Securitisation 2023

Last Updated January 12, 2023

Spain

Contributed By Cuatrecasas

Close All

Law and Practice

Authors


Jaime de la Torre


Arnau Pastor


Jaime Juan Rodríguez

Cuatrecasas has a multidisciplinary and highly qualified team of more than 1,000 lawyers and a network of 27 offices in 13 countries (with a strong presence in Spain and Portugal, as well as in Latin America). It advises on all areas of business law, adopting a sectoral approach and focusing on all types of business, and has extensive knowledge and experience in giving the most sophisticated advice, covering ongoing and transactional matters. Teams are highly specialised, made up of lawyers from different practices who offer efficient solutions through a transversal vision of clients' businesses. Cuatrecasas carries out securitisation transactions within the various models (mortgage, assets and synthetic), providing legal advice to originators, management companies, rating agencies and underwriting banks. It actively participates in the structuring of receivables financing through conduits abroad, and in transactions to assign credit and sell credit portfolios (performing and non-performing loans).

1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

Insolvency laws can affect securitisation at the following three levels:

- the special-purpose entity (SPE);
- the assignor of the receivables; and
- the management company.

Insolvency of the SPE

A Spanish SPE takes the form of a securitisation fund (*fondo de titulización*). By regulatory definition, an SPE has a separate set of assets and liabilities, lacks legal personality and is controlled by a management company – see **4.10 SPEs or Other Entities** for further details.

Article 1.1 of the Spanish Insolvency Law (Royal Decree-Law 1/2020, as amended) requires the status of "debtor" to be applied only to a natural and legal person, so the SPE's lack of legal personality precludes the application of the insolvency proceedings thereto. In sum, securitisation noteholders (and other creditors, if any) will have limited recourse against the SPE: its assets.

Insolvency of the Assignor of the Receivables

Assignors of receivables to an SPE are typically entities with a legal personality, and are therefore subject to insolvency proceedings. The main risk in the context of a securitisation transaction is a potential claw-back challenge that could jeopardise the transfer of the receivables to the SPE (to the detriment of the asset pool to which the noteholders have recourse).

In connection with the assignment of assets perfected prior to the insolvency proceeding, Spanish Law 5/2015 provides for a safe harbour: during the two-year claw-back challenge period, the insolvency administrator will be able to raise a claw-back challenge if fraud can be evidenced.

A right of removal (*derecho de separación*) should be applied under the terms provided in Articles 239 and 240 of the Spanish Insolvency Law. That means that the perfected assignment of the relevant receivables shall be considered the property of the SPE, held by the insolvent assignor, over which the assignor has no rights of use, security or retention (Article 239.1 of the Spanish Insolvency Law), except for money (due to its fungible condition there is commingling risk, even if paid into a separate bank account with no other source of cash).

Therefore, the assignment (or transfer) of the receivables from the assignor to the SPE is not subject to a severe claw-back risk.

Insolvency of the Management Company

Article 33 of Law 5/2015 provides for the compulsory replacement of the management company whenever such is affected by an insolvency situation.

1.2 Special Purpose Entities (SPEs)

Structural Aspects of the SPE

The applicable Spanish regulation does not contain a wide margin of discretion. An SPE has to be incorporated as an ad hoc special purpose fund, devoid of legal personality, and administered by a securitisation management company.

Securitisation management companies are special entities specifically designed with an ad hoc status to serve as the management companies of securitisation SPEs. These entities shall have the suffix "SGFT" in their legal name (*sociedad gestora de fondos de titulización*) and must be authorised by the Spanish Securities Exchange Commission (*Comisión Nacional del Mercado de Valores* – CNMV).

The CNMV has a list of authorised management companies available on its website.

SPEs cannot have directors; they are administered by securitisation management companies instead. Moreover, SPEs cannot enter into transactions other than those expressly authorised and disclosed in the corresponding deed of incorporation (and in the prospectus, when applicable). Therefore, SPEs are ring-fenced in the sense that transactions other than those specifically needed for the securitisation transaction purposes are not legally allowed.

Substantive Consolidation

The Spanish general doctrine establishes that substantive consolidation may take place when the estates of different entities are significantly blended – ie, when it is rendered unfeasible to carve out different pools of claims.

However, the general doctrine on substantive consolidation is irrelevant in the context of Spanish securitisation. The bankruptcy-remote nature of the SPE is not affected by this issue, as the insolvency regime is not applicable to SPEs.

1.3 Transfer of Financial Assets

Perfection of the transfer must observe a number of features in order to have erga omnes effects. Some features are general (applicable to any kind of underlying asset type), while other features are specific to an asset type (eg, mortgage receivables).

Please see **4.1 Specific Disclosure Laws or Regulations** regarding the general characteristics, as per Law 5/2015.

Documentation Best Practices

Although any written form is legally possible and enforceable among the parties, the best practice is to document the transfer as a notarial document before a public notary.

In general, the transfer of mortgage receivables shall be documented in a public deed (*escritura*), while other assets (consumer, credit cards, auto, etc) shall be documented in a notarial deed (*póliza*).

The Transfer of Mortgage Receivables by Credit Entities

A special regime applies to the transfer of mortgage receivables by a credit entity – please see **4.9 Banks Securitising Financial Assets**.

True Sale

A true sale of the underlying receivables is effected when the documentation best practices referred to above are observed.

Usually, the counsel drafting a securitisation transaction will include a section in the legal opinion regarding the “true sale” nature of the assignment of receivables.

Notification to Borrowers

When structuring a securitisation, one of the items that must be reviewed during the legal due diligence is the transferability of the loans. Customarily, the loans shall include a clause allowing the assignment of the receivables by the lender without any consent.

A notification to borrowers has the following legal implications.

- Perfection: the perfection of the transfer of the receivables is not a legal requirement. However, until it is notified that the receivables have been transferred, a borrower will be legally discharged of its obligations for payments made to the original lender, and

will be able to set-off obligations against the original lender, pursuant to Article 1,198 of the Civil Code (this can be an issue if the original lender performs retail banking, although some mitigants can be structured).
- Consumer protection: autonomous regions have introduced legislation in the field of consumer law that imposes an obligation on assignors to send a notification disclosing certain information. The lack of notification may not have an effect on the perfection (or enforceability) of the transfer, but it can trigger administrative sanctions and reputational risks. An ad hoc review shall be made on a case-by-case basis due to the rapid development of this kind of legislation.

1.4 Construction of Bankruptcy-Remote Transactions

There are no additional means by which to enhance the bankruptcy-remoteness of a securitisation in Spain, apart from the regulatory framework and the best practices described in **1.3 Transfer of Financial Assets**.

Customarily, the drafting counsel includes a section on insolvency in the transaction legal opinion, covering at least the following items:

- the insolvency of the assignor and a description of the safe harbour;
- the non-applicability of the insolvency regime to the SPE; and
- the replacement of the management company when it is affected by an insolvency situation pursuant to Article 33 of Law 5/2015.

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

Under Spanish value-added tax (VAT) legislation, the transfer of receivables would be a supply of services for VAT purposes, which would be deemed to be located in the place where the recipient of the services is established for VAT purposes. Therefore, as long as the recipient of the services (SPE) is established for VAT purposes within Spanish VAT territory or has a permanent establishment within the Spanish VAT territory to which the service is supplied, the transfer would be subject to VAT in Spain, but exempt.

Note that the services rendered by the seller to the purchaser, consisting of the collection of the payments made by the obligors, would be considered a separate transaction. According to the Spanish general VAT location rules, such collection services would be deemed to be located in the jurisdiction where the purchaser is established for VAT purposes.

In addition, provided the assignment of the receivables is formalised by means of a public deed and meets certain requirements (ie, the receivables have an ascertainable value; the transaction has a document that can be registered in a public registry, regardless of whether it is effectively registered; and the receivables are not subject to transfer tax, capital duty or inheritance gift tax), the assignment shall be subject to stamp duty. Tax rates currently range between 0.5% and 2%, depending on the autonomous region in which the public deed is to be registered. However, a specific exemption from this stamp duty tax applies when the originator assigns mortgage transfer certificates (*certificados de transmission de hipoteca* – MTCs) or mortgage participations (*participaciones hipotecarias* – MPs) over mortgage loans. This exemption is governed by Law No 2/1981 and by transfer tax and stamp duty legislation.

2.2 Taxes on SPEs

The SPE is subject to the general provisions of the Corporate Income Tax (CIT) Law. The taxable base is calculated in accordance with the provisions of Section IV of the CIT Law. The current applicable tax rate is 25%.

The SPE's CIT taxable base is generally close to nil as its financial income (interest earned from the receivables) offsets its financial expenses (interest paid to the bondholders). However, certain specific CIT features are applicable to the SPE, as follows.

- The tax deductibility of the impairment in the value of debt securities registered as assets in the SPE – in this regard, rule 13 of CNMV Circular 2/2016 sets forth the criteria for the SPE to carry out value adjustments resulting from the impairment in the value of their registered financial assets. Article 13.1 of the CIT Law states that the CIT regulations (Article 9 and the seventh Transitory Provision) will rule the conditions for the deductibility of value adjustments made on account of the impairment in the value of debt securities valued at amortised cost.
- Pursuant to Article 16.6 of the CIT Law, the limitation on the tax deductibility of financial expenses shall not be applicable to the SPE.
- The yield of credit rights that constitute the income of the SPE shall not be subject to any withholding tax on account of the CIT liability payable by the SPE.

The SPE can be considered an entrepreneur for VAT purposes. However, as SPEs carry out VAT-exempt activity, they are not entitled to deduct any input VAT.

2.3 Taxes on Transfers Crossing Borders

Whether the payments on the receivables made to a non-Spanish tax resident purchaser by Spanish obligors would be subject to withholding taxes in Spain depends on the characterisation, for tax purposes, of the income received by the purchaser, and on the jurisdiction where the purchaser resides for tax purposes.

Although the tax characterisation of the income obtained by the non-Spanish tax resident purchaser is not clearly defined under Spanish law, it is likely to be deemed to be either interest income or capital gains.

According to the Spanish Non-Resident Income Tax Law, regardless of whether it is characterised as interest or capital gains, such income would be tax-exempt in Spain to the extent the purchaser meets the following requirements:

- it is resident for tax purposes in an EU member state or in a state within the European Economic Area (EEA), other than a tax haven territory, provided that the purchaser is also the "beneficial owner" of such income; and
- it does not act, in regards to the purchase of the receivables, through a permanent establishment located in Spain or outside the EU or EEA.

Residency for tax purposes in an EU member state or in a state within the EEA must be accredited through a certificate of tax residency issued by the relevant tax authorities. Tax residency certificates are valid for a one-year period.

If the purchaser is resident for tax purposes in a state that is neither an EU member state nor a state within the EEA, it may be subject to withholding tax in Spain in accordance with the provisions set forth in the relevant convention for the avoidance of double taxation.

Residency in a particular jurisdiction for the purposes of the application of a reduced rate of withholding tax in accordance with a specific convention must be accredited through a certificate of tax residency, issued by the relevant tax authorities. These certificates are valid for a one-year period.

If the purchaser is not accredited to be tax resident in an EU member state or a state within the EEA, nor in a jurisdiction with which Spain has a convention for the avoidance of double taxation in force, the purchaser would be subject to tax on the income derived from the transaction at the general current tax rate of 19%.

For Spanish VAT purposes, the transfer of receivables would be a supply of services, which would be deemed to be located in the place where the recipient of the services is established for VAT purposes. Therefore, as long as the recipient of the services (purchaser) is not established for VAT purposes within Spanish VAT territory or does not have a permanent establishment within the Spanish VAT territory to which the service is supplied, the transfer would not be subject to VAT in Spain.

2.4 Other Taxes

The incorporation of the SPE is subject to but exempt from "Capital Duty" (*Operaciones Societarias*) (Article 45.I.B.20.4 of the Revised Text of the Law on Transfer Tax and Stamp Duty). The incorporation and winding-up of the SPE is not subject to Stamp Duty Tax (Article 31.2 of the Revised Text of the Law on Transfer Tax and Stamp Duty).

2.5 Obtaining Legal Opinions

Legal opinions usually cover taxation matters, such as the taxation of the transaction (including stamp taxes and VAT on the transfer of the receivables and on the collection services provided to the SPE) and the taxation of the investors on the income deriving from the notes issued by the SPE.

3. Accounting Rules and Issues

3.1 Legal Issues With Securitisation Accounting Rules

There are three accounting issues related to securitisation:

- a review of the status of the receivables in the assignor's balance sheet prior to the securitisation – the receivables must be recorded as existing credit rights;
- SPEs have a legal obligation to audit the yearly financial accounts; and
- credit entities transferring mortgage loans according to the regime envisaged under Royal Decree-Law 24/2021 (further described in **4.9 Banks Securitising Financial Assets**) have to create and update a special accounting registry to keep track of the following, among other matters:
    - the total mortgage pool;
    - the MPs and MTCs issued (as defined in **4.9 Banks Securitising Financial Assets**);
    - the *cédulas hipotecarias* and *bonos hipotecarios* issued; and
    - the final balance of the eligible collateral available versus the already issued transfer titles.

3.2 Dealing With Legal Issues

Accounting rules do not usually trigger legal issues.

There is one special case where the review of the status of the receivables in the assignor's balance sheet prior to the securitisation is key: when the transaction involves the transfer of balloon instalments, it is necessary to confirm that, unlike leasing instalments, the balloon loan instalments are actually recorded as existing receivables.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

According to Article 17 of Law 5/2015, the assignment of receivables to an SPE is subject to the following requirements.

- The assignor must provide its audited annual accounts for the previous two years to the CNMV (unless it has been recently incorporated). This requirement does not apply when the securities issued by the SPE will be offered only to qualified investors and will not be traded on an official secondary market or multilateral trading system, nor when the guarantor or debtor of the assets being transferred is a public body.
- The assignor must detail the transactions involving the transfer of credit rights (whether regarding present or future receivables) in its annual reports.
- Transfers of assets to an SPE must be formalised in a written document.
- If additional assets are assigned to the SPE (beyond the initial ones), a notification must be sent to the CNMV identifying the assets incorporated and their characteristics, together with a representation stating that such new assets meet all the requirements set out in the SPE's deed of incorporation.

Moreover, pursuant to Article 34 of Law 5/2015, management companies shall publish the following information on their websites, for each of the SPEs they manage:

- the deed of incorporation and any other subsequent deeds;
- the prospectus and any supplements thereto, if applicable; and
- the annual/quarterly reports (see **4.4 Periodic Reporting**).

In addition, SPEs are generally subject to the disclosure requirements envisaged under the Securitisation Regulation (see **4.2 General Disclosure Laws or Regulations**).

4.2 General Disclosure Laws or Regulations

According to the Securitisation Regulation, SPEs shall make the following information regarding the securitisation available to the CNMV and the investors before pricing (and also to potential investors if they so require):

- all underlying documentation that is essential for the understanding of the transaction;
- where a prospectus has not been drawn up, a transaction summary/overview of the main features of the securitisation; and
- in simple, transparent and standardised (STS) securitisations, the STS notification.

In public deals, according to the Securitisation Regulation, disclosures must be made to a securitisation repository – ie, an entity duly registered for that purpose with the European Securities and Markets Authority (ESMA). The means of disclosure for private deals, on the other hand, is not prescribed. According to ESMA, "absent any instructions or guidance provided by national competent authorities, reporting entities are free to make use of any arrangements that meet the conditions of the Regulation."

4.3 Credit Risk Retention

Spanish regulations do not contain specific risk retention requirements for securitisation transactions; the applicable legal framework is to be found in Article 6 of the Securitisation Regulation, which establishes the obligation of the originator, sponsor and original lender to retain a material net economic interest of not less than 5% of the nominal value of the securitisation.

Such economic net interest shall be measured at the origination date, maintained throughout the securitisation transaction and determined by the notional value for off-balance sheet items. Furthermore, the net economic interest cannot be sold, divided between different retainers nor subject to any credit-risk mitigation, any short positions or any other hedging.

The Securitisation Regulation sets forth alternative procedures to comply with retention requirements:

- the retention of no less than 5% of the nominal value of each of the tranches sold;
- the retention of the originator's interest of no less than 5% of the nominal value of each of the securitised exposures (in revolving securitisations or securitisations of revolving exposures);
- the retention of randomly selected exposures, equivalent to no less than 5% of the nominal value of the securitised exposures, where such exposures would otherwise have been securitised in the securitisation and the number of potentially securitised exposures is not less than 100 at origination;
- the retention of the first loss tranche and, where such retention does not amount to 5% of the nominal value of the securitised exposures, if necessary, other tranches having the same or a more severe risk profile than those transferred or sold to investors and not maturing any earlier than those transferred or sold to investors, so that the retention is equal in total to an amount equivalent to no less than 5% of the nominal value of the securitised exposures; and
- the retention of a first loss exposure of not less than 5% of every securitised exposure.

4.4 Periodic Reporting

Law 5/2015 sets out a periodic reporting regime, with the CNMV being the national public body to which such reports and data must be delivered.

According to Article 35 of Law 5/2015, management companies of SPEs must submit the relevant SPE's annual financial statements to the CNMV for its registration, together with the auditors' report in respect thereof, within four months following the end of the SPE's financial year (ie, prior to 30 April of each year).

In addition, management companies must present the relevant SPE's quarterly report to the CNMV within two months of the end of each calendar quarter, including:

- a breakdown of the assets transferred to the SPE;
- a breakdown of the SPE's liabilities;
- the total commitments arising from the derivative instruments in place (when applicable);
- a breakdown of the fees paid by the SPE;
- a report regarding the compliance with the operating rules of the SPE set out in the deed of incorporation – if the management company carries out active management of the SPE, it must also submit a report on the compliance with the asset and risk management policies; and
- any other information that may be requested by the CNMV.

Pursuant to Article 36 of Law 5/2015, management companies must give immediate notice to the CNMV and to their creditors of any material event that is specifically relevant to the situation or development of the SPE (except in the case of an SPE whose securities are not admitted to trading on an official secondary market). Material facts specifically relevant to the SPE will be those that could have a significant impact on the notes issued and/or on its assets.

According to Article 7 of the Securitisation Regulation, the originator, the sponsor and the SPE of a securitisation shall designate one entity from amongst themselves to submit the information set out in points (a), (b), (d), (e), (f) and (g) of Article 7(1) to a registered securitisation repository.

If no prospectus has to be drawn up, it is not necessary to disclose such information through a registered securitisation repository.

The Commission Delegated Regulation EU 2020/1224 sets out the information and the details to be made available, and the Commission Delegated Regulation EU 2020/1225 sets out the format and standardised templates for making such information available.

Breach of the transparency obligations envisaged under the Securitisation Regulation may lead to pecuniary sanctions for the originator, sponsor or SPE. Likewise, if a regulator determines that a securitisation transaction did not comply or no longer complies with the reporting obligations, investors may be required by such regulator to set aside additional capital.

4.5 Activities of Rating Agencies

In Spain, the securitisation activities of rating agencies are primarily regulated under:

- Regulation EC 1060/2009 on credit rating agencies (the CRA), which has subsequently been amended by Regulation EU 513/2011 (CRA II), which transferred the responsibility for the registration and supervision of credit agencies to ESMA; and
- Regulation EU 462/2013 (CRA III), which introduced certain items in relation to credit rating agencies (eg, the reliance of firms on external credit ratings, independence, sovereign debt ratings, or the degree of competition in the industry or the liability regime).

On 30 September 2020, ESMA published the final report for its Guidelines on Internal Control for Credit Rating Agencies.

In relation to the material requirements, European financial institutions are only allowed to use for regulatory purposes the credit ratings issued – in general terms – by a credit rating agency that is certified or registered with ESMA, which oversees the registration of such agencies and supervises their activities.

CRA III establishes an obligation for any issuer, sponsor or original lender to appoint a minimum of two independent rating agencies if they intend to request a credit rating for a structured financial instrument. In addition, the issuer or any related third party should consider appointing a credit rating agency with less than 10% of the total market share.

According to Law 5/2015, in Spain the granting of a credit rating to the securitisation notes does not constitute a legal requirement to incorporate an SPE, but it is common market practice to assign ratings to the notes of public securitisations.

Finally, the main sanctions are set forth in CRA III and include pecuniary fines of between EUR25,000 and EUR750,000.

4.6 Treatment of Securitisation in Financial Entities

Banks' capital and liquidity requirements are regulated under the so-called "CRDV package" of legislation, which includes:

- Directive 2013/36/EU, regarding prudential supervision, which has been transposed into the Spanish legal framework by Law 10/2014 and Bank of Spain Circulars 2/2014 and 2/2016;
- Regulation EU 575/2013, on prudential requirements;
- Directive EU 2019/878, the transposition of which into the Spanish legal framework has been initiated by Royal Decree-Law 7/2021; and
- Regulation EU 2019/876 (CRR II).

In general terms, the CRDV package establishes the following two main requirements.

- The liquidity coverage requirement (LCR) assesses if the number of high-quality liquid assets (HQLA) owned by banks is sufficient to cover the liquidity needs over a stress period. In this regard, there are three tiers of HQLA (Level 1, Level 2A and 2B), and securitisations can only be eligible as Level 2B when the following requirements are fulfilled:
  - the securitisation qualifies as STS;
  - an external credit quality assessment has been conducted by an External Credit Assessment Institution;
  - the position has the highest level of seniority, given that the securitisation transaction fulfils certain requirements in terms of minimum size and weighted average life; and
  - the underlying exposures that back the securitisation belong exclusively to certain subcategories (eg, residential loans, or commercial loans to finance capital expenditure).
- the net stable funding requirement (NSFR) has the main purpose of ensuring that banks do not suffer from a short-term funding crisis, by establishing the holding of a minimum level of stable funding. In this regard, in the securitisation context, an originator bank is required to establish a certain level of stable funding in relation to the assets held. In addition, a bank that invests in a securitisation will be required to establish a certain amount of stable funding in relation to the securitisation that it is holding.

The legal framework for insurance companies is contained in Law 20/2015 and Royal Decree 1060/2015, regarding the regulation, supervision and solvency of insurance and reinsurance entities.

The requirements in relation to other regulated financial entities (eg, alternative investments fund managers) are established in Law 22/2014, regulating venture capital entities, other closed-ended collective investment entities and management companies of closed-ended collective investment entities.

4.7 Use of Derivatives

With regards to the use of derivatives in securitisation transactions, Law 5/2015 lays out only a few provisions:

- pursuant to Article 35, management companies shall submit an annual report (as described in **4.4 Periodic Reporting**) to the CNMV for each of the funds they

manage, which must include, inter alia, the total commitments arising from the derivatives in place (if any); and
- Article 19 defines the framework for synthetic securitisation; please see **7.1 Synthetic Securitisation Regulation and Structure**.

Derivatives continue to be a common tool to hedge possible risks for SPEs, mainly interest rate risk, which is hedged by means of swaps and caps.

The CNMV is the Spanish supervising body for the derivatives market, as well as the principal regulator of the entities operating in such market. When the relevant entity is a credit institution, the Bank of Spain may also have certain supervisory or control functions.

In any case, the bulk of the regulation on derivatives can be found in Regulation EU 648/2012 of the European Parliament and of the Council (as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 (EMIR)). In this regard, EMIR provides for collateral posting obligations and central clearing of derivatives. However, EMIR also provides for some exemptions to such collateral posting and clearing obligations in the context of STS securitisations.

4.8 Investor Protection

Securitisation in Spain is a regulated activity under Law 5/2015, supervised by the CNMV. For public SPEs, a prior authorisation is required from the CNMV, which is the supervisory body responsible for approving and registering the relevant prospectuses. For private securitisations that do not require a prospectus to be published, the CNMV performs an ex-post control, as the deed of incorporation of the SPE must be registered in the CNMV's records. In this regard, note that securitisations can only be carried out in Spain through securitisation funds, as further discussed in **4.10 SPEs or Other Entities** and **4.11 Activities Avoided by SPEs or Other Securitisation Entities**.

In addition, Law 5/2015 foresees the possibility of setting up the so-called "meeting of creditors" (*Junta de Acreedores*), which is a creditors' committee in the context of a particular securitisation transaction that constitutes an additional protection for investors (please see **6.6 Trustees**).

In any case, European regulation is the main legal framework that provides protection for investors by virtue of:

- the Securitisation Regulation, which contains, among others, the disclosure requirements and the compulsory periodic reporting obligations; and
- when applicable, the Prospectus Regulation, which ensures that investors will be provided with all material information regarding a securitisation transaction.

On a separate note, Article 3 of the Securitisation Regulation prohibits selling securitisation positions to retail clients (as defined in point 11 of Article 4(1) of Directive 2014/65/EU), unless the seller of the securitisation position carries out a suitability assessment on the potential client (in the terms explained in **6.5 Investors**).

4.9 Banks Securitising Financial Assets

In Spain, the applicable legal provisions for securitising banks are to be found primarily in the Securitisation Regulation, the CRR and Law 5/2015. In addition, the following Spanish legal requirements must be considered.

Mortgage Loans

The applicable legislation establishes that the credit rights arising from mortgage loans can be assigned by means of transferrable securities called mortgage participations (MPs) (*participaciones hipotecarias*). In order to transfer said credit right through an MP, the following conditions must be met:

- the mortgage loan shall be secured with a first-rank mortgage;
- the LTV does not exceed 60% or 80% regarding residential properties;
- the mortgaged property is insured against damages; and
- the assets do not qualify as excluded assets (eg, mortgage loans granted over a right of usufruct, surface rights or administrative concessions).

If any of these requirements are not met, the credit rights may be transferred through different transferrable securities, called mortgage transfer certificates (MTCs) (*certificados de transmission de hipoteca*). However, MTCs can only be held by qualified investors.

Spanish laws confer a privileged regime to MPs and MTCs regarding the following:

- the process of registration with the relevant Land Registry;
- taxation (ie, both the issuance and the transfer benefit from an exemption on stamp duty tax); and
- insolvency (ie, the insolvency authorities can only challenge the issuance of MPs/MTCs if there has been fraud in said issuance).

The legal requirements for mortgage loans (which are secured by mortgages over real estate properties) granted by credit institutions are to be found in Royal Decree-Law 24/2021 and Law 2/1981 on the Mortgage Market Law and the respective development regulation (ie, Royal Decree 716/2009, of 24 April).

Royal Decree-Law 24/2021 entered into force on 8 July 2022 and comprehends a legal environment for the MPs and the MTCs replicating the main features of the MPs/MTCs as they were envisaged under Law 2/1981 and Royal Decree 716/2009.

Therefore, MPs/MTCs issued prior to 8 July 2022 will continue to be governed under Law 2/1981, while MPs/MTCs issued after such date will be governed under Royal Decree-Law 24/2021.

Issuers of MPs/MTCs shall retain the custody and management of the relevant mortgage loan, so they shall transfer to the holders of the MPs/MTCs the principal and interests received by virtue of the underlying loans (in the same percentage of its participation in the relevant mortgage loan).

Holders of MPs/MTCs have certain faculties. For example, if a given obligor defaults on its obligations under the underlying mortgage loan, the holder of the relevant MP/MTC is entitled to compel the issuer to initiate the execution of the mortgage; if the issuer does not do so within 60 days, the holder of the MP/MTC will be entitled to enforce the mortgage pro rata to their stake in the mortgage loan.

Consumer Loans

The applicable Spanish legal framework does not establish particularities in relation to the sale and perfection of consumer loans. However, according to Law 16/2011, if a loan is assigned by the original lender and this is no longer the servicer, a notification to the customer shall be completed.

4.10 SPEs or Other Entities

Securitisation in Spain is regulated under Law 5/2015, according to which Spanish securitisation transactions can only be carried out specifically through a securitisation fund (*fondo de titulización*) (the SPE).

A Spanish securitisation fund is a vehicle without legal entity with the purpose of acquiring claims transferred by the seller with the proceeds of an issuance of fixed income securities (securitisation notes) or loans, which is governed by Law 5/2015.

An SPE constitutes an independent economic unit made up primarily of the assigned claims and the securitisation notes, and has a defined term after which the assets will be liquidated and the liabilities discharged, up to the value of the asset proceeds. Any other transaction related to the SPE is incidental to these primary operations.

Spanish securitisation funds (SPEs) are not legal entities; therefore, only specialised management companies called Securitisation Fund Management Companies (*Sociedades Gestoras de Fondos de Titulización* – SGFT), which are regulated under Law 5/2015 (Title III, Chapter II), can handle the incorporation, management and legal representation of an SPE.

These management companies must be authorised by the CNMV and have the sole purpose of incorporating, managing and representing SPEs in the interest of the noteholders. They must meet certain requirements, including:

- having personnel with expertise;
- thoroughly assessing risks in relation to securitised assets;
- avoiding conflicts of interest; and
- complying with reporting requirements.

According to Article 25.2 of Law 5/2015, Spanish management companies may only incorporate, manage and represent foreign SPEs and special purpose vehicles that are similar to Spanish securitisation funds in accordance with the applicable regulations of the relevant jurisdiction.

4.11 Activities Avoided by SPEs or Other Securitisation Entities

As explained in **4.10 SPEs or Other Entities**, securitisation in Spain is only carried out through SPEs (with the characteristics described above), which are managed by SGFTs, which are companies whose sole purpose is to manage such securitisation SPEs in Spain and abroad (as set out in Law 5/2015 – please see **4.10 SPEs or Other Entities**).

4.12 Material Forms of Credit Enhancement

Of the multiple material forms of credit enhancement used in Spanish securitisation transactions, the following are the most frequent:

- subordination through splitting the notes issued into tranches;
- reserves (cash or highly liquid investments);
- hedging instruments (especially interest rate swaps and cap agreements);
- over-collateralisation; and
- reverse accounts and spread accounts.

4.13 Participation of Government-Sponsored Entities

In general, government-sponsored entities do not participate in the securitisation market.

4.14 Entities Investing in Securitisation

Securitisations can have a wide variety of investor profiles, including credit institutions, investment funds, insurance companies and other institutional investors.

5. Documentation

5.1 Bankruptcy-Remote Transfers

The prospectus and the deed of incorporation must establish the following:

- that the SPE is a securitisation fund governed under Law 5/2015, as a separate estate of assets and liabilities devoid of legal personality, and is therefore not subject to the proceedings detailed in the Insolvency Law;
- that the SPE is an ad hoc fund specifically designed to carry out the securitisation transaction – expressly rejecting the possibility of the SPE entering into other transactions not foreseen or authorised in the prospectus and the deed of incorporation;
- that the assignor includes a declaration that the financial statements of the last two financial years have an unqualified opinion from the relevant auditor;
- in order to mitigate the set-off risk derived from retail banking activities, the seller normally includes a written undertaking holding the SPE harmless for any set-off performed by a debtor against a receivable;
- since assignors typically continue to be servicers of the receivables, standard servicer replacement events shall be established linked to the servicer's rating or insolvency proceeding; and
- an accounts provider replacement event shall be included, usually linked to the long-term deposit rating.

5.2 Principal Warranties

The documentation formalising the incorporation of a securitisation SPE normally includes certain representations and warranties (R&W) stated by the originator with regards to both its capacity as originator and the underlying assets of the transaction. These R&W are set out in the SPE's deed of incorporation and, where applicable, also in the relevant prospectus.

The most common R&W regarding the originator cover the following aspects:

- the legal form of incorporation;
- that there has been no insolvency or bankruptcy;
- that it has obtained all necessary authorisations (administrative and corporate), including from third parties (if applicable), to validly perform the assignment of the relevant assets; and
- that it has audited annual accounts for the two previous financial years, unless it is a recently incorporated company.

Widely accepted R&W regarding the underlying assets cover the following aspects:

- that they have been originated in the ordinary course of the originator's business;
- that they exist and are valid and susceptible to enforcement or claim in accordance with applicable laws;
- that they meet all necessary conditions to be assigned to the SPE;
- that they are not of a lower credit quality than other similar assets in the originator's portfolio that are not securitised;

- that they comply with the homogeneity factors within the meaning of Articles 1 and 2 of the Commission Delegated Regulation of 28 May 2019 (in the case of residential loans, commercial loans secured with mortgages over real estate, credit facilities, auto loans and leases, trade and credit card receivables); and
- other agreed R&W related to the portfolio (eg, maturity, outstanding principal balance, existence of security, documentation).

If at any time after the date upon which an asset was transferred to the SPE it is detected that any such assigned asset has hidden defects and is not compliant with the relevant R&W at the time those R&W were made, the following waterfall of actions is usually implemented in order to avoid harmful effects for the SPE:

- remedy – the defect is remedied, if possible;
- replacement – if no remediation is possible, the originator shall replace the corresponding asset with another that has at least similar characteristics (in terms of credit quality, outstanding nominal balance rate of interest, remaining term, and other agreed items); or
- repurchase – the originator undertakes to return, in cash, the principal.

If none of the above actions were implemented in order to correct the asset defects, or if the originator's capacity R&W were untrue, an action to claim damages against the originator could be initiated by virtue of the transaction documentation.

5.3 Principal Perfection Provisions

According to Article 17 of Law 5/2015, the assignment of receivables to an SPE is subject to the requirements listed in **4.1 Specific Disclosure Laws or Regulations**.

Moreover, a description of the assets/receivables to be transferred to an SPE shall be provided, identifying their main features. However, Law 5/2015 does not determine which data would be deemed sufficient to fulfil such requirement. As a matter of practice, the following details are usually provided:

- asset identification code;
- execution date;
- outstanding balances;
- interest;
- amortisation system; or
- maturity dates.

No additional formalities are generally required in order to complete the perfection of a sale of receivables/assets to an SPE. However, written form is standard in Spain.

In addition, pursuant to Article 1280 of the Civil Code, if the receivables are executed in a public document, any party may legally require the other party to execute the assignment of those receivables by means of a public document. However, the validity of the assignment between the parties will not be affected if the assignment is not executed in a public document. In addition, pursuant to Article 1526 of the Civil Code, the assignment of a receivable will be fully effective vis-à-vis third parties upon the date deemed certain. In this regard, Articles 1218 and 1227 of the Civil Code set out that the execution date of a document will be deemed certain if such document is executed before a public notary.

5.4 Principal Covenants

The following key commitments on the originator’s side, among others, are usually included in the documentation:

- to sell to the SPE the relevant assets, as specified in the transaction documents;
- to transfer to the SPE the amounts collected from the debtors of the underlying assets;
- if applicable, to manage the underlying assets (see **4.9 Banks Securitising Financial Assets**);
- if applicable, to retain a material net economic interest of not less than 5% of the nominal value of the securitisation (see **4.3 Credit Risk Retention**); and
- to comply with applicable regulations.

It is also worth noting that the originator states several representations and warranties, in relation to itself and to the underlying assets, which must be considered (see **5.2 Principal Warranties**).

5.5 Principal Servicing Provisions

It has to be taken into consideration (as anticipated in **4.9 Banks Securitising Financial Assets**) that the entity legally in charge of the servicing will vary, depending on the nature of the asset to be transferred to the SPE.

- If the assets to be transferred to the SPE (or the assets from which the receivables to be transferred arise) are secured by a real estate mortgage, Spanish legislation states that the originator itself has the legal obligation to retain the custody and administration of those assets.
- When the underlying asset (or the assets from which the receivables to be transferred arise) is other than those indicated above, it is the management company of the SPE that has the legal obligation to administer and manage the assets pooled in the SPE (article 26.1.b of Law 2/2015). Therefore, if the parties prefer the originator to be the one performing the servicing duties, the management company has to delegate such functions (insofar as it holds them in accordance with the law) in favour of the originator. This is usually conducted through the deed of incorporation or by means of a specific servicing agreement.

The functions of the servicer are mentioned in the SPE's deed of incorporation or in the servicing agreement, and also in a prospectus when one is drawn up. The most common practice, however, is for the servicer to enter into a "Servicing Agreement" with the relevant parties, in which all of its functions and duties are regulated in detail, in particular:

- the custody of the documentation relating to the underlying assets;
- the management of the collections and the undertaking to transfer to the SPE all the amounts that belong to such SPE;
- actions to be implemented in case of defaulted assets;
- notices between the management company and the SPE; and
- servicer termination events (which usually comprise the breach of the obligations assumed or the representations stated by the servicer, the consequences of insolvency and resolution measures, or certain rating downgrade provisions) – accordingly, it is common to regulate a replacement procedure for the servicer.

5.6 Principal Defaults

The Originator

As noted in **5.2 Principal Warranties**, the originator states certain R&W both on its capacity and on the underlying assets, in the relevant SPE documentation. Failure to comply with these R&W leads to the implementation of a number of measures in order to prevent the SPE suffering any adverse effect.

In addition, the documentation for each transaction includes certain events that may trigger the early redemption of the notes (eg, clean-up calls, tax calls or regulatory calls regarding SRT transactions).

The Management Company

Management companies shall carry out the early liquidation of the SPE if, as stated in Article 33 of Law 5/2015 , four months have elapsed since the occurrence of an event giving rise to the mandatory replacement of a management company due to a declaration of insolvency thereof, or in the event of the revocation of the compulsory authorisations of a management company (without a new management company having been appointed).

It is common to foresee the early liquidation of the SPE if it has defaulted on its payment obligations for a certain period of time.

5.7 Principal Indemnities

The documentation of securitisation transactions does not usually cover indemnities in particular. To the extent that the originator has stated the relevant R&W (in respect of its capacity and the underlying assets), there will be an action against the originator under the Civil Code for breaching such R&W and its obligations under the transaction documents.

6. Roles and Responsibilities of the Parties

6.1 Issuers

According to Law 5/2015, only SPEs specifically incorporated as securitisation SPEs can act as issuers under a securitisation transaction. Please see **4.10 SPEs or Other Entities**.

6.2 Sponsors

Spanish regulation does not contain a specific legal framework applicable to the role of “sponsors”.

The rules applicable to sponsors are established in the Securitisation Regulation, Article 2 of which includes within the definition of “sponsors” those credit institutions (located inside or outside the EU) or investment firms other than the originator of the transaction that:

- establish and manage asset-backed commercial paper programmes (ABCP) or other securitisations that purchase exposures from third-party entities; or
- in addition to the previous activities, delegate the day-to-day active portfolio management involved in that securitisation to an entity authorised to perform such activity.

According to Article 25 of the Securitisation Regulation, only certain credit institutions can have the role of sponsors in ABCP. In this regard, a credit institution that becomes a sponsor of an ABCP will have to be a liquidity facility provider and cover all the credit and liquidity risks associated with the securitisation exposures.

6.3 Underwriters and Placement Agents

In a securitisation transaction, the role of underwriters/placement agents is generally related to the structuring of the transaction. Underwriters and placement agents (usually credit institutions or investment funds) generally perform the following functions:

- placing the securities with investors;
- controlling the status and evolution of the demand, and co-ordinating the activities of the different underwriters and placement entities involved in the operation;
- fixing the final price (in agreement with the originator);
- structuring the transaction between the different tranches; and
- drafting the primary documentation and generating offering documents.

In the prospectus, arrangers must disclose the specific activities that have been carried out. The prospectus can include a statement of assumption of responsibility by the arranger of a particular section of the prospectus. Article 35 of Royal Decree 1310/2005 establishes that the arranger will be liable when the required verifications have not been diligently performed.

Lastly, placement activity is regulated under Article 144 of the Securities Market Law. Therefore, those entities acting as placement agents of a securitisation transaction must be registered with the relevant registers of the CNMV or the Bank of Spain. This issue is particularly important in the case of foreign entities that perform a placement role of securitisation notes.

6.4 Servicers

The servicer's main function is to manage the underlying assets of a securitisation in accordance with the terms of the SPE's deed of incorporation and, where applicable, the particular servicing agreement. Duties may range from transferring payments to the SPE or delivering periodic reports to managing defaulted assets or renegotiating certain terms of the underlying asset with the relevant obligors.

The role of servicer can be carried out (subject to the legal limitation noted in **5.5 Principal Servicing Provisions**) either by the originator itself or by another entity, although it is very common for these functions to be performed by the originator (especially in the case of securitisations originated by banks, regardless of the underlying asset).

The features of the servicing activities in the context of a securitisation transaction are further discussed in **5.5 Principal Servicing Provisions**.

6.5 Investors

In securitisation transactions, the initial role of investors is to subscribe the notes issued by SPEs and pay the relevant purchase price.

The responsibilities of investors derive from two main sources:

- the terms and conditions of the relevant securitisation transaction set out in the deed of incorporation and, when applicable, the subscription agreement; and/or
- the regulatory obligations applicable to the investor (according to its nature as a legal entity).

Moreover, although under Spanish law there are no general restrictions regarding the type of investor allowed to participate in a securitisation transaction, it is common to restrict the subscription of securitisation notes to professional and qualified investors. In this regard, for the purposes of targeting the concept of “qualified investor”, it is common

practice to refer to the description contained in Article 2 of the Prospectus Regulation or in other Spanish legal provisions (eg, Article 22.4 of Law 5/2015, Article 205 of the Securities Market Law or Article 58 et seq of Royal Decree 1464/2018).

Finally, Article 3 of the Securitisation Regulation establishes that, in order to sell a securitisation position to a retail client (as defined in point 11 of Article 4(1) of Directive 2014/65/EU – ie, any client that does not constitute a "qualified investor"), the seller shall:

- conduct a suitability test on the retail client (according to Article 25(2) of Directive 2014/65/EU);
- determine that, on the basis of such test, the securitisation position is suitable for that retail client; and
- immediately provide the retail client with a report containing the outcome of said suitability test.

In addition, if the financial instruments portfolio of the retail client is lower than EUR500,000, the seller shall ensure that the customer's total investment in financial instruments does not exceed 10% of their portfolio (including the purchase under analysis).

6.6 Trustees

Spanish law does not include the figure of the trustee, which is recognised under common law. However, Article 37 of Law 5/2015 contemplates the possibility of establishing the so-called "meeting of creditors" (*Junta de Acreedores*).

If there is a meeting of creditors in a securitisation transaction, it is included in the deed of incorporation or in the prospectus, and its main faculties are contained in a specific regulation that sets out the different resolutions that may be adopted and the quorums required in each case. In general terms, said meeting of creditors normally has a smaller range of faculties than a trustee would have.

7. Synthetic Securitisation

7.1 Synthetic Securitisation Regulation and Structure

In Spain, synthetic securitisation transactions (ie, securitisation transactions where the risk is transferred by means of derivatives instruments or guarantees, without transferring the exposures being securitised) are permitted under both Law 5/2015 and the Securitisation Regulation.

In particular, Article 19 of Law 5/2015 establishes that securitisation SPEs may synthetically securitise loans and other credit rights by contracting credit derivatives with third parties and/or granting financial guarantees to the holders of the loans or credit rights. According to such article, the assets of the SPE may include deposits in credit institutions and/or fixed-income securities traded in official secondary markets.

In addition to the Securitisation Regulation and Law 5/2015, Spanish synthetic securitisations are also regulated at a European level, through CRR II and Regulation EU 2021/557, which establishes the requirements for a synthetic securitisation to achieve an STS label.

8. Specific Asset Types

8.1 Common Financial Assets

The three main types of assets are residential mortgages, consumer loans and auto loans, in terms of both volume and number of transactions.

Residential non-performing or residential sub-performing loans are starting to be securitised after the last update of the European Securitisation Regulation regarding regulatory clarity for non-performing exposures.

In the field of auto loans, some originators have started to securitise balloon loans (including the balloon instalment) following the trend in other European Union member states.

8.2 Common Structures

As described in **4.10 SPEs or Other Entities** and **4.11 Activities Avoided by SPEs or Other Securitisation Entities**, a securitisation transaction can only be carried out through SPEs in Spain, whereby the originator transfers the underlying assets to the SPE and said SPE issues notes. What will vary in each case is the characteristics of the transaction itself (beyond the type of underlying asset). The options that are usually considered when structuring securitisation transactions in Spain include the following:

- public or private funds (see **4.8 Investor Protection**) – these SPEs may be listed in a regulated market (AIAF) or in a multilateral trading facility (MARF);
- closed-ended funds on the assets and liabilities side; open-ended funds on the assets side and closed-ended funds on the liabilities side; or open-ended funds on the assets and liabilities side;
- contracting (or not) financial derivatives (mainly IRS or CAPs) – when derivatives are contracted, they are documented under the ISDA standard agreement (eg, subject to English, Irish or French law), or under the standard agreement drawn up by the Spanish banking association, known as CMOF (*Contrato Marco de Operaciones Financieras*) (drafted only in the Spanish language and subject to the laws of Spain);
- if notes are rated or not;
- how the initial costs associated with the issuance and constitution of the SPE will be satisfied – through a specific tranche of notes, which is subscribed by the originator, or through the subscription by the originator of a subordinated loan;
- the form in which the risk retention requirements are met, within the possibilities provided for in Article 6 of the Securitisation Regulation (see **4.3 Credit Risk Retention**); and
- items that are included in the SPE's priority of payments and how such payments are made (as a waterfall of payments, this is divided pro rata between the different items or a combination of both).