Bulgaria

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1. Legal framework

1.1 Is there a special securitisation law (and/or special provisions in other laws) in place, establishing a legal framework for securitisation transactions in Bulgaria?

A special legal framework regulating the securitisation of real estate and receivables was introduced in Bulgaria with the adoption of the Special Investment Purpose Companies Act (the ***SIPCA***)[1], which, together with provisions contained in general commercial and civil legislation, provides a basis for the securitisation of real estate and receivables.

The legal definition of securitisation under the SIPCA reflects the purpose of the legislator, which was to regulate true-sale securitisation: 'Securitisation shall be the activity which results in rights (ownership rights and/or construction rights) in real estate or cash receivables, including future ones, being materialised in securities offered publicly.'

The SIPCA sets out the rules for:

(a) establishing and licensing of special investment purpose companies (***SIPCs***);

(b) the business activities of SIPCs;

(c) the relations with the servicing company and depository bank of SIPCs;

(d) the limitations and restrictions on the operations, transactions and investments of SIPCs;

(e) the disclosure of information and conflicts of interests for SIPCs;

(f) the reorganisation and winding-up of SIPCs; and

(g) compulsory administrative measures and administrative liability in the case of violations of the rules therein.

The SIPCA sets up a number of protective measures and rules intended to reduce the risk of investors investing in the securities issued by SIPCs.

The regulations contained in the SIPCA focus on the SIPCs themselves, rather than their relationship with the Originator. The SIPCA attempts to reduce the risk of insolvency of an SIPC by specifying that SIPCs cannot acquire:

(a) real estate or receivables subject to legal dispute;

(b) real estate outside Bulgaria;

(c) receivables against foreign persons; or

(d) receivables subject to compulsory execution/ foreclosure.

Thus, the SIPCA allows the SIPC and the Originator to arrange their relationship contractually subject to compliance with general civil and commercial laws. The SIPCA also limits SIPCs in:

(a) permitted investments;

(b) the evaluation, purchase and pricing of real estate or receivables; and

(c) entering into certain transactions.

The legal framework of securitisation transactions also comprises the provisions of the Public Offering of Securities Act (***POSA***)[2], with respect to:

(a) licensing requirements;

(b) the preparation, confirmation and publication of a prospectus for shares or bonds issued by SIPCs and offered to the public on a regulated market;

(c) the increase of capital of SIPCs, etc.

1 In some structures, there are two SPVs – one acting as the Purchaser and one as the Issuer.
2 Promulgated in *State Gazette* number 114 of 30 December 1999, as amended from time to time.

The POSA also applies to SIPCs for administrative control and regulation exercised by the financial regulator, the Financial Supervision Commission (the ***FSC***). Pursuant to the SIPCA, the FSC is also competent to supervise the activities of the Servicer(s) in conformity with the POSA. Several provisions of the Collective Investment Schemes and Other Undertakings for Collective Investments Act (related to the activity of the depository bank, various prospectus requirements and the procedure for reorganisation and winding-up of the SIPC) are also applicable to SIPCs.

All matters not specifically regulated by the SIPCA are governed in accordance with general Bulgarian law and the POSA, in particular.

2. Sale and assignment of receivables

2.1 Is a true sale of receivables, which will be effective even in the insolvency of the assignor, in principle, possible under existing legislation?

In principle, a true sale of receivables is possible under Bulgarian law. Assuming that under the applicable conflict of law rules (contained in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations) the transfer of the title of the receivables from the Originator to the SIPC (the SPV) is governed by Bulgarian law, the Bulgarian Obligations and Contracts Act (the ***OCA***) shall apply.

Section 4 deals in detail with the legal issues arising from the bankruptcy/insolvency of the Originator.

2.2 Is disclosure of the assignment to the obligor of the receivables (the obligor) or the consent of the obligor necessary?

Assuming the assignment would be governed by Bulgarian law, the Originator, as the assignor of the receivables, should notify the obligor of the assignment to ensure that the assignment is effective against the obligor and any third parties, including the creditors of the obligor. The law does not require the notification to be made in writing; however, it is recommended in order to evidence the notification.

The assignor is further obliged to deliver to the assignee all documents evidencing the existence of the receivables and to confirm in writing to the assignee that the assignment has been completed (if the assignment was not made in writing).

The consent of the obligor is not required, unless the contract under which the receivables arise explicitly requires it.

If the obligor is not notified, then the assignment will only take effect between the Originator and the Purchaser. Any payment made by the obligor to the Originator will be considered a valid payment discharging the obligor from its liabilities. It should be also noted that if notification is not served on the obligor, then the assignment will not be enforceable against third parties either.

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2.3 Are there any other formalities for the assignment to be effective (perfection)?

Please refer to paragraph 2.2. According to Bulgarian law, the assignment will take effect in relation to third parties and the obligor when the obligor receives notification. Generally no other formalities are required for the assignment to be effective (however, note the special requirements for the validity of an assignment of receivables secured by a mortgage, discussed in paragraph 2.6 below).

2.4 To what extent is the individual identification of receivables required to assign them effectively?

The individual identification of the receivables necessary to assign them effectively includes:

(a) the grounds giving rise to the receivables, (ie contractual details (the agreement or other instrument under which the receivables arise));

(b) the components of the receivables (principle, interest (if any), costs (if any), etc). It is not necessary to identify the specific amounts as of the date of assignment, but these need to be identifiable (ie the type of principal and accessory receivables and the method of calculation, if applicable, to determine the amounts); and

(c) other important terms and conditions of receivables such as maturity, term, termination, modification, payment method, etc.

2.5 Can future receivables be effectively assigned?

Yes, provided that the contractual grounds for the existence of the receivables are effectively and validly established at the time of the assignment.

2.6 Do ancillary rights, such as security interests, guarantees or rights under related insurance contracts, transfer with the receivable without any additional formalities?

Yes, in principle ancillary rights, such as security interests and any privileges connected with the receivable, are transferred with the receivable unless otherwise provided in the assignment agreement or in the security documentation. Certain additional formalities may also have to be observed. Rights under insurance contracts are transferred with the receivable, unless otherwise provided for in the insurance contract. Surety agreements[3] are to be transferred under the same procedure, (ie by written assignment and notification to the surety[4]). Bank guarantees are, as a matter of practice, not transferable (although there is no legal regulation on this issue). Further, the assignment of receivables secured by a mortgage must be made in a written form with notarised signatures of the parties and be recorded in the Real Estate Register to be enforceable.

It is further advisable to record the assignment of the receivables secured by a special pledge in the register of special pledges. If the receivable is secured by an ordinary pledge, (ie where the security is created by way of possession) then the security asset, as a rule, will have to be delivered to the assignee. In practice, many receivables are secured with promissory notes[5], which, in the case of an assignment of receivables, would have to be endorsed by the assignee.

3 Agreements between the creditor and a third party (a surety) by which the surety assumes the obligation to guarantee the performance of the main obligor. Usually such agreements are signed by all of the three parties involved (creditor, obligor and surety).

4 As a rule, many sureties prefer to assume obligations only to a specific creditor. In such cases, the Originator would not be able to assign those agreements except with the additional consent of the surety/amendment to the surety agreement.

5 Such a security would allow the creditor to obtain an order for immediate payment and a writ of execution without having to pass through a court trial first (unless the obligor files an opposition).

2.7 Will the assignment be valid even if the contract creating the receivable prohibits assignment?

The assignment would be null and void provided that the contract under which the receivable arises, explicitly and expressly stipulates that the receivable is non-transferable[6]. If such a transfer is made, it could be defended (although opinions vary on this matter) on the basis that the assignment would be valid between the assignor and the assignee (ie the assignee will be entitled to receive the benefits from, for instance, the collection of the receivable), but such a transfer would not be enforceable against the obligor. Furthermore, the obligor may have a claim against the Originator for breach of contract.

2.8 What are the legal requirements to assign receivables that are secured by a mortgage so that the assignee remains secured by the mortgage? In particular: does the assignment of receivables that are secured by a mortgage require registration with a land registry? If so, what are the registration costs? How long does the registration of a mortgage take? Additionally, what are the legal requirements in Bulgaria to foreclose on a mortgage and how long does the foreclosure process usually take?

The assignment of a receivable secured by a mortgage must be effected through a written instrument with notarised signatures of the parties (see also paragraph 2.6). This should then be registered with the regional office of the Registration Agency where the real estate is located.

The registration costs for a mortgage depend on the amount secured. Notary fees are calculated and collected as a percentage of the secured amount and not based on the value of the mortgaged asset. The law establishes a cap on the notary fees, which in any case cannot exceed BGN6,000 (approximately €3,000).

The notary fees to certify the signatures of the parties executing the assignment agreement transferring the receivable secured by a mortgage is calculated under the same rules and then reduced to 30 per cent of the initial amount (ie the notary fees in this case may not exceed BGN1,800 (approximately €900)). However, practices of local notaries vary and many of them tend to charge the maximum amount of BGN6,000 (approximately €3,000).

The registration of the notary deed creating the mortgage with the local land register requires the payment of a statutory fee of 0.1 per cent of the amount secured. An identical fee should be collected for the registration of the assignment agreement transferring the receivable secured by the mortgage.

The registration of the mortgage does not require much time and normally follows immediately after the execution of the notary deed. A registered counterpart of the mortgage deed (after entry in the land register) is received within three days.

The mortgage deed entitles the mortgagee to obtain an order for immediate payment and a writ of execution from the competent regional court, and to start a procedure for the compulsory collection of its claims listed in the mortgage deed without court trial (in such cases the opposition of the obligor to the order of immediate payment would not stop the enforcement procedure).

6 Article 99 of the OCA provides that a receivable can be assigned, provided that the law or the contract does not provide otherwise or the receivable is non-assignable due to its very nature.

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The cost of the issuance of an order for immediate payment and a writ of execution is 2 per cent of the amount claimed[7]. The issuance of an order for immediate payment and a writ of execution could take a month or more (depending on the court reviewing the application – courts in Sofia are usually the slowest in Bulgaria due to their busy schedule), despite the fact that the judge should review and issue an order for immediate payment and a writ of execution within three days from the filing of the application.

The order (and the ruling) for immediate payment is subject to the opposition by the debtor within 14 days from the receipt of the order. Following the opposition, the applicant needs to file a claim and initiate a standard civil proceeding (which is simultaneous with the foreclosure proceedings). Provided that the writ of execution is available, the mortgagee may proceed with filing a foreclosure case with a bailiff's office. The bailiff sends a notice for voluntary payment to the debtor and serves the order for immediate payment and, two weeks after its receipt, schedules foreclosure actions – inventory, evaluation and sale.

The inventory is to be made following receipt by the debtor of a notice of the date and time of the inventory, provided that the summoning provisions of the law have been fully complied with. The inspection of the property by the evaluators is to be made on the date of the inventory. The bailiff has to announce the public tender of the property within seven days from the inventory. The statutory duration of the public tender is one month. The acquirer of the mortgaged property is obliged to pay the price in its proposal within seven days of the sale closing.

Therefore, provided that there are no complications, such as appeals of or impediments to the summoning procedure and a court issued an injunction stopping the enforcement, foreclosure should not take more than a couple of months.

For non-commercial debtors, the law gives the debtor a right to suspend foreclosure and defer the payments owed to the creditor by paying 30 per cent of the debt and declaring that he will pay 10 per cent of the remainder monthly. This option can be exercised before the first day of the public tender and, therefore, undermine the foreclosure. However, in case the debtor misses a monthly payment, the foreclosure procedure is reinstated.

Unfortunately, the time necessary to foreclose on a mortgage cannot be predicted solely on the provisions of the law, as there is no guarantee whether the public tender will be unobstructed by the debtor and ultimately successful.

7 Recoverable from the proceeds of the liquidation of the mortgaged estate.

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3. Servicing

3.1 May the Originator continue to service the assigned receivable (including enforcement of the receivable before a court in the Originator's own name and enforcement of security relating to the receivable)?

The Originator may continue to service the assigned receivable on contractual grounds (a mandate) acting on behalf of the Purchaser (as a proxy). Enforcement of the receivable before the court after the assignment cannot be carried out in the name of the Originator and, therefore, the enforcement of any relating security should be conducted in the name of the Purchaser.

The Originator is liable to the Purchaser for the validity and existence of the receivable. If the Originator expressly commits to it, the Originator may also be liable for the solvency of the obligor, but even in this case its liability is limited to the amount of the consideration received by it from the Purchaser against the assignment. The Civil Procedure Code further provides that the Originator may join the civil proceedings between the Purchaser and the obligor on the part of the Purchaser.

According to the civil procedure code, the SPV (being a SIPC and a legal entity) shall be represented in court, for the purposes of collecting the receivables, by its authorised representatives or in accordance with the provisions of its constitutional documents. If the constitutional documents of the SPV allow for the Servicer/back-up Servicer to be its court representative, although not legally the authorised representatives of the SPV, the Servicer/back-up Servicer would be allowed to represent the SIPC in court.

According to the Commerce Act the SPV may appoint the Servicer/back-up Servicer as its commercial representative and specifically grant it with the power to be its representative in court. The Servicer/back-up Servicer will act before the court through its manager, in-house counsel or an external lawyer.

3.2 May the Purchaser enforce the receivables once the obligor has received notification of the assignment?

Yes, provided that the conditions for enforcement set out in the agreement creating the receivables are in place.

3.3 Will the Servicer and/or a back-up Servicer need to be a licensed bank/require any other licences?

Assuming the Servicer is understood to be the Originator or a third party entrusted by the SPV/Purchaser to collect the receivables assigned to the SPV/Purchaser, and assuming the Servicer's activities are limited to just collecting the receivables, the Servicer would not be required to be a licensed institution. The same conclusion applies to the back-up Servicer.

Further, pursuant to the SIPCA, SIPCs are prohibited from collecting the receivables assigned to them. SIPCs must entrust such collection to one or more servicing companies, being commercial companies that must have the required organisation and resources. The servicing company/companies must service the receivables in accordance with the law and the constitutional documents of the SIPC. Servicing companies are under the supervision of the FSC.

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4. Insolvency

4.1 Will the assignment be respected in the bankruptcy/other insolvency of the Originator (also see paragraph 2.1 above)?

In principle, in the insolvency of the Originator, the validity of an assignment of receivables made by the insolvent Originator after the date of the court decision opening the insolvency procedure would be null and void against the creditors of the insolvent Originator.

Further, the assignment of receivables could be invalidated in relation to the creditors of the insolvent Originator if:

(a) the receivables have been assigned without consideration and the assignment was made within the two-year period before the issuance of the court ruling opening the insolvency procedure;

(b) the receivables have been assigned for consideration substantially less than the value of the receivables and the assignment was made within the two-year period before the issuance of the court ruling opening the insolvency procedure but after the initial date of the Originator's insolvency[8];

(c) the assignment of the receivables is detrimental to the creditors (would obstruct their ability to successfully enforce their claims), the assignee was related[9] to the insolvent Originator and the assignment was made within the two-year period before the issuance of the court ruling opening the insolvency procedure; or

(d) the assignment of the receivables is detrimental to a creditor and both parties to the assignment agreement were aware of the detriment.

In the above cases, the consideration paid by the Purchaser to the Originator must be returned to the Purchaser and, if it cannot be paid from the bankruptcy estate or the consideration was monetary, the Purchaser will become a creditor of the insolvent Originator.

8 The initial date of the insolvency is determined by the bankruptcy court in its decision on the opening of the insolvency procedure. Normally, the initial date precedes not only the date of the decision but also the date of filing of the application for the opening of the insolvency procedure.

9 In Paragraph 1 of its Supplementary Provisions the CA defines a related person as:
2. Employers and employees;
3. Persons one of which is involved in the management of the other one's company;
4. Partners;
5. A company and a person who owns more than 5 per cent of the company's voting shares;
6. Persons whose activities are under the direct or indirect control of a third party;
7. Persons who exercise joint direct or indirect control over a third party;
8. Persons one of whom is a commercial agent of the other;
9. Persons one of whom has made a donation in favour of the other.
Related are also persons who either directly or indirectly participate in the management, control or capital of another person or persons, which may enable them to agree on terms and conditions which differ from the standard practice.

Importantly, the SIPCA establishes a special exemption for SIPCs from the general rules on avoidance of certain transactions in an insolvency procedure. These provisions are aimed at stimulating the creation of a securitisation market for real estate and receivables and requiring that the real estate or receivables acquired by the SIPC must be evaluated prior to the acquisition by an independent evaluator and that the purchase price should not deviate substantially from such evaluation.

Normally, it could be expected that most of the Originators would be banks. Therefore, the assignments made by the insolvent bank to the SIPC (the SPV) could be challenged on the special grounds established under the banks' insolvency act.

According to Article 60 of the Banks' Insolvency Act, the bankruptcy court can invalidate an insolvent bank's following transactions:

(a) gratuitous transactions performed in the three years prior to the date of the insolvency;

(b) gratuitous transactions in favour of administrators or shareholders of the Originator, or persons related to shareholders or administrators, performed in the five years prior to the date of the insolvency;

(c) transactions or other actions aimed at causing damage to the creditors of the bank undertaken in the five years prior to the date of the insolvency;

(d) repayment of debt through the transfer of assets, made in the six months prior to the insolvency date, provided that the return of the assets to the bank would increase the amount payable to the creditors as a result of the liquidation of the bankruptcy estate;

(e) transactions with a party related to the bank, administrator or shareholder of the bank or a spouse or a relative thereof in direct line or a relative thereof in collateral line up to a sixth degree, entered into in the two years prior to the date of the insolvency, provided that the same is to the detriment of the creditors;

(f) transactions of the bank where the value of what was provided is materially higher than the value of the compensation received, made in the two years prior to the date of the insolvency; and

(g) the establishment of a pledge, mortgage or other security interest for payment that was unsecured in the year prior to the date of the insolvency.

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The law stipulates that the bankruptcy court may also invalidate transactions or actions of the type described above, which were entered into/ undertaken after the date of the insolvency but before the date of the decision of the bankruptcy court to open the insolvency proceedings.

The Banks' Insolvency Act also provides that, as of the date of withdrawal of the insolvent bank's banking licence[10], it may not dispose of its assets, except by paying ordinary expenses aimed at the preservation and management of the assets. Any other disposals of assets would be null and void with respect to the creditors of the bank.

The Banks' Insolvency Act further decrees that certain actions the bank undertakes after the decision of the opening of the insolvency procedure will be null and void with respect to the creditors of the bank, provided that the same were made in breach of the procedural rules or the requirements of the said act. Those actions include:

(a) the bank's performance of an obligation that has occurred prior to the date of the decision for the opening of the insolvency procedure;

(b) (the establishment of a pledge or mortgage over a right[11] or asset belonging to the bankruptcy estate; and

(c) transactions involving rights or assets belonging to the bankruptcy estate.

Certain actions taken by the bank after the initial date of the insolvency (including those taken after that date but before the withdrawal of the banking licence) are also considered null and void with respect to the creditors of the insolvent bank. Those include:

(d) performance of a monetary obligation irrespective of the manner of the performance;

(e) gratuitous transactions involving rights or assets of the bankruptcy estate;

(f) the creation of a pledge, mortgage or other charge over an asset or right from the bankruptcy estate; and

(g) transactions involving rights or assets from the bankruptcy estate, where the value of what was provided is materially higher than the value of the compensation received.

10 The withdrawal of the banking licence is the first administrative step by which the central bank starts the procedure for putting a bank into bankruptcy.

11 The receivables of the bank from its obligors are rights that belong to the bankruptcy estate.

The above claims for invalidation or declaring the nullity of the transactions can be filed by the bankruptcy trustee or by the deposits guarantee fund if the trustee fails to do so. The creditors of the insolvent bank (the ***Originator***) also have the right to file some of the claims, subject to certain additional requirements.

It should be noted, however, that the transactions described above are quite unlikely to be entered into in a true-sale securitisation. Therefore we believe that, although there is no case law on this issue, from a practical point of view the chances of successfully clawing back transfers of receivables made by a bank (as Originator) are limited.

4.2 In particular: would the Originator's bankruptcy receiver have to surrender any proceeds of assigned receivables, which have arrived on the bankrupt estate's accounts after opening of the bankruptcy proceedings?

Provided the validity of the assignment has not been challenged and turned down, the assigned receivables shall pertain to the estate of the Purchaser, not to the estate of the insolvent Originator and, therefore, the Originator's receiver will have to surrender any proceeds from the receivables to the Purchaser if such proceeds come into the possession of the Originator for any reason (eg if the Originator is also the Servicer).

In such cases, we would recommend that the Purchaser appoint a back-up Servicer as soon as reasonably possible because, should the insolvent Servicer (Originator) fail to perform its obligation to transfer the collected proceeds to the Purchaser, the latter would have to claim in the same way as an ordinary creditor of the insolvent Servicer.

4.3 What is the risk of bankruptcy avoidance (clawback) of the true sale upon Originator insolvency?

Please refer to paragraph 4.1. Given that the receivables of the Originator, including those of a bank, are to be transferred to the SPV on the basis of a market evaluation and provided that all of the special requirements of the SIPCA are observed, we consider the risks of a successful clawback to be very limited.

4.4 Will the Purchaser be entitled to notify the obligors of the assignment and to advise them to discharge the receivables to the Purchaser's order in the Originator's insolvency?

Please refer to paragraph 2.2 above – the notice of the assignment is to be made to the obligor by the Originator upon the execution of the assignment agreement.

Where the obligors were notified of the assignment and were instructed to continue to discharge their obligations to the Originator as Servicer for the Purchaser, we consider that the Purchaser has the right, in the case of the Originator's (ie Servicer's) insolvency, to instruct the obligors to start performing their obligations to the back-up Servicer (as mentioned above, the Purchaser may not service the receivables directly but is supposed to appoint a Servicer).

The law contains no rules on cases where:

(a) the obligors were not notified of the assignment in advance, meaning that, under Bulgarian law, the assignment is not enforceable against them or against third parties (including the creditors of the insolvent Originator); and

(b) the obligors continued to perform their obligations to the Originator without knowing that it is no longer their creditor but a mere Servicer for the Purchaser.

In our view it would be possible for the Purchaser to request the Originator to prepare in advance a notification to the obligors, to be delivered to them if the Originator goes bankrupt. It would be best if the date and signature of the Originator the notification were notarised to avoid claims that the assignment was made after the opening of the insolvency procedure and to the detriment of the creditors. However, to the best of our knowledge, this mechanism has never been tested in practice.

5. Choice of law and procedural matters

5.1 Can the parties choose a law other than Bulgarian law to govern the sale of receivables?

Pursuant to the general conflict of law provisions applicable in Bulgaria (contained in Regulation (EC) No 593/2008), the parties to a transaction with an international element (eg a transaction where one of the parties is a foreign entity) may agree that they can choose a foreign law to govern the transaction. The choice of a foreign law, however, does not affect the applicability of any mandatory rules of Bulgarian law in cases where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, nor does it affect the applicability of any mandatory provisions of European law where all other elements relevant to the situation at the time of the choice are located in one or more member states of the European Union.

With respect to assignments of receivables, the rules of Regulation No 593/2008 stipulate that the law governing the assigned receivable shall govern:

(a) its assignability;

(b) the relations between the assignee and the obligor;

(c) the conditions under which the assignment can be invoked against the obligor; and

(d) whether the obligations of the obligor have been validly discharged.

The relations between the Purchaser and the Originator may be governed by the law chosen to govern the assignment, subject to conformity with the conflict of law rules set out in Regulation No 593/2008.

5.2 Would an agreement by the Originator and further parties to subordinate and/or refrain from enforcing their claims, if any, against the Purchaser and not to file a bankruptcy petition against the Purchaser until termination of the transaction (non-petition covenant) be enforceable?

The effectiveness and enforceability of such a covenant is disputable. Bulgarian law declares null and void any covenants excluding or limiting in advance liability for non-performance when the latter is due to willful misconduct or gross negligence. In addition, the preliminary waiver of the right to file a claim is considered to be null and void on the grounds that Bulgarian procedural rules are mandatory.

6. Security structures

6.1 Does Bulgaria recognise the establishment of escrow accounts?

Bulgarian law does not provide for any special rules for the establishment of escrow accounts. However, the concept is widely known and used on the grounds of the contractual freedom principle. Payment accounts managed by banks are not *numerus clausus* and the applicable laws allow for the existence of 'other' types of payment accounts which are managed on contractual basis. The rules of the OCA on mandate agreements will apply to escrow agreements and the role of the escrow agent.

The law provides for other types of accounts which are similar to an escrow bank account, namely special or client accounts that are opened in the name of a notary or an attorney. The amounts under such accounts are not considered to be the property of the notary/attorney. The conditions for release of such amounts are to be determined contractually.

7. Data protection/banking secrecy

7.1 Are there restrictions on the information that the Originator can provide to the Purchaser, a third-party (back-up) Servicer and/or investors regarding the receivables and the obligors (notably, if the receivables are generated under consumer loans generated by a bank)?

If the Originator collects, uses, processes or assigns the processing or transfers the personal data of the obligor, it will need to be registered as a personal data controller with the personal data protection commission (the ***Commission***). The Originator as the controller of personal data must adopt and register its rules on data protection and receive the consent of the obligor to the collection and processing of certain personal data, with reference to the intended use or potential transfer of such data. The consent of the obligor will not be necessary if the collection and processing of the data is required by law or if the processing is necessary for the performance of the contract between the Originator and the obligor, or for protection of the legally acknowledged interest of the Originator.

The Personal Data Protection Act[12] (the ***PDPA***[13]) further provides that the obligor will have the right to require information from the Originator, in its capacity as controller, before its data is transferred to another controller or a third party for the purposes of direct marketing.

12 Promulgated in State Gazette number 1 of 4 January 2002, in force as of 1 January 2002, as amended from time to time.

13 Please note that the law does not refer to the data of legal persons but only to the data of natural persons.

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In the case of a transfer of personal data regarding the obligor to the Purchaser, a third party Servicer or investors, the data necessary for the performance of the agreement by the obligor will not be subject to restrictions provided that no sensitive information[14] is involved.

In the case of an assignment of receivables under a consumer loan generated by a bank, the bank, as controller of personal data, would need to ensure that:

(a) the transfer of the personal data is made in conformity with the PDPA (there is consent of the customer where explicitly required by the law and approval by the Commission in certain cases of transfer to third non-EU countries); and

(b) the transfer is in conformity with the rules filed with the Commission, or, if the rules do not deal with the transfer of data, respective notification is filed with the Commission.

The Purchaser and/or the Servicer would become controllers of personal data in the case of the acquisition of the receivables and should, therefore, comply with the provisions of the PDPA as well.

The Credit Institutions' Act introduces special rules on bank secrecy. According to the Credit Institutions' Act, all persons are protected from disclosure of information related to:

(a) their bank balances; and

(b) operations with their bank accounts. However, account numbers and other bank account details are not covered by the bank secrecy provisions[15].

Bank secrecy may be waived with the explicit consent of the client or on several other occasions explicitly set out in the Credit Institutions' Act.

However, in the event of an assignment of receivables, the bank would not need the explicit consent of the customer to disclose the balance in its account since the balance is actually the amount of the transferred receivable. An issue may arise in a due diligence by the Purchaser for the purposes of evaluating the receivables before the assignment. In such a case, bank secrecy may be complied with by keeping anonymous the identity of the obligor until the assignment becomes effective. Therefore, it is advisable in the banking documentation to be used for the initial creation of the receivables (eg personal credits, consumer credits, etc) to include provisions allowing the bank to disclose those details.

14 'Sensitive data' is considered to be data relating to race and ethnic origin, political, religious or philosophical persuasions, membership in political parties, organisations, associations with religious, philosophical, political or trade union purposes, as well as personal data referring to the health and the sexual life or the human genome of the individual. The term 'sensitive' is not defined in the PDPA, but the provisions of the law protecting the above data fully correspond to the term, as determined in the EU directives on personal data.

15 Despite the fact that information on bank account numbers is not covered by banking secrecy provisions, Bulgarian banks normally refuse to disclose these details based on their internal rules or practices, or their loyalty to customers.

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8. Securitisation vehicles (SPVs)

8.1 Is it possible to set up an onshore SPV to act as Purchaser? If so, in which corporate form?

Yes, it is possible to incorporate a Bulgarian SPV as a joint-stock company to be subsequently licensed as a SIPC in conformity with the SIPCA.

8.2 Does the SPV need a licence to be allowed to purchase and securitise receivables (eg consumer loans granted by an Originator that is a licensed bank)? Will the SPV need to maintain a minimum level of capital?

Yes, the SPV (SIPC) needs a licence issued by the FSC. The SPV (SIPC) must have a minimum capital of BGN500,000 (approximately €250,000). Institutional investors must subscribe to at least 30 per initial capital and the capital contributions must be monetary.

8.3 May the SPV issue asset-backed securities on the domestic and/or foreign capital markets? May securities be issued in different tranches of seniority?

Yes, the SPV (SIPC) may issue asset-backed securities on the domestic and/or on foreign capital markets in conformity with the POSA and the respective capital markets' requirements and regulations.

The SPV (SIPC) may issue securities in different tranches of seniority. It should be noted, however, that this issue is not regulated in detail in Bulgaria. As a rule, the debt instruments (eg bonds) issued by a company are considered to be senior to the shares (the interest and the principal under the bonds are to be repaid before the dividends and the liquidation quota). The SIPC may also issue shares with different rights on the basis of which some of the shares could be senior to others.

The issuing of shares with different rights is usually associated with the creation of preferred shares. The law prohibits a SIPC from issuing preferred shares granting their owners more than one vote or the right to additional liquidation quota[16].

16 The SIPCA provides that the SIPC should not issue shares granting the right to more than one vote, while the POSA prohibits, in addition to the above, the issuing of shares giving the right to additional liquidation quota.

8.4 May the SPV enter into currency and/or interest hedging arrangements with third parties?

The SIPCA provides that SIPCs may only enter into the transactions explicitly set out therein, namely:

(a) raising funds by issuing securities;

(b) acquiring real estate to assign its management, leasing or sale or to acquire receivables; and

(c) transactions directly related to the performance of the transactions under items (i) and (ii).

SIPCs are also permitted to enter into some auxiliary transactions such as:

(a) issuing debt securities registered for trade on a regulated market;

(b) (taking banking credits to acquire and operate the assets that are subject to the securitisation;

(c) taking banking credits up to 20 per cent of the balance sheet value of its assets, which loans are to be used to pay interest under loans that are extended for not more than 12 months;

(d) investing up to 10 per cent of its capital in the Servicer;

(e) investing its free resources in securities issued or guaranteed by the state; and

(f) investing its free resources in bank deposits.

Therefore, if entering into currency and/or interest hedging arrangements with third parties is directly related to the scope of business of the SIPC, it should not be in breach of the law. However, it would be wise to seek the FSC's view on this.

8.5 Can ABS investors be contractually privileged with respect to specific pools of receivables held by the SPV (and will such privilege hold valid in the SPV's insolvency)?

There are no restrictions in the SIPCA on a SIPC providing ABS investors with a security interest securing their receivables under the ABS against the SIPC by way of pledging certain receivables held by the SIPC and/or a pool of such receivables. As a rule, the granted privileges (such as pledges or mortgages) will remain valid if the SPV becomes insolvent.

8.6 Can the SPV be structured as a fund (ie a pool of assets without legal personality, as is the case in France and Spain)?

No, under the SIPCA, a SIPC must take the form of a joint stock company whose shares are publicly traded.

8.7 Does Bulgaria recognise the 'passporting' of banking activities, as is generally permissible in EU member states?

A bank based, and licensed to operate, in the EU may perform banking services in Bulgaria through a branch office or directly, cross-border, upon notification of the Bulgarian National Bank by the respective competent body. As an alternative, the foreign bank may establish a subsidiary in Bulgaria as an independent legal entity, which will need to obtain a licence from the Bulgarian National Bank.

8.8 Does the assignment of receivables to a foreign SPV require a foreign exchange permit from your central bank (or similar authority) and if so, is it generally perceived as feasible to obtain such a permit?

This transaction will only require the declaration of the obligors' obligation to the foreign SPV with the Bulgarian National Bank for statistical purposes in conformity with the Currency Act.

On a separate note, it should be mentioned that cross-border transfer of personal data to a processor or controller in a third non-EEA member country may only be carried out with the approval of the Personal Data Protection Commission, which would require an assessment of the provided level of data protection. Such approval is not needed in cases of transfer of data to member states of the EU or the European Economic Area, as it is presumed by law that the level of protection in these countries is adequate. The Commission will not need to assess the level of protection in the respective third country if the transfer is to be carried out in accordance with the standard clauses approved by the European Commission, or with the binding corporate rules adopted by the relevant data protection authority, or with the US Safe Harbor Principles. However, an updated record of the transfer shall be made in the Personal Data Protection Commission under the batch number of the local personal data exporter.

9. Tax treatment

9.1 Are any stamp or transfer taxes or duties assessed at any level of the transaction?

As a rule, there are no stamp or transfer taxes on the assignment of receivables. However, as stated in paragraph 2.6 above, if the receivables are secured by a mortgage, the assignment would need to have a notary certification of signatures and be registered with the land register.

In the case of a transfer of immovable property there are:

(a) notary fees on the purchase price (which cannot exceed BGN6,000, approximately €3,000);

(b) statutory registration fees of 0.1 per cent of the purchase price; and

(c) local tax on the purchase price (the local tax is different for every municipality, eg for the municipality of Sofia the local tax is 2.5 per cent).

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9.2 What is the VAT treatment of the transaction? Notably, will: (a) the sale of the receivables; (b) the servicing of the receivables, whether effected by the Originator or a back-up Servicer; or (c) the assumption, if any, of the default risk of the receivables by the Purchaser, be subject to VAT?

The Bulgarian Value Added Tax Act (the *VATA*) introduces a 20 per cent VAT to all supplies of services and goods, unless explicitly relieved in the VATA.

The VATA further provides for a general exemption from VAT taxation for financial services. The sale of receivables would represent a financial service under the VATA, provided, however, that it does not amount to the factoring or collection of a debt, in which case 20 per cent VAT will be levied. The applicability of the tax exemption will depend on the wording and interpretation of the assignment agreement.

In our opinion, the servicing of the receivables, if carried out by a Servicer, would not represent a financial service and, therefore, 20 per cent VAT will be payable on the value of those services. The assumption of the default risk by the Purchaser should not be viewed as a separate transaction from the assignment and therefore it is not subject to separate taxation.

9.3 How will the SPV be taxed? Will the servicing of assets by the Originator make the SPV liable for tax in the Originator's jurisdiction (assuming the SPV is offshore)?

Pursuant to the corporate income tax act (the *CITA*), SIPCs are exempted from corporate income tax.

9.4 Will withholding tax be assessed at any level in the transaction (notably on: (a) payments by the obligors to the Servicer; (b) payments of collections by the Servicer to the Purchaser; and (c) payments of interest by the SPV to investors)?

(a) Payments by the obligors to the Servicer

In fact, the Servicer will be collecting the payments on behalf of the SPV, so the obligors will make payments to the SPV through the Servicer. Given that the obligors will be Bulgarian tax residents and that the SPV is also a Bulgarian entity (a Bulgarian tax resident), no withholding tax will be due and payable.

(b) Payments of collections by the Servicer to the Purchaser

There will be no withholding tax on those payments.

(c) Payments of interest and dividends by the SPV to investors.

Taxation of the income from the sale of the SPV shares.

There could be many different options depending on the nationality (tax residence) of the investor, the presence of a double tax treaty (foreign tax residents only), the investor's legal status (individual vs legal entity), the type of income (dividends vs interest) and on whether the income originates from instruments traded on a regulated market or not[17]:

17 The SIPCA provides that the SIPC should not issue shares granting the right to more than one vote, while the POSA prohibits, in addition to the above, the issuing of shares giving the right to additional liquidation quota.

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	Bulgarian tax resident		Foreign tax resident from a treaty country[18]		Foreign tax resident from a non-treaty country	
Incomes from	individual	legal entity	individual	legal entity[19]	individual	legal entity
Interest (ordinary debt)	NA[20]	no WT	NA	0-10 per cent	NA	5-10 per cent
Interest (debt instruments traded on a regulated market)	not taxable	not taxable	not taxable	not taxable	not taxable	not taxable
Dividends (shares not traded on a stock exchange)	5 per cent	no WT [22]	0-5 per cent	0-5 per cent	5 per cent	5 per cent
Dividends (shares traded on a stock exchange)[21]	5 per cent	no WT	0-5 per cent	0-5 per cent	5 per cent	5 per cent
Transactions with shares not traded on a regulated market	NA[23]	no WT	0-10 per cent[24]	0-10 per cent	10 per cent	10 per cent
Transactions with shares traded on a regulated market	not taxable	not taxable	not taxable	not taxable	not taxable	not taxable

10. Accounting and regulatory treatment

10.1 Will the sale be treated as a sale for accounting purposes (potentially leading to a gain/loss on sale), taking the receivables off the Originator's balance sheet?

Yes, the sale will be treated as a sale for accounting purposes and will take the receivables off the balance sheet of the Originator.

10.2 Will the Purchaser need to show the receivables on its balance sheet?

Yes, the Purchaser will need to show the receivables on its balance sheet.

10.3 Will the Originator have to consolidate the Purchaser on its balance sheet?

No.

10.4 If the Originator is a bank, will the sale remove the receivable from the Originator's balance sheet for capital adequacy purposes?

If the sale is unconditional and stipulates an immediate payment of the full purchase price, the issue of capital adequacy will be irrelevant and the Originator will have to remove the receivable from its balance sheet. If the agreement stipulates a buy-back option or deferred payment of the purchase price or other condition, such option will have to be reflected off-balance sheet.

18 The Tax and Social Security Procedure Act establishes a special procedure to be followed by investors from a treaty country to establish that the more favourable rates under the tax treaty should be applied.

19 The law entitles the SIPC to receive banking loans. However, there is no requirement that those loans be provided by Bulgarian banking institutions (ie banks licensed to operate in Bulgaria).

20 In our view, it would be impossible for individuals to extend ordinary credits to the SIPC. The latter are entitled to receive banking credits or to issue publicly traded debt instruments.

21 The founders' shares are not issued through an initial public offering. Therefore, those shares do not necessarily have to be publicly traded. At every founders' meeting, the founders have to decide on a capital increase to be carried out through a public offering of shares. Thus, a SIPC may have shares that originally are not publicly traded and shares that are subsequently publicly traded.

22 In general, the dividends income will form part of the general income of the Bulgarian company but will be excluded from taxation. However, the dividends paid by a SIPC are not subject to this rule and they are part of the investor's taxable income.

23 Part of the general income.

24 The law provides that the income from the sale of shares issued by a Bulgarian company is always of Bulgarian origin (ie subject to taxation in Bulgaria). However, its rules are quite confusing regarding cases where the shares in a Bulgarian company are transferred by one foreign entity to another.