

Securitisation

Legal and tax aspects - Poland

2017



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Securitisation transactions have been receiving increased attention as attractive alternatives for Polish companies, especially those who can derive large pools of receivables from the debtors which are consumers or small/middle enterprises. This includes banks, insurers, financial institutions, leasing companies, and other firms. The aim of this document is to bring up the legal and tax aspects of securitisation financing in Poland. In order to achieve this task, several regulations need to be examined since there is no separate act on securitisation that covers all of the relevant issues.

Introduction

Through securitisation, originators are able to refinance their business activities while transferring the risk outside. Receivables that could be subject to securitisation mostly comprise of loan and lease contracts; however, any receivable that can be pooled and generate future cashflows can be securitised.

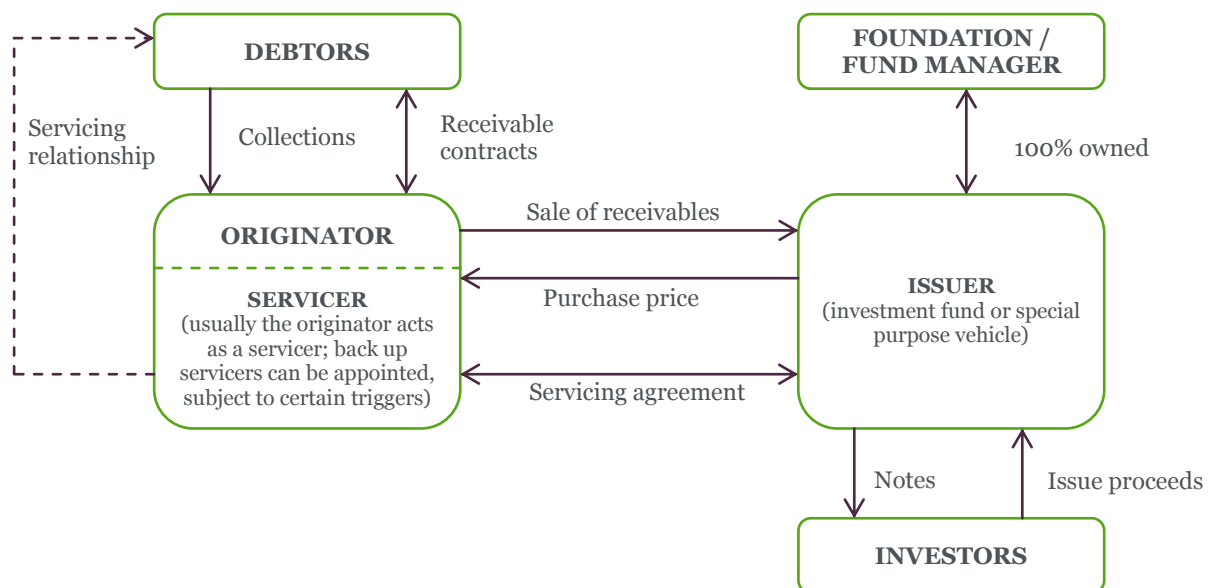
The main features of a securitisation structure include:

- separation (transfer) of a pool of receivables that is used as the basis for issuing notes;
- using bankruptcy-remote designated entity (usually independent from the originator) as the issuer; and

- transfer of risk from the originator to the investors.

Financing through securitisation allows for better risk assessment, and the acquisition of rating higher than normal, which also means a lower cost of capital. Other advantage is the possibility of recognising the sale of receivables as a significant risk transfer for the purpose of the regulations concerning capital requirements. This mostly applies to banks and insurers. However, the detailed regulatory requirements concerning capital requirements are not the subject of this paper.

A typical structure of a “true sale” securitisation transaction can be described as follows:



Assignment of receivables

General

Under Polish law, the legal relationships between parties (such as a creditor and a borrower) usually consists of two mirror-like elements – the receivable (asset), and the obligation (debt). In the above-mentioned scenario, the creditor's obligation (which is, at the same time, the borrower's receivable) is represented by the amount of cash that is to be paid to the borrower, while the creditor's receivable (which is the borrower's debt) comprises of the amounts that are to be repaid to the creditor by the borrower (interest and the principal element). Generally, in securitisation transactions only the originator's "receivable" component is subject to transfer¹ in order to serve as a base for the securities issued (usually by an entity separated from the originator) to refinance the originator's business activity.

By transferring the receivables, the assignor also transfers the other rights and claims connected to the receivable, including any interest. Certain rights are not automatically transferred and can require separate contract provision; these include any initial warranties given to the assignor. However, this should not be the case concerning the assignment of receivables for the purpose of securitisation.

Polish law states that each receivable can be transferred (assigned) by the creditor to any third party, unless this transfer is contrary to the law, or a contractual stipulation, or would be against the nature of an obligation². Polish law does not recognise a general assignment which means that the assignment can only refer to

individual receivables, and not to the portfolio of receivables.

Under Polish civil law, the assignment of claims, rights, or receivables is normally dependent on the existence of a "legal reason" (or *causa*). If the assignment results from the sale of receivables, the validity of the assignment will depend on the validity of the underlying sale agreement.

For the purpose of a transfer, receivables must be appropriately identified. Depending on the type of receivable, it is sufficient to provide the following data concerning the relevant receivable, or the agreement under which it arises (if provided):

- (i) type of receivable;
- (ii) parties to the agreement;
- (iii) number of the agreement;
- (iv) date of the agreement; and
- (v) in the case of a vehicle lease – vehicle identification number.

True sale

A true sale (assignment of receivables) is the most common way of securitisation, involving an agreement between an assignor and an assignee, pursuant to which the receivables are transferred. In order to reach a "true sale," the effect of the transfer must be definite (i.e. not constitute a fiduciary transfer for security reasons only) and, in order to avoid being challenged, should be performed for consideration³. A true sale assignment is subject to all of the general rules mentioned above.

¹ Please note that in securitisation there will usually be no (or almost no) obligations on the originator's side. For example, a bank refinancing its credit portfolio will have all of the underlying credit facilities utilised, which means that its core obligations (i.e. cash drawdown) have already been fulfilled. This leaves the bank with receivables (interest and principle to be paid by the debtors to a bank) that can be easily transferred.

² Certain receivables cannot be transferred. This concerns pre-emption rights, alimonies, salaries from work contracts, or personal easements.

³ A deferred purchase price structure is also commonly used and generally it should not result in impairment of the true sale effect of the assignment. This also applies to a discount.

Future receivables

Specific rules apply to the transfer of future receivables. Polish law does not specifically deal with the transfer of future receivables. The prevailing view on this matter (as also presented by the Supreme Court of Poland) is that the transfer of future receivables is possible, if the following conditions have been met:

- (i) a contractual relationship between the original creditor and the debtor exists at the time of the transfer; and
- (ii) the receivable and the contract have been duly described (this is also a requirement for a valid assignment in general, but when a transfer concerns future receivables it is even more important to provide a proper description).

It is also important to distinguish between future receivables and receivables existing, but not yet due and payable. The former concerns only receivables not yet existing (i.e. an obligation has not been created, but it may arise in the future).

Form of assignment

In general, no special form for the assignment of receivables under Polish law is required. However, there are certain exceptions from this rule:

- (i) the transfer must be in writing, if the receivables or the underlying agreements themselves are in writing;
- (ii) the mortgage receivables can only be transferred under the agreement with the signatures certified by a notary public;
- (iii) the security assignment has to be executed with a certified date in order to be effective against the bankruptcy estate (please also see the [Claw-back and insolvency risks](#) section on page 12); or
- (iv) certain receivables can be subject to more restricted terms.

Debtors' consents

As a rule, the consent of a debtor is not necessary for the assignment to be valid and enforceable. However, a specific legal act or contractual provision of an agreement under which the particular receivable arises may require this consent. In particular, the creditor and the debtor may have agreed that the assignment required the debtor's consent.

Certain agreements stipulate provisions in accordance to which an assignment without the debtor's consent is only possible in specific situations. For example, the underlying documents might allow the creditor to assign its receivables without a consent only if they are assigned to a financial institution or a special purpose vehicle, designated for securitisation reasons (popular contract clause). In this case, the assignee will also be bound by these provisions and will not be able to reassign the receivables freely, unless the debtor's consent has been obtained.

Silent assignment structure

As a rule, Polish law also recognises the concept of "silent assignment" which means that the assignment of receivables is valid even though the debtors have not been notified.

However, in the case of a "silent assignment," any performance of the agreement made by the debtor in favour of the previous lender is effective towards the assignee, until the debtor has been notified of the assignment. This rule also applies to other legal acts between the debtor and the previous lender, such as the release from debt, the prolongation of the time limit to repay the debt, contractual set-off, the termination of a contractual relationship between the parties, novation, or the modification of the contractual relationship including the amount, time limit and place of the performance of the parties, and interest rate, or instalments. Accordingly, the unilateral acts of the parties related to the agreement, such

as a statement on the set off, will also be subject to the above principle.

Notification requirements

Pursuant to the Civil Code, there is no general requirement under Polish law to notify the debtor of an assignment, and the failure to do so incurs the following legal risks:

- (i) the first risk is that the debtor who has not been notified could affect payment with a discharging effect to the original creditor, or enter into any other transaction with respect to the receivable with the original creditor;
- (ii) other important consequences are connected with the right of the debtor to set-off its claims towards the original creditor against the assigned receivable;
- (iii) even following the notification, it is possible to raise defences against the assignee (the acquiring creditor) that arise from its relationship with the assignor (the original creditor) which existed at the time the notification was made (any claims that arose after the notification are not capable of being raised against the assignee).

Any notification of an assignment of a receivable which is to be binding upon the debtor should be made by the assignor (i.e. the originator). Alternatively, an issuer can make notifications to debtors based on a power of attorney granted by an originator. However, in the case of an originator's bankruptcy, all powers of attorney granted by the originator would automatically expire, meaning that there is a risk that if an originator went bankrupt, an issuer would not be able to use the power of attorney and effectively notify the debtors of the assignment of the receivables. The usual approach to this issue is to notify a debtor upon, or shortly after, the assignment of a receivable by an originator, and to instruct the debtors to continue making payments to the originator until they have received different payment

instructions from the issuer. The right to make new payment instructions in this scenario by an issuer on its own behalf cannot be revoked by the originator.

In practice, most originators inform the debtors about the assignment together with dispatching the first invoice set after the transfer, in order to save costs. However, in most cases, this would not prove effective if the invoices are being sent electronically, since the notification should generally be given in the same form as the agreement between the originator and the debtor⁴.

Notification requirements for the assignment of consumer loans

In addition, under the Consumer Loan Act, in the case of an assignment of receivables under consumer loan agreements, the assignor is obliged to notify a debtor of the assignment on a durable medium, unless the debtor continues to render performance under the loan facility agreement towards the assignor. In most structures, banks, being the originators, also service assigned receivables, in which case no notification is required in accordance to the Consumer Loan Act.

Special types of securitisation

Apart from true sale, where the receivables are assigned, i.e. transferred to another entity which serves as an issuing vehicle, the following types of securitisation are also possible:

Synthetic securitisation

Synthetic securitisation, as opposed to a true sale assignment, does not involve a transfer of receivables as such. In synthetic securitisation, the structure ownership of the receivables remains with the originator and the risk separation effect is obtained by using either specially tailored derivatives or guarantees. This

⁴ Under Polish law, only the electronic form with a qualified certificate is treated as an equivalent to the written form, and in most cases a simple email will not suffice.

type of securitisation also does not necessarily involve the issuance of securities.

Synthetic securitisation can be divided into two main types:

- (i) Balance sheet synthetic transactions (BSST) – mainly used by banks and insurance companies, primarily for managing credit risk and capital relief; or
- (ii) Arbitrage synthetic transactions – used purely for refinancing purposes.

Common synthetic securitisation transactions involve collateralised debt obligations (CDO), in accordance to which the underlying credit exposures are taken using a credit default swap rather than by having a vehicle acquire receivables and issue asset-backed instrument such as a note.

Unlike true sale securitisation, synthetic securitisation not always provides a full risk transfer. This is because the initial credit risk is replaced with a counterparty risk. In the case of a counterparty's bankruptcy, some synthetic structures may prove ineffective with respect to risk mitigation. A number of legal issues concerning derivatives, including special treatment under the Polish Bankruptcy Law, need to be taken into account when running a synthetic securitisation involving these instruments.

Sub-participation

Sub-participation securitisation, similarly to synthetic securitisation, does not involve the assignment of receivables. Instead, in accordance with the sub-participation agreement, the originator is obliged to shift all of the cashflows from a particular receivable, or a pool of receivables to a securitisation fund (and not the other entity).

Unlike in other types of securitisation, the payment of the price for any “rights to cashflows” cannot be deferred. A sub-

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participation agreement can be executed in a simple written form.

Please note that, in the case of an originator's bankruptcy, the receivables that generated cashflows “sold” pursuant to the sub-participation agreement will not constitute a part of the originator's bankruptcy estate. Instead, it is the securitisation fund that will assume all of the rights arising under these receivables.

Types of issuers

Securitisation via an SPV

Polish law does not recognise trusts or similar entities (commonly used for securitisation transactions carried out abroad). Therefore, other legal forms need to be used for issuing purposes. The usual choice is a limited liability company (pol. *spółka z ograniczoną odpowiedzialnością*, with a minimal share capital of PLN 5,000). It is debatable whether a foundation (pol. *fundacja*, with a minimal share capital of PLN 1,000) can also be used, since it can only be established for a specific aim⁵.

⁵ Polish law does not allow private foundations. Please note that according to the Polish Act on Foundations, a foundation can be established for a “socially or economically beneficial purpose.” However, it is commonly agreed that the “economical” purpose concerns a publicly beneficial objective, rather than a private aim.

There are no separate license requirements for a Polish SPV to serve as an issuing entity for securitisation purposes (please see LICENCE REQUIREMENTS below).

An SPV can also be registered outside Poland. The most common choice is Ireland, although Luxembourg, France, Sweden, and Spain are also often considered. Several tax matters and existing double tax treaties between Poland and the place of registration need to be considered in this approach.

Securitisation via an investment fund

A securitisation fund is a type of closed-end investment fund regulated under the Polish Act on Investment Funds. Securitisation funds are designated to mainly invest in specified receivables, or pools of receivables. Securitisation funds can engage in securitisation transactions as an issuer of investment certificates (including subordinated certificates).

As with any other funds regulated under the Polish Act on Investment Funds, a securitisation fund can be established and managed only by a fund manager (pol. *towarzystwo funduszy inwestycyjnych*). A fund manager is a joint stock company set up under Polish law, although the fund management can be transferred to another authorised fund manager registered in another country which is an EU member state, as long as this fund manager operates in Poland. Every fund manager can establish and manage more than one investment fund, as well as managing various types of investment funds. Apart from this, investment funds are obliged to enter into depositary agreements with a custodian which is responsible for keeping the fund's assets, maintaining the asset register, and monitoring the cashflows and compliance of the funds with the Polish Act on Investment Funds.

Unlike a regular SPV, a securitisation fund is subject to a number of requirements. In particular, the exposure to receivables of one

debtor cannot exceed 20% of the value of the securitisation fund's assets.

The establishment of an investment fund requires the consent of the Polish Financial Supervision Authority (the “KNF”, pol. *Komisja Nadzoru Finansowego*), unless the fund's statutes does not allow the offering of investment certificates to the public, or their admission to the regulated market, or the MTF. The KNF is also responsible for the supervision of Polish investment funds and fund managers, and any investment fund is subject to entry in the register of investment funds maintained by the KNF. The managing and servicing of receivables acquired by a securitisation fund by an entity other than a fund manager requires the KNF's consent, as does any change in the fund's statutes.

There are two types of securitisation fund:

- standard securitisation funds; or
- non-standard securitisation funds.

The main differences between these two forms are as follows:

- (i) standard securitisation funds have to be established with separate sub-funds, whereas for the establishment of non-standard securitisation funds, sub-funds are only an option;
- (ii) standard securitisation funds can only perform one issue per sub-fund; no additional issues are allowed;
- (iii) certificates of non-standard securitisation funds can only be acquired by legal entities; natural persons can only buy these certificates if (i) the statutes allow for these operations, and (ii) the nominal value of each certificate is no less than EUR 40,000.; and
- (iv) notes issued by a standard securitisation fund cannot exceed 25% of the combined asset value for this fund, while for a non-standard securitisation fund this threshold is 75%.

Both types of funds have different requirements concerning capital allocation:

- standard securitisation funds are obliged to allocate at least 75% of the value of the assets of a given sub-fund exclusively in one pool of receivables, or, if its statutes allow, in more than one pool of receivables, if every pool meets the following requirements: (i) the receivables were originated by banks, (ii) all of the receivables are of the same type, and (iii) all of the receivables' purchase agreements or sub-participation agreements (as applicable) will be entered into no later than three months after the establishment of the fund;
- non-standard securitisation funds are obliged to allocate at least 75% of the value of the assets of a given sub-fund (and, in the case of non-standard securitisation funds without the sub-funds, at least 75% of the value of all of the assets) exclusively in: (i) specific receivables, (ii) securities incorporating pecuniary receivables (including notes issued in accordance to securitisation transactions) – however, exposure to these securities cannot exceed 25% of the value of the assets of any sub-fund (and, in the case of non-standard securitisation funds without the sub-funds, at least 25% of the value of all of the assets), or (iii) the rights arising under specific receivables (including the right to receive interest).

Under Polish law, each sub-fund is treated as a separate asset pool and is, therefore, protected from claims against other sub-funds and investment funds in general (limited recourse). At least two sub-funds need to be created in order to achieve an asset separation effect.

A fund manager, or a securitisation fund, can also enter into a guarantee agreement for the benefit of investors in investment certificates, as long as one party to this agreement is a bank, or

an entity rated by a professional rating agency on, at least, an investment level.

Special requirements for bank securitisations

In accordance to the Polish Banking Law, the securitisation of bank receivables is subject to certain requirements concerning issuers. In particular:

- (i) an issuer cannot be linked to the bank-originator by means of equity (e.g. it cannot be its affiliate or subsidiary), or organisation (e.g. it cannot be managed by the bank-originator); and
- (ii) the activities of an issuer must be limited to carrying out securitisation, comprising of the acquisition of receivables, the issue of securities based on these receivables, and supportive activities.

Securitisating bank receivables is also subject to special tax treatment. Please refer to the section **Taxation** on page 16.

Transfer of collateral

Civil pledge, financial pledge, and registered pledge

Polish law recognises two main types of pledges:

- (i) civil pledge (including its special form, a financial pledge); and
- (ii) registered pledge.

A pledge is a security interest that can be established over a right or a movable (but not on a real property). A pledge can only be transferred together with a secured receivable (i.e. the relevant receivable can be transferred either with, or without, a pledge, but the pledge itself cannot be transferred without transferring the secured receivable). A pledge is a proprietary right, and, as a rule, has priority over any personal (including contractual) claims that could be raised against the debtor. While a civil pledge can only be enforced by a court proceeding, both a financial and registered

pledge can provide other (usually quicker than a court proceeding) types of enforcement, including seizure. Pledges over certain types of assets (e.g. shares) can involve special completion or notification requirements for their establishment or transfer.

A civil pledge can be established or assigned in accordance with an agreement in written form with certified date⁶, and is not subject to registration. A financial pledge is a type of civil pledge that: (i) can be established or assigned by an agreement in simple written form, (ii) is available only to banks and financial institutions, (iii) can only encumber certain types of rights, such as shares or bank account receivables, and (iv) is not subject to any bankruptcy hardening periods (please see below). In case of there being more than one civil or financial pledge over an asset, the later established pledge has priority over the one established earlier.

A registered pledge can be established or assigned in accordance to an agreement in simple written form, and is subject to a completion requirement in the form of its registration in the register of pledges, maintained by the relevant district court (entry usually takes between two to three weeks). In case of more than one registered pledge over an asset, the registered pledge that was entered into the register earlier has priority over one entered later. The transfer of a registered pledge is effective upon the day of entry of the new pledgee into the register. A transfer agreement should be executed in written form, with one extra copy for registration purposes. The court fee for the re-registration of a registered pledge is PLN 100.

Mortgage

Mortgages are subject to registration in the land and mortgage register, run by the relevant district court (entry usually takes between one

to two months). A mortgage is a security proprietary right that can be established over a real property, and, as a rule, has priority over any personal (including contractual) claims that could be raised against the debtor. In case there being more than one mortgage over a single real property, the mortgage entered into the land and mortgage register earlier has, as a rule, priority over one entered later.

Under Polish law, the assignment of rights arising from a mortgage is inseparably connected to the assignment of the receivables secured by this mortgage. That said, once the secured receivable has been transferred, the mortgage will follow, and no separate security transfer is required. However, a mortgage cannot be transferred without the secured receivable. The transfer of a mortgage receivable (and the mortgage along with it) is effective upon the registration of the new mortgage creditor in the land and mortgage register (the effective date being the date the application was filed). The transfer agreement should be executed in written form with notarised signatures, with one extra copy for registration purposes. However, if a bank were to transfer a mortgage receivable, the re-registration of the mortgage would only require a simple written form (no notarisation required). The court fee for the re-registration of a mortgage is PLN 200.

Fiduciary transfer of title to movables by way of a security

The ownership of a movable can be transferred to a creditor as a fiduciary act, as collateral securing the creditor's receivables. A transfer of title by way of a security is usually conditional and expires on or after the repayment of the receivable. It is also possible to transfer partial ownership (i.e. share) in the relevant asset, such as a share in a jointly owned property.

A transfer of title by way of security is completed upon the execution of the relevant transfer agreement. The transfer of movables does not require any specific form or registration; however, due to Bankruptcy law

⁶ This form of agreement is required in order for a pledge established on a right to be valid, as well as for a pledge established on a movable to be effective against the pledgor's creditors.

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provisions (please see below) it might be advisable to enter into a transfer agreement with a certified date.

The transfer of certain assets could involve Polish administrative regulations. For example, each transfer of a title to a vehicle, which is registered by the relevant Polish communication authority, should be reflected in this vehicle's certificates. This is required in relation to the transfer of the full legal title to the vehicle, or a part thereof, and also in relation to a transfer by way of a security. The transfer of a title should be reported to the relevant local communication authority within 30 days of its occurrence. Failure to meet this requirement is a petty offence under Polish law and can be punished by a fine of up to PLN 3,000 for each offence.

Fiduciary transfer of a title to a property by way of a security

Unlike the fiduciary transfer of a movable, the transfer of a property cannot be conditional, and is subject to registration in the land and mortgage register. The transfer agreement should be executed in the form of a notarial deed. The transfer of an ownership in a real property is effective upon the execution of the agreement. However, please note that the title

to certain real properties might not be full "ownership," but instead, a so called "perpetual usufruct". In the case of these properties, the transfer would only be effective upon its registration in the land and mortgage register (the date of filing an application being the effective date).

When dealing with a transfer of a title in a property one must take into account several requirements. This applies to: (i) limitations on the transfer of agricultural properties, (ii) preemptive rights, and (iii) the requirements concerning foreigners acquiring the real property (including legal personal with their registered offices outside Poland). In transactions concerning property transfers, separate advice, in this respect, would be recommended. However, most securitisation deals do not involve property transfers.

Security assignments (including the assignments of insurance claims)

The assignment of receivables for security reasons (including receivables under insurance contracts) is generally subject to the same legal regime as in relation to any other receivables under civil law agreements (including any risks connected with a so called "silent assignment," etc.). The only general form of requirements is that the receivable stated in writing can only be transferred in accordance to the assignment agreement in written form. However, due to Bankruptcy law provisions (please see below), it would be advisable to enter into a transfer agreement of these collaterals with a certified date.

Insurance receivables are generally transferable by their nature, but they could be subject to contractual restrictions limiting or prohibiting their transfer. However, third party liability insurances are not transferable by their nature: the loss payees under these insurances are always third parties damaged by the relevant accidents.

Promissory note

In Poland, a promissory note is often used as an additional collateral securing payment obligations. A promissory note is usually blank (i.e. is not filled in with all of the elements required by the law for promissory notes, but is only signed by the debtor and the guarantor, if any), and is accompanied with an agreement between the debtor and the creditor which sets out the rules of filling in the promissory note by the creditor in case of a default of the debtor (called a "promissory note declaration").

The transfer of rights under the blank promissory note can either be made by: (i) an assignment of rights (rules similar to the assignment mentioned above), or (ii) an endorsement placed on the document of the promissory note by the original creditor, together with the delivery of the promissory note declaration. Blank promissory notes do not have to be filled in with any missing data upon their transfer.

The difference between these two forms is that in the case of the transfer of the promissory note by way of assignment, the assignee, when requesting the payment under the promissory note, would, in addition to presenting the promissory note document, have to prove the existence of the valid assignment agreement; whereas in the case of endorsement, it is sufficient to present the promissory note document itself; in each case filled in in accordance with the promissory note declaration.

Submission to enforcement

A submission to enforcement is a written statement of a debtor on the voluntary submission to enforcement (executed in the form of a notarial deed) in favour of the creditor. The statement significantly facilitates the enforcement and enables the enforcement to proceed without going through a court trial. A submission to enforcement, upon the

attachment of an enforcement clause by the relevant court, constitutes an enforcement title.

The rights of an originator under submissions to enforcement cannot be assigned to the issuing company. In order to benefit from the security interest secured by the submissions to enforcement, each relevant debtor would have to issue a new submission to enforcement in favour of the issuer. This statement should be executed in the form of a notarial deed.

In certain cases, the issuer will be able to conduct accelerated court enforcement proceedings upon obtaining other forms of enforcement title. For instance, the Civil Procedure Code states other less formalistic enforcement proceedings that lead to the issuance of an enforcement title, e.g. an electronic payment order.

Special rules concerning banks and securitisation investment funds

Banks and securitisation funds benefit from an easier re-registration procedure. In order to evidence a transfer of mortgage receivables (and, in the case of securitisation funds, also a registered pledge), the following documents are needed for the disclosure of the transfer of the mortgage (or a registered pledge) in the relevant register:

- in the case of a bank – the bank's accounting books, extracts from these books, and receipts and other statements signed by the bank's representatives with a seal of the bank; or
- in the case of a securitisation fund – an extract from the fund's accounting books confirming the acquisition of the relevant receivables; this extract has to be executed by the fund's representatives, with the seal of the fund manager; in addition, the court fee for the re-registration of a collateral in this manner is PLN 100.

Please note that this procedure only concerns the registration of a collateral and the

mentioned documents cannot be the sole grounds for the assignment of receivables which also has to be valid in order for the effective and enforceable transfer and registration of security interest.

Parallel debt

Parallel debt is the English law structure creating an abstract obligation of an issuer towards a security trustee that combines a pool of different receivables in order to facilitate the process of securing these receivables. It mirrors the principal obligations such as those arising under a credit facility or notes. This means that a decrease or increase of value of any of the principal obligations will affect the parallel debt. Since Polish law does not recognise trusts, in the case of more than one creditor (in securitisation – more than one investor), each obligation would have to be secured separately, which generates costs and is more time-consuming, which is the reason for the establishment of a parallel debt.

Certain receivables (including receivables arising under debt securities) can also be secured using the so-called administrator structure. In this case, the administrator exercises the rights from a security interest in its own name, but for the benefit of all of the creditors. Different administrator structures are possible for mortgages, registered pledges and – only for bond receivables – other collaterals.

Other

There are several other relatively less common types of collaterals (e.g. guarantee or special types of security interest such as bottomry, for certain types of assets, in this case ships), a number of which can be transferred by a simple agreement, without any particular form requirements. However, due to bankruptcy law provisions (please see below) it might be advisable to enter into a transfer agreement of these collaterals with a certified date.

Please also note that this section needs to be read together with the Claw-back and

insolvency risks section on page 12, since Polish bankruptcy and restructuring regulations can, in certain cases, affect the validity or enforceability of several types of security interest.

Data protection

Personal data protection and its applicability

The definition of personal data covers any information about a natural person, which allows for the identification of this person⁷. The Polish Act on Personal Data Protection stipulates certain limits on the possibility of processing personal data. Data processing is understood very broadly and it includes any operations using data, such as collection, fixing, retention, changing, making it available, or removing.

Consent requirements and exceptions

Generally, in order to process personal data (except for its removal) the prior consent of the person whose data is being processed is required. This consent has to be explicit and cannot be blank, so a general consent clause would not be sufficient.

There are several exceptions from the general requirement to obtain express consent, in particular if the disclosure or transfer of data is necessary for the realisation of the data administrator's legally justified purposes, or the disclosure and processing of the data by the acquirer of the data would not violate the rights and freedoms of the data subject.

The following conditions have to be met in order for a data administrator to be able to disclose personal data:

- (i) there is a legally justified purpose for the disclosure;
- (ii) the disclosure is necessary in order to achieve that purpose; and

⁷ E.g. name, surname, address (including email address), as well as tax ID, or other similar data.

- (iii) the disclosure and processing of the data by the acquirer of the data would not violate the rights and freedoms of the data subject.

In securitisation transactions involving personal data, the processing of this data is necessary for financing the originator's business activity through securitisation which should generally be considered as a legally justified purpose. In addition, in most transactions there is no change in the method or scope that personal data is processed. As a consequence of this, it could be argued that the disclosure of the personal data of the debtors would not violate their laws and freedoms. However, every case needs to be analysed individually.

Notification requirements

In the case of the acquisition of personal data, the acquirer is required, as the data administrator, to notify the data subject of this acquisition and provide the data subject with the following information:

- (i) full name and address;
- (ii) purpose of the data collection;
- (iii) source; and
- (iv) rights of the data subject, including the right to rectify the contents of the data.

Naturally, in the case of a transaction involving a "silent assignment," the aim is not to notify the debtors at the closing date, so personal data cannot be processed (in particular, it cannot be transferred from an originator to an issuer). This is usually resolved by one of the following solutions:

- no personal data is transferred at closing date, but certain events (so called "notification events") trigger an obligation for the originator to notify the debtors of data processing, coupled with the transferring of this data to an issuer; or
- personal data is transferred to a professional entity (data trustee) on the

purchase date of the receivables, but it has no access to it (so there is no data processing which would trigger a notification obligation) because the data is subject to encryption – the issuer has an encryption key, but would only be allowed to access this data after a certain trigger (which also triggers the obligation to notify the debtors of any data processing actions; sometimes a data trustee can be authorised by an originator to notify the debtors in its name, although this authorisation would not prevail in the case of the originator's bankruptcy).

Securitisation and banking secrecy

According to the Polish Act on Personal Data Protection, if any other act in law states a more restrictive protection for personal data, the Polish Act on Personal Data Protection does not apply. It is a widely accepted view that the banking secrecy regulation (i.e. the Polish Banking Law) overrides personal data protection regulations. In particular, personal data comprising banking secrecy can be disclosed to other parties if it is necessary for entering into and executing receivable purchase agreements connected to securitisation transactions, as well as related rating agreements, or servicing agreements, subscription agreements, agency agreements, or insurance agreements.

Claw-back and insolvency risks

Applicability of insolvency regulations

Generally, the Polish Bankruptcy Law and the Polish Restructuring Law apply to companies and entrepreneurs with their centre of main interest (i.e. their registered office, or management) in Poland. However, both regulations can also apply to foreign entities that either conduct their economic activity in Poland, or whose assets are located in Poland, in which case the Polish proceedings would be secondary proceedings in relation to main the

proceeding conducted in the bankrupt's centre of main interest.

Claw-back risk – bankruptcy law

Under the Polish Bankruptcy Law, any past action in accordance to which a bankrupt company has disposed of its assets or renounced its claim, that:

- (i) took place within one year prior to the filing of the petition to declare bankruptcy; and
- (ii) has been performed gratuitously, or for a consideration which value is significantly lower than the value of the disposed assets,

will be ineffective towards the bankruptcy estate.

Additionally, any legal action performed by the bankrupt with an affiliate company within six months prior to the filing of the petition to declare bankruptcy can be declared bankrupt, unless it is proved that this action has not been taken to the creditors' detriment.

Claw-back risk – civil law

In addition, in accordance to the Polish Civil Code, each creditor of an originator has the right to challenge any action made by this origination (including the assignment of receivables) within five years from the date of this action if it is in a position to cumulatively prove that:

- (i) the action was carried out by the originator to the detriment of its creditors; and
- (ii) the originator was aware of the detrimental effect on the position of the creditors; and
- (iii) the person or entity that benefited from this action (e.g. the issuer in the case of an assignment) was, or should be aware of the above-mentioned detrimental effect.

Claw-back risk – general recommendations

In the case of the above claw-back risks, as long as the sale (assignment) of the receivables for the purpose of securitisation is performed at the market value, the risks mentioned above should not be significant. Moreover, instead of involving, as an issuing entity, a company affiliated to the originator, it is safer to use a so called "orphan structure," in which the issuer is an independent being. This can be achieved by using a special purpose vehicle managed by a professional corporate services provider.

Hardening periods

In accordance to the Polish Bankruptcy Law, the security interest established by the bankrupt within six months prior to the filing of the petition to declare bankruptcy, is ineffective. This could specifically concern the establishment of a pledge, or a mortgage. The security assignment of a future receivable, executed with a certified date, is subject to the same hardening period, while not executing this security assignment in this form would mean that it would not be effective against bankruptcy estate at all.

The rule above is general and does not mean that every security interest is automatically invalidated. In particular, a secured creditor can seek the recognition of a security interest effective if, at the time of its establishment, it was not aware of the existence of any grounds for the declaration of bankruptcy by the security provider. In addition, the hardening periods do not apply to financial pledges.

Effect on parallel debt structures

As indicated above, in the transactions involving Polish assets or receivables, there is a risk that a Polish secondary bankruptcy, or a restructuring proceeding might be initiated even if the issuer's centre of main interest is outside Poland. If this proceeding is initiated, the claims either need to be lodged to the bankruptcy estate by the

creditors (the bankruptcy proceeding), or should be placed in the claims list automatically based on the accounting books of the company under restructuring (the restructuring proceeding).

If this is the case, unsecured claims can be subject to a voluntary arrangement between the relevant creditors. This also applies to receivables constituting the principal obligations that will be treated as unsecured for the purpose of any proceeding, unless there is a separate security interest dedicated to these receivables⁸.

The risk mentioned above would only be material in the situation where the issuer has other creditors whose receivables are not part of a parallel debt and simultaneously exceed those that are. In this case these unsecured creditors could have an interest in voting for a voluntary decrease of all of the unsecured receivables, since this will also decrease the secured parallel debt.

However, in the case of a bankruptcy-remote SPV managed by an independent third party, this risk is perceived as theoretical. This is because this entity will not have any material obligations other than those arising under the notes issued in accordance to the securitisation transaction. This can be further mitigated either by providing an additional contractual provision which will prevent a decrease of the parallel debt along with the principal receivables in the case of an arrangement, or by the establishment of a separate security interest for the benefit of the investors.

Other regulatory matters

Maximum interest

In Poland, the interest rate cannot exceed the maximum interest rate. The maximum interest rate per annum is twice the statutory interest rate, equal to the National Bank of Poland's

reference interest rate (as of the date of this paper, equal to 1.5%)⁹ plus 3.5 percentage points. Consequently, the current maximum interest rate is 10% per annum.

If the amount of interest arising from a contract exceeds the maximum interest amount, then only the maximum interest rate applies. It should be noted that the maximum interest constitutes an overriding mandatory provision and applies to all payments made to Polish entities, regardless of the choice of law.

License requirements for collecting funds

Polish Banking Law regulates the activity of collecting funds from groups of persons for the purpose of further lending these funds. This means that no entity without a license or permission can expose money directly obtained from the public to the transaction risk. The purpose of this regulation is to prevent the activity of para-banks or consumer lending companies acting without a license.

In the case of securitisation, the originator usually does not collect money from investors, but instead sells receivables to the independent issuing entity in exchange for funds obtained by the issuer by way of offering debt instruments, such as notes. Moreover, Polish Banking Law does not stipulate a pass-through rule here, which means that the issuance of notes by an SPV or investment fund, the proceeds from which would then be transferred to the originator, will not be treated as obtaining funds from the public by the originator.

Apart from this, even direct issuance or using an SPV, or an investment fund located in Poland will not bear a non-compliance risk due to a number of factors. In particular, securitisation is always based on a pool of receivables. Also, only using funds obtained from the public to grant loans (or encumber borrowed funds in

⁸ Since it is the parallel debt receivable which is being secured by the relevant collateral, not the principal receivables.

⁹ These rates are subject to automatic change upon any change to the reference rate of the National Bank of Poland. The Monetary Policy Council periodically determines the reference rate based on its assessment of the current financial situation. It is impossible to determine the frequency of these changes in advance.

another way that creates a transactional risk) that constitutes a business conducted in an organised and regular manner would be subject to sanctions. It is highly unlikely that any securitisation financing terms would fall under these provisions, and even if it did, in most cases the financing is granted for "general corporate purposes" and unless the funds obtained from the securitisation were held on a separate bank account, they would still be subject to dilution with any of the originator's other cash, which eliminates the risk.

Finally, the "license or permission" should be treated broadly, which means that securitisation by banks or insurers, for which Polish law provides direct law provisions referring to securitisation, is completely safe. The same applies to regulated issues and the public offerings of notes.

Due diligence and retention requirements

Certain European regulations concerning regulated financial entities (i.e.: (i) CRR – in respect of credit institutions and investment firms, (ii) Solvency II – in respect of insurance and reinsurance companies; and (iii) AIFMR – in respect of investment funds) provide several of the requirements in respect of acquiring asset-based securities by these entities, including notes issued pursuant to securitisation transactions. An investor should be able to demonstrate that it has undertaken a due diligence in respect of various matters including its note position, the underlying assets, and the relevant sponsor or originator. On the other hand, the originator, sponsor, or original lender in respect of the relevant securitisation, has to explicitly disclose to the investors that it will retain, on an ongoing basis, a net economic interest of not less than 5% in respect of certain specified credit risk tranches or asset exposures.

There are several ways of how to deal with retention – in particular:

- (i) the retention of the nominal value of each of the tranches transferred to the investors;
- (ii) in the case of revolving exposures, the retention of the originator's interest;
- (iii) the retention of randomly selected exposures; or
- (iv) the retention of the first loss tranche and, if applicable, other tranches with the same, or a more severe, risk profile.

Investors that fail to comply with these requirements can be subject to certain sanctions, including a penal capital charge on any gain from instruments issued due to the securitisation.

Set-off

Before notifying the debtors (silent assignment)

In accordance with general rules, the originator and debtor can set off their receivables against each other if both are due and payable and can be pursued in court or before another state authority. A set-off is made by one party making

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a statement to the other party. This statement has a retroactive effect from the moment the set-off became possible.

After notifying the debtors

After being notified of the assignment of the receivables, the debtor only has the right to set off its receivable against the originator (against the assigned receivables) that existed as of the date when the debtor was notified. A debtor cannot, however, set-off its receivable that became due and payable after a day when the assigned receivable becomes due and payable.

Special rules for banks

In accordance to Polish Banking Law, banks can set-off receivables towards a debtor against a claim of a debtor against a bank which is not due and payable, if the debtor has been put into liquidation, and in all circumstances in which a bank is authorised to satisfy its claims before the maturity date, e.g. if the security interest was significantly decreased¹⁰. A set-off cannot, however, be exercised to the extent of the claim of a debtor against a bank arising from a bank account being seized as a result of the satisfaction of tax liabilities. If this set-off right is exercised, the repayment amount due from the debtor to the originator will be decreased by this set-off amount.

Set-off and debtor's bankruptcy

In addition to the general principles concerning set-offs as described above, special rules apply to set-offs towards a debtor that has been declared bankrupt. As a rule, this set-off would be possible if both claims existed upon the date of the declaration of bankruptcy. However, a set-off would not be possible if:

- (i) the relevant receivable against the debtor was assigned after the debtor declared its bankruptcy, or within a year before this bankruptcy has been declared; and

- (ii) the assignee had knowledge of the existence of the basis for declaring this bankruptcy.

Taxation

General

As in any other transactions undertaken in business activity, as well as in the securitisation of receivables, tax aspects play key role. Therefore, the structuring of the securitisation always requires a proper tax analysis which would take into account a number of differing factors, including:

- (i) the type of the originator and receivables being securitised (e.g. bank loans, lease instalments, trading receivables);
- (ii) the type and location of the issuer to which the receivables are transferred (i.e. Polish securitisation funds, Polish, or foreign SPVs);
- (iii) the type of financing provided to the issuer (e.g. financing under notes/bonds, or subordinated loan, etc.);
- (iv) the type and location of investors financing the SPV (e.g. banks or non-banking entities, Polish or foreign entities);
- (v) the functions performed by the servicer of the receivables, etc.

Taking into account the variety of specific situations and circumstances which might arise in a given securitisation transaction, each of them requires a detailed analysis from the tax perspective and proper planning (including the review of any foreign tax implications in the case of an SPV located abroad).

This brochure does not aim to cover all tax implications which might be connected with securitisation. The purpose of this note is, instead, to provide an overview of the key Polish tax aspects which, in general, arise in all securitisation transactions originated by Polish

¹⁰ In a judgement issued on 23 February 2001, the Supreme Court confirmed that a bank may set-off its debt towards a debtor against the claim of the debtor against the bank arising from the deposit agreement entered into with this bank

entities. This brochure does not constitute a substitute for the tax advice which would be required to properly implement each particular securitisation.

Tax on the transfer of receivables (VAT or CLTT)

According to the current position presented by the Polish tax authorities, the securitisation of receivables should be classified as a VAT-exempt financial service rendered by an SPV (i.e. the purchaser of the receivables) to the originator (seller).

In order for the securitisation to be treated as a (VAT exempt) service for Polish VAT purposes, it must include some kind of consideration payable to the SPV for entering into the transaction and for providing financing to the originator (as a result of the purchase of the receivables). Otherwise the transaction would remain outside the VAT system.

Assuming the securitisation is treated as a service for VAT purposes (as described above), it will not be subject to the Polish civil law activities tax (CLTT - a type of stamp duty), which is generally payable by the purchaser at a 1% rate on the purchase of property rights (such as, e.g. receivables).

There is no direct regulation in the VAT regulations relating to sub-participation. There is also very little practice on the market relating to sub-participation transactions. However, it can be argued that sub-participation can be treated as a complex financial service which is exempt from VAT. Notwithstanding the above arguments behind the VAT exemption of sub-participation, please note that there is a risk that the services rendered by a participant for the originator in accordance with a sub-participation transaction could be qualified by the Polish tax authorities as subject to standard 23% VAT, and not be exempt. We are aware of at least one such negative tax ruling. However, the latest decisions of the administrative courts have proved that the exemption should apply to

sub-participation transactions, and the negative tax rulings were incorrect.

Corporate Income Tax

The implications of the securitisation of receivables from an income tax perspective depend on several factors, the most important being the type of the originator, the nature of the receivables, and the type of issuer purchasing the receivables.

In the case of the securitisation of bank credits, the purchase price derived by the bank from the sale of the receivables will constitute a taxable revenue for the bank. On the other hand, the bank is entitled to recognize a tax deductible cost in the amount of the value of the receivables being sold.

In the case of the securitisation of lease receivables, the price derived by the lessor for the sale of the receivables to the SPV will not constitute a taxable revenue for the lessor. Instead, the lessor will continue revealing taxable revenues with respect to the lease payments due from the lessees.

From the perspective of a Polish SPV buying the receivables, the purchase price will be tax deductible (pro rata) only upon showing the taxable revenue as a result of the collections received from these receivables.

All investment funds, including securitisation funds, are exempt from Polish corporate income tax, except for income of closed-end funds derived from the tax-transparent entities.

Special tax treatment for NPL securitisation

Generally, any loss incurred by the bank on the sale of the credit receivables will not be a tax-deductible item. However, receivables arising under non-performing loans (NPLs) that are sold to a Polish securitisation fund (and not the regular SPV) will be treated as tax deductible – up to the sum of the provisions recognised by the bank in respect of these receivables. In addition, subject to certain requirements, any

proceeds from the sale of the principal (not the interest component) of the NPL receivables to a Polish securitisation fund will not be treated as taxable income by the bank-originator.

Servicing of the receivables

Polish VAT treatment of the servicing of the receivables by the originator to the benefit of the SPV depends on the type of services rendered in this respect by the originator and the location of the SPV. In general, the servicing of the receivables will usually be treated as a debt collection subject to standard VAT rates in Poland. In the case of an SPV located outside Poland, the place of supply of these services should generally be at the seat of the SPV (thus no Polish VAT would be chargeable in such a case).

Withholding tax

In the vast majority of securitisation transactions, Polish withholding tax implications are one of the most important. They can relate to the transfer of collections in the case of a foreign SPV participating in a transaction, or to interest payable by a Polish SPV to a foreign investor for financing provided under the notes (issued by the SPV), or senior loans (granted to the Polish SPV).

As a result of the above, the withholding tax aspects need detailed analysis based on the available double tax treaties, as well as taking into account the status of the financing parties. For example, the interest payable by a Polish SPV to a foreign investor which is a bank, will highly likely be exempt from withholding tax in Poland under the "banking loan" included in the majority of double tax treaties signed by Poland.

Tax rulings

Due to the complexity of the tax issues involved in the securitisation transactions, as well as the fact that the majority of them are not addressed directly in the tax law, the confirmation of the key tax aspects through individual tax rulings issued by Polish tax authorities is always

recommended. This specifically relates to the VAT/CLTT treatment of the sale and servicing of receivables, the withholding tax treatment of the collections transferred to a foreign SPV, and the CIT implications for Polish originators and Polish SPVs. Obtaining an individual tax ruling takes three months from the time of filing the relevant application.

GAAR

According to the General Anti-Abuse Regulations implemented in Poland in July 2016, the Head of the National Tax Administration in Poland is able to challenge Polish taxpayers' actions which the GAAR has acknowledged as tax avoidance. This can apply to transactions entered into solely or mainly for tax reasons, including transactions entered into for the purpose of avoiding, decreasing, or delaying the tax payable in Poland in connection with these transactions. If the relevant transaction or structure is acknowledged as tax avoidance, the tax liability of the relevant taxpayer will be calculated as if this liability resulted from an 'adequate' transaction of similar economic consequences, or by ignoring the tax avoidance activity which could result in a higher tax becoming due and payable.

Although, securitisation transactions in most cases are implemented mainly for reasons other than for tax, or business, the above-mentioned new GAAR provisions should be observed when structuring a given securitisation. In certain situations, gathering the proper business substance and justification might be necessary in order to mitigate any risk of a GAAR application.

Possible impact of the proposed EU regulation on Polish securitisation transactions

General

The draft of the regulation which lays down the common rules on securitisation (the "Draft Regulation") was agreed on 30 July 2017 by the

European Parliament, and the Council and the Commission. The Draft Regulation, if published, will apply from January 1, 2019, subject to grandfathering provisions. The new harmonised rules on due diligence, risk retention and disclosure will only apply to the transactions executed on or after the Regulation applies. Transactions conducted before 1 January 2019 will be subject to the existing rules.

For more detailed information please refer to our briefing note "A New Era: The New European Framework for Securitisations", that can be obtained [here](#).

What's new

The Draft Regulation stipulates:

- (i) the definition of a Securitisation Special Purpose Entity (SSPE, which can be subject to certain additional requirements, if not established in the EU;
- (ii) the possibility of obtaining a simple, transparent and standardised securitisation (STS) status, which gives preferential capital treatment;
- (iii) the new, harmonised rules on risk retention, due diligence, and disclosure, as well as a number of new requirements;
- (iv) the obligatory suitability tests for offerings;
- (v) the exclusion of certain derivatives entered into by SSPEs from clearing obligations under the EMIR;
- (vi) the different capital treatment for entities engaged in securitisation; and
- (vii) the new rules on liabilities and new sanctions.

Conclusions

It should be underlined that the securitisation structures and documentation involved are very complex and every particular transaction needs to be analysed individually. This document only

briefly describes certain special types of securitisation and taxation issues. Accounting issues also play a major role for originators that wish to achieve the "off-balance sheet" treatment for securitised receivables. Different portfolios, especially loan and lease portfolios, involve different legal and tax issues connected to the securitisation of these receivables.

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