

CAPITAL MARKETS

Amendment to securitisation framework enters into force in Portugal

Law no. 69/2019 of 28 August has now entered into force, implementing the changes to the Portuguese securitisation framework following approval of Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 (“**Securitisation Regulation**”).

This law has now amended the Portuguese Securitisation Law approved by Law no. 453/99 of 5 November (“**Securitisation Law**”), as well as the Portuguese Securities Code, to now provide rules expressly contemplating the newly distinguished categories of traditional securitisations, simple transparent and standardized (“**STS**”) and non-STS transactions, as well as synthetic securitisations, in accordance with the Securitisation Regulation.

Although most material aspects of the securitisation framework applicable in Portugal regarding STS, non-STS and synthetic securitisations are now currently provided under the Securitisation Regulation, Portuguese lawmakers have implemented additional specifications for the Portuguese legal system, mainly in what concerns traditional securitisations.

This legal note seeks to outline at a high level the material changes to the previously applicable securitisation framework in Portugal, in relation to provisions that differ from the regime set out under the Securitisation Regulation, which has been directly applicable in Portugal since its entry into force on 1 January 2019.

1. Requirement for Servicers in non-STS Securitisations

Portuguese lawmakers have now implemented new requirements for entities that are to perform servicing of loan portfolios in securitisation transactions, determining that in non-STS transactions a servicer is required to have specialized abilities in the management of credits that are similar to those comprising the securitized portfolio, as well as to have internal policies and procedures, as well as duly documented risk management control mechanisms in what concerns the management of credit portfolios. Basically, Portuguese law extends the requirement of Article 21(8) of the Securitisation Regulation applicable to STS securitisations to non-STS securitisations.

Servicers are now also subject to the supervision of the CMVM, which is expected to ascertain the suitability of an entity for the servicing of loan portfolios.

2. New rules on transfers of receivables from securitisation companies

The new wording for Article 45 of the Securitisation Law now clearly provides that performing receivables may be transferred from a securitisation company to a credit institution whereas the previous version of the law only permitted transfers of performing receivables to another securitisation company or securitisation fund. Non-performing receivable or substitutions for breach of warranties continue to be freely assigned to any entity or back to the originator, respectively.

This now allows for considerable flexibility in securitisation structures of performing portfolios transferred by credit institutions to securitisation companies, by allowing such credit institutions to repurchase transferred credits after a determined lapse of time or a specific event.

This change raises the issue if such redemption of securitisation notes in full may occur only in respect of credit institutions, rather than any type of originator, as in accordance with the position of the CMVM to date regarding redemption of securitisation notes, it had determined that, for as long as the originator of the credits was the holder of all securitisation notes in a given transaction, that originator would be entitled to redeem the notes in full, hence repurchasing the portfolio. Now, with the express provision that performing loans may only be transferred to other securitisation companies and credit institutions, it is expected that the CMVM should clarify in the future if redemptions in full and repurchase of performing portfolios should continue to be restricted to credit institutions, rather than allow for the repurchase of portfolios from originators that are not authorized credit institutions.

3. Full and partial redemptions of securitisation notes

Whereas the previous wording of the Securitisation Law did not provide for partial redemptions of the securitisation notes, the newly inserted article 61(2) now expressly provides that securitisation companies may, several times, proceed with both full and partial redemptions of notes, for as long as equal treatment of noteholders of the same class is ensured.

This amendment marks a considerable change to the previous framework, as this now allows far greater flexibility for credit institutions to structure securitisation transactions, whereby loan portfolios may be transferred to a securitisation company, and later partially repurchased by the seller.

4. Holding of real estate assets by securitisation vehicles

Portuguese lawmakers have now clarified in the Securitisation Law that securitisation vehicles are allowed to both acquire and hold real estate assets within segregated portfolios for a maximum of two years, for as long as such assets are acquired by the securitisation vehicle following enforcement of any underlying loans which had been secured by mortgages over such assets.

However, the amendments to the Securitisation Law have not clarified a long-standing discussion in the Portuguese securitisation market in respect of the ability for securitisation vehicles to hold stakes in ReoCos, meaning previous limitations on structuring options regarding portfolios that include real estate properties shall continue to apply.

5. Synthetic securitisations

The amendment to the Securitisation law now expressly foresees the possibility of Portuguese securitisation vehicles (securitisation funds and companies) being used to structure synthetic securitisations. The Securitisation Law has been amended thoroughly so as to foresee this possibility and bring the Portuguese securitisation regime in line with the Securitisation Regulation. It will now be possible for Portuguese securitisation vehicles to issue participation units or notes in the context of a synthetic transaction which will have the full benefit of the securitisation law.

6. Securitisation of future receivables

It will now become easier to structure securitisation of future receivables as the previous requirement that future receivables would have to arise under existing contractual relationships has been removed.

Under the amended regime, a Portuguese securitisation vehicle can be used to structure a securitisation of future receivables or cash flows, provided that these arise from relationships and in amounts known or able of being estimated.