

## European Trade Receivables Securitization: Increased Deal Flow for Continent's Shortest- Term Assets

Trade receivables have, in recent times, re-emerged as a favored asset class among securitization market players, in part due to their short maturities, traditionally straightforward deal structures and a historic ability to provide companies that have less than top-grade credit with access to the capital markets. Today, as the global securitization market recovers, we expect these assets to remain in demand, and offer in this update a short explanation of certain issues which may emerge in the context of multi-jurisdictional European trade receivables facilities.

The costs of rapid expansion and globalization have led to an increased need for working capital on both sides of the Atlantic, and some global companies have begun to finance their European subsidiaries using methods more traditionally utilized in the United States (i.e., trade receivables securitization). In addition, some lenders have turned to Europe in search of short-term assets because of perceived saturation within the United States trade receivables market and the appearance of room for growth on the continent.

Today, the majority of Europe's trade receivables are produced in England, France, Germany, Italy, Spain and the Netherlands. Although there are many jurisdiction-specific issues that arise in the context of a multi-jurisdictional European trade receivables securitization, we have addressed several of the most prominent issues for your consideration.

### Location of Issuing Entity

Due to tax considerations, the issuing entity is typically formed in a jurisdiction outside of any

jurisdiction in which receivables are originated, and is often formed in a jurisdiction where it may benefit from double-taxation treaties. For example, Ireland and Luxembourg are common choices. Note that if an Irish issuing entity is not established as an orphan entity and is instead directly or indirectly related to an Irish operating company, then it is necessary to ensure that the assets of the issuing entity cannot be placed into examinership along with those of the related Irish operating company.

### Currency Risk

In transactions involving receivables denominated in two or more currencies (e.g., € and £), or where a lending conduit issues commercial paper in a currency (e.g., \$ or £) other than the currency in which receivables are denominated, the issuing entity and/or the conduit may need to enter into an interest rate hedge agreement. Alternatively, such transactions may be structured with discrete pools of receivables denominated in a single currency, with the conduit issuing commercial paper in matching currency.

## Auditing, Surveillance, and Back-up Servicing

In light of the double-billing receivables fraud perpetrated by the Italian company Parmalat in the 1990s, lenders and rating agencies in Europe have considerably tightened their diligence of receivables files. Today, rated European trade receivables securitizations may require bi-annual, quarterly or even monthly receivables audits conducted by third-party auditors, depending on the relevant analyst's level of comfort with existing auditing and servicing practices. In some cases, a back-up servicer is required.

## VAT

In most European jurisdictions, a value-added tax, or VAT, applies to sales of goods delivered by originators to obligors. The originator of the receivables typically must account for the VAT in respect of the underlying goods to the government on a monthly or quarterly basis, and therefore in some cases must account to the tax authorities for the VAT before the relevant obligor settles its debt. If the issuing entity elects to fund the VAT portion of each receivable, then the originator will be covered for VAT (subject to purchase price discounts). Provisions are typically made for re-transfer of any non-performing or otherwise ineligible receivables to the originator, so that the originator may claim the appropriate "bad debt" relief from the relevant governmental entity.

## True Sale and Other Legal Considerations

Each country has specific true sale requirements, and in some cases, such as France, sale treatment and the contents of the related legal opinion depend on what transfer method is used by the issuing entity to acquire the receivables. In the case of England, true sale language is often modified to reflect the initial retention of legal title by the originator (only beneficial title is initially sold to the issuing entity). In addition, numerous jurisdictions have recordation formalities that appear onerous in comparison to United States transactions, which often incur additional delays between the sale of receivables and the "perfection" of the lender's security interest in such receivables, or the validity of such sales against third parties. For example, in Spain, each agreement and each document evidencing the sale and/or perfection of receivables must be formalized in front of a notary, which requires the payment of notary

fees, special formatting within the documents, an official appointment with such notary and an authorized signatory of each party to be present at each signing (powers of attorney are typically utilized in each document for this purpose). To minimize transaction costs and administrative difficulties, transaction parties often agree to perfect sales of Spanish receivables on a less frequent, periodic basis (e.g., weekly, or monthly). In Germany, it is critical to present a receivables purchase agreement reflecting the transfer of the seller/originator's default or credit risk to the purchaser. In cases where an issuing entity is related to the operating company selling receivables (or its parent), a non-consolidation opinion is typically obtained, to provide comfort that a bankruptcy or insolvency (or receivership or other analogous proceeding under local law) of the parent would not affect the issuing entity. Finally, technical legal considerations may occasionally impact closing logistics, as in the case of England, where a signing officer must receive a copy of the full document to be executed as a deed prior to its execution.

## Consumer Privacy

In many European jurisdictions, consumer privacy concerns create business and documentation issues. For example, in transactions involving German receivables, it may be advisable to include an independent data trustee to avoid any issues with the German Data Protection Code. The circumstances under which data protection laws will apply to receivables also vary from jurisdiction to jurisdiction. In Spain, data protection rules apply to individual data but not to company data (although names and surnames of the contact persons of a company are regarded as personal data). Transfer of personal data (in Spain) generally requires the prior consent of the individual whose details are to be transferred.

## Forms of Payment

European obligors most commonly present payment in representative form (e.g., checks, bills of exchange or promissory notes). The "clearing" time for each such negotiable instrument may be characterized as an additional delay of payment. For example, in Spain, in the case of bills of exchange or promissory notes, the originator or servicer may be required to endorse each bill of exchange to the issuing entity and present it for payment at the bank where the relevant payment account is located; in such a case, logistical concerns

such as bank holidays, bank hours and travel time can lead to potentially significant delays.

market (or simply moved from one conduit to another), new opportunities are still available within Europe, particularly with respect to cross-border transactions.

## Practical Considerations

Although there are many parallels between United States trade receivables structures and their European counterparts, as a general rule we recommend that you plan to significantly increase lead time in respect of all logistical issues, especially in respect of rating agencies, and negotiating with third party and other lockbox banks.

Whereas many United States trade receivables opportunities may have already been absorbed by the

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