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5 October 2006

Attn. Stéphane Kerjean

Senior Legal Counsel

European Central Bank - Directorate General Legal Services

Coordinator of the EFMLG Working Group on Securitisation

Dear Sir:

Legal Obstacles to Cross-Border Securitisation in the EU

The European Securitisation Forum (“ESF” or “Forum”)¹ would like to thank you for the opportunity to submit our thoughts with regard to the “Questionnaire on Legal Obstacles to Cross-Border Securitisations” and the “Assessment to the Replies to the Questionnaire” (jointly the “EFMLG’s Report”), following the hearing held on 12th June.

The ESF appreciates in particular that the EFMLG has devoted a great deal of time to consider current legal obstacles to cross-border securitisation. As you already know, the ESF produced in May of 2002 “A Framework for European Securitisation” (the “Framework”) setting up the elements needed to build up a more uniform and harmonised framework for securitisation in Europe. The ESF has since then advocated changes to certain national frameworks that are currently inconsistent with some of the goals pointed out by the, with the ultimate goal of ensuring a level playing field for securitisation market participants across Europe.

¹ The ESF is an organisation which brings together securitisation market participants throughout Europe and which comprises over 160 firms from across the Continent. The purpose of the ESF is to promote the efficient growth and continued development of securitisation throughout Europe by advocating the positions and represent the interests of its members. The Forum also identifies, recommends and implements market standardisation policies, practices, guidelines and related documentation, to promote liquidity, transparency and efficiency in the primary and secondary European securitisation markets. The Forum also undertakes initiatives designed to educate and inform external constituencies, including legislative and regulatory officials, the financial media, industry participants and others concerning the operation, importance and policy benefits of the securitisation markets and related activities throughout Europe.



The EFMLG's Report shows that, although many positive steps have been taken by various Member States to promote and develop their national securitisation markets, there still remain significant differences between the various jurisdictions. In this sense, it is this very disparate degree of legal, and thus market, development of each Member State, rather than any wilful intention to raise barriers that hinders cross-border securitisation. Indeed, we noted in the Framework document that "the absence of a more homogenous securitisation market infrastructure throughout Europe has obvious and deeply-rooted underlying causes -including significant legal, regulatory, social, cultural, behavioural and economic differences among individual European jurisdictions".

At the moment, in our view these deeply-rooted underlying causes present significant obstacles to a single, comprehensive EU securitisation legal framework. Many national securitisation laws were indeed developed in reaction to a specific local industry or business need, and they are not flexible enough in many cases as a result.

Rather than attempting to put together a single legal framework for all Member States, we recommend that EU efforts should focus in the short term on providing a set of principles for Member States to develop their national frameworks with a view to a *de facto* harmonisation in the future as markets mature and converge. This action could be coupled by EU initiatives to remove specific obstacles to cross-border securitisation in matters within its direct regulatory powers. In this context, cross-border securitisation should be understood to include both the transfer of assets located in more than one jurisdiction as well as the ability of originators, servicers and other market participants to more easily provide services on a cross-border basis and in a level playing field.

The ESF would certainly support any such initiatives from the EU and would like to contribute with some initial suggestions contained in this letter.

For the avoidance of doubt, we would like to clarify that this letter only covers cash securitisation issues. The scope of this letter does not include the following matters either:

- a) Accounting issues (IAS 39 and IAS 27-SIC 12), in respect of which we are actively liaising with the International Accounting Standard Board (IASB);
- b) Financial Institutions' Capital Regulatory issues within Directive 2006/48/EC (CRD), in respect of which we are engaged in conversations with national Regulators on the implementation of this Directive and will be reaching out to the European Commission and to CEBS on EU-wide issues;
- c) Insurance securitisation in the context of Solvency II, for which we are liaising with CEIOPS and national Finance Ministries

1. Summary of principles for the development of national securitisation frameworks



The purpose of the ESF's framework document was to “establish a set of agreed principles beneficial to the promotion of securitisation in Europe”. The ESF continues to uphold those principles and recommends their endorsement to the extent necessary by the EU to guide the development of securitisation frameworks in Member States, especially for those countries lagging behind or those which have not yet developed any regulation for securitisation.

At the very least, specific principles in matters concerning the origination and transfer of assets to SPVs, taxation or insolvency issues should be developed, as these matters are well beyond the capacity of the EU to produce effective regulation. We summarise below the main principles that we consider relevant in this regard:

- a) Origination of assets:
 - (i) To have laws relating to the origination of assets that do not impose restrictions to the types of assets that can be securitised, whether they are assets, receivables, debts, claims, present and future, performing or non-performing, or to the type of originators that may securitise;
 - (ii) To have laws that ensure the enforceability or realisation of the asset by the SPV or the contractual servicer, without need to “join in” the originator;
- b) Transfer of assets and bankruptcy remoteness:
 - (i) To have laws and regulations that do not impose costly or time-consuming formalities for the true sale or legal assignment of assets, including their ancillary rights. As an alternative to the transfer of the assets, laws could provide for the use of loans or securities backed by a security over the assets with similar ring-fencing and bankruptcy remoteness effects of a true sale;
 - (ii) To have laws that provide for the clear “ring-fencing” of the assets and the bankruptcy remoteness of the SPV in case of the insolvency of the originator and regardless of the domicile or place of incorporation of the SPV (further regulatory action could be taken by the EU in this regard as described below);
 - (iii) To remove any requirement to notify debtors for the effectiveness of the transfer and to have regulations that prevent set-off of existing claims with the originator by non-notified debtors;
 - (iv) To have laws that prevent insolvency/bankruptcy officers from interfering with cashflows associated with securitised assets (“co-mingling”) or the disposal by such SPVs of those assets to third parties;



- c) Taxation:
- (i) To remove any withholding tax on cashflows both in and out of the SPV, as well as to investors in the SPVs-issued bonds;
 - (ii) To remove or mitigate stamp duties, transfer taxes and capital duties that may apply to transfers of assets into an SPV;
 - (iii) To have SPVs that are fiscally transparent and achieve tax neutrality; and
 - (iv) To exempt from VAT services paid by the SPV to transaction parties.

2. EU regulation to remove specific obstacles to cross-border securitisation

In addition to setting up certain principles to promote the further development of national securitisation frameworks, we recommend that the EU takes regulatory initiatives in the following areas to remove specific obstacles to cross-border securitisations:

- **Cross-border recognition of securitisation SPVs**

Given the existing variety of securitisation SPV models within national frameworks, we do not think appropriate for the EU to regulate an “European SPV”, but certain steps could be taken to provide for the cross-border recognition of *existing* SPVs:

- a) Concept of “recognised SPV”: the EU could create a broad concept of “recognised securitisation SPV” along the lines of the SSPE’s definition in art. 4(44) of the CRD²; and
- b) Protection of transfers of assets to a “recognised SPV”: regulation could be passed to ensure that transfers of assets located in an EU jurisdiction different from the SPV jurisdiction are given the same effects of the transfers of assets located within the same SPV jurisdiction, in terms of ring-fencing and bankruptcy remoteness. This could be achieved:
 - By submitting the transfer of assets to a “recognised SPV” to the law governing the SPV itself or, alternatively, by allowing the parties to choose the law governing the “recognised SPV” as the law governing the transfer

² As a reference, art. 4(44) of the CRD includes the following definition: “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”

of the assets. This could be introduced in the context of the “Rome I Regulation” process which the Commission is already undertaking;

- By amending Council Regulation (EC) 1346/2000 on Insolvency Proceedings and Directive 2001/24/CE on the Reorganisation and Winding up of Credit Institutions to ensure the bankruptcy remoteness of cross-border transfers of assets to a “Recognised SPV”. In this regard, we recommend amending art. 13 of the Regulation and art. 30 of the Directive to clarify that a transfer of assets to a “Recognised SPV” will not be deemed a “Detrimental Act” unless the originator’s creditors provide proof that such transfer can be declared null and void in accordance with the law governing the transfer.



- **Banking licence issues**

The ESF would support an EU initiative to clarify the scope of article 5 of the CRD in a manner that expressly exempts the securitisation SPVs from the obligation to obtain a banking licence. Furthermore, origination should not be subject to banking or other type of licence.

As highlighted in the EFMLG Report, servicing of securitised assets is subject to a banking licence in certain EU Member States or, as matter of practice, servicing can only be carried out by financial institutions due to constraints or lack of clarity in local laws. The ESF would certainly support any amendments to the CRD and to any other relevant piece of EU legislation to expressly exclude servicing from the scope of banking licence requirements as well as to, generally, ensure that non-bank servicers can service portfolios of securitised assets.

- **Data Protection issues**

As explained at the 12th June hearing by the industry representatives, third party servicing, both by banks and non-banks, is seriously hindered by data protection constraints.

The ESF would support an EU initiative to amend the Directive 95/46/EC (Data Protection Directive) to ensure that the securitised assets may be transferred to a third party servicer without triggering any doubts with regard to breaches in data protection duties and without requiring any burdensome formalities associated with such a transfer.

- **“26th Regime” for Securitisation**

As it was noted by the industry representatives at the 12th June hearing, a “26th Regime” for securitisation could be a workable initiative to promote a single type of “tick the box” cross-border securitisation framework, whereby market participants

could elect to have a transaction governed under local national rules or the alternative “26th Regime” if certain criteria are met.



The ESF would support a project of the EU in this regard, provided that there is consensus between Member States and within the industry to take this step. In any event, this would seem like a longer term project given the need for that consensus prior to its inception, thus we recommend that the EU first takes the initiatives outlined above of establishing principles for Member States to consistently develop modern and flexible securitisation frameworks and removing specific obstacles for cross-border securitisation in EU legislation.

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The ESF sincerely appreciates the opportunity to present this letter to the EFMLG with initial suggestions on cross-border securitisation issues. We are keen to continue the fruitful dialog we have opened with the EFMLG on these matters and would be pleased to discuss our suggestions in greater details if you deem it necessary.

Please do not hesitate to contact Rick Watson (Managing Director, Head of the ESF) or Carlos Echave (Director, ESF) at +44.20.77.43.93.11 should you have any questions.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Carlos Echave". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Carlos Echave
Director and Regulatory Counsel
ESF