St. Michael's House
1 George Yard
London EC3V 9DH
Tel +44.20.77 43 93 11
Fax +44.20.77 43 93 01
www.europeansecuritisation.com

20 November 2006

Atn. Ana Cecić
Ministry of Finance
Market Consultations Secretariat
Katančićeva 5
100000 Zagreb
Croatia

c/c Irakli Managadze
Senior Policy Advisor
Financial Institutions
European Bank for Reconstruction and Development (EBRD)
One Exchange Square,
London EC2A 2JN, UK

Dear Ana,

ESF's RESPONSE TO THE CROATIAN SECURITISATION LAW CONSULTATIVE DOCUMENT

Many thanks for this opportunity to submit our thoughts in relation to the Consultative Document published by the Ministry of Finance of Croatia at www.crosecuritization.com to draft a securitisation law.

The European Securitisation Forum (ESF) is a trade association comprised of 160 firms active in the securitisation markets across Europe, including commercial and investment banks, investors, trustees, servicers, law firms, insurance companies, rating agencies, auditors, IT service providers and stock exchanges. The goal of the ESF is to promote the efficient growth and continued development of this market throughout Europe, and to advocate the positions, represent the interests, and serve the needs of our members. The ESF also undertakes initiatives designed to educate and inform external constituencies, including legislative and regulatory officials, the financial media, industry participants and others concerning the operation, importance and policy benefits of the securitisation market and related activities throughout Europe.

You may find further information about the ESF in our webpage: www.europeansecuritisation.com.

Our responses to the questionnaire may be found at the annex to this cover letter. In drafting the response, we have engaged representatives from some of our major members with expertise in the most developed European securitisation markets as well as in emerging markets. With this background, we are confident that the Ministry will

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find our contribution useful to the Croatian Securitisation Law process, but we will be happy to continue assisting in this process if so required by the Ministry.

We remain at your disposal for further discussion of this document. Please, do not hesitate to contact Carlos Echave in this regard at tel. +44 20 77 4393 39 or at e-mail address – cechave@europeansecuritisation.com.

Yours sincerely,

Carlos Echave
Director, European Securitisation Forum

St. Michael's House
1 George Yard
London EC3V 9DH
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ANNEX

1 STRUCTURE OF THE SECURITISATION LAW

Q1 Do you find the above approach advisable?

The ESF agrees with the approach proposed by the Consultative Document to regulate securitisation in the future Croatian law.

The majority of the issues covered by the Consultative Document (true sale, insolvency regime, SPVs structures and management, supervision, taxation, etc.) are typical examples of primary legislation issues for securitisation. The future law should take a high level principles approach to regulate these issues to prevent the framework from becoming inflexible to market innovation. Secondary (i.e. government) regulation may be needed with respect to some technical areas or, in some cases, may not be needed at all. We have made this distinction where necessary throughout the document with regard to specific matters.

Do you suggest any other broad principle to inform the drafting of the Law?

The Ministry should consider including in the securitisation Law or in separate pieces of legislation principles or rules concerning the following matters, if necessary:

a) Accounting for securitisation transactions for both the originator and the SPV (derecognition of securitised assets and consolidation of SPVs) if the International Accounting Standards (IAS-IFRS, in particular IAS 27-SIC 12 and IAS 39) have not been endorsed by Croatia; and

b) Regulatory capital treatment for financial institutions originators, provided that the Basel II Accord has no been implemented by Croatia.

True sale under law, accounting derecognition and regulatory capital relief do not need to precisely coincide (see Q34), though the three sets of rules are necessary elements of any securitisation framework.

With regard to "supervision/licensing of SPVs", the ESF recommends that the securitisation SPVs are not subject to licensing requirements and that they are supervised as capital markets transactions, hence requiring supervision in the event of constituting public offers of securities, without prejudice of potential supervision of management companies and of the management of company SPVs (see Q13).

Is there any particular example of EU Law that you would suggest to be used as reference?

The ESF has extensively reviewed many European securitisation laws, most of which require in our view some degree of revision to contend with market innovation. The Anglo Saxon system of law, on the other hand, does not require a specific set of rules for securitisation because it is generally conducive for transactions and its flexibility foster market innovation (with the exception of tax rules which are mentioned below).

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A securitisation framework in a Civil law environment will be workable if it is capable of providing for the complete isolation of the portfolio through a true sale and, at the same time, for the same or similar degree of flexibility as in Anglo Saxon jurisdictions. In this sense, the Luxembourg law of 22nd March 2004 is generally praised as the best existing example in that regard, but certainly other laws also provide useful examples and we have made multiple references to EU local securitisation laws where relevant throughout this response.

Please provide examples of the securitisation issues usually addressed in the secondary regulations.

Please see previous Questions. We refer to our responses throughout the Consultative Document in this regard.

2 DEFINITION OF SECURITISATION TRANSACTION

Q2

What are you views on addressing both definitions in a single Law? If you do not agree with this approach, how would you suggest these two types of securitisations should be addressed in the law?

Consistently with the high-level principles approach that we recommend for the securitisation law, the ESF further recommends that this approach be also taken to define securitisation. A too prescriptive or detailed definition should be avoided to prevent uncertainties in the interpretation of the law or to discourage market innovation. The Croatian Law should also avoid defining securitisation by reference to the transfer of assets or risk to Croatian law-recognised SPVs only.

The ESF recommends a single definition of securitisation for both cash and synthetic transactions on the basis of the following principles: securitisation entails the transfer of a pool of assets (via sale/assignment or equitable assignment/sub-participation) and/or the risk associated to that pool of assets to an SPV which, in turn, finances the transfer through the issue of securities. The sole purpose of that SPV should be to acquire pools of assets or risks from assets and to channel the payments from the underlying assets to investors (see Q10).

What are your views on approach to include special provisions dealing with asset-backed commercial paper programmes, master trust securisation schemes and subparticipation in the Securitisation Law?

We agree that these and other securitisation structures should be permitted by the Croatian Law, but again we would caution against an excessive detailed regulation in particular at the law level. In this regard, we recommend that the Croatian Law contains a general provision allowing structures with replenishment of assets, active pool management and multi-issuance of securities, leaving the technical regulation, if necessary, to the secondary legislation.

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In your opinion, would the Securitisation Law be the proper place to regulate the covered bonds? What particular issues should be addressed in the Law with respect to the covered bonds?

No, covered bonds and securitisation are different types of products and, therefore, should be regulated by separate sets of rules.

3 ASSETS

Q3 Do you think any other type of assets should be included in the definition of the assets suitable for securitisation?

The ESF agrees that the Securitisation Law should not restrict the types of assets that can be securitised whether they are assets, receivables, debts, claims, present and future, performing or non-performing, and regardless of the nature of the originator. Where there are restrictions to securitise certain types of assets the Securitisation law should remove those restrictions.

Q4 What are your views on the statutory pledge approach? Do you think the contractual security interest over such assets would be a better solution?

We agree with the statutory pledge approach as a workable solution to ensure the separation of the pool of assets in the SPV for the benefit of the investors. This will be particularly appropriate for SPV companies, but not necessary in the case of SPV funds where the investors' collection rights will rank senior to all others (with a few exceptions) in the fund's payment waterfall.

This highlights the relevant differences in terms of legislative intervention that result from choosing one form of SPV or the other. This is further explained throughout the document in relation to different issues.

Q5 Do you agree that separate legal personalities of the Fund and the management company would be sufficient to achieve separation of the pool of assets?

We are of the view that where the securitisation SPV takes the form of a fund, it should be regulated as an estate without legal personality and separated from the originator for ring-fencing and bankruptcy purposes. These features of the fund, coupled with a specialised company that manages but does not own the fund, will be sufficient to achieve the separation of the pool of assets.

Q6 In your experience, are future flows considered as eligible for securitisation in other jurisdictions? If yes, how are they usually identified in the assignment agreement and any related security agreement?

Yes. However, the existing regulations in this regard are very disparate.

Most frameworks simply do not restrict the types of assets that can be securitised and, hence, future flows are deemed included. For example, French law generally requires that the assets that are securitised must be identified and individualised or be capable of being identified and individualised.

The laws of Luxembourg and Spain contain specific provisions for the securitisation of future flows:

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a) Luxembourg law provides that "a future claim which arises out of an existing or future agreement is capable of being assigned to or by a securitisation undertaking provided that it can be identified as being part of the assignment at the time it comes into existence or at any other time agreed between the parties. […] The assignment of a future claim is conditional upon its coming into existence, but when the claim comes into existence, the assignment becomes effective between parties and against third parties as from the moment the assignment is agreed on, unless the contrary is provided for in such agreement".

b) Spanish law provides that, among the different assets that may be incorporated into an asset securitisation fund, are "future credit rights, consisting of income or receipts of a known or estimated amount, the transmission of which is contractually formalised, evidencing in unequivocal form the full assignment of the title". With one exception, the securitisation of these assets is subject to authorisation from the Ministry of Finance which on 10th November 2005 issued an Order listing a wide variety of future flows that are expressly authorised to be securitised without further Government approval.

What is usually the status of the assignment of future flows following insolvency of the originator in other jurisdictions? Please describe which kind of receivables are usually considered as future receivables, i.e. does future contracted receivables usually fall into this category? What is usually the status of the assignment of future uncontracted receivables following insolvency of the originator in other jurisdictions?

Given the absence of specific regulation for future flows in most securitisation laws, general bankruptcy rules apply. In this case, future receivables arising after the declaration of insolvency will normally be subject to the bankruptcy of the originator. Thus, for future receivables, there exists the risk in many jurisdictions that the contract from which the future flows arise is challenged by the administrators of the originator's bankruptcy or that receivables maturing after the insolvency cannot be paid to the SPV.

Luxembourg Law, however, provides that the assignment of "future claims" will be effective upon coming into existence, "notwithstanding the opening of bankruptcy proceedings or any other collective proceedings against the assignor before the date on which the claim comes into existence". We recommend that the Croatian Securitisation Law take this approach.

It is worth mentioning that under the UK's Enterprise Act of 2002, a secured creditor with a floating charge and part of a "capital markets arrangement" is entitled to appoint an administrative receiver thereby blocking the appointment of an administrator (who could otherwise impose an automatic stay on legal proceedings and on the security enforcement). This effectively represents a "step-in" right of the secured creditor giving it the ability to take control of the borrower and it has been used in UK whole business securitisations that qualify as "capital market arrangements", whereby the security trustee may exercise this right over the SPVs of the deal to ensure that the securitised business continues to generate cashflows to pay the bondholders.

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1 George Yard
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Fax +44.20.77 43 93 01
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Q7: Please provide information on your experience with similar kind of registry existing in Germany, Greece or elsewhere. Are there any additional benefits and/or reasons why we should consider including provisions on this kind of registry in the Croatian Securitisation Law?

An efficient securitisation framework must facilitate the true sale of assets by (i) permitting the isolation of the transferred assets, including their ancillary rights, by removing them from the legal reach of the originator, its creditors and its insolvency administration officers; (ii) not imposing costly or time-consuming formalities or registrations for the true sale or legal assignment of assets, including their ancillary rights; and (iii) ensuring the enforceability or realisation of the asset by the SPV or the contractual servicer, without need to "join in" the originator.

The German Refinance Register (*Refinanzierungsregister*) has proven a very positive initiative to foster cash securitisation by banks in that country along the lines described above. However, other countries have taken different approaches which also merit a review:

a) In France, a transfer of assets under the Securitisation law only requires the execution of a transfer agreement between the originator and the SPV without further formalities. The transfer is effective between the parties and enforceable against third parties from the date it is executed, and the same applies to the ancillary rights attached to such assets;

b) In Italy, by contrast, such transfer must be published in an Official Gazette, in two national newspapers and one local newspaper to be effective vis-à-vis third parties;

c) Lastly, in Spain mortgage assets may be transferred via sub-participation. This process involves the issue by the originator of mortgage participations (*Participación Hipotecaria* or *Certificado de Transmisión Hipotecaria*) subscribed by the SPV. Each mortgage participation gives the SPV certain foreclosure rights over the particular mortgage loan which it represents, without the need to amend the land register entry.

The ESF recommends the Ministry to review the above options in the light of the following circumstances: (i) consumer protection issues; (ii) need for legal certainty and security for the overall legal system; and (iii) particularities for some types of assets (i.e. assets with registered security).

4 ORIGINATOR

Q8: What are your views on approach to exclude a possibility of physical persons acting as originators?

We agree with the Consultative Document approach not to exclude any potential originator type. However, we do not believe that securitisation is an appropriate form of financing for individuals.

St. Michael's House
1 George Yard
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Fax +44.20.77 43 93 01
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5 SPECIAL PURPOSE VEHICLE (SPV)

Q9: What is your opinion on the above approach of using both company and fund structure? Are there any advantages of using only one of these two structures? What difficulties could face the market participants if only one of these structures would be envisaged by the Law? In case only one type of vehicle would be used, in your experience, which type would be more acceptable to the market participants?

Both structures are well known and accepted by investors and other market participants. Investors, in particular, appreciate the simplicity and predictability of fund structures, but company structures can be used for more complex transactions (i.e. whole business securitisations).

The reason why some countries opted in the past for the fund structure is because it requires much lighter legislative intervention: the fund, as a separate estate without legal personality, is easier to construe as a bankruptcy remote and tax neutral entity. A company with these same features requires far greater legislative changes in corporate and tax regulations.

Thus, a choice for one or the other type of structure is not as much a matter of market preference as of political will on the side of the regulator. We recommend that both structures are regulated in the future Croatian securitisation law, as that will provide a broader menu of options for market participants.

Q10: Please provide examples of activities and/or contractual relationships that would be absolutely necessary for the SPV to effect the securitisation transaction.

In our view, the securitisation law should not make a list of contractual relationships that a securitisation SPV could enter into, as this would hinder market innovation. No regulator has taken that approach.

Instead, where the SPV is a fund, it cannot perform any other activity than simply grouping the pool of securitised assets and passing on to investors the cashflows collected from the assets. All other activities necessary for the transaction (i.e. collection of payments, enforcement of securities, etc.) are performed by other parties on behalf of the fund. The corporate object of the management company is limited by reference to the fund and, thus, it also performs all its activities on behalf of the fund.

Where the SPV is a company, the law should require its corporate object to be limited to the performance of securitisation transactions in order to benefit from the similar treatment of securitisation funds as regards taxation, bankruptcy remoteness, etc. The range of activities that a securitisation company could engage in should, however, be interpreted consistently with the greater complexity of the company structure and of the transactions that can be carried out under this SPV form (as mentioned in Q9) and hence should include a broader scope of activities than mere channelling cashflows from the pool of assets to the investors.

None of these issues, however, requires a detailed regulation, but rather simply a prudential supervision over transactions implemented by market participants.

St. Michael's House
1 George Yard
London EC3V 9DH
Tel +44.20.77 43 93 11
Fax +44.20.77 43 93 01
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Are there any reasons why we should consider allowing the re-sell of the SPV's pool of assets? What would usually happen with the proceeds of the re-sell and the SPV following the re-sell?

As a general rule, there should be as much flexibility as possible for market participants to set up structures which entail the re-sale of the pool of assets. We list below several examples:

a) Replenishment of assets: this is frequent in cases where the securitised assets are revolving and hence so is the structure of the transaction (CDOs, credit cards or trade receivables). In this case, it may be necessary to resell the asset in order to replace it due to the limited size of the pool or the short maturity of the asset;

b) Portfolio management: in certain transactions, portfolio managers may be entitled to replace or resell assets under certain circumstances (downgrade, default or inadequacy of the asset) in order to prevent the deterioration of the pool or to generate a higher return for investors. This is justified for investor protection or investor interest reasons; and

c) Clean-up calls: originators are permitted to exercise these calls when the SPV is no longer economically efficient because of the negative trade-off between financial advantages and expenses of the transaction. EU Directive 2006/48/EC implementing the Basel Accord (the Capital Requirements Directive) provides that these clauses must have the following features for regulatory capital purposes:

   i) they must be exercisable at the discretion of the originator credit institution;

   ii) they may only be exercised when 10% or less of the original value of the exposures securitised remains unamortised; and

   iii) they may not be structured to avoid allocating losses to credit enhancement positions or other positions held by investors and are not otherwise structured to provide credit enhancement.

In the structures described in (a) and (b) above, the proceeds from the re-sale of assets are usually re-invested in new assets. Where the structure has a controlled amortisation, the proceeds are deposited in an escrow account and passed on to investors at the end of the "revolving period".

The exercise of clean-up calls will result in the termination of the relevant transaction. Where the SPV is a single transaction-type, it will have to be liquidated, with the proceeds of the call being distributed to the investors. Where the SPV is multi-transaction type, it should be organised in separate compartments and, hence, the liquidation of one compartment will not affect the others (see Q 14).

St. Michael's House
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Fax +44.20.77 43 93 01
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Q11: Please provide details of types of hedging arrangements that would be absolutely necessary to be allowed to SPV, if any?

For the reasons explained in Q10, the future Croatian securitisation provisions amd in particular primary legislation should avoid making a detailed regulation of hedging arrangements that the SPV would be allowed to enter into (whether as main asset of the transaction or for hedging purposes). Instead, we believe that hedging arrangements could easily be interpreted as being among the necessary contractual relationships for any securitisation or as being within the scope of a securitisation SPV corporate object.

In any event, as an example of how other jurisdictions address this issue, we can mention that Spanish law simply contains the following very general provision in this regard: management companies, on behalf of the fund, are entitled to enter into swap agreements to "ensure the predictability of payments under the issued securities, to compensate for the differences in interest rates of the mortgage participations and the securities backed by them and to change the financial features of the securities".

Q12: Please provide examples of conflict of laws issues market participants usually face in multi-jurisdictional securitisation transactions.

Multi-jurisdictional securitisation transactions currently face significant legal barriers. Most existing securitisation laws merely contemplate the transfer of assets to the local securitisation SPV and, thus it is unclear whether the special provisions regarding taxation, bankruptcy remoteness or ring-fencing also benefit transfers to off-shore SPVs. Many of the multi-jurisdictional transactions carried out to date have required setting up intermediary local SPVs in those jurisdictions where pools of assets were located to achieve legal certainty for the transfer under the local securitisation or civil law. This has greatly increased the costs and complexity of these transactions and, as a result, has limited their growth.

If transfer under general laws gives rise to these issues in Croatia, it could be helpful that the future Croatian Securitisation law expressly recognise the transfer of Croatian assets to off-shore SPVs. This will increase the possibilities of Croatian assets being securitised as part of bigger multi-jurisdictional pools of similar assets. Similarly to art. 12 of the Rome Convention, Croatian law should govern "the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged" as well as formalities for the transfer (i.e. filings in registers, publications) in a manner that does not hinder the transfer of assets to off-shore securitisation SPVs.

With regard to the issue of securities, it should be subject to the law of the place where the securities are being offered to the public, regardless of the place of incorporation of the SPV.

St. Michael's House
1 George Yard
London EC3V 9DH
Tel +44.20.77 43 93 11
Fax +44.20.77 43 93 01
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Q13: What are your views on the above proposed approach related to the scope of licensing and supervision of SPV? What is perceived by the market participants to be acceptable level of licensing requirements and scope of supervision?

There is not a unique supervision/licensing model for SPVs across Europe. Though no specific license is normally required for a securitisation SPV, in practice some countries submit the incorporation of these entities to prior authorisation from a regulator (i.e. the securities regulator in the case of Spain and Portugal and the banking regulator in the case of Italy). We recommend that the future Croatian securitisation law stay away from these models.

Instead, we believe that a distinction should be made between the management of the SPV and the securitisation itself:

a) the incorporation of a management company could indeed be subject to prior approval from the securities regulator. We believe that the extent of the supervision roughly described in the Consultative Document would be considered reasonable (i.e. approval of constitutional documents, management rules and persons that will manage those companies); and

b) the establishment of a fund by a management company or the issue of securitisation bonds by a company SPV constitutes a capital markets transaction and, as such, should be subject to supervision when it amounts to a public offering of securities. According to the Directive 2003/71/EC of 4 November (Prospectus Directive), where securities are offered to qualified investors (as is normally the case in securitisation transactions), there is no obligation to publish a prospectus. However, a prospectus must be published when those same securities are admitted to trading. According to this model, private transactions where securities are placed among qualified investors and not admitted to trading should not be subject to any degree of supervision from the regulators.

Under both the above procedures, regulators will need to be responsive to authorisation requests from market participants in order to meet market demands.

Q14: Are there any particular advantages in allowing multitransactions SPV? How is this issue addressed in other EU jurisdictions?

In most jurisdictions with well-developed securitisation market (with or without a specific law), securitisation SPVs are construed as multitransaction vehicles. There are various benefits of this:

a) it reduces the administrative and audit expenses derived from incorporating and running securitisation SPVs;

b) it maximises name recognition of the issuing SPV; and

c) it reduces the time to set up a transaction.

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Multitransaction SPVs can be construed as entities with separate compartments, as it is the case of securitisation funds in France and Belgium and securitisation undertakings (both funds and companies) in Luxembourg. The statutory pledge mentioned in Q4 may also be used to the same effect.

Each compartment is legally isolated from the others by virtue of the following provisions: (i) a compartment is comprised by a specific portfolio of securitised assets ring-fenced with a tranche or tranches of securities; (ii) the holders of the securities in that tranche or tranches do not have recourse against the securitised assets ring-fenced with a different compartment; and (iii) each compartment is incorporated and liquidated separately and independently from the others, without this liquidation affecting any other compartment of the SPV which continues existing with the non-liquidated compartments.

As a matter of practice, each compartment operates as a separate entity from the point of view of the securities holders, but all the compartments together constitute a unity from the point of view of the SPV management.

Q15: What could be the benefits for the market participants if the securitisation structures envisaging intermediary SPV would be allowed by the Securitisation Law? Please provide information in which cases such intermediary SPVs are usually used and for which purposes

We understand that by "intermediary SPVs" the Consultative Document is referring to warehousing structures. Many structured finance transactions involve pools of financial assets originated wholly and exclusively with securitisation in mind. However, it can take a considerable period to originate assets to a sufficient level or with the right mix to make a securitisation economically viable. During that period of build-up of the portfolio, the assets are warehoused in a securitisation SPV which is financed not by an issue of securities, but by bank loans or by commercial paper. Once the face value of the acquired assets amounts to the appropriate volume, the SPV refinances its banking liabilities or the commercial paper by means of an issue of bonds backed by the assets previously acquired and warehoused by it. This structure provides the originator with flexibility and time to build-up the portfolio, while reducing the costs of the intermediate financing because the lender is lending to a bankruptcy remote entity and not to the originator directly.

"Intermediary SPVs" can also be found in whole business securitisations, where one or various SPVs own the securitised business or businesses, while the securities are issued by an issuer SPV which, in turn, finances the "operating" SPVs via intra-group loans. These structures are normally used to isolate risks and maximise the performance of each of the SPVs.

St. Michael's House
1 George Yard
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Fax +44.20.77 43 93 01
www.europeansecuritisation.com

6 SECURITIES

Q16: Does the latter represent a common practice in other EU jurisdictions?

The approach in the Consultative Document is correct.

Securitisation SPVs are allowed to issue all types of securities and tranches and a single prospectus suffices for a single transaction, regardless of the tranching of the securities. Programme prospectuses may also be used in most jurisdictions to reduce the costs of setting up additional transactions within the same scheme or by the same issuer.

Q17: In your opinion, is the latter a reasonable requirement?

Please see response to Q13. We recommend that private placements not be subject to the obligation of publishing a prospectus, although in practice a private prospectus will normally be used in these transactions.

Q18: What are your views on the above-proposed approach related to the rating of the securities?

The ESF recommends that the rating of any securities in a securitisation is not obligatory by operation of law. Where the rating is compulsory by law (i.e. Spain or France), this obligation has been strongly contested by market participants.

7 SERVICER

Q19: What are your views on the above proposed approach to allow rendering of servicing activities only to the licensed financial institutions and the originators?

The regulation with regard to supervision and licensing of servicers is very disparate across Europe.

The originator is in almost all cases authorised to service its own portfolio. Some countries, such as Italy or France, restrict third party servicing to licensed financial institutions. In practice, however, third party servicing is greatly impaired by data protection and banking secrecy regulations in many jurisdictions, where the transfer of personal data to servicers could be construed as a breach of these regulations.

Third party servicing promotes competition among market participants and this competition, ultimately, contributes to improve the overall efficiency of the servicing techniques available to market participans and benefits both consumers and bondholders. Hence, in our view third party servicing should be facilitated by not confining it to financial institutions and by adequately addressing data protection and banking secrecy issues to allow the transfer of necessary personal and confidential data on the underlying assets for services to perform their contractual duties (see Q31 and Q32). Supervision similar to that described for management companies (see Q13) would be seen by market

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1 George Yard
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Tel +44.20.77 43 93 11
Fax +44.20.77 43 93 01
www.europeansecuritisation.com

participants as acceptable for servicers as well. We also recommend that the Croatian law provides for an expedited system of recognition of servicers authorised in EU jurisdictions.

Q20: In your view, would the principles described above be sufficient to adequately mitigate the commingling risk? Are there additional ways to mitigate such risk that proved to be efficient in practice?

The approach described in the Consultative Document to prevent the commingling risk is satisfactory and should be sufficient. It is generally consistent with the mechanism put in place to the same end by the French *Code Monétaire et Financier*. We would recommend, however, that the principle be contained in the law and further developed in the secondary legislation.

Q21: Please provide information regarding the capacity in which the servicer usually enforces the assigned receivables and related security interest

The servicer acts as agent of the SPV and is empowered as such by operation of law or by the transaction contractual documentation.

8 BONDHOLDERS' MEETING / FIDUCIARY REPRESENTATIVE / SECURITY TRUSTEE

Q22: Would there be any practical difficulties if the law would prescribe a minimal scope of authorities of a bondholders' meeting and a joint fiduciary representative of the bondholders? Is this usual in other EU jurisdictions?

No. The existence of a bondholders' representative is normal practice for all fixed income markets across Europe. Regulation for bondholders' representatives in securitisation, therefore, does not need to substantially differ from that applicable to other fixed income markets.

In securitisation laws, however, there is a particularity: where the SPV takes the form of a fund, the management company usually takes on the investor representative role by operation of law and hence there is no need for a separate investors' representative. In this connection, the Portuguese *Decreto-Lei nº 453/99* provides that "the management company and the custodian shall be jointly responsible for ensuring compliance with all duties set down by law and in the management rules and regulations and shall act in the interest of holders of securitisation units". Spanish and French regulations take a similar approach.

Q23: What are your views on (i) introducing in the Securitisation Law the security trustee concept in line with common law jurisdictions and (ii) potential difficulties arising from incorporation thereof in civil law system?

We do not consider necessary for the Croatian securitisation law to regulate a specific "security trustee" concept. Instead, we suggest the law regulate the bondholder

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representative in broad and flexible terms so as to allow market participants to freely decide how they want to organise their representation, including the enforcement of their security. Foreign EU firms qualified to represent investors according to their local laws should be permitted to perform the same role in Croatia according to its future law.

9 TAX TREATMENT

Q24: Please provide examples of how taxation issues are usually addressed in other jurisdictions, i.e. by introducing special provisions in the relevant laws or by obtaining tax administration guidelines or in any other way

Taxation of SPVs is undoubtedly the most important regulatory concern in setting up a securitisation transaction. Experience shows that unclear or inexistent tax rules have either discouraged the development of a local securitisation market in some European jurisdictions or forced transactions off-shore.

The importance of taxation rules is better exemplified by the UK market. While, as explained in Q1, there are no specific rules for securitisation in the UK, it has been necessary to pass a number of tax rules for securitisation SPVs in that country, and a whole new framework is now being devised to address the issues caused for such vehicles by the profit volatility induced by applying International Accounting Standard 39 (and its UK equivalent FRS 26) for tax purposes.

A specific set of tax rules would be preferable for the future Croatian Securitisation law to provide certainty and security to market participants in this key issue. The alternative of getting tax clearances from the authorities on a case-by-case basis has worked well in other more-experienced jurisdictions, but we do not think it appropriate for Croatia given its condition of new entrant to the international securitisation markets.

Q25: Please provide information on what additional tax problems market participants usually face in the context of the securitisation transactions.

As a general rule, securitisation is not intended to create tax benefits for an originator or any other parties to the transaction. Therefore, securitisation structures are construed to achieve fiscal transparency and neutrality while tax authorities should not seek to attack securitisation structures as they are not tax motivated.

It follows that taxation rules applicable to securitisation should seek to ensure that tax neutrality. In addition to withholding tax, VAT or permanent establishment issues mentioned in the Consultative Document, tax regulations should also address the following two key matters:

a) Stamp duty, transfer tax and capital duties: these taxes may be payable on the transfer of the assets or the security to the SPV. It is advisable that the transfer of any assets or security as part of a securitisation be specifically exempt or, at the very least, mitigated, as high transfer taxes will no doubt greatly disincentive securitisations;

St. Michael's House
1 George Yard
London EC3V 9DH
Tel +44.20.77 43 93 11
Fax +44.20.77 43 93 01
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b) Corporate income taxation of the SPV: the creation of an SPV gives rise to an entity taxable under the corporations' income tax. Where the SPV takes the form of a fund, it is normally designed by the securitisation law to be tax neutral: as a separate estate without legal personality, the fund does not run a business and, as such, it does not generate a profit. The extraction of any surplus by the originator is normally tax-free. Where the utilised SPV is a standard company, the same surplus extraction may attract taxation under the applicable corporations' income tax, even though it is hard to argue that such surplus constitutes a profit from an economic point of view. Market participants have tried to address this issue with sufficient structuring and tax analysis in advance to ensure tax neutrality. However, as the UK experience shows (see Q24), a specific exemption for this surplus extraction is preferable to avoid the uncertainties arising from changes to the overall accounting or tax frameworks.

10 BANKRUPTCY REMOTENESS

Q26: Would you agree with the above approach with respect to instruments for minimising the risk of bankruptcy of the SPV? What other instruments would you suggest for achieving that purpose?

Again as described for other questions in previous responses, the legal nature of the securitisation SPV is relevant in this regard too: where the SPV takes the form of a fund, it is normally not subject to general bankruptcy laws by virtue of the securitisation law that created it.

Where the SPV is a standard company, it will be indeed subject to general bankruptcy laws. In most jurisdictions lacking a comprehensive securitisation law (UK, The Netherlands, Germany), general bankruptcy laws usually give effect to limited recourse clauses, and more rarely to non-petition clauses. The Luxembourg securitisation law explicitly recognises the validity and enforceability of these clauses in the bankruptcy of a securitisation undertaking along the following lines: "The articles of incorporation, the management regulations of a securitisation undertaking and any agreement entered into by the securitisation undertaking may contain provisions by which investors and creditors accept to subordinate the maturity or the enforcement of their rights to the payment of other investors or creditors or undertake not to seize the assets of the securitisation undertaking nor, as the case may be, of the issuing or acquisition vehicle, and not to petition for bankruptcy thereof or request the opening of any other collective or reorganisation proceedings against them". Furthermore, the Luxembourg law also introduces special rules of procedure for the liquidation or bankruptcy of the securitisation undertaking. We see merit in this precedent for the future Croatian Securitisation law.

In addition to the above issues, the bankruptcy regime of the SPV should take into consideration the following:

St. Michael's House
1 George Yard
London EC3V 9DH
Tel +44.20.77 43 93 11
Fax +44.20.77 43 93 01
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a) Bankruptcy group consolidation: in some jurisdictions, a subsidiary may be dragged into the parent company's bankruptcy procedures, thus being subject to the relevant insolvency rules. If this concept exists under Croatian law or case law, securitisation SPVs should be expressly exempted;

b) Piercing of the corporate veil: again, if this concept exists in Croatian case law, it might be helpful to incorporate certain safeguards for securitisation SPVs to avoid potential liability for SPV managers, given the lack of familiarity of judicial courts with these structures.

Q27: How is this issue addressed in other EU jurisdictions?

See response to Q28, in particular regarding the Luxembourg law example.

Q28: Is this approach common in other EU jurisdictions?

This approach is not common under the law of other jurisdictions. Furthermore, it would be a more workable solution that the securitisation law simply recognises investors a preferential collection right over the SPV assets (or its corresponding compartment) upon its liquidation or bankruptcy.

Q29: What are your views on the above approach related to achieving bankruptcy remoteness? What other instruments of achieving bankruptcy remoteness of the SPV would you suggest to be included in the Securitization Law?

The ESF agrees with the measures envisaged by the Consultative Document to ensure the bankruptcy remoteness of securitisation transactions upon the insolvency of the originator. These measures are largely consistent with those provided by other jurisdictions in this area.

In this connection, please see below three minor comments:

a) Defining the conditions for the true-sale is not in itself a bankruptcy issue. Having the future Croatian Securitisation law defined a true sale (see Q7), the law should provide that compliant transactions cannot be challenged by the originator's creditors or bankruptcy administration unless they can demonstrate that the transaction was a fraudulent conveyance. In making these determinations, however, the law should avoid being too detailed or prescriptive. With regard to future receivables, please see Q6;

b) Comments in Q20 concerning separate accounts in the servicer to avoid the commingling risk should be understood also applicable to the originator's bankruptcy, whether acting as servicer or not. This scheme will be the only means to make the SPV's right of separation effective in practice; and

c) In this context, the bankruptcy group consolidation concept mentioned in Q26 will also be relevant if the originator is the SPV's parent company.

St. Michael's House
1 George Yard
London EC3V 9DH
Tel +44.20.77 43 93 11
Fax +44.20.77 43 93 01
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11 SCOPE OF APPLICATION OF NATIONAL LAW

See Q12.

12 DATA AND CONSUMERS' PROTECTION RULES

Q31 and Q32: Are there any other notification instruments used in EU jurisdictions that, in your opinion, would be more efficient? What are your views on the above approach related to the data and consumers' protection rules? What other instruments of dealing with those issues would you propose to be included in the Securitization Law?

We agree with the Consultative Document's approach of using EU data protection regulations as a guideline for the future Croatian Securitisation law. Please, note that data protection issues arise in the context of third party servicing, as the SPV, even though it purchases the assets, will never manage the portfolio as it does not have the infrastructure for that.

We understand that the public announcement scheme mentioned in the Consultative Document is consistent with the Italian Newsletter April 2 – 8, 2001 – *Garante per la Protezione dei dati personali*. We believe that it is a good system, though a simpler and less costly option would be simply to allow under the securitisation law the transfer of necessary personal data to third party servicers, which would be bound by the same data protection obligations applicable to originators.

Please, remember that in addition to data and consumer protection issues, banking secrecy laws need also be considered in this regard (see Q19).

13 RE-CHARACTERISATION RISK

Q34: What are your views on the above approach related to addressing the re-characterisation risk in the Securitization Law? Has this been done successfully in any EU jurisdiction? What would be the best way to address that risk in the Law? What other instruments of dealing with those issues would you propose to be included in the Securitization Law?

We believe that re-characterisation risk should not be of great concern in Croatia if the provisions envisaged in this Consultative Document concerning true sale and bankruptcy remoteness are finally implemented by the law. Re-characterisation constitutes a risk significantly in jurisdictions lacking a specific securitisation law. Having said that, a special mention should be made to accounting and regulatory capital issues.

Since the introduction of the International Accounting Standards in the EU and, in particular IAS 27-SIC 12 and IAS 39, accounting and legal treatment for securitisations are not necessarily coincident. Practically in all cases in Europe, transactions that

St. Michael's House
1 George Yard
London EC3V 9DH
Tel +44.20.77 43 93 11
Fax +44.20.77 43 93 01
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qualify as "true sales" for securitisation laws do not achieve, however, off-balance sheet accounting treatment and, hence, the assets continue to be recognised by the originator after they have been sold to the SPV. To the extent that Croatia has implemented or will be implementing IAS 27-SIC 12 and IAS 39, the future securitisation law cannot address this law/accounting separation independently from the International Accounting Standards' Board regulations and guidelines.

A similar, though less acute, differentiation will exist between legal and regulatory capital treatments of securitisations following the implementation of the Capital Requirementes Directive on 1st January 2007. The Directive contains its own definition of securitisation. Upon its implementation by each Member State, efforts are being made by national regulators to align that definition with local laws or practices, but there may be cases where a true sale of assets to an SPV does not qualify as securitisation for the purposes of the Directive or, by contrast, a transaction that is not formally a securitisation according to local laws may be treated as such under the Directive by banking regulators. Again, to the extent that Croatia intends to implement the Basel II Accord, its future Securitisation Law will not be able to address this issue inconsistently with the Accord. It would be advisable to broadly take into consideration some of the concepts and definitions of the Accord in drafting the Securitisation law, as capital relief or risk tranfer is one of the main drivers for banks to originate securitisations.

14 SCOPE OF APPLICATION OF NATIONAL LAW

Q35: What are your views on the approach not to address the abovementioned issues in the Securitization Law?

We agree with the approach of the Consultative Document. Furthermore, we question the need of regulating the matters described in the Document even in the secondary regulation.