

France

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MARKET AND LEGAL REGIME

1. Please give a brief overview of the securitisation market in your jurisdiction. In particular:

- How active and/or developed is the market and what notable transactions and new structures have taken place recently?
- To what extent have central bank liquidity schemes assisted the securitisation market in your jurisdiction? Were retained securitisations common in the last 12 months?
- Is securitisation particularly concentrated in certain industry sectors?

Due to the subprime crisis, mortgage-related products decreased in value and investor appetite deteriorated. This led to broad-based distress in securitisation markets from the summer of 2007 and activity halted across most sections of the market. Although there is some securitisation of commercial receivables, issuance volumes collapsed in 2008.

However, securitisation is still recognised as a useful tool to the finance economy and there has been much consideration in relation to reforming the securitisation process (see *Question 29*). In fact, the market has been maintained by transactions used directly for bank refinancing with central banks or refinancing institutions. They represent a vast majority of securitisation transactions.

2. Is there a specific legislative regime within which securitisations in your jurisdiction are carried out? In particular:

- What are the main laws governing securitisations?
- Is there a regulatory authority?

Legal regime

French securitisation is regulated by a legal regime providing clear and protective rules under the supervision of a regulator. This regime allows the parties to both:

- Organise their contractual relations.
- Implement many of the measures proposed by the BIS (see *Question 29*).

Securitisation became part of the French legal system 20 years ago with Law No. 88-1201 dated 23 December 1988 (Securitisation Law) and is codified in Articles L214-5 and L214-43 to L214-49 of the Monetary and Financial Code (*Code monétaire et financier*). The Securitisation Law created a specific form of securitisation vehicle called a *fonds commun de créances*

(FCC), which is a collective debt investment fund or common pool of debts.

Since 1988, the Securitisation Law has been improved several times, including by:

- Authorising FCCs to issue various types of debt securities.
- Entering into credit derivatives arrangements.
- Creating protected receivables collection accounts.

The Securitisation Law has recently been streamlined and modernised by a:

- Governmental ordinance of 13 June 2008 (2008 Ordinance).
- Governmental decree dated 17 July 2008 (2008 Decree).

The 2008 Ordinance allows the creation of securitisation corporations (*Société de Titrisation*) (SDTs), and regulates the securitisation of insurance risks.

FCCs are now called *fonds commun de titrisation* (FCTs).

Regulatory authority

The Financial Markets Authority (*Autorité des Marchés Financiers*) (AMF) is the main regulatory authority in relation to securitisation.

REASONS FOR DOING A SECURITISATION

3. Which of the reasons for doing a securitisation, as set out in the Model Guide, usually apply in your jurisdiction? In particular, how are the reasons for doing a securitisation in your jurisdiction affected by:

- Accounting practices in your jurisdiction, such as application of the International Financial Reporting Standards (IFRS)?
- National or supra-national rules concerning capital adequacy (such as the Basel International Convergence of Capital Measurement and Capital Standards: a Revised Framework (Basel II Accord) or the Capital Requirements Directive)? What authority in your jurisdiction regulates capital adequacy requirements?

Usual reasons for securitisation

Cheaper borrowing. Cheaper borrowing is the biggest incentive to securitise in France. This is particularly true for real estate financing and leveraged buyout (LBO) financing, where investors seek yield levels which are lower than those of banks.

Accounting practices and capital adequacy. Securitisation techniques are useful to banks in relation to balance sheet management, provided the securitisation transactions achieve a true sale of the receivables without commitment by the originator to repurchase the securitised assets.

The Cooke ratio, contained in Directive 89/647/EEC on solvency ratio for credit institutions (Solvency Ratio Directive), was transposed into French law by the Banking and Financial Regulatory Committee (Comité de la Réglementation Bancaire et Financière) (CRBF) Regulation No. 91-05 of 15 February 1991. The CRBF is the body responsible for passing regulations governing credit institutions in France.

The McDonough ratio, contained in the Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions and Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions (together, the Capital Requirements Directive) (see *Model Guide, Capital Adequacy*), was transposed by an ordinance of 19 April 2007 and a decree of 20 February 2007.

Securitisation also allows banks to manage their rate risks.

Initially developed for credit institutions, securitisation has extended to the financing of debts held by commercial companies (which allows them to reduce their debt portfolio and shift the customer default risk to the securitisation vehicle). Securitisation allows an improvement of both the:

- Balance sheet main equilibriums.
- Management of the key ratios of the assigning company.

THE SPECIAL PURPOSE VEHICLE (SPV)

Establishing the SPV

4. How is an SPV established in your jurisdiction? Please explain:

- What form does the SPV usually take and how is it set up?
- What is the legal status of the SPV?
- How is the SPV usually owned?
- Are there any particular regulatory requirements that apply to the SPVs?

Form and set up of the SPV

Since the 2008 Ordinance, two types of securitisation vehicles (Securitisation Entities) are available:

- The FCT (*Fonds Communs de Titrisation*) is the main vehicle used for implementing securitisation transactions under French law. Largely derived from the former receivable securitisation fund or FCC (*Fonds Communs de Créances*), the FCT has a much broader scope of activities ranging from the securitisation of any receivables to the securitisation of insurance risks.
- The SDT (*Société de Titrisation*) is a new form of securitisation entity which is a specific form of share company. The use of this legal form may bring significant advantages in transactions where the benefit of international tax treaties is important.

Legal status and ownership

An FCT is a co-ownership (*co-propriété*) without legal personality. It is a collective debt investment fund organised, like most

French funds, with a fund manager (*société de gestion*) and fund custodian (*dépositaire*). FCTs have no share capital, no shareholders, no board of directors and no employees.

The SDT is a corporation and can issue bonds. It is regulated by its constituting documents (that is, regulations or articles of association) and regulatory requirements.

Securitisation Entities are not supervised by a regulatory body. However, the AMF approves and supervises the FCT's management company, which must follow certain rules of conduct set out in AMF Regulations.

When an FCT's management strategy includes active asset management or the sale of protection through credit derivatives transactions, the management company must comply with certain additional specific requirements, including to (*Article R214-92 et seq., Monetary and Financial Code*):

- Obtain a specific licence from the AMF authorising it to carry out such activities.
- Put in place appropriate management and organisational procedures under AMF Regulation 94-01 and the AMF instruction of 1 July 2004.

The custodian of the securitisation entity must be either (*Article L214-48, Monetary and Financial Code*):

- A French credit institution (or a French branch of a credit institution incorporated in the European Economic Area (EEA)).
- Any institution approved by the Committee on credit institutions and investment firms (*Comité des établissements de crédit et des entreprises d'investissement*).

When securitisation vehicles issue securities which are publicly sold, these securities must be rated according to Article L214-44 of the Monetary and Financial Code. This provides that a document must be prepared by an approved institution containing:

- An appraisal of the characteristics of the units to be issued by the FCT.
- The debts which it proposes to acquire.
- An assessment of the risks inherent in these debts.

The document must be annexed to the information memorandum (*note d'information*) and sent to the potential subscribers in the fund.

For units that are privately placed and where no information memorandum is required, a rating is not required but may be done for commercial reasons.

5. Is the SPV usually established in your jurisdiction or offshore? If established offshore, in what jurisdiction are SPVs usually established and why? Are there any particular circumstances when it is advantageous to establish the SPV in your jurisdiction?

Securitisation Entities are usually established in France. Generally, Securitisation Entities established offshore cannot conduct activities in France. French Securitisation Entities are not strictly considered to be credit institutions. However, they do benefit from a specific exemption from the Banking Monopoly Law.

The acquisition on a regular basis of non-matured receivables from originators in France is a credit activity which only licensed or “passported” credit institutions can carry out. Although securitisation entities are not credit institutions, Article L511-6 of the Monetary and Financial Code allows them to purchase non-matured receivables.

Ensuring the SPV is insolvency remote

6. Is it possible to make the SPV insolvency remote in your jurisdiction? If so, how is this usually achieved?

The Bankruptcy Law does not apply to FCTs and SDTs. The 2008 Ordinance expressly disapplies the relevant provisions of Book VI of the Commercial Code in relation to French securitisation entities. Therefore, Securitisation Entities are considered as bankruptcy remote under French Law.

In addition, a number of structuring features are used to mitigate a potential insolvency risk, including:

- Limiting the securitisation entity's activities to securitisation.
- Ensuring that the securitisation entity has no contractual liabilities unrelated to the relevant securitisation.
- Ensuring that the investors' and creditors' recourse is limited to the securitisation assets.

Ensuring the SPV is treated separately from the originator

7. Is there a risk that the courts can treat the assets of the SPV as those of the originator if the originator becomes subject to insolvency proceedings? If so, can this be avoided/minimised?

Separateness

Securitisation Entities are organised as autonomous institutions, that both:

- Are managed by an independent FCT manager.
- Have their assets segregated from the transferor's assets.

Therefore, the risk of consolidation of securitisation entities' assets with those of the transferor is remote. The consolidation of assets in a bankruptcy context is restricted to specific situations where there is either:

- Commingling (that is, mixing together) of the assets of two corporations.
- De facto management.

The risk of assets clawback in a transferor insolvency is also remote (see Question 17).

Future receivables

It is possible to assign future receivables. However, this may involve risk as, despite the assignment, the amounts payable by the debtor after the start of insolvency proceedings against the originator could be held to form part of the insolvent originator's estate. This would leave the assignee with an unsecured claim in the originator's insolvency for those amounts.

However, a transfer of future receivables to a Securitisation Entity remains effective despite the start of an insolvency proceeding against the originator (Article L 214-43, *Monetary and Financial*

Code). Therefore the risk outlined above should be avoided, subject to the court's interpretation.

Avoidance of commingling risk

In many securitisations where the originator remains in charge of the collection of the securitised receivables (that is, servicing the receivables), there is a risk that the securitised receivables proceeds are both:

- Commingled with the assets of the originator.
- Retained by the bankruptcy administrator after occurrence of a bankruptcy affecting the originator.

This risk can be mitigated by creating a special collection account. The management company and the entity responsible for servicing the receivables can agree to credit collected sums to a specially dedicated account of the FCT, from which the creditors of the entity responsible for servicing the receivables cannot claim payment (even if the entity becomes the subject of insolvency proceedings) (*Article L214-46-1, Monetary and Financial Code*).

The main features of this special account are:

- It can be opened in the name of the servicer, but the FCT is the sole beneficiary of the amounts credited.
- The management company can manage and dispose of the sums in the account, subject to and in accordance with the terms of the bank account agreement.
- If sums other than the sums generated by the transferred receivables are credited to the account, the entity responsible for servicing the receivables must prove that the other sums are not owed and due to the FCT.

THE SECURITIES

Issuing the securities

8. Are the securities issued by the SPV usually publicly or privately issued?

A Securitisation Entity generally finances its activities by issuing debt instruments such as notes (*titres de créances négociables* or *obligations*). An FCT can also issue units and an SDT can issue shares. These can be issued publicly or privately. Under French law a public offer of securities (*appel public à l'épargne*) is defined as either:

- The admission to trading of securities on a regulated market.
- The issue or sale of securities to the public by means of publicity or solicitation (*démarchage*), or through a bank or financial services provider.

However, the issue or sale of securities to the following, acting on their own account, does not amount to a public offer:

- Qualified investors (that is, broadly, corporate entities with the competence and means necessary to understand the risks inherent in transactions relating to financial instruments). French regulations define precisely who qualified investors are.
- A limited circle of investors.

French law does not permit the solicitation of individual investors for FCT securities. Therefore, public offering of FCT securities cannot be

made by way of canvassing and solicitation of private individual investors (*démarchage*). This prohibition is backed by criminal sanctions.

9. If the securities are publicly issued:

- Are the securities usually listed on a regulated exchange in your jurisdiction or in another jurisdiction?
- If in your jurisdiction, please briefly summarise the main documents required to make an application to list debt securities on the main regulated exchange in your jurisdiction. Are there any share capital requirements?
- If a particular exchange (domestic or foreign) is usually chosen for listing the securities, please briefly summarise the main reasons for this.

It is possible to list FCT units or notes, and SDT shares or notes, in France. However, this is rare due to practical reasons such as cost and timing. Listing in Dublin or Luxembourg is frequently preferred by issuers.

Listing FCT units or notes, and SDT shares or notes, in Paris requires the preparation of an AMF-approved information memorandum or prospectus (*note d'information*). This document takes the form of a reference document (describing the issuer structure) and an operation note (*note d'opération*) (describing the securities' features). Where an issuer makes only a single issue of units, the reference document and pricing supplement (that is, the document including all the financial information related to the units, including issue price and maturity) are in practice prepared and published as a single information memorandum or prospectus.

In addition, all advertisements relating to a public offering of FCT units or notes, and of SDT shares or notes, must be provided to the AMF before their distribution.

Constituting the securities

10. If the trust concept is not recognised in your jurisdiction, what document are the securities issued by the SPV constituted by and how are the rights in them held?

The trust concept has been recently introduced in the form of a *fiducie*. However, securities can be issued without creating a trust or *fiducie*.

The Securitisation Law, as amended, contemplates the possibility of FCTs and SDTs (or parts of these entities) making multiple issues of units or notes. If a Securitisation Entity makes multiple issues, the entity's bye-laws (*règlement*) must provide for this and explicitly state the relevant mechanisms.

Financial instruments or securities issues are generally dematerialised (that is, their property is represented by book entries in securities accounts rather than by a certificate or paper form). Shares, units and notes can be evidenced by entries in securities accounts kept with a bank or directly by the management company or custodian. Units, shares or notes issued by Securitisation Entities are generally freely negotiable.

The minimum denomination of an FCT unit is EUR150 (about US\$220) or its foreign equivalent. This expressly contemplates FCT units being denominated in currencies other than euros.

TRANSFERRING THE RECEIVABLES

Classes of receivables

11. What classes of receivables are usually securitised in your jurisdiction? Please explain any particular reasons (for example, the strength of the origination market) why such receivables are usually securitised and the progress of the market in securitising new classes of receivables.

The following are usually securitised through an FCT or SDT, regardless of the currency of the debt:

- Mortgage loans.
- Commercial or consumer loans.
- Hire-purchase receivables.
- Trade receivables.

The 2008 Ordinance broadens the scope of securitisation entities' activities to any risks including insurance risks. It therefore officially recognises that an FCT or SDT can be used to allow insurance companies to both:

- Securitise insurance risks.
- Acquire exposure to insurance risks in compliance with Directive 2005/68/EC on reinsurance (Reinsurance Directive).

Securitisation entities can acquire receivables from any person. The restriction that they could only acquire receivables from credit institutions, insurance companies or the *Caisse des Dépôts et Consignations* (a public financial institution in France) was removed in 1998.

The acquisition of receivables by securitisation entities can result from an existing or a future agreement, and the amount and payment date of the debts need not be determined (that is, securitisation entities can acquire existing or future debts). The 2008 Decree, as amended, also expressly provides that securitisation entities can acquire receivables arising under hire purchase (*crédit-bail*) agreements.

An FCT can also acquire receivables that are delinquent or doubtful, or subject to litigation.

Receivables assigned to a particular Securitisation Entity can be sold by different originators. Therefore, multi-seller Securitisation Entities are a practical possibility and have been created many times in the past.

The transfer of the receivables from the originator to the SPV

12. How are the receivables usually transferred from the originator to the SPV (for example, assignment, novation, sub-participation, declaration of trust)? How is the transfer perfected? Are there any rules, requirements or exemptions that apply specifically to transferring receivables in a securitisation transaction?

There are several ways to transfer receivables to a purchaser under French law, in particular:

- By way of assignment (*Articles 1689 et seq, Civil Code*).

- A subrogation (*Articles 1249 et seq., Civil Code*).
- Daily assignment (*Articles L313-23 to L313-34, Monetary and Financial Code*).

The Securitisation Law provides for a specific and simplified method to assign receivables to French Securitisation Entities. Such an assignment of receivables is made using a special document, called a *bordereau*, which the originator delivers to the management company of the Securitisation Entity. It is a much simpler mechanism than the ordinary methods of assignment required by French law, both in terms of efficiency and cost.

The *bordereau* must comply with certain formal conditions. The remittance of the *bordereau* encompasses the simultaneous transfer of all security interests securing the assigned debt.

13. Are there any types of receivables that it is not possible or not practical to securitise in your jurisdiction (for example, future receivables)?

It seems that all types of receivables can be securitised. Any of the following types of debt, among others, can be securitised through an FCT regardless of the currency of the debt:

- Mortgage loans.
- Debts of public entities.
- Commercial or consumer loans of all kinds.
- Hire-purchase receivables.
- Trade receivables.
- Credit card receivables.

Receivables can arise from an existing agreement (*acte déjà intervenu*) or a future agreement (*acte à intervenir*). These receivables may be governed by French law or any foreign law, and can be:

- Non-matured receivables.
- Future receivables (the amount and maturity of which are not determined on the relevant transfer date).
- Defaulted receivables (*créances immobilisées*).
- Doubtful receivables (*créances douteuses*).
- Receivables subject to litigation (*créances litigieuses*).
- Debt securities (governed by French law or foreign law) representing a monetary claim against the relevant issuer.

14. How is any security attached to the receivables transferred to the SPV? What are the perfection requirements?

The assignment of receivables to an FCT takes effect and becomes enforceable against third parties as of the date of the *bordereau* (see *Question 12*). The transfer entails the transfer of any security interest securing the transferred debt and is enforceable against third parties without further formality. This makes the *bordereau* method of transfer particularly attractive in cases involving mortgage loans. The transfer of mortgage loans using alternative methods of transfer can involve very significant costs, such as registration and notarial fees.

Prohibitions on transfer

15. Are there any prohibitions on transferring the receivables or other issues restricting the transfer? For example, is a negative pledge enforceable, or are there any legislative provisions that affect the transfer of receivables (such as consumer or data protection rules)?

Contractual restrictions

Contracts underlying the securitised receivables should be reviewed in advance to identify any provisions requiring other parties' prior consent or contractual prohibitions to transferring such receivables. If these provisions are present, it may be necessary to obtain the debtor's consent before the securitisation.

Legislative restrictions

Legislative provisions relating to data protection or restrictions on disclosure of information may create an obstacle to the transfer of debts to third parties. However, when the originator/assignor services assigned receivables under an agreement with the FCT's management company, the provisions may not apply.

French provisions on data protection and banking secrecy seek to prevent any communication abuse of personal data. Law No. 78-17 on data protection (*loi informatique et liberté*), created a supervisory body responsible for ensuring that personal data is adequately stored and treated. In addition, where the assignor of the receivables is a credit institution, the provisions of the law relating to banking secrecy apply (*Article L511-33, Monetary and Financial Code*). These rules may prohibit banks from transferring any information to third parties without the prior consent of the underlying obligor, although the Law No. 2008-776 of 4 August 2008 for modernisation of the economy excludes the application of banking secrecy laws in many situations. This law expressly sets aside statutory provisions on professional secrecy in relation to confidential information to be provided in the context of an assignment of receivables.

Avoiding the transfer being re-characterised

16. Is there a risk that a transfer of title to the receivables will be re-characterised as a loan with security? If so, can this risk be avoided and/or minimised?

It appears that there is no precedent or case law in relation to which a transfer of title to receivables to a French Securitisation Entity has been re-characterised as a secured loan. This is not a real concern under French Law.

Ensuring the transfer cannot be unwound if the originator becomes insolvent

17. Can the originator (or a liquidator or other insolvency officer of the originator) unwind the transaction at a later date? If yes, on what grounds can this be done and what is the timescale for doing so? Can this risk be avoided or minimised?

The transfer of receivables to a securitisation entity is definite (*Article L 214-43, Monetary and Financial Code*). The risk of claw-back (that is, where the transfer of the debts by the originator to the FCT becomes void after the transferor's bankruptcy) is remote.

The Insolvency Law provides for transactions entered into on preferential terms to be set aside in certain circumstances, under:

- **Article 107-2.** This provides for the automatic avoidance of any contract in which the insolvent party's obligations are manifestly greater than those of the other party to the contract.
- **Article 108.** This gives a court the power to set aside any transaction entered into for value if, at the time of entering into the contract, one party knew of the other party's insolvency.

These provisions apply to transactions entered into during the suspect period (*période suspecte*), which is fixed by the court at a maximum of 18 months before the judgment marking the start of the insolvency proceedings.

Despite any insolvency procedure opened on the basis of Book VI of the Commercial Code, or any equivalent foreign procedure against the transferor after the transfer, the transfer remains effective after the court decision opening insolvency (*2008 Ordinance*). Subject to court interpretation, this clearly affirms the legislator's intention to disapply the clawback provisions (see *above*) in the context of a securitisation.

In relation to over-collateralisation (see *Question 21*), there is a view that Article 107 of the Insolvency Law does not apply because the originator usually retains the right to the FCT's liquidation surplus. The right to this surplus is regarded as compensating for the undervalue created by the over-collateralisation.

Establishing the applicable law

18. Are choice of law clauses in contracts usually recognised and enforced in your jurisdiction? If yes, is a particular law usually chosen to govern the transaction documents? Are there any circumstances when local law will override a choice of law?

Choice of law clauses in contracts are usually recognised and enforced on the basis of the Rome Convention on the law applicable to contractual obligations (*1980/934/EEC*) (Rome Convention), which was ratified by France on 21 June 1992. This convention embodies the principles of French private international law applicable to the governing law of contracts, including those entered into with non-EU persons. The Rome Convention allows the parties to a contract to choose any foreign law to govern their contract, provided that both the:

- Contract can be qualified as an international contract (that is, the contract involves non-French elements).
- The law is not chosen to avoid French public policy considerations.

Under French conflict of laws rules, subject to any treaty provisions to the contrary, the assignment of the receivables must be perfected under the laws of the debtor's own jurisdiction. Therefore, notice of the assignment must be given according to the law governing the assignment agreement.

The parties to an offshore securitisation of French receivables are occasionally willing to document the transfer of receivables under the law of another jurisdiction, such as English law.

In principle, an assignment agreement of French receivables can be governed by foreign law, provided that this choice of law is not made with a view to avoiding mandatory provisions of French law. However, it may be desirable that French law receivables owed by French debtors are assigned under French law (whether or not the originator is French), as this will facilitate recognition of the transfer by French courts if the matter is disputed.

Since the 2008 Ordinance, the transfer of receivables to a French Securitisation Entity can be made under a foreign law selected by the parties. This may facilitate the transfer of non-French receivables to a French Securitisation Entity.

SECURITY AND RISK

Creating security

19. Please briefly list the main types of security that can be taken over the various assets of the SPV in your jurisdiction, and the requirements to perfect such security.

The 2008 Ordinance removes the previous prohibition of Securitisation Entities creating collateral over their assets. They can now provide collateral or security interests over the receivables they hold (see *Question 20*) to either:

- Noteholders.
- Any other creditors.

For further information on taking security over assets in France, see *PLC Cross-border Finance Handbook 2010, Country Q&A, France*.

20. How is the security granted by the SPV held for the investors? If the trust concept is recognised, are there any particular requirements for setting up the trust (for example, the security trustee providing some form of consideration)? Are foreign trusts recognised in your jurisdiction?

Securitisation Entities can grant security over their assets (see *Question 19*). There is no specific requirement in relation to the method of providing the security. Therefore, a pledge or fiduciary transfer can be used. The creation of a trust is generally not necessary as, under French law, security can be created in favour of the noteholders.

Credit enhancement

21. What methods of credit enhancement are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the credit enhancement techniques set out in the Model Guide?

The following credit enhancement techniques are commonly used by French Securitisation Entities:

- Guarantees provided by the originator, an affiliate of the originator, a credit establishment, an insurance company or the *Caisse des Dépôts et Consignations* (see *Question 11*).
- Issuance of specific units (that is, subordinated units redeemable after full redemption of the notes and senior units).
- Subordinated loans.

- Over-collateralisation.
- Pre-existing guarantees or security attached to the debts acquired by a French Securitisation Entity.

This list is not exhaustive, allowing for other credit enhancement techniques such as cash reserve funds. Any of these credit enhancement techniques can be structured to support an umbrella securitisation entity or any individual part of it.

The Securitisation Entity's regulation must set out the terms and procedure of any credit enhancement.

For further information, see *Model Guide, Credit enhancement*.

RISK MANAGEMENT AND LIQUIDITY SUPPORT

22. What methods of liquidity support are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the provision of liquidity support as set out in the Model Guide?

Liquidity support is generally provided through subordinated credits lines and cash reserves (see *Model Guide, Risk management and liquidity support*).

Credit facilities can only be provided by credit institutions and other institutions defined by the Monetary and Financial Code. Commercial companies are generally not allowed to extend credit.

CASH FLOW IN THE STRUCTURE

Distribution of funds

23. Please explain any variations to the Cash flow index accompanying Diagram 9 of the Model Guide that apply in your jurisdiction.

The Cash flow index accompanying Diagram 9 mostly applies in France (see *Model Guide, Diagram 9 and box, Cash flow index*), subject to the following variations:

- The Paying Agent is in charge of all payments to unit holders and note holders, but does not handle allocation of funds to other parties according to the waterfall. The management company does this.
- Extraction of surplus amounts held by the Securitisation Entity is generally made by way of specific subordinated notes or units combined with an adapted waterfall.

Profit extraction

24. What methods of profit extraction are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the profit extraction techniques set out in the Model Guide?

Issuing specific categories of units or notes is the most common form of profit extraction technique. The rights of each category of units or notes are defined in the Securitisation Entity's regulations.

THE ROLE OF THE RATING AGENCIES

25. What is the sovereign rating of your jurisdiction? What factors impact on this and are there any specific factors in your jurisdiction that affect the rating of the securities issued by the SPV (for example, legal certainty or political issues)? How are such risks usually managed?

The rating of securities issued by French Securitisation Entities can be affected by certain defects or weaknesses affecting the underlying securitised receivables. It seems that there are no major problems or defects to the French securitisation legal framework that would be detrimental to their rating.

TAX ISSUES

26. What tax issues arise in securitisations in your jurisdiction? In particular:

- What transfer taxes may apply to the transfer of the receivables? Please give the applicable tax rates and explain how transfer taxes are usually dealt with.
- Is withholding tax payable in certain circumstances? Please give the applicable tax rates and explain how withholding taxes are usually dealt with.
- Are there any other tax issues that apply to securitisations in your jurisdiction?

Transfer and documentary taxes

There is no transfer tax, stamp duty or other documentary tax on the assignment of receivables to an FCT, unless the assignment is registered with the French tax authorities, in which case a nominal tax amount of EUR125 (about US\$184) is payable.

Withholding tax

Usually, no withholding tax applies to payments in relation to trade receivables. However, there is a risk that the tax authorities could seek to apply Article 182B of the Tax Code (*Code Général des Impôts*) to domestic lease and hire purchase (*crédit bail*) receivables. Article 182B imposes a withholding tax on payments that are both:

- Made by a debtor carrying on business in France to a beneficiary who does not have a permanent professional establishment in France.
- In consideration for any services supplied or used in France.

In relation to loan interest, no withholding tax applies on domestic interest payments. Where a French debtor makes interest payments to a foreign beneficiary, withholding tax applies in principle at the rate of 15%. However, exemptions are available under domestic tax law. In particular, Article 131 *quater* of the Tax Code provides that interest paid abroad on loans entered into abroad and granted to French legal entities is exempt from withholding tax. However it is not clear whether this exemption is applicable in the case of loans first granted by a French lender.

The rule set out above in relation to withholding tax is subject to applicable relieving provisions contained in any double tax agreement between France and the offshore vehicle home jurisdiction.

Other tax issues

FCTs benefit from a specific tax treatment as they are specifically designed to be tax neutral. For the tax regime applicable to unit holders or note holders, income on units or debt securities held by French tax-resident individuals is subject to income tax at a progressive rate. The tax regime applicable to an SDT has not yet been published.

SYNTHETIC SECURITISATIONS

27. Are synthetic securitisations possible in your jurisdiction? If so, please briefly explain any particularly common structures used. Are there any particular reasons for doing a synthetic securitisation in your jurisdiction?

Synthetic securitisations are possible under French law. The most common form is implementation through credit derivatives.

OTHER SECURITISATION STRUCTURES

28. Which of the various structures, set out in the Model Guide or otherwise, are commonly used in your jurisdiction?

A number of possible alternative structures allow French originators to transfer the economic risk related to receivables but do not always qualify as securitisation structures under French law. Two of these are outlined below:

- **Synthetic securitisation.** It is possible to have French receivables purchased by an EU bank (that is, a bank licensed in the EU) located outside France. The bank then purchases a protection against default from the securitisation vehicle or a third party and therefore transfers the whole of its exposure on the receivables. If properly documented, the arrangement should not generate any capital adequacy cost for the bank, although the final determination of this question will be a matter for the bank's own regulatory authority.
- **Two-tier structure.** Another possibility is for the receivables to be assigned to a French securitisation entity through a bank or an insurance company. An offshore securitisation vehicle then purchases all or part of the notes issued by the French Securitisation Entity. The particular advantage of this structure is that it combines certain advantages of French securitisation (in particular, the simplicity of the assignment mechanism and the certainty that all security is transferred without further cost or formality by that mechanism) with the flexibility of an offshore vehicle.

REFORM

29. Please summarise any reform proposals and state whether they are likely to come into force and, if so, when. For example, what structuring trends do you foresee and will they be driven mainly by regulatory changes, risk management, new credit rating methodology, economic necessity, or other factors?

The Securitisation Law has recently been modernised by the 2008 Ordinance. Further implementing regulations are awaited

relating to the tax treatment of an SDT. In the wake of the financial crisis, there is consideration at European and French authority level in relation to regulating securitisation.

In its Quarterly Review of September 2009, the Bank of International Settlements (BIS) set out measures that could be taken to revive and strengthen the securitisation process. It highlighted the roles of:

- Increasing complexity.
- Limited transparency.
- Over-reliance on ratings.

In this context, simplicity should be developed through an increased standardisation of structures, based on fewer tranches and less reliance on structural features (other than subordination) for credit enhancement. The BIS also pointed out the need for new standard disclosures and reporting procedures (for new and outstanding securitisations), applicable to issuers and servicers, in relation to both the:

- Structure itself.
- Underlying risks and assets.

The BIS also proposed the implementation of risk retention by originators and arrangers, used as incentives for better structuring.

Additionally, the authorities are currently working on a new scheme to improve the financing of home loans through a vehicle issuing cover bonds eligible to European UCITS.

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