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Securitisation

Austria
Markus Fellner and Florian Kranebitter
Fellner Wratzfeld & Partners

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Law and Practice

Contributed by:
Markus Fellner and Florian Kranebitter
Fellner Wratzfeld & Partners see p.13

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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

Austrian insolvency law affects securitisations in different ways subject to the form of transaction. In the case of a true sale transaction of receivables, the legal and economical ownership of assets, including the credit risk, is transferred to the special purpose entity (SPE), while the originator receives the corresponding amount of funds. This means that the sale and transfer of receivables not only enables the increase of liquidity, but also the distribution and reallocation of credit risk. For the validity of such transaction, Austrian law requires an agreement (title) between the originator (as seller) and the SPE (as buyer) as well as an act of transfer (modus).

In the event of the originator's insolvency, the acquired receivables are not accessible to the originator's creditors. The SPE's right of ownership over the acquired receivables triggers a right of segregation (*Aussonderungsrecht*) which ensures that the receivables do not fall into the originator's insolvency estate.

By contrast, if the SPE receives claims for granting a loan to the originator, and if the SPE considers these receivables as collateral, the transaction may be categorised as a secured loan transaction. In that case, the SPE has a right to separate satisfaction in case of the insolvency of the originator (*Absonderungsrecht*). The right to separate satisfaction only applies if the assignment of the receivables has been notified to the debtor or a book entry in the obligor's company ledger for the effectiveness of the security assignment has been made prior to the opening of insolvency proceedings.

Besides the significant consequences in the event of the insolvency of the originator, securitisation can be generally seen as an instrument for economic objectives and – more precisely – for balance-sheet management by the reason of its flexibility as a financial product. Using the financial means, received in the course of the transaction, to repay liabilities leads to a balance sheet contraction at the SPE. Thus, the balance sheet figures can be actively improved. The interposition of an additional entity also broadens the originator's access to new investors, as their decision about potential investments is mainly dependent on debt securities ratings.

Segregation and Separation Rights

Both segregation rights and separation rights can be subject to a six-month deferment, mandated by the insolvency administrator after the commencement of insolvency proceedings, if the business continuity of the originator might be jeopardised. This means that during such deferment period the SPE – which has an ownership interest or is entitled to separate satisfaction – cannot request the fulfilment of its claims. This provision may only be disregarded if the enforcement is vital in order to prevent severe disadvantages for the SPE and the enforcement against other assets of the debtor has not led, or is unlikely to lead, to full satisfaction of the SPE.

1.2 Special-Purpose Entities

Pursuant to the Securitisation Regulation (2017/2402) which "lays down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation", an SPE is a company that has been established for carrying out one or more securitisations. The activity of an SPE must be limited to what is necessary for that purpose and the SPE's structure is intended to isolate their own obligations from those of the originator.

An SPE may be established, for example, as a limited liability company (*Gesellschaft mit beschränkter Haftung*). The permissible business objectives of an SPE generally consist of the transfer of receivables (true sale transactions) or just the transfer of risks (synthetic securitisations). In both of these business objectives, it is common and permitted to conclude necessary securitisation transactions such as hedging. The binding limitation of the business activities of an SPE to the securitisation and to the purchase of risks and assets is essential for preventing the SPE's insolvency. This restriction forbids and hinders the SPE from conducting any other business activities, which consequently could increase the chance of bankruptcy.

Although it is not necessarily required, the SPE should be isolated from the originator to render the SPE's assets bankruptcy-remote in the event of bankruptcy of the originator. If this is not the case, there is substantial risk that the SPE is consolidated or liquidated with the originator, which would mean that the receivables might not flow directly to the investor of the securitisation. Thus, in case of consolidation of the SPE (eg, the SPE is an affiliate of the originator), the creditors' rights to segregation may be insufficient to legally isolate financial assets from the originator. The SPE shall therefore restrict the extent of business transactions in order to mitigate any risks.

The Austrian Banking Act permits the establishment of special purpose entities. Securitisation transactions do not qualify as banking transactions under the Austrian Banking Act and, hence, no banking licence is required to pursue these kinds of transactions. This concerns the issue of debt securities, the taking up of loans, the conclusion of hedging transactions and the conclusion of auxiliary transactions relating to securitisation transactions. However, it must be noted that SPEs are obliged to comply with banking secrecy obligations in the same manner as credit institutions.

1.3 Transfer of Financial Assets

Under Austrian law, a transfer of financial assets requires a valid agreement (title of transfer) and an actual act of transfer, which effects the transfer of the claim to the SPE (mode of transfer); the act of assignment is usually deemed to be included in the receivables purchase agreement itself. The consent or notification of the debtor is not mandatory for the validity of the assignment. If these requirements are not met, the exposures remain on the balance sheet of the originator as transferor (such as in a synthetic securitisation, in which the legal ownership of the originator is not transferred to the SPE, but only the economic risk).

Compared to a true sale, loans backed by collateral (secured loan) require certain formalities in order to be valid. In particular, receivables assigned as security (in the form of an assignment agreement as title of transfer), require a book entry or notification to the third party about the security assignment (mode of transfer) to be effective. This means that the assignment has to be disclosed in a way that enables the third-party debtor to become aware of it. The book entry as a publicity act for a security assignment must be set out in both the individual customer accounts and in the open item list.

Future receivables can also be subject to assignment if the debtor and the contractual relationship to such debtor are duly individualised. Although the conclusion of the agreement already affects the assignment of receivables, this will only have a third-party effect if the publicity act (book entry or debtor notification) has been set.

1.4 Construction of Bankruptcy-Remote Transactions

In the case of bankruptcy on the part of the originator, there is a risk that the receivables and collateral (or the payments arising from them) transferred to the SPE might be allocated to the originator's bankruptcy estate, which may lead to a realisation of the risk on the side of the SPE and investors. In order to ensure a bankruptcy-remote transaction, an insolvency proof sale under the applicable civil law and proper assignment of the financial asset from the seller to the purchaser/the SPE is essential. In terms of a secured loan transaction, the purchaser should examine that the notification of the debtor took place, or the book entry was made correctly.

In addition, the purchaser should make sure that the debtor has not agreed to a no-assignment clause with the originator or that the receivables have not already been assigned to another purchaser (no double assignment). The SPE should also be isolated from the originator (eg, with regard to consolidation requirements) in order to safeguard the bankruptcy-remoteness of its assets in the event of bankruptcy on the part of the originator.

In the course of a restructuring or risk shifting process it is common that the responsible law firms evaluate the respective risk of such process and confirm the validity of the construction of the bankruptcy-remote transaction.

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

In Austria, value added tax (VAT) generally amounts to a rate of 20% of the consideration and is imposed on the sales of goods and provision of services. According to the Austrian Value Added Tax Act (*Umsatzsteuergesetz*), however, certain transactions and turnovers are exempt from VAT, eg, transactions in the business of monetary claims and the mediation of these transactions.

The qualification as turnover of a monetary claim requires that the claim is economically separated from the assets of the originator and transferred to the assets of the SPE, which is only the case if the opportunities and risks associated with the assets no longer affect the assignor (originator) but solely the assignee (SPE). Hence, in the absence of any other agreement, the originator is responsible for the accuracy and recoverability of the assigned claim and no turnover with respect to Austrian tax exemption is made.

In case of the sale of receivables, a tax exemption only applies to the sale of the receivables itself; any other services provided by the purchaser (SPE) are subject to turnover tax. The ECJ, however, clarified in its decision C-93/10 that sales of receivables from non-performing loans at a price below their face value are not considered a taxable service, provided that the difference between the face value and the purchase price reflects the actual economical value of the respective claims at the time of their assignment. A full tax exemption is thus dependent on the relationship of the purchase price and the actual economic value of the assigned claims.

Triggering Stamp Duty

Certain types of written contracts might trigger stamp duty under Austrian law. The term "written" is broadly interpreted. If a contract is established outside of Austria but brought into Austrian territory, stamp duties still apply due to written agreement's nexus to Austria. The term "written" even comprises communication comprising an electronic or digital signature, which gives evidence of a chargeable transaction. The assignment of claims, or other rights being documented, are subject to a 0.8% stamp duty of the consideration. However, assignments to SPEs and assignments between financial institutions are exempt from such stamp duty.

A potential stamp duty might also be avoided by the following structures (but still need to be assessed with respect to its underlying facts on a case-by-case basis):

- the oral conclusion of a contract;
- the oral conclusion of a contract between the legal representatives of both parties and confirmed by each legal representative exclusively to the respective client;
- the signing of an agreement abroad, while assuring that there is no reference to Austria; or
- the conclusion of a contract by implied acceptance of an offer.

In each of the cases outlined above, aiming to avoid a written documentation of the contract, the risk of triggering an obligation a stamp duty at a later stage by "substitution documentation" (*Ersatzbeurkundung*) remains present, eg, original documents or certified copies are sent to Austria or if implied indications for an agreement (such as protocols or emails) exist which are deemed to evidence sufficient substance of the underlying agreement.

Attention should also be paid to capital gains tax (*Kapitalertragsteuer*) with regard to gains distributed to the SPE's shareholders as well as to corporate income tax under Austrian law.

2.2 Taxes on SPEs

See **2.1 Taxes and Tax Avoidance**.

2.3 Taxes on Transfers Crossing Borders

As outlined in **2.1 Taxes and Tax Avoidance**, the sale of receivables is – in general – exempt from Austrian VAT. VAT may be imposed on factoring services through the purchaser – for example, regarding collection services; however, as it is usually the case for a true sale securitisation, no factoring services are provided if the seller continues to collect the receivables.

2.4 Other Taxes

See **2.1 Taxes and Tax Avoidance**.

2.5 Obtaining Legal Opinions

Usually, all the above-mentioned tax-related issues in regard to securitisation are covered in legal opinions, such as the potential application of withholding taxes and stamp duties, as well as the general tax treatment of the SPE and potential VAT on the transfer of receivables and provided services.

3. Accounting Rules and Issues

3.1 Legal Issues with Securitisation Accounting Rules

Under Austrian law, there are no specific accounting provisions regarding securitisation. If an entity is controlled by another company, the Austrian Commercial Code requires a joint and consolidated financial statement. A controlling influence derives, for instance, from a majority of votes. Furthermore, significant influence may also arise from a shareholders' agreement. In such case, the International Financial Reporting Standards (IFRS) must be taken into account as well (eg, based on the "power of disposal and return" approach it is checked whether the parent company can significantly influence the returns of the SPE).

As mentioned, an SPE should be isolated from the originator. If the SPE is under control of the originator, investors should be aware of the aspect of consolidation with regard to their risk management.

3.2 Dealing with Legal Issues

As outlined in **3.1 Legal Issues with Securitisation Accounting Rules**, there are no specific mandatory national accounting provisions regarding securitisation transactions. Moreover, accounting analysis is typically undertaken separately from the legal analysis.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

Regulation 2019/876 (CRR2)

Regulation 2019/876 (CRR2) – which was published on 7 June 2019 in the Official Journal of the EU as an amendment to the former Capital Requirements Regulation 575/2013 (CRR) – introduced an array of essential changes, which had already been part of the Basel III standards. As part of the framework introduced by CRR2, the frequency and content of required disclosures depends on the classification of each institution as a large, small or non-complex or other institution as defined by the Regulation. In particular, CRR2 introduced less onerous reporting requirements and reduced administrative burdens for smaller institutions in the form of targeted simplifications.

The disclosure requirements of exposures to securitisation positions is considerable for institutions evaluating risk-weighted exposure amounts. The CRR2 requires sufficiently comprehensive information for both trading book and non-trading book activities. Institutions must disclose, among other matters, information on behalf of their (synthetic) securitisation and

re-securitisation activities, their role in securitisation and re-securitisation transactions, their use of the "simple, transparent and standardised securitisation" as defined in CRR2 and the extent to which they use securitisation transactions for transferring the credit risk of exposures to third parties. They shall also disclose the carrying amount of securitisation exposures, for which they act as originator, sponsor or investor.

The information is essential for investors for conducting risk analysis and due diligence of the risk profile of a securitisation position and for interpreting credit quality and performance of the respective underlying exposures. Most of the provisions introduced by the CRR2, however, will not come into force until June 2021 and therefore its full impact remains to be awaited.

EU Regulation (EC) No 1060/2009

Pursuant to the EU regulation (EC) No 1060/2009 on credit rating agencies, information on the credit quality, the performance of the underlying exposures of the securitisation transaction, the cash flows and any relevant collateral in terms of the transaction as well as any other necessary information must be jointly published by the issuer, the originator and the sponsor of a structured finance instrument on the website of the European Securities and Markets Authority (ESMA).

STS Regulation

The Regulation (EU) 2017/2402 on Securitisations (STS Regulation), which entered into force on 1 January 2019, stipulates similar disclosure requirements. The regulation applies to all securitisations as well as to the "simple, transparent and standardised" securitisation types for which it provides a comprehensive regulatory framework. Generally, the STS Regulation applies if the following criteria are met:

- the relevant exposures are acquired by the SPE through a true sale or an assignment or a transfer with the same legal effect (ie, simplicity);
- the originator, sponsor and SPE have provided historical data on default and loss performance to investors – for example, cash flow model (ie, transparency); and
- the risk-retention requirements are fulfilled by the originator, sponsor and SPE (ie, standardisation).

The STS Regulation stipulates the importance of a well-developed and comprehensive information system so that (potential) investors easily get access to all relevant information about the respective transactions and securitisations. The originator, the sponsor and the SPE should, therefore, provide data concerning the underlying exposure, the underlying transaction documentation (eg, the asset sale agreement for true sale securitisation) and the investor reports of credit quality and performance of the underlying exposure, not only to the investors, but also to the competent authorities and upon request to potential investors.

Apart from the STS Regulation, the Austrian Standardised Securitisation Enforcement Act (STS Act) – which entered into force on 1 January 2019 – is another specific disclosure law relating to securitisation, though at national level, as it includes administrative penalties for non-compliance with disclosure obligations under the STS Regulation.

Attention should also be paid to disclosure requirements of the technical standards on disclosure issued by the ESMA under the STS Regulation, comprising, for instance, information on significant events affecting the securitisation (eg, material changes in its structural features). Finally, the delegated regulations issued by the European Commission with respect to information and details of a securitisation to be made available by the originator, sponsor or SPE must be considered.

4.2 General Disclosure Laws or Regulations

As defined under EU legislation, asset-backed securities are only offered to qualified investors, and not to the public or retail investors. Due to that fact, no corresponding key information document is required.

The Prospectus Regulation (EU) 2017/1129, which came fully into force in July 2019, ensures an easier access to the capital markets especially for small and medium-sized enterprises.

Asset-backed securities placed with institutional investors, as defined in the STS Regulation (eg, credit institutes or insurance enterprises), need to fulfil the transparency requirements of Article 7 of such regulation. According to Article 7 the originator, sponsor and SPE of a securitisation transaction have to make at least the following information available:

- information on the underlying exposures on a quarterly basis, or in the case of ABCP (asset-backed commercial paper) information on the underlying receivables or credit claims on a monthly basis;
- all underlying documentation that is essential for the understanding of the transaction;
- in the case of STS securitisations, the STS notification referred to in Article 27;
- quarterly investor reports, or, in the case of ABCP, monthly investor reports; and
- any inside information relating to the securitisation the participants are obliged to make public.

4.3 Credit Risk Retention

STS Regulation

With respect to the importance of protecting investors against credit risks, credit risk retention is a ubiquitous issue at the European level. Previously regulated mainly by the Capital Requirements Regulation, the STS Regulation provides new provisions for credit-risk retention. The STS Regulation sets out that an investor may only accept the transfer of the credit risk in terms of securitisation positions if the originator, sponsor or the original lender of the securitised exposures has explicitly confirmed that it will retain, on an ongoing basis, a material net economic interest in the credit risk of not less than 5%.

In addition, the STS Regulation states that the material net economic interest should not be split among different types of holders and not be subjected to credit risk mitigation or hedging. The STS Regulation also clarifies which types of retention of a material net economic interest qualifies as not less than 5%. For instance, in the case of revolving securitisations or securitisations of revolving exposures, the retention of the originator's interest is not less than 5% of the nominal value of each of the securitised exposures; further, in the event of the retention of a "first loss exposure" of not less than 5% of every securitised exposure within the securitisation.

Originators must ensure that the performance of the assets to be transferred to the SPE is not significantly lower than the comparable assets on the balance sheet of the originator (so-called prohibition on adverse selection). According to the STS Act, the breach of such obligation is sanctioned by the FMA.

Besides the STS Regulation, there are a number of other provisions with regard to credit risk retentions, such as the Commission Delegated Regulation (EU) 625/2014 of 13 March 2014.

The EBA and the Austrian Banking Act

In 2018 the European Banking Authority (EBA) partially incorporated provisions of the Commission Delegated Regulation in its final draft of regulatory technical standards, which aimed to clarify the risk retention requirements stipulated by the STS Regulation. The draft included rules concerning the measurement of the level of retention, the prohibition of hedging the retained interest and the modalities of retaining risk. Furthermore, it included new approaches with respect to the disclosure of the retained material data to investors, the prohibition on adverse selection under the STS Regulation and other aspects affecting risk retention for the sake of clarity.

The Austrian Banking Act (*Bankwesengesetz*) states that the FMA may impose a fine of up to EUR150,000 if a credit institution does not meet the credit risk retention requirements. Additionally, in the event of a breach of any risk retention requirement the FMA may, in accordance with the STS Act, impose financial sanctions on the originators' or sponsors' representatives and on the persons responsible for an original lender of up to EUR5 million or up to twice the amount of the advantage derived from the infringement, if such amount can be quantified.

4.4 Periodic Reporting

Pursuant to Article 7 of the STS Regulation, the originator, sponsor and the SPE must provide holders of a securitisation position, the competent authorities and upon request the potential investors with information such as on the underlying exposures on a quarterly basis (in the case of asset-backed commercial paper programme information on the underlying receivables or credit claims must be provided on a monthly basis), all underlying documentation regarding the transaction (including a detailed description of priority of payments of the securitisation), quarterly (or monthly in the case of an asset-backed commercial paper programme) investor reports and any inside information and significant events relating to the securitisation. Non-compliance with such reporting-provisions may be sanctioned under the STS Act as already outlined in **4.3 Credit Risk Retention**.

The CRR2 provides for certain disclosure requirements, which apply to originators, sponsors or original lenders to the advantage of the investors. The provisions primarily relate to their commitment to maintain the net economic interest in the securitisation, the relevant data on the credit quality and to the performance of the respective underlying exposures, cash flows and collateral supporting a securitisation exposure. In addition, they are obliged to disclose any other important information in order to carry out comprehensive stress tests on the cash flows.

Furthermore, reporting requirements are also included in the Implementing Technical Standards of EBA (ITS) on supervisory reporting with respect to information on securitisations. Its aim is to implement standardised reporting guidelines (eg, definitions, frequencies and uniform formats) for guaranteeing fair competition and for giving supervisors the opportunity to evaluate risks across the EU. The ITS includes provisions about reporting of own-funds and capital requirements, reporting on large exposures and reporting on liquidity and stable funding as well as reporting rules on securitisation exposures.

The Austrian Banking Act requires banks operating in Austria to report securitisations and related risk information on a quarterly basis to the central credit registry (*Zentralkreditregister*) of the Austrian National Bank (*Österreichische Nationalbank*).

4.5 Activities of Rating Agencies

Credit rating agencies (CRAs) play an essential role in the disclosure of relevant data to investors and have the task to rate securities. Although their legislative framework mainly consists of a regulation on CRAs and of amending regulations on CRAs (CRA Regulation), there are also delegated acts by the European Commission and technical standards by the ESMA, as the latter-mentioned institution is the single supervisor of CRAs operating in the European Union.

The CRA Regulation

The CRA Regulation includes multiple provisions emphasising CRAs' independence, objectivity and adequate quality in order to avoid conflicts of interest when issuing credit ratings. Additionally, the CRA regulation includes recommendations for issuers, originators and sponsors to avoid these conflicts of interest. For the purpose of remaining independent, for instance, the regulation recommends that issuers shall appoint at least two different CRAs for credit ratings.

Pursuant to the CRA Regulation, entities using credit ratings are also required to consider their own credit risk assessment and cannot solely rely on credit ratings to avoid over-reliance. For this purpose, entities should not use the credit ratings as the sole parameter for evaluating the creditworthiness of different investments. Furthermore, the Austrian National Regulation of the Austrian Financial Market Authority (*Kreditinstitute-Risikomanagementverordnung* or KI-RMV), does not allow an approach for credit risk assessment which is only based on external credit assessments.

Operating in the EU

Operating credit ratings in the EU requires the registration as a CRA. According to ESMA, CRAs from non-EU countries, which have the intention to offer ratings in the EU, must either have a certification or an endorsement. Otherwise, ESMA might impose fines or supervisory measures on entities conducting credit rating activities without registration.

CRAs' primary obligation is to provide investors with the necessary data on default probability and rating outlooks. They are required to reveal data about their rating assumptions and their methodologies, which have to be reviewed regularly with regard to their adequacy. However, CRAs are not allowed to carry out any consultancy or advisory services and have to comply with several disclosure obligations (apart from the mandatory warning of a probable default of a credit rating).

ESMA is exclusively responsible for the registration and supervision of CRAs in the EU. In case of an infringement by a CRA, fines of up to EUR 750,000 may be imposed. Together with the member states, ESMA is required to inform the public about imposed penalties (if appropriate and proportionate). It is also possible that a civil liability arises from certain infringements under the CRA Regulation. If this is the case, an investor or issuer may claim damages due to that infringement by the CRA.

On 30 September 2020, the ESMA published the final report for its Guidelines on Internal Control for CRAs, which communicates what ESMA considers to be the characteristics and components of an effective internal control structure within a CRA. The guidelines, however, will only apply from 1 July 2021.

4.6 Treatment of Securitisation in Financial Entities

The CRR2 provides for capital and more rigorous liquidity requirements rules for banks and other institutions within the scope of CRR2. In comparison to the former CRR, additional requirements concerning the leverage ratio were added for all institutions under the CRR (3% of the core capital). Further, it stipulates that institutions must apply either the standardised approach, which allows more opportunities in terms of diversification, or the internal ratings-based approach (IRB approach) to calculate their risk-weighted exposure amounts for the purpose of capital adequacy requirements and to cover a particular percentage of it with own means (*Eigenmittelunterlegung*).

Pursuant to the KI-RMV (*Kreditinstitute-Risikomanagementverordnung*), banks in Austria are obliged to record and manage securitisation risk using appropriate and adequate principles and procedures. Furthermore, the economic substance of the securitisation has to be fully reflected in the risk assessment and the management decisions of the banks.

Banks acting as originators of revolving securitisations with early repayment clauses must have liquidity plans to consider the effects of repayments. In addition, banks must prepare stress tests for liquidity positions and risk-mitigation factors, which should take into account off-balance-sheet items and other contingent liabilities of SPEs. Furthermore, it is required that the assumptions, on which basis financing position decisions are made, must be reviewed regularly and at least annually.

4.7 Use of Derivatives

According to the STS Regulation, originators, sponsors and original lenders can comply with their obligation to mitigate the interest rate risk and currency risk arising from the STS securitisation by entering into derivative contracts. However, the SPE shall only enter into derivative contracts for the purpose of hedging interest rate or currency risk. In addition, it must ensure that the pool of underlying exposures does not comprise derivatives as derivatives increase the complexity of both the transaction and the risk and due diligence analysis carried out by the investor.

Those derivatives have to be documented under common standards. Moreover, any interest payments under an STS securitisation should not reference complex formulas or derivatives and must be based on market interest rates or generally used sectoral rates reflecting the refinancing costs. According to the STS Act, a fine up to EUR5 million may be imposed in the event of non-compliance with the provisions regarding derivatives under the STS Regulation.

It has to be considered that in synthetic securitisations banks use derivative contracts to transfer the credit risk. As this implies an additional counterparty credit risk, the STS criteria should not allow synthetic transactions.

Synthetic Securitisation

Based on a draft report on the STS framework for synthetic securitisation in form of a discussion paper in September 2019, the EBA has published the final report on the STS framework for synthetic securitisation on 6 May 2020. This report, which is limited to balance-sheet securitisation, includes a list of criteria to be considered when labelling the synthetic securitisation as "STS" and provides the pros and cons of a potential differentiated capital treatment for this type of securitisation. The following three recommendations regarding the STS synthetic product are the result of the published report:

- establishing a cross-sectoral framework for STS synthetic securitisation that is limited to balance-sheet securitisation;
- to be eligible for "STS" status, synthetic securitisation must comply with the proposed criteria on simplicity, standardisation and transparency; and
- the European Commission should consider the pros and cons related to a potentially differentiated capital treatment for STS balance-sheet synthetic securitisation, and any potential future proposal for STS synthetic securitisation should be accompanied by a mandate to the EBA to monitor the functioning of the STS synthetic market.

4.8 Investor Protection

The due diligence requirements provisions for investors, formerly included in the Capital Requirements Regulation, are stipulated in Article 5 of the STS Regulation, which sets out the minimum standards of due diligence measures conducted by investors.

Prior to investing in securitisation positions, an investor shall perform a careful and comprehensive due diligence in order to ensure that the risks arising from the securitisation position are adequately valued. The due diligence assessments by investors other than the originator, sponsor or original lender, must at least comprise the respective risk characteristics of the relevant securitisation position and of the underlying exposures and textural characteristics, as well as the approaches for addressing the question with respect to the compliance of that securitisation with the requirements set out in the STS Regulation. This requires comprehensive and sound knowledge of the securitised exposures, such as information on the exposure type, proportion of overdue loans, collateral type and occupancy and default rates. Subsequently, investors must monitor the information on the exposures underlying the securitisation positions, in particular with respect to material changes, on an ongoing basis.

According to the STS Act, the FMA is responsible for monitoring investors' compliance with due diligence provisions. Violations of such provisions may lead to supervisory sanctions by the FMA in the form of increased own funds requirements. Institutions must demonstrate to the competent authorities, such as the FMA in Austria, for each of their securitisation positions the fulfilment of the minimum standards, which relates to the comprehensive and thorough understanding of each securitisation position and implementation of written procedures appropriate to their risk profiles and, where relevant, to their trading book and non-trading book.

4.9 Banks Securitising Financial Assets

There is no special law in Austria specifically relating to securitisation – except for the STS Act, which came into force on 1 January 2019 and which sets out those provisions necessary for the effectiveness of the STS Regulation.

In addition, the STS Regulation sets out provisions comprising due diligence obligations for investors, risk retention requirements for the parties involved in a securitisation and transparency requirements (see **4.1 Specific Disclosure Laws or Regulations**).

4.10 SPEs or Other Entities

There are no special laws that apply to the form of SPEs accomplishing securitisations in Austria. As mentioned above, the SPE may be established as, for example, a limited liability company (*Gesellschaft mit beschränkter Haftung*).

In general, the main participants involved in a securitisation transaction are the SPE, the originator, the servicer (which carries out the ongoing management and collection of the receivables), the investor and a trustee. The trustee may among others, act as a paying agent between the servicer and the investors; in principle, the trustee monitors the orderliness of the transaction and the business activities of the SPE and servicer on behalf of the investors. If problems occur in the transaction (eg, defaults), the trustee will particularly monitor the obligations and performance of all parties relating to the securities issued. A trust construction may also be created by the involvement of a security trustee, who solely represents the interests of the

investors; in this case, all claims resulting from the receivables portfolio (including ancillary rights) are transferred by the SPE to a security trustee to protect the investors against the SPE's possible insolvency.

In practice, the bankruptcy-remote transfer of the receivables (purchased by the SPE from the originator) to the security trustee can be agreed upon in a security trust agreement between the SPE and the security trustee. Regarding the bankruptcy remoteness of an SPE, it is necessary for the SPE to be isolated from the originator.

4.11 Activities Avoided by SPEs or Other Securitisation Entities

In Austria, there is no specific legislation that applies to activities avoided by SPEs or other securitisation entities. Parties involved in a securitisation are regulated under different EU regulations and other related acts. This means that the relevant restrictions derive from EU legislation. In order to mitigate risks involved in securitisation transactions, there are certain requirements at the European level which relate to the due diligence assessment of risks by investors and disclosure obligations by the originator, sponsor and original lender. As credit risks may arise in a securitisation transaction, credit enhancement measures can be taken by the parties involved.

4.12 Material Forms of Credit Enhancement

The credit risks within a securitisation transaction may be mitigated by various credit enhancements before the credit risks are distributed to the investors, either by internal credit enhancements within the pool of receivables or by external credit enhancements provided by third parties.

The most common forms and techniques of internal credit enhancement are the following:

- tranching/subordination of securities – the risk of the collateral is distributed among different tranches that match different investor risk profiles (senior securities will be repaid first and have therefore a priority position in comparison to junior securities);
- over-collateralisation – the portfolio transferred to the SPE are of greater nominal value than that of the bonds issued to the investors; or
- excess spread – this technique can be used to cover credit risks if necessary (eg, if the interest payments to the investors are lower than the sum of the individual interest payments of the debtors).

The most common forms of external credit enhancement are:

- guarantees from third parties (eg, guarantor guarantees to compensate for losses arising from credit risks up to a certain amount);
- letters of credit; or
- surety bonds (a type of insurance policy that reimburses the issuer for any losses).

4.13 Participation of Government-Sponsored Entities

There are no special rules regulating the sale or collection of receivables by governmental entities. With regards to non-assignment clauses, however, public sector entities are treated differently than private sector firms. It should be noted that, under Austrian law, non-assignment clauses made between private sector firms are not enforceable, but indemnities can incur. On the contrary, non-assignment clauses made between a legal person under public law (or an institution established by it) and an applicant for subsidies are enforceable; this also applies if an institution acts in the name of and for the account of a legal person governed by public law.

4.14 Entities Investing in Securitisation

Typical entities investing in securitisation are financial institutions as well as banks, insurance companies and pension funds. The investor as one of the main involved parties in the securitisation transaction purchases bonds or assumes only the credit risks that are transferred by means of the various tranches in a securitisation transaction.

5. Documentation

5.1 Bankruptcy-Remote Transfers

While standardised contracts of the International Swaps and Derivatives Association (ISDA) can be used for synthetic sales of receivables, a true-sale structure must be documented on an individual basis.

As already outlined in **1.1 Insolvency Laws** and **1.3 Transfer of Financial Assets**, a true sale requires a receivables purchase agreement (title of transfer) between the originator and the SPE, and an act of transfer that effects the transfer of the claim (mode of transfer). The consent or notification of the debtor is not necessary for the effectiveness of the assignment.

The SPE's right of ownership to the purchased assets creates a right of segregation (*Aussonderungsrecht*) and ensures that the receivables will not form part of the insolvency assets of the originator. In order to qualify for segregation, it must be ensured that the receivables of the originator are effectively purchased

by the SPE. This is the case in a true sale transaction as the ownership of the receivables, including the credit risk, passes to the SPE. The isolation of the originator's financial assets from those of the SPE also requires that the SPE is separated from the originator as a legal person.

5.2 Principal Warranties

In securitisation transactions, representations and warranties relate especially to the accuracy and enforceability of the claim. The assignor is typically liable for the accuracy (*Richtigkeit*) and enforceability (*Einbringlichkeit*) of the claim. Accuracy of the claim means that there are no defects of title (*Rechtsmängeln*). The claim must exist and be free from objections. Warranty claims (*Gewährleistungsansprüche*) expire by law within two years as of knowledge of the defect of title. In the case of warranty, supplementary performance (*Nacherfüllung*), such as by eliminating objections, by law takes precedence over a claim to price reduction and conversion (if the claim is not enforceable).

Moreover, in order to limit the risk associated with the originator's insolvency, a netting agreement is typically concluded in a framework agreement foreseeing that in the insolvency of the originator, all mutual claims between the SPE and the originator are converted into a net claim. As outlined in **4.10 SPEs or Other Entities**, a security trustee construction can be created by a security trustee agreement to protect the investors against the SPE's possible insolvency.

5.3 Principal Perfection Provisions

See **5.1 Bankruptcy-Remote Transfers**.

5.4 Principal Covenants

See **5.1 Bankruptcy-Remote Transfers**.

5.5 Principal Servicing Provisions

See **5.1 Bankruptcy-Remote Transfers**.

5.6 Principal Defaults

In case of default, interest payments may occur in addition, as regulated by law or agreed in the transfer documentation among the parties.

5.7 Principal Indemnities

To warranty claims, indemnity claims could arise in case of fault.

6. Roles and Responsibilities of the Parties

6.1 Issuers

The issuer in a securitisation transaction is the SPE, which is established for the specific purpose to conclude securitisation transactions. The SPE purchases, as a first step, a defined pool of receivables and pays the corresponding amount of financial funds to the originator, then structures the risks and issues the assets to investors. In a true sale securitisation as the traditional form of a securitisation transaction, the ownership of the claim is transferred from the originator to the SPE and the assigned risks to the SPE can be passed on to the investors by issuing bonds that are collateralised by the receivables (asset-backed securities or ABS).

6.2 Sponsors

According to the STS Regulation, a "sponsor" means a credit institution, whether located in the EU or not (as defined in the CRR), or an investment firm as defined in Directive 2014/65/EU, other than an originator, that establishes and manages an asset-backed commercial paper programme or other securitisation that purchases exposures from third-party entities, or establishes an asset-backed commercial paper programme or other securitisation that purchases exposures from third-party entities and delegates the day-to-day active portfolio management involved in that securitisation to an entity authorised to perform such activity in line with EU law.

This means that the sponsor in a securitisation transaction is responsible for setting up the SPE and cannot be the originator under the STS Regulation. The sponsor sets up the securitisation programme under which third-party exposures are purchased and may decide (as well as the originator) to hedge against unfavourable interest rate and currency exchange movements.

6.3 Underwriters and Placement Agents

The typical underwriters or placement agents are financial institutions and investment banks and contribute in structuring the transaction by analysing investor demand. They provide guidance on structuring in an efficient and cost-effective manner and essentially assist the SPE by offering securities to investors who may be interested in purchasing the SPE's securities for the tranches of the assets that are sold to investors. This means that underwriters serve as intermediaries between the acting parties.

6.4 Servicers

The servicer is appointed by the SPE to collect interest and principal payments on the underlying loans. Furthermore, the originator usually acts as servicer and monitors the rating and performance of the other participants.

6.5 Investors

The investors of a securitisation are often insurance companies, pension funds or banks and assume or hold the risks of a securitisation. Investors acquire bonds and pay, in return, the corresponding purchase price as outlined in **4.8 Investor Protection**, investors are subject to due diligence requirements to evaluate the risks arising from securitisation transactions.

6.6 Trustees

The trustee controls the disbursement of cash flow with regard to the investors, monitors the proper conduct of the transaction, oversees the business activities of the SPE and servicer on behalf of the investors, and safeguards the investor's rights in general. Acting as a paying agent between the servicer and investors can be an additional assignment of a trustee.

7. Synthetic Securitisation

7.1 Synthetic Securitisation Regulation and Structure

Apart from the transfer of receivables in the form of a true sale transaction, another option is to transfer risk trough a synthetic securitisation. While in a true sale securitisation ownership is transferred from the originator to the SPE, in a synthetic securitisation, the credit or default risk associated with the underlying assets is transferred to the SPE and, subsequently, to investors. This means that, without changing the ownership structure, a synthetic transaction allows the originator to transfer economic risk while the exposures remain on its balance sheet. The risk is transferred by means of guarantees or derivative contracts, which serve as hedging instruments (hedge).

At European level, there are various provisions comprising the application of and the handling with synthetic securitisation transactions. Provisions on synthetic securitisation relating to capital adequacy and risk management requirements are included under the CRR2. In addition, the STS Regulation states that, due to the additional counterparty credit risk and complexity relating to the derivative contract, the STS criteria, as already set out, shall not allow synthetic securitisation, which means that this form is still excepted from the general STS framework. The STS Regulation called on the EBA to publish a report on the feasibility of a specific framework for simple, transparent and standardised synthetic securitisation.

EBA Proposals

As already outlined in **4.7 Use of Derivatives** the EBA published proposals for developing a simple, transparent and standardised (STS) framework for synthetic securitisation on 6 May 2020. Based on this report, the European Commission will potentially adopt a draft of legislation concerning this matter in due course. The final report sets out a list of STS criteria, which are already known from traditional securitisation transactions (the EBA emphasised their aim of ensuring an appropriate level of consistency), but with appropriate adaptions in certain fields. It includes specific provisions with regard to:

- eligible protection contracts, counterparties and collateral requirements mitigating the counterparty credit risk that is inherently involved in the synthetic structures;
- requirements addressing various structural features of the securitisation transaction;
- requirements ensuring that the framework targets only balance-sheet synthetic securitisation; and
- other features to ensure consistency and stability in the fields of synthetic securitisation transactions.

Derivatives that entail the transfer of credit risk mostly fall within the categories of credit default swaps (CDS) and credit-linked notes (CLN). Under the CDS (unfunded), the SPE is responsible for the losses and agrees to refund potential losses if a specified credit event (eg, borrower default) occurs. In return, the originator generates a premium payment to the SPE. Via the issuance of funded or unfunded securities, the SPE transfers the credit risk to the investors. If funded CLN are issued, the CLN are repaid in part within a defined period in advance (even if a credit event does not occur). Upon occurrence of a credit event on the relevant exposure, the SPE uses the returns from such investments to repay its debts towards the originator.

8. Specific Asset Types

8.1 Common Financial Assets

Austrian securitisations include a wide range of assets. Most common are receivables from bank loans, SME loans as well as trade receivables. Synthetic sales and true sales of receivables are more common in Austria compared to the German market where covered bonds have a strong standing.

8.2 Common Structures

The European Central Bank (ECB) implemented loan level data reporting requirements for asset-backed securities (ABSs) as part of the Eurosystem's collateral framework. The loan level templates are inter alia available for SME loans.

Fellner Wratzfeld & Partners has a team of more than 120 highly qualified legal personnel and is one of Austria's leading business law firms based in Vienna. Its major fields of specialisation include banking and finance, corporate/M&A, real estate, infrastructure and procurement law, changes of legal form, reorganisation and restructuring. Fellner Wratzfeld & Partners mainly represents Austrian and international private companies but also has clients from the public sector. The firm advises renowned credit institutions and financial services providers on financing projects. Its expertise has proven its worth repeatedly, but also in regard to financing company reorganisations. The firm draws upon substantial experience gained in the financing of complex consortia in the last few years and has been, and still is, involved in the largest banking and finance cases in Austria.

Authors

Markus Fellner is founding partner and head of department. He is top-tier ranked by peers in this practice area and his impressive track record includes the representation of some of Austria's largest banks in restructuring mandates. Markus has recently succeeded in advising Huber Group, Steinhoff Group and Kremsmüller Industrieanlagen GmbH & Co KG. His other key areas of practice include banking and finance, corporate/M&A as well as dispute resolution. Markus has published a considerable number of articles and essays on topics related to this area of expertise, including capital maintenance rules in Austria, M&A and business restructuring and insolvency. He speaks German, English and Italian.

Florian Kranebitter is a partner at fwp specialised in particular in the international transaction practice of fwp, including cross-border restructuring and insolvency cases in various industries. Florian co-led in the advice on the Steinhoff Group restructuring and other restructuring cases, such as Huber Group, Kreisel Group and Borckenstein, and is known for his skills in international restructurings in particular, combining his work in multi-lender/multi-jurisdiction financing. His other fields of specialisation are corporate/M&A, banking and finance, and antitrust and competition law. He speaks German, English and French.

Fellner Wratzfeld & Partners

Schottenring 12
1010 Vienna
Austria

Tel: +43 1 537 70 351
Fax: +43 1 537 70 70
Email: marketing@fwp.at
Web: www.fwp.at