

# **Securitisation transactions in Portugal: main features of the revised legal framework for securitisation as introduced by Decree-Law 82/2002 of 5 April 2002**

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## **1. Introduction**

Known to Portuguese financial operators since 1997, securitisation is a corporate financing tool which only gained legal status in 1999, as Decree-Law 453/99, of 5<sup>th</sup> November 1999 introduced the legal framework for securitisation transactions. It was later completed by Decree-Law 219/2001 of 4<sup>th</sup> August 2001, which addressed the (complex) tax issues raised by securitisation operations.

A boom in securitisation operations, which gained momentum as an alternative to financing corporate business through a stagnant equity market, proved that the solutions adopted in Decree-Law 453/99 lacked some flexibility, most especially with regard to the incorporation and management of Special Purpose Vehicles (SPVs).

Thus, the Portuguese legislator produced, through Decree-Law 82/2002 of 5 April 2002, a profound revision of the framework set out by Decree-Law 453/99, in particular of the provisions relating to the incorporation and operation of the *sociedades de titularização de créditos* (securitisation companies).

The main features of securitisation transactions under Decree-Law 453/99, of 5<sup>th</sup> November 1999, as well as the main amendments introduced thereto by Decree-Law 82/2002, of 5 April 2002, shall be outlined in this article.

## **2. Main features of securitisation operations in Portugal**

Decree-Law 453/99 spins the legal framework for securitisation around the three basic steps that every securitisation is comprised of:

- a) Asset origination;
- b) Asset conveyance;
- c) Issuance of asset-based securities (ABS).

## **2.1. Asset origination**

Asset origination consists of the (i) creation and (ii) selection and evaluation of the assets to be securitised. These assets are created wherever an entity (“originator”) makes a loan or otherwise grants or extends financing to a third party (the “obligor”). The originator then selects and evaluates, amongst the loans, receivables and other financial assets thus created, those that will constitute the basis for the issuance of ABS.

### **2.1.1. Types of assets, which can be securitised**

Identifying the assets to be securitised is a crucial preliminary step to securitisation, since they can only be securitised if they comply with a number of requirements.

Thus, in accordance with article 4 (1) of Decree-Law 453/99, all assets can be generally be securitised, provided that:

- i) The conveyance of such assets is not restricted by legal or contractual provisions;
- ii) They are of a pecuniary nature;
- iii) The underlying credits are not subject to any situation whose verification may involve its modification or termination;
- iv) The underlying credits are not overdue;
- v) They are not the subject matter of any pending legal proceedings nor serve to secure or guarantee a debt or have been seized or apprehended by way of enforcement of a payment in default.

Futures can also be securitised provided that they flow from clearly defined contractual relationship and their value is known or can be estimated.

However, insurance undertakings, pension funds and pension fund managing companies are only allowed to securitise:

- (i) Mortgage-backed loans;

- (ii) Loans to the State or other entity governed by public law;
- (iii) Credits held by pension funds against contributors flowing from their obligation to make contributions thereto.

Decree-Law 82/2002 of 5 April 2002 extended the notion of securitisable mortgage-backed loans to subsidized housing loans, which were not listed in the original version of article 4 of Decree-Law 354/99. Indeed, subsidized housing loans represent a significant share of the overall housing loans granted by Portuguese credit institutions.

### **2.1.2. Evaluation and rating**

Pursuant to articles 27 (3c) and 60 (4) of Decree-Law 353/99, as amended by Decree-Law 82/2002, the assets to be securitised must be evaluated and rated by an authorised rating agency. Evaluation and rating are mandatory wherever the issuance of ABS with recourse to a public subscription offer is intended.

### **2.1.3. Asset servicing**

The entities, which originate the assets underlying securitisation transactions (originators), are required, under Decree-Law 453/99, to continue to provide managing and collection services in relation to those assets (“servicing”).

Under the original version of article 5(1) of Decree-Law 453/99, credit institutions, financial companies or insurance companies, which originated assets to be securitised were required to conclude servicing contracts whereby they undertook to provide managing and collection services in relation to those assets. Thus, other entities were allowed to choose between servicing the assets themselves or awarding such function to a capable third party.

Decree-Law 82/2002 introduced two additions to the abovementioned provision, aiming at both clarifying the scope of the servicing duties and giving the same provision some flexibility:

- (i) Pension fund managing companies are also required to conclude servicing contracts in relation to the securitised assets;

(ii) Credit institutions, financial companies insurance companies and pension fund managing companies can also award the servicing of the securitised assets to a capable third party, in justified cases and under prior authorisation by their respective supervisory authority.

## **2.2. Asset conveyance**

The second phase of the securitisation procedure is the conveyance of the underlying assets to another entity (the “issuer”), which shall issue debt securities based on those assets in the capital markets. The basic form for such a conveyance is that of an assignment of credits, since the underlying asset consists of, or is based on, a credit held by the originator against a third party (“obligor”), as referred to in item 2.1.1. above.

### **2.2.1. Main features of asset conveyance under Decree-Law 453/99**

Thus, under Decree-Law 453/99, the conveyance of assets for securitisation purposes is construed as an assignment of credits concluded between the originator and the issuer.

In the Portuguese legal system, the assignment of credits is generally governed by articles 577 to 588 of the Portuguese Civil Code. The provisions of Decree-Law 453/99 adapt these rules to securitisation transactions.

The following items summarise the main features of asset conveyance within securitisation transactions and its specific traits in relation to the assignment of credits as governed by the Portuguese Civil Code.

#### **2.2.1.1. True sale**

As per article 4 (5) of Decree-Law 453/99, the assignment of credits cannot be subordinated to a condition or a term or to a time limit with regard to its effectiveness, duration or expiry, except (i) where the assignee is a securitisation fund (since the assignment is only effective upon the instatement of the fund) and (ii) in the case of an incomplete ABS subscription.

Furthermore, the assignor, or any entity in a control or group relationship with the assignor, is prevented from granting any guarantee or taking any responsibility with regard to an eventual default on the assigned credit. However, this does not affect the assignor's obligation to guarantee the existence and enforceability of the assigned credit flowing from article 587 (1) of the Portuguese Civil Code neither does it affect a guarantee on the credit granted by a third party nor the transfer of the risk of default to an insurance undertaking.

Thus, it is clear that Decree-Law 453/99 requires that the assignment be conducted so as to result in a "true sale", i.e., in an actual transfer of the credits to the assignee, rather than a secured financing. This requirement is justified by the need to protect investors: removal of the credits from the assignor's estate not only isolates them against the effects of the assignor's bankruptcy or insolvency ("bankruptcy remoteness") but also require investors to look for the assets themselves and not the assignor upon payment of ABS.

#### **2.2.1.2. Effects of the assignment**

Similarly to article 583 (1) of the Portuguese Civil Code, article 6(1) of Decree-Law 453/99 states that the assignment is only effective upon notification of the assignment to the obligor.

Article 6(4) of Decree-Law 453/99 contains a significant restriction to the abovementioned principle, however: where the assignor is a credit institution, finance company, insurance undertaking, pension fund or a pension fund managing company, the assignment is effective in relation to the obligors in the moment it becomes effective between the assignor and the assignee, irrespective of notification to the obligors. Without this restriction, most securitisation transactions would be impaired by the practical impossibility to make mass notifications to obligors.

Nonetheless, pursuant to article 6(5), this restriction does not apply where the assignor has awarded the servicing of the assigned credits to a third party. This provision was introduced by Decree-Law 82/2002 of 5 April 2002 and is a consequence of the offering - also by the same Decree-Law - to credit

institutions, finance companies, insurance undertakings, pension funds or pension fund managing companies the possibility to award a third party the servicing of the credits to be securitised.

Meanwhile, the replacement of the servicer is only effective upon notification to the obligor(s) as well.

According to article 6(2) of Decree-Law, either notification must be made by means of registered mail addressed to the obligor and is considered to be effective from the third day counting from the date of registration.

#### **2.2.1.3. Form of assignment and registration requirements**

Credit assignments within securitisation transactions can be effected by means of a private written agreement, even if the assigned credit is a mortgage-based one, as per article 7(1) of Decree-Law 453/99. This regime differs significantly from that of the Portuguese Civil Code, under which the assignment of mortgage-based credits is only valid if made through a notarial deed (article 578(2)). Such a difference results from the sheer fact that securitisation of mortgaged-based credits would practically impossible should the Civil Code requirement apply.

As per article 7 (2) of Decree-Law 453/99, the abovementioned agreement is sufficient for registering the assignment with the registration office the mortgage was previously registered with (since in Portugal registration of the mortgage is mandatory), provided that the signatures contained in the agreement are certified by a notary public or by the secretary of each of the signatory companies.

#### **2.2.1.4. Types of entities to whom the assets can be conveyed- the Special Purpose Vehicles (SPVs)**

Another distinctive trait of securitisation transactions is the nature of the entity to which the underlying assets are conveyed - or, in Decree-Law 453/99's perspective, the entity to which the credits are assigned: the assignee is a bankruptcy-remote or insolvency-remote (i.e., thinly capitalised so as to reduce

the risk of insolvency or bankruptcy as far as possible) special purpose vehicle (SPV), that is, an entity is created with the sole purpose of receiving those assets and issue debt securities (ABS).

According to article 3 of Decree-Law 453/99, securitisation transactions can only be carried out through two types of SPVs:

- (i) Securitisation funds;
- (ii) Securitisation companies.

The main features, requirements and procedures to instate or incorporate these vehicles shall be discussed in detail below.

### **2.3. Issuance of Asset-Backed Securities (ABS)**

The third and final stage of a securitisation transaction is the issuance of asset-backed securities or ABS; that is, the issuance of debt securities based on the underlying assets intended for offering to investors.

#### **2.3.1. Types and features of ABS that can be issued under Decree-Law 453/99**

The types and features of ABS are regulated by Decree-Law 453/99 in accordance with two major concepts:

- a) The nature of the issuer;
- b) The nature of the offer of ABS to investors (public or private).

##### *a) Types of ABS as per the nature of the issuer*

As we mentioned in item 2.2.1.4. above, the underlying assets are conveyed to specific entities - the Special Purpose Vehicles (SPV) -, which then issue debt securities on those assets. Under Decree-Law 453/99, there are two types of SPVs (securitisation funds and securitisation companies) and each one issues a distinctive type of security on the underlying assets. Thus, we have:

- *Unidades de titularização de créditos* (securitisation fund participation units), issued by securitisation funds;

- *Obrigações titularizadas* (securitised bonds), issued by securitisation companies.

*b) Features of ABS as per the nature of the offer*

Under Decree-Law 453/99, both securitisation fund participation units and securitised bonds can be publicly offered. Thus, there are different requirements for the issuance and/or registration of publicly or privately offered ABS, as discussed in detail below.

### **2.3.2. Securitisation fund participation units**

#### **2.3.2.1. Key features and nature**

Each securitisation fund must be divided into units representing a participation in the fund equal to each unit's nominal value, which is determined in the securitisation fund's management statute- the *unidades de titularização de créditos* (securitisation fund participation units), or *unidades de titularização* (participation units).

The participation units are book entry securities, which must be registered in accordance with articles 61 and following of the Portuguese Securities Code.

The originator of the assets conveyed to the securitisation fund can acquire participation units.

The subscribers of participation units are entitled to:

- (a) Payment of periodical income;
- (b) Reimbursement of the participation units' nominal value;
- (c) A share in any surplus resulting from the liquidation of the securitisation fund - after full payment of any periodical income and of all expenses incurred by the fund - proportionate to the amount of participation units owned.

Where the fund issued several categories of participation units, the precedence of each subscriber in the abovementioned payments is established in accordance with the category of units he subscribed.

### **2.3.2.2. Public securitisation fund participation units subscription offers**

The issuance of securitisation fund participation units by means of a public subscription offer must be authorised by the *Comissão do Mercado de Valores Mobiliários* (Securities Market Supervisory Authority - CMVM) - articles 27(3) and 34 of Decree-Law 453/99).

The authorisation for launching a public securitisation fund participation unit subscription offer and the authorisation for the instatement of a securitisation fund must applied for, and are granted, simultaneously, since the CMVM is also empowered to authorise the instatement of those funds (see item 2.4.2.1.3. below).

The underlying assets must be evaluated and rated by an authorised rating agency, in a report that must be filed with the CMVM along with the application for authorisation to launch the offer.

The launch of a public subscription offer is subject to the Portuguese Securities Code's provisions on public offers, *inter alia*:

- (a) Those concerning the procedures for registration of public offers with the CMVM, since authorised public securitisation fund participation unit subscription offers are also subject to registration with the CMVM prior to their launching, as per article 27 (9) of Decree-Law 453/99;
- (b) Those concerning the information and/or disclosure duties, namely the duty to disseminate the offer by means of a prospectus, which, according to article 34(2) of Decree-Law 453/99, must be advertised through the listed market bulletin or the CMVM's information system.

### **2.3.2.3. Private securitisation fund participation units subscription offers**

Prior registration of private subscription offers of securitisation fund participation units is not required; these must only be subsequently communicated to the CMVM for statistical purposes, as per article 110 (2) of the Portuguese Securities Code. Evaluation and rating of the underlying credits by an authorised rating agency is not mandatory either.

#### **2.3.2.4. Reimbursement of securitisation fund participation units**

We have mentioned in item 2.3.2.1. above that the owners of participation units are entitled to the reimbursement thereof upon the liquidation of the fund. Anticipated reimbursement of part or of all participation units is possible, provided that such possibility is expressly stated in the fund's management statute and that non-discrimination of participation units within the same category is ensured.

#### **2.3.3. Securitised bonds**

ABS are issued by securitisation companies under the form of securitisation bonds.

##### **2.3.3.1. Key features and nature**

Unlike securitisation fund participation units, securitised bonds can be either book-entry or certificated securities;

The securitisation company can issue several categories of securitisation bonds, which can differ with regard to the guarantees granted to subscribers, to the amount of the interest paid on the bonds, which can be fixed or variable, and to the subscriber's precedence in the reimbursement;

Like securitisation fund participation units, securitised bonds have differentiated features depending on whether they are issued with recourse to a public or private offer.

##### **2.3.3.2. Public securitised bond subscription offer**

Prior authorisation by the CMVM is required for the issuance of securitised bonds with recourse to a public subscription offer.

The underlying assets must be evaluated and rated by an authorised rating agency, in a report similar to that required for the public offer for the subscription of securitisation fund participation units and which must be filed with the CMVM along with the application for authorisation to launch the offer.

In accordance with article 60(3) of Decree-Law 453/99, registration with the Registrar of Companies of Portugal of a public offer of subscription of securitised bonds addressed to Portuguese-resident investors is dispensed with and replaced with a certificate issued and sent *ex officio* by the CMVM to the Companies Registration Office.

The provisions of article 60(3) are significant alleviation of the burdensome requirement, valid for “classical” (i.e. non-securitised) bonds, of registration both with the CMVM (prior to the issuance) and with the Companies Registration Office, imposed by article 3 (1) of the Portuguese Companies Registration Procedures Code, as approved by Decree-Law 403/86, of 3 December 1983, as amended, and by article 114 of the Securities Code, respectively.

#### **2.3.3.3. Private securitised bond subscription offers**

The CMVM is also empowered to authorise private offers of subscription of securitised bonds.

The requirement of registration with both the CMVM and with the Companies Registration Office, mentioned in item 2.3.3.2. (iv) above applies to private offers.

Evaluation and rating of the underlying assets is not required.

#### **2.3.3.4. Reimbursement of securitised bonds**

Article 61 of Decree-Law 453/99 states that reimbursement and remuneration of the securitised bonds can only be made with recourse to (i) the underlying credits (ii) the surplus resulting from the collection thereof, and (iii) the income generated by those credits, e.g. interest rates charged thereon.

The remainder of the issuer’s assets cannot be utilised for the abovementioned purpose.

This provision, introduced by Decree-Law 82/2002, thus enshrines the “limited recourse” principle in the Portuguese securitisation law and therefore not only

further ensures the “insolvency or bankruptcy remoteness” of securitised bonds by protecting the bonds against the effects of the issuer’s insolvency or bankruptcy but also stresses the “true sale” nature of the assignment of the underlying credits by directing securitised bond subscribers wishing to be reimbursed to the obligors of the same credits.

On the other hand, article 62 of Decree-Law 453/99, also amended by Decree-Law 82/2002, imposes the “segregation principle”, under which the underlying credits (as well as the surplus resulting from the collection thereof and the income generated by those credits, as per the amendment introduced by Decree-Law 82/2002) constitute “autonomous assets” in relation to other assets owned by the securitisation company.

As a consequence of this principle, (i) the credits underlying such “autonomous assets” must be discriminated in “segregated” (i.e., separate) accounts and (ii) full reimbursement of the securitised bonds takes precedence over the payment of the securitisation company’s debts as far as those “autonomous assets” are concerned. Furthermore, each bond certificate or book-entry must contain a reference to the respective underlying credit, under the form of a cipher whose key is deposited with the CMVM.

Thus, the securitisation company is only entitled to whatever surplus may result from full reimbursement of the securitisation bonds with recourse to the “autonomous assets”. These “autonomous assets” can only be seized by creditors on grounds of default by the securitisation company on its debts should its assets prove insufficient to pay such debts.

## **2.4. Features of and requirements for the incorporation and operation of SPVs**

The most important amendments to Decree-Law 453/99 introduced by Decree-Law 82/2002 concerned the incorporation and operation of SPVs, in particular, of securitisation companies.

### **2.4.1. Securitisation Companies**

#### **2.4.1.1. Nature and corporate object**

As per article 39 of Decree-Law 453/99, as amended by Decree-Law 82/2002, securitisation companies are corporations whose sole object is to carry out securitisation transactions by means of the acquisition, managing and assignment of the underlying credits and of the issuance of securitised bonds in order to finance the acquisition of such assets.

The original version of article 39 qualified securitisation companies as financial companies. They thus had to comply with the provisions and requirements set forth in legal framework for the incorporation, operation and supervision of financial companies, contained in Decree-Law 298/92 of 31 December 1992, as amended (*Regime Geral das Instituições de Crédito e Sociedades Financeiras*).

However, Decree-Law 82/2002 removed such a qualification. Therefore, securitisation companies are now qualified as commercial companies, their incorporation, operation and supervision now being regulated by Decree-Law 453/99, the Portuguese Companies Code and the Portuguese Securities Code.

Originally, article 40 of Decree-Law 453/99 allowed securitisation companies to render the assignor credit-risk analysis and managing services, including accounting and marketing support, in relation to the assigned credits, as well as to award to a third party the servicing of the same credits, irrespective of the restrictions thereon contained in article 5(1) (see item 2.1.3. above).

However, Decree-Law 82/2002 revoked this provision, thus emphasizing that securitisation companies are securitisation vehicles alone.

#### **2.4.1.2. Corporate name and share capital**

As per article 40 of Decree-Law 453/99 (originally numbered article 42, renumbered article 40, after amendment, by Decree-Law 82/2002), the corporate name of securitisation companies must bear the expression “*sociedade de titularização de créditos*” or the acronym “STC”.

The share capital of securitisation companies is composed by nominative shares only and must be equal to, or higher than, the lower threshold as set out by the Minister of Finance via governmental order (EUR 250,000 - *Portaria* (Governmental Order) no. 676/2000 of 19 June 2002)

Securitisation companies can have a single shareholder (an innovation brought by Decree-Law 82/2002 with the aim of facilitating the incorporation of securitisation companies).

### **2.4.1.3. Incorporation and operation requirements**

#### **2.4.1.3.1. Prior authorisation by the CMVM**

A securitisation company can only be incorporated under prior authorisation by the CMVM, as per article 47 of Decree-Law 453/99, as amended by Decree-Law 82/2002. As the new version of article 39 suppressed the qualification of securitisation companies as financial companies, prior authorisation by the *Banco de Portugal* (required for the incorporation of financial companies by Decree-Law 298/92 of 31 December 1992) no longer applied.

#### **2.4.1.3.2. Moral and professional ability of the members of the Board of Directors**

According to article 41 of Decree-Law 453/99, in the version introduced by Decree-Law 82/2002, the members of the Board must be morally and professionally able to fill in the director's duties. Such ability is presumed not to exist where:

- (i) The person was convicted by a court of law for serious crimes like fraudulent bankruptcy, fraud, or money laundering or to an administrative fine by the securities market, banking or insurance supervisory authority, or
- (ii) Such person is bankrupt or deemed to be responsible for the bankruptcy of a company of which he was a member of the Board of Directors, or
- (iii) The person's functions were suspended, totally or partially by the CMVM as a precautionary measure within an enquiry on the breach or securities market regulations.

The ability of the members of the Board is verified by the CMVM on examining the application for the authorisation for the incorporation of a securitisation company and doubts thereupon constitute a valid ground to

deny such an authorisation (articles 48 (3) and 51 (c) of Decree-Law 453/99, as amended by Decree-Law 82/2002).

This is a new requirement, introduced by Decree-Law 82/2002, largely drawn on article 30 of Decree-Law 298/92 of 31 December 1992 (applicable to financial companies in accordance with article 182 thereof) and related to the power now awarded to the CMVM to authorise the incorporation of securitisation companies.

#### **2.4.1.3.3. Moral and professional ability of qualifying shareholders**

Article 42 of Decree-Law 453/99 was also amended by Decree-Law 82/2002. The new version thereof now requires the prospective holder of qualifying shareholdings in a securitisation company to be able to ensure a sound and prudent managing of that company. He is deemed not to be able to ensure such a managing where:

- (i) The manner in which he usually runs his businesses or the nature of his professional activity reveal a significant propensity for excessive risk-taking;
- (ii) His financial status is inadequate in relation to the amount of the proposed shareholdings in the securitisation company;
- (iii) The CMVM has a reasonable doubt on the legality of the funding used to finance the acquisition of the qualifying shareholdings in question or on the true identity of the owner of such funding.

Article 42 (2) of Decree-Law 453/99 adopts the notion of qualifying shareholdings contained in article 13 (7) of Decree-Law 298/92 of 31 December 1992. Thus, a holding in a securitisation company is of a qualifying nature if it is greater than 10% of the company's share capital or of the voting rights attached thereto or if, for any other reason, it grants its holder a significant influence in the company's management. Furthermore, calculation of a qualifying participation also takes into consideration the voting rights:

- (i) Held by the shareholder's spouse or minor descendants;

- (ii) Held by a third party, whether in its own name or not, on behalf of the shareholder or under an agreement whereby they undertake to jointly exercise their voting rights in relation to the company concerned or whereby the third party's voting rights are provisionally transferred to the shareholder;
- (iii) Held by companies controlled by, or in a group relationship with, the shareholder;
- (iv) Attached to shares used to secure a debt, unless the creditor desires to exercise those voting rights, in which case they are considered as belonging to that creditor, or deposited with, the shareholder, provided that he was given no specific voting instructions.

#### **2.4.1.3.4. Duties of securitisation companies**

Under the new version of article 46 of Decree-Law 453/99, introduced by Decree-Law 82/2002, articles 304(2 and 4), 305, 308, 309, 314 (1), 316 and 317 of the Portuguese Securities Code now apply, with the appropriate adaptations. These provisions concern a number of duties financial intermediaries must comply with within the exercise of their activities, namely:

- (i) Observation of the principles of good faith and of high standards of diligence, loyalty and transparency as well as of a duty of professional secrecy;
- (ii) Maintenance of the human resources, materials and technical support required for providing services with high levels of professional capacity, quality and efficiency;
- (iii) Safekeeping of documents related to their operations;
- (iv) Avoidance or reduction of situations of conflict of interest;
- (v) Liability for damages arising from the violation of duties relating to the exercise of its activities;
- (vi) Obligation to elaborate an internal "Code of Conduct";
- (vii) Auditors' duty to communicate certain information to the CMVM.

A consequence of the application of this set of duties to securitisation companies is their submission to the CMVM's supervision. As further discussed below, the enlargement and reinforcement of the CMVM's supervisory powers was of the main objectives of Decree-Law 82/2002.

#### **2.4.1.3.5. Own funds**

Under article 43 of Decree-Law 453/99, as amended by Decree-Law 82/2002, securitisation companies' own funds are now subject to lower thresholds equivalent to the following fractions of the net value of the securitised bonds issued by the securitisation company available for trade:

- (i) Up to EUR 75,000,000 - 0.5%;
- (ii) On the excess – 1‰.

#### **2.4.1.3.6. Financial resources**

Decree-Law 82/2002 also introduced significant amendments to Decree-Law 453/99. Thus, under the newly revised article 44 (formerly article 43), securitisation companies can only finance their activities with recourse to:

- i) Their own funds;
- (ii) The issuance of securitised bonds;
- (iii) Loans secured by the assets underlying a given issuance of securitised bonds, strictly for the purpose of ensure cash liquidity on reimbursing, or paying interest on, securitised bonds.

Thus, securitised companies are no longer allowed to carry out certain operations permitted under the original version of article 43, namely the issuance of non-securitised bonds, the carrying out of foreign exchange or futures transactions and the acquisition, on an ancillary basis, of equity or short-term, public or private debt securities.

Here, too, Decree-Law 82/2002 emphasizes that securitisation companies are solely securitisation transaction vehicles and not financial institutions.

#### **2.4.1.3.7. Credit assignment by securitisation companies**

Pursuant to article 45 of Decree-Law 453/99 as revised by Decree-Law 82/2002 (formerly article 41) securitisation companies are only allowed to convey the securitised assets to other securitisation companies or to securitisation funds.

They may, however, convey the securitised assets to other entities in the following circumstances:

- (i) In case of default on the loan underlying the asset in question;
- (ii) Back to the assignor, should the asset reveal hidden defects;
- (iii) Where the assets in question constitute a maximum 10% of a set of “autonomous assets” originally allocated to the reimbursement of a given issuance of securitised bonds.

The possibility given in item (iii) above was introduced anew by Decree-Law 82/2002, which also clarified that the assets that reveal hidden defects can only be conveyed back to the assignor.

#### **2.4.2. Securitisation funds**

*Fundos de Titularização de Créditos* (Securitisation funds) are the other SPV contemplated in Decree-Law 453/99 and are managed by entities specifically incorporated for the purpose, the *sociedades gestoras de titularização de créditos* (securitisation fund managing companies).

##### **2.4.2.1. Instatement and management of securitisation funds**

###### **2.4.2.1.1. Nature and types of securitisation funds**

Securitisation funds are arrangements whereby a group of persons to whom certain financial assets are conveyed allocate such assets to the sole purpose of securitising such assets. Those assets are deposited with a financial institution (*depositário* or depositary) and managed by a third entity (the *sociedade gestora de fundo de titularização de créditos* or securitisation fund managing company) in accordance with provisions contained in a written document elaborated by this company, called the *regulamento de gestão do fundo de titularização de créditos* (securitisation fund managing statute).

Claims relating to debts incurred by the persons to whom the assets are conveyed or by the entities, which manage the funds, or by the conveyor or conveyors cannot be satisfied with recourse to the said assets.

The funds are divided in fractions - *the unidades de titularização de crédito* - (securitisation fund participation units), whose main features were described in item 2.3.2.1. above.

The subscribers of securitisation fund participation units are only liable for the debts incurred by the securitisation fund up to the value of the units each one subscribed.

Securitisation funds can be of a variable or fixed nature. The former are those whose managing statute allows the acquisition of new assets, either by way of replacement of assets whose term is shorter than that of the fund itself or in addition to those already acquired upon the instatement of the fund, or the issuance of new participation units.

#### **2.4.2.1.2. Features of securitisation funds**

Both variable and fixed securitisation funds can acquire new assets wherever the credits underlying the assets conveyed to the fund are fully redeemed in advance or reveal hidden defects. However, such a possibility must be expressly stipulated in the fund's management statute.

Securitisation funds must use their resources to acquire, either initially or subsequently, assets to be securitised, which must constitute at least 75% of the funds total assets, and are only allowed to use their liquidity reserves to acquire listed securities and short-term, private or public debt securities, where required to ensure an efficient management of the fund, provided that the acquisition of such securities does not entail a modification of the participation units' rating.

Wherever stipulated in the management statute, securitisation fund managing companies are allowed to borrow on behalf of the funds in order to endow them with adequate liquidity reserves and/or make use risk-coverage instruments, namely foreign-exchange and interest-rate swaps.

The securitisation funds' liabilities can comprise not only the liabilities arising from the participation units but also those arising from the loans and risk-coverage instruments referred to above.

The securitisation funds' assets cannot be disposed of, except if the underlying credits reveal hidden defects or upon liquidation of the fund, neither can they be encumbered in any way, except where required to secure the loans referred to in paragraph (iii) above.

#### **2.4.2.1.3. Requirements for the instatement of securitisation funds**

The instatement of a securitisation funds must be previously authorisation by the CMVM, as per article 27 (1) of Decree-Law 453/99).

The abovementioned authorisation must be applied for by the securitisation fund managing company, which is required supply the following documentation:

- (a) The draft management statute;
- (b) Draft deposit contract with the entity that will serve as depositary;
- (c) Assignment agreement regarding the assets to be conveyed to the fund;
- (d) Draft servicing contract, wherever such function is to be awarded to an entity other than the management company;
- (e) Forward financial overview of the fund.

If the securitisation fund participation units are to be issued with recourse to a public subscription offer, the management company must also apply to the CMVM for authorisation to launch the offer and supply a draft prospectus, a placement contract and an asset evaluation and rating report by an authorised rating agency.

Should the assignor be a credit institution, financial company, insurance undertaking, pension fund or a pension fund management company, the CMVM can only authorise the instatement of the fund under prior consent by the assignor's supervisory authority (the *Banco de Portugal* for credit

institutions and financial companies and the *Instituto de Seguros de Portugal* for pension funds and pension fund management companies).

The fund is considered instated on the date of the financial settlement of the subscription of the participation units and both the assignment agreement and the deposit contract enter into force on the same date.

#### **2.4.2.2. Incorporation and operation of securitisation fund management companies**

##### **2.4.2.2.1. Nature and corporate object**

Securitisation fund management companies are financial companies with head offices in Portugal whose sole object is the management of one or more securitisation funds on behalf of the subscribers of participation units in those funds (articles 15 and 16 (1) of Decree-Law 453/99). They are not allowed to assign their powers to a third party, without prejudice to the possibility of awarding servicing functions to someone else, where permitted by law.

##### **2.4.2.2.2. Corporate name, form and share capital**

Pursuant to article 17 of Decree-Law 453/99, securitisation fund management companies' corporate name must bear the expression "*sociedade gestora de fundos de titularização de créditos*" (securitisation fund management companies) or the acronym "SGFTC". They must also be incorporated under the form of corporations (*sociedades anónimas*), whose share capital is composed by nominative shares only and must be equal to, or higher than, the lower threshold as set out by the Minister of Finance via governmental order (EUR 250,000 - *Portaria* (Governmental Order) no. 676/2002 of 19 June 2002).

##### **2.4.2.2.3. Main duties**

As per article 18 of Decree-Law 453/99, securitisation fund management companies must observe strict professional diligence and care criteria with

regard to their actions and are empowered to carry out all actions required to manage the fund, *inter alia*:

- (i) Acquire assets to be securitised on behalf of the fund and in accordance with the provisions of the management statute, notify the respective obligors of such acquisition and ensure land property registration procedures wherever the same assets are mortgage-backed;
- (ii) Provide for all actions and/or contracts required for the issuance of participation units;
- (iii) Borrow on behalf of the funds in order to endow the latter with adequate liquidity reserves, if stipulated in the management statute;
- (iv) Oversee the amounts paid by the obligors with regard to the loans underlying the assets conveyed to the fund and service those assets where servicing functions do not pertain to the assignor or to a third party;
- (v) Authorise the encumbrance or disposal of the fund's assets in the terms and conditions provide for in the law (see paragraphs (v) and (vi) of item 2.4.2.1.4. above);
- (vi) Manage the costs incurred by the fund and keep its accounts in good order;
- (vii) Comply will all information duties imposed by the law, including that of informing the CMVM on the acquisition by the fund of listed securities and short-term, private or public debt securities.

Furthermore, securitisation fund management companies are also prevented from:

- a) Borrowing on their own account;
- b) Encumbering or disposing of fund assets outside the cases referred to in item (v) above;
- c) Acquire any securities on their own account, except public funds, national or foreign, or similar.

#### **2.4.2.2.4. Authorisation**

Since securitisation fund management companies are financial companies, they can only be incorporated under authorisation granted on a case-by-case

basis by the *Banco de Portugal*, pursuant to Decree-Law 298/92 of 31 December 1992 (the “*Regime Geral das Instituições de Crédito e Sociedades Financeiras*”, referred to above). The *Banco de Portugal* can also authorise securitisation fund management companies to perform money broking operations.

#### **2.4.2.2.5. Own funds**

Under article 19 of Decree-Law 453/99, as amended by Decree-Law 82/2002, securitisation fund management companies’ own funds are subject to lower thresholds equivalent to the following fractions of the overall net value of the securitisation funds:

- (i) Up to EUR 75,000,000 - 0.5%;
- (ii) On the excess – 1‰.

#### **2.4.2.2.6. Replacement of the management company**

Under article 22 of Decree-Law 453/99, the CMVM can order the replacement of the securitisation fund management company:

- a) On joint request of the management company and of the depositary, provided that the fund subscribers’ rights are adequately protected;
- b) Should the management company’s authorisation be revoked by the *Banco de Portugal* or should it enter into liquidation procedures for any other reason.

### **3. Supervision and regulation of security transactions**

Supervision and regulation of security transactions is generally awarded to the *Comissão do Mercado de Valores Mobiliários* (Securities Market Supervisory Authority - CMVM), whose powers were considerably reinforced under the amendments introduced by Decree-Law 82/2002.

In particular, Decree-Law 82/2002 clarified and expanded the CMVM’s supervisory and regulatory powers on securitisation companies, in articulation with the new qualification

of securitisation companies (which lost their former qualification as financial companies and were thus removed from the scope of the *Banco de Portugal's* supervision) and of the extension to securitisation companies of a number of duties imposed on financial intermediaries. It also clarified the CMVM's regulatory powers with regard to the various steps of securitisation transactions.

### **3.1. Supervision**

With regard to supervision, as results from the amended version of Decree-Law 453/99, the CMVM is empowered to:

- (i) Authorise and supervise public ABS subscription offers, whether launched by securitisation funds or by securitisation companies, as well as to authorise and supervise private ABS subscription offers launched by securitisation companies;
- (ii) Grant authorisation for the instatement of securitisation funds and to request any additional information and/or documentation or any modification to the documentation lodged by the applicant, as well as to approve the securitisation fund management statute fund and any modifications thereto;
- (iii) To supervise the activities of securitisation funds, without prejudice to the *Banco de Portugal's* supervision powers on securitisation fund management companies, in particular with regard to the funds' auditing and compliance with information duties;
- (iv) Authorise, or revoke the authorisation for, the incorporation and operation of securitisation companies;
- (v) Evaluate the professional and moral ability of the members of the Board of Directors and decide whether any proposed qualifying holdings in the securitisation company's share capital hamper, or is likely to hamper, a sound and prudent management of the company;
- (vi) Supervise all the activities carried out by securitisation companies, including the compliance thereof with the duties of financial intermediaries applicable to securitisation companies;

### **3.2. Regulation**

The supervisory powers awarded to the CMVM are backed by ample regulatory powers on, *inter alia*, the following fields:

- (i) Requirements, procedures and documentation for applying for an authorisation to launch a public ABS subscription offer, including minimum contents of the prospectus;
- (ii) Requirements for the operation and duties of securitisation funds, namely (a) types of risk-coverage instruments funds are allowed to use, (b) types of securities funds are allow to acquire with their liquidity reserves, (c) terms and conditions in which securitisation fund managing companies can borrow on behalf of the funds for other purposes than to finance the fund's liquidity reserves, (d) information disclosure to the CMVM and to the public at large, (e) minimum contents of the rating agency's report on the securitisation transaction, (f) auditing of securitisation funds.
- (iii) Requirements for the incorporation and operation of securitisation companies, namely (a) procedures for the authorisation and registration of securitisation companies, including the registration of members of the Board of Directors or of qualifying holdings, (b) technical, material and human requirements for the operation of securitisation companies, (c) types of assets eligible for securitisation companies' own funds, (d) financial resources, in particular, the types of financial instruments securitisation bond in which reimbursement surpluses can be reinvested, (e) prudential supervision and auditing, and, (f) disclosure of information to the CMVM and the public at large.
- (iv) Requirements and procedures for public and private securitised bond subscription offers, including the contents of the prospectus and other documentation to be disclosed to the CMVM and to the public at large.

### **4. Conclusions**

Decree-Law 453/99, analysed above, constitutes a rather complete legal framework for securitisation transactions in Portugal, except for tax matters, regulated elsewhere.

On the other hand, the amendments introduced by Decree-Law 82/2002 are a clear attempt to ease the requirements for incorporating and operating securitisation companies, in order to further increase the competitiveness of the Portuguese securitisation market. These amendments also seek to attract such transactions, since the rather hefty requirements for incorporating and operating securitisation companies imposed by the original version of Decree-Law 453/99 as well as the lack of clear tax rules on securitisation - only adopted in 2001 - led most financial operators to carry out the securitisation transactions with recourse to off-shore based SPVs.

The regulatory and supervisory powers now awarded to the *Comissão do Mercado de Valores Mobiliários* (Securities Market Supervisory Authority - CMVM) are also a significant contribution to ensure a transparent and balanced securitisation market, since the CMVM's regulatory powers with regard to securitisation funds are clarified and securitisation companies are now subject to a single supervisory authority.

Under its new powers, the CMVM is finishing a regulation on the procedures for incorporation and operation of securitisation companies (currently under public discussion), which, in the medium term, shall constitute a point of reference to evaluate the performance of the new legal framework for securitisation transactions in Portugal.