if the debtor is a public entity, under certain circumstances, the formal approval of the debtor is required.

132 E.g. security interests, pledges, guarantees, credit insurance.

3.4.6. Ring-fencing of cash flows associated with securitised assets/Commingling risk

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

Commingling risk is defined as the risk that cash belonging to an issuing SPV is mixed with cash belonging to a third party (for instance, the originator or servicer) or goes into the account in the name of a third party in such a way that, in the insolvency of the third party, it cannot be separately identified or is frozen in the accounts of the third party. Mitigants available to commingling risk are very diverse and rank form simple implementation of short –term payment cycles, a declaration of trust by the originator over its accounts through which SPV monies flow or a charge over the originator's accounts to the creation of "lock-box accounts" that isolate the assets of the securitisation vehicle from the one of the originators. France, Luxembourg and Portugal seem to have introduced in the legislation specific provisions establishing dedicated tools for mitigating or avoiding the commingling risk in securitisation transactions. Guidelines of Governor of Banca d'Italia adopted in 2000 also mitigate the commingling risk by stating that the SPV in particular is required to ensure permanently the separation of the assets of the different securitisation transactions and the separation of these latter with regard to the assets of the SPV itself.[133] In the Netherlands, any payments on the securitised assets which are made to a bank account held by the originator or the servicer but not yet distributed to the SPV will fall in the bankrupt estate of such originator or servicer upon being declared bankrupt. However, the issuer has the right to receive such amounts by preference after deduction of the general bankruptcy costs.

133 See Annex 1, § 1 of the Guidelines of Governor of Bank of Italy 2000.

Recommendation nº25:

The EFMLG is of the view that securitisation laws should allow collections from transferred assets to be credited to a 'collection account' in name of originator but for such collections to be isolated at point and time of such collection from insolvency of originator notwithstanding the 'commingled' nature of account;

3.5. Protection of note holders

In most jurisdictions a trustee equivalent [134] is not required by law to represent investors, but transactions generally include such a party to represent the 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, whilst not necessarily excluding representation by an independent third party as well.

In the framework of securitisations, noteholders can not in principle interfere with the management of the SPV and, very often, a separate legal entity may be entrusted with the task of protecting the interests of noteholders and assuring the proper payment of principal and interest as and when it is due to the noteholders. Annex IV.1 provides a brief overview of structures in certain EU Member States that are used to protect the noteholders in a securitisation transaction.

The safeguarding of noteholders' interests is structured differently in the Member States. Safeguarding includes functions e.g. monitoring of the SPV, representation of the investors, and in case of difficulties, taking of enforcement action, as opposed to, measures taken by SPV aimed at improving the investor position which might include e.g. guarantees from third parties, issuance of subordinated units and over collateralization. In some Member States, law defines the roles of the different legal entities in a securitisation transaction and imposes obligations to safeguard the interests of the investors. For example, in France, the guarding of investor's interests is established by legislation enshrined in the Financial and Monetary Code and implementing rules relating to it. French legislation imposes the duty of guarding the interests of investors to the management company of the *fonds commun de créances* (FCC). In other jurisdictions the guarding of investors' interests may have been delegated to a separate legal entity from the management of the SPV to avoid any possible conflict of interest between the SPV and noteholders. The Luxembourg Law has adapted the concept of 'fiduciary representative' ('représentant-fiduciaire') to represent the noteholders which is similar to the common law concept of trust. Besides this the Luxembourg law also imposes some obligations to

134 A professional trustee or trust company or similar participant which is independent of the originator and which has control of the assets.

the management company.[135] There are also jurisdictions in which the law does not especially create a separate legal entity to protect the noteholders vis-à-vis the SPV or impose additional requirements to safeguard the interests of the noteholders. For example, in the UK, there is no specific legislation concerning the establishment of a legal entity for the protection of the noteholders but in practice a note trustee is appointed to represent the investors.

In a cross-border context, safeguarding of the noteholders' interests in a securitisation transaction becomes problematic. If there is a structure created by law to protect the noteholders like the Luxembourg fiduciary representative or a structure like the British note trustee, the domestic rules will not usually apply if this body is situated in another Member State than the place where the SPV is located. This also raises some issues in a cross-border context because of the lack of recognition of foreign entities, the absence of legislation on trusts in all jurisdictions and also problems relating to the insolvency and to the validity of possible collaterals. As an example, the Luxembourg Securitisation Law[136] applies only to fiduciary-representatives having their registered office in Luxembourg. This means that if a trustee whose registered office is abroad is appointed to represent the note holders, the Luxembourg Law does not provide necessarily sufficient protection and the foreign trustee can not use the rights granted to the Luxembourg fiduciary representative. These rights include e.g. the possible right to request in court replacement of the management bodies of the management company or acting as a liquidator on behalf of the investors.[137] The Luxembourg law ensures also the soundness of the fiduciary representative by setting minimum capital requirements and mandatory authorisation.[138]

Rating agencies have also recognised the importance of the entities that are created to represent the noteholders for the assessment of the securitisation transaction's credit strength. Rating agencies monitor for example the trustee's ability to perform its core functions which include monitoring, representation, enforcement and distribution. If the trustee is considered not competent to conduct its functions, this may have negative impact on the rating of the transaction.

3.6. Tax treatment of securitisations

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:

135 According to Art. 16 of the Luxembourg law: "The management company must perform its duties in an independent manner and in the sole interest of the securitisation fund and the investors."
136 Article 67 of the Law of 22nd March 2004.
137 See Art. 74 and Art. 75 of the Luxembourg law.
138 See Art. 80 of the Luxembourg law.

(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.

3.6.1. Tax treatment of SPVs

In most jurisdictions the tax treatment of SPVs differs from other legal entities. In some jurisdictions, such as France or Italy, the principle of tax neutrality is followed, which means that 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.

Recommendation nº26:

The EFMLG is of the view that the tax treatment of SPVs should be certain and predictable.

3.6.2. Tax treatment of transactions related to securitisation[139]

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.*

A further issue addressed relates to the impact the transfer has on the assets' tax treatment. The issue would arise for instance in case the originator enjoys a privileged tax regime. 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.

139 The survey identified 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.

Recommendation nº27:

The EFMLG is of the view that a complex tax treatment of securitisation transactions discourages the use of securitisation techniques altogether. Member States should consider drawing a clear set of relevant provisions that would allow interested parties to make an efficient cost and benefit analysis for all securitisation transactions.

3.6.3. Taxation of multi-jurisdictional transactions

The survey addressed the issue whether the pertinent tax provisions introduce any difference in the tax treatment depending on the country of the registered seat or office or on the nationality of: (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.

Recommendation nº28:

The EFMLG is of the view that the abolition of cross-border withholding taxes on cash flows on securitised assets in connection with a securitisation should be a prime aim for EU action.

Part IV Recommendations and proposals for further action

4.1. The need for convergence of securitisation laws in Europe:

There is a need for convergence of securitisation laws in Europe. As described above in Part III of the Report, the landscape of securitisation in the European Union is characterised by its diversity and its fragmentation. Over the past years, national legislators have taken in an un-coordinated manner some important legislative initiatives with a view to clarify the domestic legal frameworks applicable to their securitisation market. This was the case in Luxembourg, in Greece or more recently in Malta, which have adopted very detailed and comprehensive legal frameworks. Some other countries which had older frameworks in place have also amended their laws with a view to facilitating the development of securitisations (for instance, the reform of the French legal framework in 2003 or the German law of 28 September 2005 on the creation of a refinancing register). While these initiatives flourish in various Member States, other countries such as Austria consider the possible adoption of specific frameworks. In the new Member States, only Poland and Malta have such laws in place.

Although these frameworks are aimed at contributing to legal certainty and transparency of transactions at the national level and often provide innovative regulatory solutions, they fail to contribute to the development of a pan-European securitisation market which, as pointed out by the IMF, is still characterised by 'an aggregation of local markets, based on the use of different techniques and instruments'.

The best practices approach which consists in inviting national regulators to amend their respective legal frameworks in order to ease securitisations has often been successful in order to improve the quality of existing laws and to promote the recourse to good practices used in certain jurisdictions in other jurisdictions (for instance, regarding synthetic securitisations). In the same time, this approach without any coordinated action at the European level tends to perpetuate the fragmentation of securitisation markets and securitisation laws continue to operate as a patchwork within the EU.

The assessment of Community legislation has also highlighted the need for common terminology and common understanding of legal concepts related to securitisation at the European level. This would require amendments to certain EU Directives on certain specific issues (for instance, disclosure requirements applicable to asset-backed securities in the Prospectus Directive, the possibility for UCITS under the UCITS Directive to invest in such financial instruments or the clarifications needed in the Consumer Credit Directive regarding the assignments of receivables and the notification to debtors) or clarification of terminology, for instance, in relation to capital requirements. Obviously, such amendments, although useful, would be limited in scope. They would not affect the core rules applicable in the context of securitisations which are still anchored in national legal frameworks and need to be made converging.

4.2. Possible options to ensure convergence of rules applicable to securitisations in the EU

The assessment of national legal frameworks in the fifteen old EU Member States undertaken by the EFMLG indicates that full harmonisation of securitisation laws would not be a realistic and even desirable objective since such exercise would affect a number of areas of law which are, for some of them, intimately related to the roots of domestic legal systems (for instance, in the field of civil law or insolvency law). At the hearing of 12 June 2006, market practitioners have also concurred to point out that an exercise of harmonisation would carry with it substantial difficulties and would take a number of years to accomplish.

Against this background, the EFMLG has examined the different possible options which the EU could take in order to assist in the development of cross-border securitisations with more immediate and effective results and thus contribute to achieving a more integrated market for securitisations in Europe.

It is noted that these options exclude the aspects relating to taxation. Although the EFMLG considers that the resolution of the issues is crucial in order to facilitate the development of cross-border securitisations, the way to implement the EFMLG recommendations in the field of taxation is not assessed further in the context of the Report, having regard to the more limited competencies of the EU legislator in this field.

At the hearing of 12 June 2006 held with market participants in Paris, the three main following options have been discussed:

4.2.1. Extension of the scope of the UCITS Directive (Option 1)

Under the UCITS Directive[140], undertakings for collective investment in transferable securities (UCITS) may be constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies). Due to the similarities of certain types of securitisation vehicles with UCITS[141], the extension of the scope of the UCITS Directive to securitisation vehicles was examined as a possible avenue with a view to increase the convergence of rules applicable to securitisation markets at the Community level.

At first sight, this option would present the advantage of making use of existing EU rules. Securitisation vehicles and other collective investment vehicles would be covered under the same umbrella. Securitisation funds are distinct in nature from undertakings for collective investment in

140 Council Directive of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (85/611/EEC).

141 As described above, certain jurisdictions, e.g., France, Belgium, Luxembourg, Spain and Portugal and to a less extent Italy, have created by law dedicated forms of vehicles, i.e. securitisation funds devoid of legal personality with independent management companies.

transferable securities (UCITS) and are subject to specific provisions. However, at the national level, rules applicable to securitisation funds often fall under the umbrella of the domestic legislation applicable to collective investment undertakings (for instance, in France[142] and Belgium[143]); these funds borrow some features of UCITS or may also be subject to the same corpus of rules (for instance, in the field of taxation[144]). In Malta, the law expressly provides that securitisation vehicles shall not be considered to be collective investment schemes as defined in the Investment Services Act, although an exception is provided in case of authorisation by the competent authority[145]. In France, implementing rules provide detailed provisions regarding the conditions for the activity of securitisation funds management companies and in particular the rules applicable in case of delegation of the financial management of the funds to other entities such as managers of collective investment undertakings[146].

Furthermore, the UCITS Directive already provides ‘common basic rules established for the authorization, supervision, structure and activities of collective investment undertakings situated in the Member States and the information they must publish’. Certain aspects of this framework could be reasonably extended to securitisation vehicles which, as described in Part III of the Report, are currently not subject to a transparent and harmonized supervisory regime at the European level.

However, the potential benefits of Option 1 might not outweigh a number of important drawbacks:

First, the definition of UCITS[147] contradicts in principle a strict assimilation of securitisation funds to collective investment undertakings since the object of securitisation vehicles is not the collective investment in financial instruments. The activities performed by securitisation vehicles are fundamentally different from the activities of UCITS. To paraphrase the definition provided in the Luxembourg legislation, a securitisation undertaking acquires or assumes risks relating to claims, other assets, or obligations assumed by third parties or inherent to all or part of the activities of third parties and issues securities, whose value or yield depends on such risks. Furthermore, they do not operate on the principle of risk-spreading[148] within the meaning of the UCITS Directive and there is in principle no obligation for securitisation funds to repurchase or redeem the units of the UCITS.

142 In France, the Financial and Monetary Code provides that FCC (Fonds Communs de Créance) belong to the category of collective investments (Book II, Products, Title I, Financial instruments, Chapter IV, Collective investments, Section 2, FCC, Articles L.214-43 to Articles L.214-49.

143 See Article 6 of the Belgian Law of 20 July 2004 on collective investment undertakings. The law covers undertakings for investment in receivables (i.e. funds for investment in receivables and companies for investment in receivables).

144 See, for instance, Art. 50 of the Luxembourg Law on securitisation of 22 March 2004.

145 Article 6 of the Act nºV of 11 April 2006.

146 See the French Ministerial Order of 1 September 2005 amending Art. 331-10- I of the General Regulations of the French Financial Markets Authority.

147 Article 1(2) of the UCITS Directive defines UCITS as undertakings the sole object of which is the collective investment in transferable securities and/or in other liquid financial assets of capital raised from the public and which operates on the principle of risk-spreading and the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets.

148 This becomes obvious if investments in equity tranches are concerned, which provide for a considerable risk concentration.

Second, securitisation vehicles are subject to specific rules concerning, for instance, the transfer of securitisation assets or the management of risks, which substantially differ from the rules applicable to UCITS. A number of the provisions of the UCITS Directive would conflict with the rules applicable to securitisation vehicles at the domestic level without necessarily providing any added value. This concerns, for instance, the conditions of authorisation of UCITS, the obligations and operating conditions applicable to management companies, the provisions applicable to the right of establishment and the freedom to provide services or the obligations regarding depositaries, which would need to be amended to apply to securitisation vehicles. Moreover, the rules relating to investment policies of UCITS are clearly not applicable in the case of securitisation vehicles.

4.2.2. The adoption of a "28th regime" (Option 2)

The option of the "26th regime"/"28th regime[149]" was also discussed at the hearing of 12 June 2006, as a possible avenue to be explored[150]. In the context of securitisation, this alternative regime would be an optional instrument available at the EU level which would offer pan-European passports for businesses and consumers, who want to be active across borders, leaving the 25/27 sets of national rules untouched. A suggested way in which to achieve this without intervening in domestic jurisdiction legislation would be the development of a "parallel", optional securitisation regime at EU law level which could be adopted on a transaction by transaction basis by market participants within the EU[151].

This solution attracts much interest from market participants since it appears at first sight as a flexible instrument which would avoid interfering with national laws. The EFMLG did not undertake an in-depth assessment of the legal feasibility of such an option. However, the following comments can be made.

First, the examples of optional regimes such as the European Company Statute[152] or the European Cooperative Society[153] show that, although these new legal forms are to be considered as "a genuinely

149 Once Bulgaria and Romania join the EU on 1 January 2007.

150 See A. Sáinz de Vicuña, 'Optional instruments for the integration of European financial markets, in Legal aspects of the European System of Central Banks', December 2005. This different methodology is 'aimed at facilitating financial integration via the creation of pan-European regimes which are non-mandatory for market participants. It proposes that the Community institutions should provide market participants with the option of using financial instruments that benefit from a 'European passport', i.e. ones that can be used equally throughout all 25 Member States, if necessary by way of a Community legal act or with the support of Community bodies. Such instruments would not need the prior harmonisation of national laws, but would instead represent an additional option on top of the financial instruments already covered by national legislation'.

151 For another example, see Options under EU law for the implementation of a Eurohypothec, Dr Habil Christoph Schmid in 'Basic Guidelines for a Eurohypothec', Outcome of the Eurohypothec workshop, November 2004 / April 2005, Mortgage Credit Foundation, Warsaw, May 2005 (published in Mortgage Bulletin, 21/2005).

152 Council Regulation 2001/2157/EC of 8 October 2001 on the Statute for a European company (SE), EU OJ L 294, 10 November 2001, pp. 1–21.

new creation", the constitutive EU Regulation setting up these entities 'provides for many aspects by reference to national law and affords its application in wide areas (…)'[154]. An optional regime could not develop without a reference to national laws. For instance, a European instrument for securitisation, whatever its legal form, would require determining the rules applicable to the transfer of receivables from the originators to this new entity, both in the case of portfolios of assets emanating from one jurisdiction and in the case of cross-border portfolios.

Second, a securitisation which would be subject to European law rules might require the existence of a legal entity having the capacity to acquire receivables and to issue financial instruments. This might imply the creation of a new form of legal entity, i.e. a European Securitisation Special Purpose Vehicle, the features of which would need to be determined[155]. In this respect, it should be noted that, in a judgment of 2 May 2006[156], the ECJ has ruled that recourse to Article 95 EC as a legal basis for a EU act is possible "to adopt measures to improve the conditions for the establishment and functioning of the internal market" [157] or "to prevent the emergence of obstacles to trade resulting from heterogeneous development of national laws"[158]. However, such legal basis would not be appropriate in the case of a proposed EU legal act which would have 'as its purpose the creation of a new form of (…) entity in addition to the national forms'[159] In the above case, the ECJ considered that Article 308 of the EC Treaty was the appropriate legal basis since the Regulation concerned the European cooperative society considered in the Regulation as 'a European legal form for cooperative societies which has specific Community character'. Article 308 of the Treaty requires the unanimity of the Council and provides for the simple consultation of the European Parliament. As such, this legal basis does not seem to constitute a simple path conducive to the development of such optional regimes, particularly in the context of securitisations which are complex in nature and require flexible legislative tools.

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153 Council Regulation (EC) Nº1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), EU OJ L207 of 18 August 2003.

154 See the Opinion of Advocate General Stix-Hackl of 12 July 2005, Case C-436/03, European Parliament v. Council of the European Union, points 82 to 90. The ECJ, in its judgment of 2 May 2006 in the same case, considered however that 'referral' to the law of the Member State in which the entity has its registered office was only 'of a subsidiary nature' (point 45).

155 See, on related concepts, for instance, the recommendation 39 of the Forum Group on Mortgage Credit to increase the transferability of mortgages by introducing pan-European Security Trust instruments (as well as recommendations 45, 46 and 48), report of 13 December 2004 ('The integration of the EU Mortgage Credit Markets').

156 C-436/03, European Parliament v. Council of the European Union.

157 Point 38.

158 Point 39.

159 Point 44 of the same judgment.

4.2.3. Adoption of an EU legal instrument setting out high level principles applicable to securitisations (Option 3)

A certain number of principles common to all jurisdictions need to be applied in the case of securitisations deals in order to ensure a high level of transparency, efficiency and legal certainty of these transactions. Most of these principles have been translated into EFMLG recommendations for further convergence of securitisation in the EU which are reflected in Part III of the Report.

One of these principles is the need for an effective segregation of the assets of the securitisation vehicle from those of the originator. The Forum Group on Mortgage Credit[160] also considered that the European Commission should harmonise legislation regarding segregation of assets and enact legislation that recognises the legal separateness of a securitisation vehicle from an originator of assets in the event of the insolvency/bankruptcy of such an originator[161].

As an alternative to the full harmonisation scenario and the two above options (Options 1 and 2), these principles could be enshrined in an EU legal act, preferably an Internal Market Directive. Should they be applied in all EU jurisdictions in a consistent and co-ordinated way, they would increase the convergence of laws in the EU while leaving Member States the possibility to decide how these principles should be implemented according to their national laws. This might imply, for instance, under certain conditions to be determined at the EU level, a system of mutual recognition of both securitisation special purpose vehicles and techniques of transfer of assets to the SPVs, and for the EU Member States which did not yet regulate those areas, to take action at the national level[162].

The type of measures required for this legal act will depend on the degree of convergence to be achieved at the EU level. Over the last years, a number of Directives have been adopted in the financial sector under the aegis of the EU Financial Services Action Plan in order to foster the creation of a Single Market for Financial services. The degree and method of harmonisation chosen vary depending of the Directives but lessons can be drawn for an application in the context of securitisation rules. For instance, the Collateral Directive[163] provides for a 'minimum regime relating to the use of financial collateral arrangements' contributing to the integration and cost-efficiency of the financial

160 In its report of 13 December 2004 ('The integration of the EU Mortgage Credit Markets'), when assessing the funding aspect of the further integration of the EU mortgage credit market, the Forum Group on Mortgage Credit explored the possibility of enhancing market integration through the development of a liquid and dynamic secondary market (development of a loan secondary market and of mortgage funding instruments) and attempted to identify market and regulatory barriers preventing lenders from effectively using existing mortgage funding instruments. Some of the Forum Group's recommendations directly apply to the field of securitisation and not specifically to mortgage financing.

161 The report, at page 42, points that: 'Securitisation and covered bond transactions have particular requirements, which need to be recognised and facilitated. A core objective in any securitisation transaction is to isolate the securitised assets from the other assets and risks of the originator (in US terminology this is known as 'true sale'). Accordingly, the securitised assets should be segregated from the originator for the benefit of the parties to the securitisation, principally the providers of funding used to finance the acquisition of such assets, but also the other creditors of the buyer of the assets. It is therefore critical that multi-seller SPVs buyers are able to segregate their assets, so that the parties that funded or are involved in a particular transaction do not compete with parties to other transactions for repayment out of the assets involved in such transaction. Assets can be isolated statutorily if applicable laws and regulations so provide'.

162 In order to ensure effective convergence in this field and to the extent these aspects would not be regulated in the EU legal act, a mechanism of notification of draft national laws to the European Commission could be useful with a view to promote common standards at the EU level.

163 Directive 2002/47/EC on financial collateral arrangements of 6 June 2002. It is based on Article 95 of the EC Treaty.

system and to the legal certainty of these arrangements. Another approach could be the one of the UCITS Directive based on Article 47(2) of the Treaty[164]. The scope of this Directive is wider, as detailed above (Option 1): this regime covers structural and supervisory aspects of the UCITS market and imposes also a number of obligations to the national competent authorities.

Another dimension which should be also taken into account is the possibility to adopt implementing measures under the Lamfalussy comitology approach. The three committees which have an interest in the development of securitisation in the EU financial sector, i.e. the Committee of European Banking Supervisors, the Committee of European Securities Regulators and the Committee of European Insurance and Pensions Supervisors could be involved and provide useful technical advice on the regulatory and supervisory aspects relating to the securitisation markets.

The EFMLG hopes that the recommendations contained in the Report will be considered useful and the European Commission might wish to consider how to implement them, fully or partially. The creation of an expert group composed of securitisation legal practitioners (law firms, originators, management companies of SPVs, rating agencies, regulatory authorities, relevant market associations, etc) would help to identify the core high-level principles which should feature in the above proposed EU legal act on securitisation and provide legal effectiveness to these principles. The EFMLG is available order to contribute to any Commission's future initiatives in this area.

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164 See above (Option 1). The recitals of the UCITS Directive provide that laws of the Member States relating to collective investment undertakings differ appreciably from one state to another, particularly as regards the obligations and controls which are imposed on those undertakings; whereas those differences distort the conditions of competition between those undertakings and do not ensure equivalent protection for unit-holders. The Directive provides that national laws governing collective investment undertakings should be coordinated with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection for unit-holders.

ANNEX I

SECURITISATION LAWS IN THE EUROPEAN UNION

EU MEMBER STATE	SECURITISATION LAW	IMPLEMENTING RULES
Austria	No §33(21)(2)(7) of the Stamp Duty Act and §2(60) of the Banking Act	Not applicable. In 2003, the Austrian Securitisation Forum mandated a small group to draft a piece of legislation on securitisation. This draft Austrian Securitisation Act has not been submitted to the Parliament.
Belgium	Law of 5 August 1992, amending the Law of 4 December 1990 on financial transactions and financial markets, creating undertakings for investment in receivables (*Organisme de placement en créances* or 'UIR'). Law of 20 July 2004 on certain forms of collective management of investment schemes (*Loi relative à certaines formes de gestion collective de portefeuilles d'investissement*). It entered into force on 9 March 2005.	Several implementation measures still need to be adopted and a number of legislative proposals for amending the Law of 20 July 2004 are currently in the pipeline. However, the royal decrees implementing the Law of 4 December 1990, and in particular the Royal Decree of 29 November 1993 on undertakings for investment in receivables and the Royal Decree of 8 July 1997 on certain implementing measures concerning undertakings for investment in receivables, remain applicable to a certain extent, despite the introduction of the new Law of 20 July 2004.
Cyprus	No	Not applicable
Czech Republic	No	Not applicable
Denmark	No	
Estonia	No	Not applicable
Finland	No	Not applicable

EU MEMBER STATE	SECURITISATION LAW	IMPLEMENTING RULES
France	Relevant provisions of the Financial and Monetary Code. Last main amendments introduced by the Loi Sécurité Financière nº2003-706 of 1 August 2003 amending the Loi n°88-1201 of 23 December 1988 (« Loi relative aux organismes de placement collectif en valeurs mobilières et portant création des *fonds communs de créances* »)	Decree n° 2004-1255 of 24 November 2004 taken in application of Articles L. 214-5 and L. 214-43 to L. 214-49 of the Monetary and Financial Code relating to *fonds communs de créances*, OJ n° 275 of 26 November 2004, p. 20067 Ministerial Order of 1st September 2005 endorsing amendments to the General Regulations (Règlement Général) of the French Financial Markets Authority (AMF) regarding the provisions applicable to the management companies of *fonds communs de créances* and prospectus for FCC units.
Germany	No single specific German law applicable to securitisations. Act on the Creation of a Refinancing Register of 28 September 2005; special tax provisions.	Not applicable
Greece	Law 3156 of 25 June 2003 published in the Government Gazette of the Greek Republic (Issue A/nº1567); Article 14 of Law 2801/2000 regarding specific provisions applicable to public sector securitisations	?
Hungary	No	Not applicable
Ireland	No specific legislative framework Special tax regime for SPVs	Not applicable
Italy	Law nº130 of 30 April 1999 published in the Official Gazette of the Republic of Italy of 14 May 1999; special provisions for public sector securitisations	Legislative Decree nº58 of 24 February 1998; Decree nº228 of 24 May 1999; Banca d'Italia Governor's Decision of 20 September 1999 ("fondi comuni di crediti")
Latvia	No	Not applicable
Lithuania	No	Not applicable
Malta	Act nºV of 2006, 11 April 2006	Not applicable
Luxembourg	Law of 22 March 2004 regarding securitisation	

EU MEMBER STATE	**SECURITISATION LAW**	**IMPLEMENTING RULES**
The Netherlands	No	"Solvency Regulation on Securitisation" by the Netherlands Central Bank (De Nederlandsche Bank N.V)
Poland	Law of 1 April 2004 (entered into force on 1 May 2004) amending the Banking Law and Investments Funds Act of 27 May 2004 (entered into force on 1 July 2004).	?
Portugal	Decree-Law 453/99 of 26 October 1999 Decree-Law 219/2001 of 4 August 2001 (Securitisation Tax Law)	Share Capital Regulations (Regulation 284/2000 of 23 May 2000 and Regulation 676/2002 of 19 June 2002) Banco de Portugal and Securities Commission Regulations
Slovakia	No	Not applicable
Slovenia	No	Not applicable
Spain	Royal Decree 926/1998 of 14 May 1998 on Asset-Backed Securitisation Funds (*Fondo de Titulización de Activos*); 3rd Additional Provision of Law 1/1999 of 5 January 1999 on capital-risk entities; specific provisions applicable to public sector securitisations	?
Sweden	No	Not applicable
United Kingdom	Common law system based on statute and caselaw.	

TYPOLOGY OF SECURITISATION VEHICLES IN THE EU

	LEGAL NATURE		COMPANIES													FUND STRUCTURE	
	Type of SPV		Type of legal structure						Minimum number of shareholders / minimum capital						Independent compartments*	Name	Independent compartments*
	Company	Fund	Public limited company	Private limited company	Joint-stock company	Partnership limited by shares	*Société cooperative organisée comme une société anonyme*	*Sociedades de titularização de créditos (STCs)*	Public limited company	Private limited company	Joint-stock company	Partnership limited by shares	Société cooperative organisée comme une société anonyme	Sociedades de titularização de créditos (STCs)			
Austria	✓		✓						/ 35,000€								
Belgium	✓	✓	✓			✓			61,500+variable part			61,500+variable part			✓	*Fond de placement en créances/Fonds voor belegging in schuldvorderingen*	
Denmark	✓		✓												✓		
England and Wales	✓		✓						2 / 50,000€								
Finland	✓				✓						✓						
France		✓														*Fonds commun de créance*	✓
Germany	✓		✓		✓	✓			/ 25,000€		/ 50,000€	/ No minimum capital					
Greece	✓		✓						/ 60,000€								
Ireland	✓		✓						7 / 40,000								
Italy	✓	✓	✓		✓	✓			✓		✓	✓			✓	*Fondi communi di crediti*	✓
Luxembourg	✓	✓	✓	✓		✓	✓		✓	✓		✓	✓		✓	✓	✓
The Netherlands	✓			✓													
Portugal	✓	✓						✓						1 / 250,000€	✓	*Fundos de titularização de créditos* (FTC)	✓
Spain		✓														*Fondo de Titulizaci ónde Activos (FTA)*	
Sweden	✓		✓						✓						✓		

ANNEX III

OVERSIGHT OF SECURITISATION VEHICLES IN THE EU

EU MEMBER STATE	Legal nature		Is there a supervisor for the SPV?			Competent supervisory authority	Supervisory aspects Possibility for the SPV to be considered as a credit institution
	Company	Fund	Yes	Only if issues securities to the public	No		
Austria	✓				✓		There is no specific supervisory authority for SPVs. The Banking law clarifies that special securitisation companies do not conduct any banking business.
Belgium	✓	✓	✓			Commission Bancaire et Financière (CBF)	The law distinguishes public undertakings for investment in receivables (UIRs) and institutional UIRs. Public UIRs are subject to the supervision of the CBF. The SPV is not considered as a credit institution.
Denmark	✓				✓	*Finanstilsynet (FSA)*	A SPV whose activity is to acquire receivables is not considered as a credit institution.
Finland	✓		✓			Rahoitustarkastus (Finnish Banking Supervision Office)	In principle, the SPV is not considered as a credit institution but is considered as a financial institution. In most cases the Rahoitustarkastus supervises the SPV.
France		✓			✓	Autorité des Marchés Financiers (management company of the FCC) Comité des établissements de crédit et des entreprises d'investissement (CECEI)/Commission Bancaire (custodian)	Only the founders of the Fonds Commun de Créances (FCC), i.e. the management company and the custodian are supervised by the French Financial Markets Authority (AMF) since the fund does not have any legal personality. The custodian is supervised by the authorities in charge of the supervision of credit institutions. FCC are not considered as credit institutions. However, an SPV incorporated outside France cannot be used because they do not benefit from the exemption to the "banking monopoly".
Germany	✓				✓		Until very recently, no German entities were used as purchaser vehicles in securitisation transactions. This might change now with the new Act on the Creation of a Refinancing Register, which enables refinancing enterprises to segregate sold assets without transferring title to it simply by registration. No need for a license for SPVs They are not considered as credit institutions under the Banking Act.

EU MEMBER STATE	Legal nature		Is there a supervisor for the SPV?			Competent supervisory authority	Supervisory aspects Possibility for the SPV to be considered as a credit institution
	Company	Fund	Yes	Only if issues securities to the public	No		
Greece	✓			✓		The Hellenic Capital Market Commission	SPVs are not considered to be credit institutions. No prudential supervision of SPVs given that securitisation only takes place through private placements. If the SPV is a Greek *société anonyme*, the supervising authority is the competent *prefecture*, which supervises the SPV as regards compliance with the law on *société anonyme*. The Hellenic Capital Market Commission has supervisory authority if securitisation takes place through public offerings. SPVs which are subsidiaries or affiliates of Greek Banks are subject to the supervision of the Bank of Greece.
Ireland	✓			✓		Irish Financial Services Regulatory Authority	Typical securitisation SPVs fall outside the financial services regulatory regime and there are not subject to supervision by Irish financial or banking regulators. Irish SPVs are subject to the jurisdiction of the Office of the Director of Corporate Enforcement with respect to their compliance with general company law. If SPV has listed securities on a regulated stock exchange, it will be subject to the rules of that exchange.
Italy	✓	✓	✓			Bance d'Italia	SPVs are subject to the supervision of the Bance d'Italia and are required to disclose certain information related to the performance of the securitisation transaction with reference to both the securitised assets and the issued notes..
Luxembourg	✓	✓		✓		Commission de surveillance du secteur financier	SPVs are not considered to be credit institutions. SPVs/Securitisation undertakings (both funds and companies) which issue securities to the public on a regular basis must be authorised by the supervisory authority, i.e. the *Commission de surveillance du secteur financier* (CSSF). This does not apply to securitisation undertakings that ony effect a single issue of securities or issue securities on an irregular basis.

EU MEMBER STATE	Legal nature		Is there a supervisor for the SPV?			Competent supervisory authority	Supervisory aspects Possibility for the SPV to be considered as a credit institution
	Company	**Fund**	**Yes**	**Only if issues securities to the public**	**No**		
The Netherlands	✓						An SPV issuing bonds falls within the definition of 'credit institution' under the Act on the Supervision of the Credit System 1992. In principle, an SPV requires a license and falls under the supervision of De Nederlandsche Bank. However, the ASCS contains a few exemptions, *inter alia*, if the notes will be offered solely to professional market participants. The Financial Services Act came into force on the first of January 2006. Pursuant to this Act, a person who becomes the legal owner of loan receivables outstanding on consumers, i.e. private individuals not conducting a business or trade, are required to hold a licence as of the moment legal title is transferred. An SPV will, however, be exempt from obtaining a license under the Financial Services Act, provided that the SPV enters into a servicing agreement with an entity regulated under the Financial Services Act.
Portugal	✓	✓	✓			Comissão do Mercado de Valores Mobiliários (CMVM)	SPVs under the Portuguese securitisation law are not considered to be credit institutions. The activity of acquiring receivables is not considered as a credit institution. **FTCs (funds)** The establishment of an FTC must be authorised by the CMVM, which also supervises the FTC's activities. Where the originator is a credit or financial institution, the FTC's establishment is also subject to the Banco de Portugal's approval. The incorporation of an SGFTC must also be authorised by both the Banco de Portugal and the CMVM. **STCs (companies)** The incorporation of a STC is subject to authorisation by CMVM. Each issuance of notes is subject to prior registration with the CMVM for public placements or subsequent communication the MCVM, for private placements.

EU MEMBER STATE	Legal nature		Is there a supervisor for the SPV?			Competent supervisory authority	Supervisory aspects Possibility for the SPV to be considered as a credit institution
	Company	Fund	Yes	Only if issues securities to the public	No		
Spain		✓		✓		Comisión Nacianal del Mercado de Valores (CNMV) Central Mercantile Register	The securitisation fund is not a credit institution. A Spanish public limited company (sociedad anónima) duly incorporated and authorised by the CNMV is responsible for the incorporation, management and representation of the Fondo de Titulizaçion de Activos (FTA).
Sweden	✓		✓			Finansinspectionen	If SPV is funded publicly it is supervised by the Swedish Financial Supervisory Authority (Sw: Finansinspektionen) which also supervises banks and credit companies etc. According to the Global Legal Group Report, if financing business is deemed to be conducted in Sweden, there is a recent licensing exemption for securitisation SPVs. This exemption only applies for SPVs acquiring receivables a limited number of times (no more than three of five times). Thus, in transactions where receivables with short maturities are acquired on a revolving basis, the exemption cannot be relied upon.
United Kingdom	✓			✓		Financial Services Authority / UK Listing Authority	SPVs are not generally considered as credit institutions and do not usually require a licence.

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

1. Structural safeguards protecting the noteholders in a securitisation transaction

a. The UK example

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

The Financial Markets Law Committee recently pointed out that trusts are highly important for the whole sale financial markets and that there is a trust relationship behind most situations of ownership.[165] In terms of securitisation, trusts have different roles depending on, in which part of the transaction they are used. The decision whether to appoint a trustee depends largely on whether the issuer considers the advantages of having a trustee to be sufficiently attractive.[166] In a structured finance transaction trustee's main function is to represent the interests of the investors and other secured parties. Besides this, trustees have administrative functions. They monitor the issuer and can exercise power if there is a need. The trust deed defines trustee's obligations in each situation. The issuer appoints a trustee to represent the holders and it owes its duties to them although its fees and expenses are payable by the issuer.

Trustee benefits both the investor and the issuer. Investors benefit from the central co-ordinating role of the trustee in acting as their representative and give the individual investors the possibility to remain

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[165] Financial Markets Law Committee: Issue 62 – Trustee Exemption Clauses, Analyses of the role of the trustee in the wholesale financial markets and of the proposals contained in the Law Commisssion's Consultation Paper No 117, "Trustee Exemption Clauses", p. 1.

[166] *Ibid.*, p. 15.

anonymous. Trustee has usually more information and is therefore in a better position to assess whether the issuer complies with the covenants. The trustee has also better resources to act than an individual investor and can gain a better negotiating position as representative of large portion of debt. On the other hand, issuers usually benefit from the trustees in the form of lower transaction costs. It is cheaper and more efficient to deal only with one counter party.[167] In some cases, a trustee may be necessary, e.g. because of a listing requirement, or because of the need to hold security on behalf of the holders. In most cases, however, the decision is based on whether the advantages of having a trustee are sufficiently attractive.

b. The French example

In France, the securitisation vehicle is called *fonds commun de créances* ('the FCC') which is a mutual debt fund. It is regulated by the Monetary and Financial Code and its implementing rules[168]. The FCC is not a separate legal entity and it has no share capital, no board of directors and no employees. It is jointly established by a management company (*société de gestion*) and a depositary (*dépositaire*). The depositary is responsible for the custody of FCC's assets and also for the supervision of the management company which manages the fund.[169] The law sets criteria how the management company should conduct its business. The management company's structure and management must enable it to conduct its business with honesty, diligence, fairness and impartiality for the sole benefit of the holders, consistent with the integrity and transparency of the market.[170] Unit holders' interests are guarded by the management company which is enshrined in law. The management company must avoid conflicts of interest and resolve any that arise equitably in the interest of the holders of securitisation fund units. If it finds itself facing a conflict of interest, it must inform the said holders thereof in the most appropriate manner. It must take all necessary measures, particularly with regard to the separation of fields of activities and tasks, to guarantee the autonomy of its management[171]. The management company must promote the interests of the unit holders of the securitisation funds it manages or whose management it outsources. To this end, it shall perform its duties consistent with the integrity, transparency and security of the market. The transactions carried out in the context of fund management, and the frequency thereof, must be decided on solely in the interests of the unit holders and made known to them. The management company must refrain from any initiative intended to favour its own interests, or those of its partners, shareholders or members, to the detriment of the unit holders' interests[172].

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[167] *Ibid.*, p. 16–17.
[168] Decree and i.e. the General Regulation of the French Financial Markets Authority –the AMF General Regulation.
[169] Art L. 331-7 of *the* AMF General Regulation.
[170] Art. L. 331-25 of AMF General Regulation..
[171] Article 331-8 of the AMF General Regulation.

Besides guarding unit holders' interest vis-à-vis third parties, the management company has to make sure that all the unit holders are treated equally between themselves. According to the law, the management company shall ensure that the holders of units or debt securities, giving entitlement to identical rights, receive equal treatment.[173] The choice of investments, and of intermediaries, must be made independently, in the holders' interests[174]. The management company must ensure that the rights attached to the securities held by a securitisation fund which it manages are exercised in the holder's interests. These rights include the right to participate in meetings, to exercise voting rights and to institute legal proceedings.[175] It is also provided that the management company's conditions of remuneration must not be such as to create a conflict of interest between it and the holders. The company's organisational structure and management must enable it to conduct its business with honesty, diligence, fairness and impartiality for the sole benefit of the holders, consistent with the integrity and transparency of the market. The management company must adopt an organisational structure which reduces the risk of conflicts of interest. Functions which might give rise to conflicts of interest must be strictly separated. Management of the securitisation fund must be completely independent from the management activities that the management company carries out for its own account[176].

c. The Luxembourg example

In Luxembourg, SPVs are called "securitisation undertakings" according to the Law of 22 March 2004 on Securitisation (the Securitisation Law). They may be set up either in the form of a company or as a fund in pure contractual form governed by management regulations. Funds are managed by a management company and do not have legal personality. Securitisation companies have a legal personality and manage themselves.[177] These structures differ in a way that the law imposes some additional requirements to the management company of the fund which relate to safeguarding of investors interests.

In the fund structure, the management company acts on behalf of the securitisation fund and its investors vis-à-vis third parties. This includes acting on behalf of the securitisation fund and its investors in all judicial proceedings, whether as a plaintiff or defendant.[178] The law imposes obligations for the management company to take investors interests into consideration when acting vis-à-vis third parties. Article 16 states that:

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172 Article 331-19 of the AMF General Regulation.
173 Art. L. 331-21 of *AMF General Regulation*.
174 Art. L. 331-22 of the *AMF General Regulation.*
175 Art. L. 331-23 of *the AMF General Regulation.*
176 Art. L. 331-24 to 331-26 of the *AMF General Regulation.*
177 Title II of *the Luxembourg law ('the Luxembourg law').*
178 Art. 15 of the Luxembourg law.

> "The management company must perform its duties in an independent manner and in the sole interest of the securitisation fund and the investors."

The Securitisation Law does not seem to pose similar duty to the SPV formed in the form of a company.

In order to protect the interests of the noteholders, Securitisation Law also defines the concept of fiduciary-representative (*représentant-fiduciaire*). Fiduciary-representative's role can be compared to the role of a trustee. The Law applies only to fiduciary-representatives whose registered office is located in Luxembourg. [179] According to the Securitisation Law, investors and creditors of a securitisation undertaking may entrust the management of their interests to one or more fiduciary-representatives. The law imposes certain requirements to make sure that fiduciary-representatives are sound and stable.[180] Fiduciary-representative has to be authorised by the CSSF.[181] Authorisation for the exercise of the activity of a fiduciary-representative can only be granted to stock companies which have a share capital and own funds of at least equal to 400 000€.[182] The instrument by which a fiduciary-representative accepts its mission must define its rights and its powers, in particular its powers of representation, specify the groups of investors or creditors on behalf of which it acts and provide for a procedure for its replacement.[183] A fiduciary-representative can delegate to a third party the exercise of the rights and duties assigned to it by the securitisation undertaking.

Fiduciary-representatives may not exercise any activities other than their principal activity except on an accessory and ancillary basis.[184] The fiduciary-representative can accept and hold all sureties and guarantees on behalf of its clients and make sure that the securitisation vehicle manages correctly the securitisation transactions. The right can be conferred to the fiduciary-representative to petition the court, on serious grounds, to order the permanent or temporary replacement of the management bodies of the securitisation undertaking, or , as the case may be, its management company. This right has to be authorised in the articles of incorporation or the internal rules of a securitisation undertaking.[185] For as long as the investors and creditors are represented by a fiduciary-representative, they cannot exercise individually the rights the defence of which they have entrusted to the fiduciary-representative and they are represented in all their relations with the securitisation undertaking and third parties connected to the securitisation by the fiduciary-representative.[186]

179 Art. 67 of the Luxembourg law.
180 See articles 68, 79 and 80 of the Luxembourg law.
181 Art. 79 of the Luxembourg law.
182 Art. 80 of the Luxembourg law.
183 Art. 68 of the Luxembourg law.
184 Art. 79 (2) of the Luxembourg law.
185 Art. 74 of the Luxembourg law.
186 Art. 69 of the Luxembourg law.

The Securitisation Law enables the use of Anglo-Saxon trust concept in the organization of a securitisation structure. Trusts are defined in Luxembourg Law dated 27, 2003. Article 71 of the Securitisation Law states that:

> "The fiduciary-representative may also be granted by the investors and the creditors the power to act in their interest in a fiduciary capacity, in accordance with the [Luxembourg] legislation on the trust and on fiduciary contracts. The assets and rights which it acquires for the benefit of investors and creditors form a fiduciary property separate from its own assets and liabilities as well as from any other fiduciary property it may hold."

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

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

Until September 2005, there existed no special legal regime governing securitisations in Germany. In order to ensure that in case of an insolvency of the originator the SPV has a right to segregation (*Aussonderung*) of the collateralised assets the transfer of title to the purchased assets was required. It is obvious that such a "true sale" raises legal and technical issues. There was, e.g., a discussion triggered by a decision of the Higher Regional Court Frankfurt in 2004 whether the banking secrecy could encompass an implied prohibition of assignment of bank loans. Special difficulties were to be observed for the securitisation of receivables which are secured by registered mortgages (*Hypotheken*) or land charges (*Grundschulden*): A transfer of receivables backed by registered mortgages or land charges requires registration with the land register, which is time consuming and expensive.

The alternative, a fiduciary arrangement where the originator continues to hold title to the sold assets as fiduciary on behalf of the SPV, was and continues to be subject to formal requirements: In order to be recognised as a fiduciary arrangement based on which segregation could be claimed, the fiduciary must acquire title to the assets directly from the SPV or a third party. This would require a transfer of title from the originator to the SPV and back to the originator. In practice a compromise was used: The originator kept the title to purchased assets, but was obliged to immediately transfer title to the sold receivable if certain events of default (e.g., a material adverse change of creditworthiness) occurred.

On 28 September 2005, the Act on the Creation of a Refinancing Register came into force. It introduces a new legal instrument: the refinancing trust (*Refinanzierungstreuhand*), enabling refinancing enterprises (*Refinanzierungsuntenehmen*) –i.e., enterprises that sell for refinancing purposes assets out of their business establishment – to segregate sold assets without transferring title to it simply by registration in a refinancing register (*Refinanzierungsregister*). It thereby offers an additional technique to facilitate true sale securitisation in Germany.

The new Act changes the German Banking Act (*Kreditwesengesetz*) by inserting a new sub-chapter on refinancing registers. The core provision is Section 22j of the Banking Act which provides that "…*assets of a refinancing enterprise duly registered in the refinancing register may be claimed for segregation by the beneficiary pursuant to Section 47 of the Insolvency Act*..." Beneficiary (*Übertragungsberechtigter*) means a SPV (*Zweckgesellschaft*), a credit institution acting as refinancing intermediary (*Refinanzierungsmittler*) or a mortgage bank that has a right to claim transfer of assets of the refinancing enterprise. Further, Section 22d(4) of the Banking Act provides that a receivable is eligible for registration and transfer to the beneficiary even if the assignment of the receivable is prohibited by oral or implied agreement between debtor and creditor.

Refinancing registers can only be maintained by credit institution and certain specified entities (e.g., the *Deutsche Bundesbank*, the *Kreditanstalt für Wiederaufbau KfW*, the public debt administration of a State) that use them as refinancing enterprise for own securitisation. A refinancing enterprise that is not a credit institution may use the refinancing register of a bank or the *KfW*. The refinancing register can be kept electronically. The proper operation of the register is supervised by an administrator (*Verwalter*) who is appointed by the German banking supervisory authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*).

ANNEX V

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ANNEX VI

COMPOSITION OF THE EFMLG

AND OF THE EFMLG WORKING GROUP ON SECURITISATION AND

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ANNEX VII

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ON LEGAL OBSTACLES TO CROSS-BORDER SECURITISATIONS

IN THE EU, 12 JUNE 2006, PARIS, BNP-PARIBAS

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