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Securitisation 2023

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Germany: Law & Practice
Dr Patrick Scholl, Andreas Lange, Dr Ralf Hesdahl and Kirsten Schürmann
Mayer Brown LLP

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GERMANY

Law and Practice

Contributed by:
Dr Patrick Scholl, Andreas Lange, Dr Ralf Hesdahl and Kirsten Schürmann
Mayer Brown LLP **see p.22**

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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

Although the term "legal true sale" is used in German market practice by the parties to financial transactions, it cannot be defined by reference to a specific provision of German law. A German "legal true sale" as the term is used in the following document, and in German market practice, means:

- the insolvency-proof assignment/transfer of a financial asset from a seller (the originator) to a purchaser, with the effect that the sold and assigned/transferred assets cease to form part of the seller's insolvency estate in the event that the seller becomes insolvent subsequent to the assignment/transfer of the respective asset; and
- that the assigned/transferred asset is not exposed to the risk that the seller's insolvency administrator may successfully challenge the assignment/transfer of the asset, or that the seller's insolvency administrator may successfully raise claw-back rights with respect to the sold and assigned/transferred asset.

This requires that the seller is subject to German law insolvency proceedings. If there is a risk that a seller of the receivables/assets shall not be subject to German law insolvency proceedings, then it is advisable to examine whether or not a perfection of the sale and assignment/transfer of the receivables/assets under the receivables purchase agreement will be acknowledged under the non-German insolvency proceedings applying to the seller.

For the German legal true sale analysis, the most important aspect to consider in connection with the sale and assignment of a receivable is whether or not the seller has also transferred the credit risk, the risk that the obligor would have to pay – on condition of its solvency – the receivables on the agreed date to the purchaser. In contrast to a retained seller participation in the credit risk of a sold and assigned receivable, any retained seller risk in the verity or dilution risk will not be taken into account for German true sale analysis purposes.

Insolvency Proceedings

If the seller is subject to insolvency proceedings under German law, there are no additional requirements for a legal true sale if the sale and assignment is non-recourse with respect to the credit risk of the receivables that have been sold. The transfer of the credit risk should not be questioned or re-characterised as an assignment of receivables for security purposes (*Sicherungszession*) with respect to receivables that will be purchased on a non-recourse basis, provided that the terms of the receivables purchase do not have the economic effect that the credit risk (*Delkredererisiko*) of the receivables has (despite the sale and assignment of them) in fact been retained by the seller. This would be the case if the seller's retained credit risk participation (due to retained purchase price provisions, default risk reserves, etc) were not at arm's length for a non-recourse receivables sale. It is notable in this context that retained dilution reserves or yield reserves or deemed collections due to broken representations and warranties will not impact the German legal true sale analysis.

The transfer of a sold and assigned receivable under a receivables purchase agreement could be questioned and re-characterised as an assignment of receivables for security purposes (*Sicherungszession*) – ie, as a secured lending transaction, with respect to receivables that will be purchased on a recourse basis. In the latter

case, the acquirer of receivables for security purposes will, in the case of the commencement of German law insolvency proceedings against the seller, be treated as a preferred creditor and will have a right to separate satisfaction (*Absonderungsrecht*). If the transaction contemplates a secured loan facility (as opposed to a receivables purchase agreement) secured by the receivables, then the assignment of the receivables would be deemed a security assignment rather than a true sale.

Re-characterisation

Under German law, it is not possible to combine both principles: there is no “true sale for security purposes”. In the case of a re-characterisation of a sale of receivables as a secured lending transaction, and in the case of the commencement of German insolvency proceedings against the transferor, German insolvency law provides that the insolvency administrator of the German transferor will mandatorily enforce and collect receivables that had been transferred for security purposes (unless such security qualifies as financial collateral in the sense of Directive 2002/47/EC), meaning that the acquirer would be barred from enforcing the receivables assigned to it itself or through an agent. The insolvency administrator is, however, obliged to transfer the proceeds from such an enforcement of receivables for security purposes to the acquirer. The German insolvency administrator will, however, deduct fees from such enforcement proceeds, as provided for under German insolvency law. These fees amount to 4% of the enforcement proceeds for the determination of the receivables, plus up to a further 5% for the enforcement process (or, under certain conditions, more or less than 5%) plus applicable VAT.

A true sale should be structured as a so-called “cash transaction”, which means that the receivables are sold for immediate and equivalent consideration. If the sale is characterised as a cash transaction, then most of the reasons to challenge the sale and transfer under German insolvency law are excluded. Qualification as financial collateral has the effect of excluding some of the reasons to challenge the transaction, but not as many as would be excluded in a cash transaction.

1.2 Special Purpose Entities (SPEs)

Issuers of German asset-backed securities (ABS) are typically organised as bankruptcy remote special-purpose entities (SPEs). Depending on the type of the securitised asset, SPEs are either located in Germany (eg, in the case of a bank loan, auto loan or consumer loan securitisations) or outside of Germany (eg, in the case of auto leases or trade receivables) – mostly Luxembourg, Ireland and The Netherlands. The choice of appropriate SPE jurisdiction is driven mainly by tax considerations, set-up and maintenance costs and confidence in the legal system’s ability to ensure a ring-fencing of the assets.

An SPE is typically established as an “orphan” by corporate service providers. Its share capital is held by charitable trusts or charitable foundations.

The corporate structure and organisation of an SPE follows (for public term transactions) the requirements of the applicable rating criteria or securitisation platform provider – eg, True Sale International GmbH (TSI as a brand for German quality securitisations) or Prime Collateralised Securities (PCS) UK Limited (True Sale PCS Label).

Restriction of Activities

An SPE’s activities will be restricted by negative covenants in the transaction documentation as

required by the rating agencies or the respective securitisation platform (TSI/PCS) in order to ensure that the activities of the SPE are limited to those required in connection with the acquisition of the securitised assets and the issued ABS. An SPE will, in particular, refrain from having its own employees, incurring indebtedness or granting security other than in connection with the securitisation. All transaction parties contracting with the SPE need to agree on non-petition clauses not to commence insolvency proceedings against the SPE, and limited recourse provisions limiting each party's claims against the SPE on the assets acquired by it and the enforcement of such claims in accordance with the provisions of the transaction documents and the agreed priority of payments ("waterfall payments").

Under German insolvency legislation each legal entity will be treated as an independent insolvency subject, with the consequence that an independent SPE will not be consolidated with the originator for insolvency purposes.

Legal Opinions

Legal opinions obtained in connection with securitisation transactions will typically include statements that the SPE has been validly established in the relevant jurisdiction, as well as statements relating to the corporate capacity of the SPE. In the case of a German SPE, a German legal opinion will not usually contain non-consolidation opinions regarding the consolidation of the SPE's assets and liabilities with the originator for insolvency purposes. German legal opinions issued for securitisation transactions will, however, address the legal, valid and binding transfer of the assets by the originator to the SPE that grants a right for segregation in the case of the originator□s subsequent insolvency, as well as the legal, valid and binding granting of security by the SPE to the transaction trustee that can be segregated from the transaction trustee's insolvency estate should the transaction trustee become insolvent. German legal opinions issued for securitisation transactions will also address the validity of limited-recourse and non-petition provisions.

1.3 Transfer of Financial Assets

Usually, the seller and purchaser of financial assets (ie, receivables) will enter into a receivables purchase agreement (RPA).

German law distinguishes between the sale and purchase at the contractual level and the actual in rem transfer of title to the receivables, which is achieved by an assignment. The RPA usually deals with both aspects: the contractual relationship (ie, the sale and purchase) between the seller and the purchaser, and the assignment of the receivables, by means of which the actual title to the receivables is transferred to the purchaser.

The sale and assignment of receivables is perfected by entering into the RPA, which provides for the assignment of the sold receivables. No further registration or notification steps are required.

German law does not recognise any bona fide acquisition (*gutgläubiger Erwerb*) of claims and receivables. As a consequence, pledges over claims and receivables governed by German law cannot be validly granted on a bona fide basis. Hence, receivables need to exist at the time of assignment to the purchaser, and need to be owned by the seller. Once title to a receivable has been transferred to another person, the seller cannot validly transfer or encumber title to the receivable to any third party.

True Sale

The legal true sale of a German law-governed receivable is perfected under the terms of the RPA between the seller and the purchaser. Notification to the obligor is not required under German law for the perfection of the German law receivables assignment. However, from a practical perspective, obligor notification is required if the purchaser wants to enforce the collection of due receivables directly.

It is market standard, in particular for rated transactions, that true sale-opinions will be obtained, such true-sale opinions address:

- the insolvency-proof assignment/transfer of a financial asset from a seller (the originator) to a purchaser, with the effect that the sold and assigned/transferred assets cease to form part of the seller's insolvency estate in the event that the seller becomes insolvent subsequent to the assignment/transfer of the respective asset; and
- that the assigned/transferred asset is not exposed to the risk that the seller's insolvency administrator may successfully challenge the assignment/transfer of the asset, or that the seller's insolvency administrator may successfully raise claw-back rights with respect to the sold and assigned/transferred asset.

For further details, see **1.1 Insolvency Laws**.

1.4 Construction of Bankruptcy-Remote Transactions

As outlined in **1.1 Insolvency Laws**, in order to ensure a bankruptcy remote transaction structure it is essential that, in addition to the insolvency proof sale and assignment of the financial asset from the seller to the purchaser or SPE, the sale and assignment must not be re-characterised due to the retention of credit risk participation to a secured lending transaction. For German insolvency proceeding purposes, it must also be structured to meet the requirements of a so-called "cash transaction", which significantly reduces the risk that the sale and assignment of the financial asset is exposed to challenge and claw-back rights of the seller's insolvency administrator.

Under the German Banking Act (KWG), credit institutions acting as refinancing enterprises owing certain other entities receivables, or mortgages or land charges securing receivables owned by the refinancing enterprise, may register such assets in the refinance register (*Refinanzierungsregister*). Assets eligible for registration that have been properly registered with the refinance register operated by the refinance enterprise can, pursuant to Section 47 of the German Insolvency Code (InsO), be segregated (*ausgesondert*) from the insolvency estate of such refinance enterprise should the refinance enterprise become insolvent subsequent to such refinance register registration.

It is not market standard in Germany to obtain separate insolvency opinions. The insolvency aspects of German transactions, ie, the features of a bankruptcy remote structure of the transaction, will be covered by the true-sale opinion. For details see **1.1 Insolvency Laws** and **1.3 Transfer of Financial Assets**.

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

Payments on receivables (eg, trade receivables), including interest payments, are not generally subject to withholding taxes in Germany. Exceptions may apply, for example, to receivables qualifying as hybrid debt instruments, receiva-

bles the obligor of which is a bank or financial services institution in Germany, securitised receivables, and – in limited circumstances – receivables secured by German real estate.

Germany does not impose any stamp duty or other documentary taxes on the sale of receivables.

2.2 Taxes on SPEs

The purchase of receivables would not generally result in German tax liability for a non-German purchaser if the purchaser did not conduct any other business in Germany and the receivables did not give rise to income from German sources (where receivables may generate German-source income, see the exceptions in **2.1 Taxes and Tax Avoidance**).

German tax liability could arise for the purchaser if the receivables were collected, monitored and/or administrated by a German originator or servicer, and the services provided resulted in a permanent representative, a permanent establishment or an effective place of management of the purchaser situated in Germany. To limit the risk of this, a non-German purchaser should display a substantial presence outside Germany and not maintain a fixed place of business inside Germany. Moreover, all relevant business decisions of the purchaser, especially in relation to the acquisition of receivables and its financing, should be made abroad. Further, the purchaser should not provide instructions in respect of the collection services performed by the originator or servicer, and such entities should not have the power to represent or legally bind the purchaser.

2.3 Taxes on Transfers Crossing Borders

In general, the sale of receivables is exempt from German VAT. An exception might apply if not only receivables but entire contractual relations were transferred. However, this is not usually the case in a true sale securitisation.

VAT may be imposed on factoring services – eg, on collection services provided by the purchaser. However, no factoring services are generally provided if, following a sale, the seller continues to collect the receivables (as is frequently the case in a true sale securitisation).

2.4 Other Taxes

In respect of a sale of trade receivables that originate from the sale of goods and services being subject to VAT, a purchaser may become secondarily liable for any VAT not duly paid by the seller. A secondary liability does not generally exist if and to the extent that the purchaser pays a consideration for the receivables to the free disposition of the seller.

2.5 Obtaining Legal Opinions

From a tax perspective, legal opinions in relation to securitisations usually cover:

- potential stamp taxes and withholding taxes;
- the tax treatment of the SPE;
- potential VAT on the transfer of the receivables and the services provided to the SPE; and
- secondary tax liability.

3. Accounting Rules and Issues

3.1 Legal Issues With Securitisation Accounting Rules

The Institute of Auditors (*Institut der Wirtschaftsprüfer*) summarised the requirements for a true sale for German commercial balance sheet purposes in its statement dated 1 October 2003 (IDW RS HFA 8, as amended on 9 December 2003 – “the IDW statement”). Pursuant to this

statement, a true sale of receivables for accounting purposes can be assumed if the economic ownership of the receivables is passed to the purchaser of the receivables. This is the case if, among other things, the following criteria are fulfilled:

- from an economic perspective, the credit risk (ie, the risk that the debtor of the receivables does not meet its payment obligations) is assumed by the purchaser;
- the sale of the receivables is final (which would not be the case, for example, if the reassignment/resale of the receivables had already been agreed at the time of the sale);
- there are no default guarantees from the seller and no total return swap is entered into between the seller and the purchaser, nor an agreement pursuant to which the purchase price will be adjusted in accordance with the losses of the sold receivables;
- the seller of the receivables does not hold equity in the purchaser and does not acquire debt securities issued by the purchaser (either in full or in a significant amount); and
- any purchase price discount agreed between the parties is either non-adjustable or, if adjustable, qualifies as appropriate and customary in the market (eg, because it is determined in accordance with the quota of actual past losses plus a reasonable risk surcharge).

3.2 Dealing With Legal Issues

Accounting analysis in relation to a securitisation is generally undertaken separately from the legal analysis.

In order to provide an opinion that the asset has been assigned on a true-sale basis for accounting purposes, legal practitioners ordinarily ensure through the documentation that the assignor bears no risk for the due realisation of the assigned assets and that representations and warranties are limited to title. To the extent that the assignor provides any undertaking to ensure realisation of any of the assets, or part thereof, the opinion is qualified to state that the true sale has not occurred to that extent. Hence, the receivables/assets which have not been subject to a true sale will continue to be accounted in the books of the assignor as a receivable.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

There is no specific German disclosure law applying to securitisations. However, relevant regulations pursuant to applicable European law include Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (the “Securitisation Regulation” or SR), and any regulatory technical standards authorised thereunder.

The SR is applicable since 1 January 2019 to all securitisations (as defined therein) other than securitisations existing prior to that date to the extent that they are grandfathered.

Prior to holding a securitisation position, an institutional investor, other than the originator, sponsor or original lender, shall verify that (if established in the European Union) the originator, sponsor or original lender retains on an

ongoing basis a material net economic interest and the risk retention is disclosed to the institutional investor each in accordance with the SR.

New Regulations

On 3 September 2020, two regulations were published regarding the detailed disclosure requirements under the SR (the Disclosure Technical Standards). These consist of regulatory technical standards concerning the information to be made available and the details of a securitisation by Commission Delegated Regulation (EU) 2020/1224 of 16 October 2019 supplementing the SR with regard to regulatory technical standards specifying the information and the details of a securitisation to be made available by the originator, sponsor and SPE (the Disclosure RTS) and implementing technical standards with regard to the standardised templates by Commission implementing Regulation (EU) 2020/1225 of 29 October 2019 laying down implementing technical standards with regard to the format and standardised templates for making available the information and details of a securitisation by the originator, sponsor and SPE (the Disclosure ITS). The Disclosure Technical Standards entered into force on 23 September 2020.

Certain specific disclosure requirements will also apply if the notes are intended to be admitted to trading on the regulated market at a stock exchange, or admitted as eligible collateral with the European Central Bank (ECB).

4.2 General Disclosure Laws or Regulations

In practice, ABS are not offered to the public or retail clients (as defined under Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (MIFID II)), but only to qualified investors (as defined in Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC – the Prospectus Regulation). Therefore, no key information document pursuant to Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) is required.

Public German ABS issuances are mostly structured as “wholesale transactions” – ie, with a denomination of at least EUR100,000 and listed on the regulated market of Luxembourg or the Irish Stock Exchange. Such listing prospectus needs to comply with the requirements of the Prospectus Regulation for “wholesale” transactions.

ABS that are intended to be placed with institutional investors (as defined in the SR) – eg, credit institutes, insurance enterprises, reinsurers, alternative investment fund managers (AIFMs) or undertakings for the collective investment in transferable securities (UCITs) – need to comply with the transparency requirements of Article 7 of the SR.

In order to achieve a uniform and clear implementation of the SR, the SR requires the European Securities and Markets Authority (ESMA) and European Banking Authority (EBA) to issue numerous RTS and ITS (Regulatory and Implementing Technical Standards) as well as Guidelines. In particular, the extensive STS (simple, transparent and standardised) criteria need to be specified in terms of how they are to be interpreted and how compliance with the STS criteria

can be demonstrated and, if necessary, verified by an independent third-party verifier.

Where originators, sponsors and securitisation vehicles wish to use the STS designation for their securitisations, investors, competent authorities and ESMA must be notified that the securitisation complies with the STS requirements and how the individual STS criteria are met. ESMA must then include the securitisation in a list of reported STS securitisations which it makes available on its website for information purposes. Article 28 of the SR requires the involvement of an independent third party in the review of a securitisation for compliance with the STS requirements for investors, originators, sponsors and securitisation SPEs. These third parties, known as STS verifiers, will be approved by the competent national supervisory authority (in Germany: BaFin). Their assessment is included in the originator’s, sponsor’s or SPV’s notification to ESMA in accordance with Article 27 (2) of the SR and provides some certainty in the market that the rules will be applied in high quality and uniform manner.

German STS Verification International GmbH (SVI) is an STS third-party verifier licensed in accordance with Article 28 of the SR for all asset classes for all countries of the European Union for ABS and ABCP transaction types.

Where, in respect of a securitisation reported as an STS securitisation, a competent authority has determined that the securitisation does not comply with the requirements and there is reason to believe that the originator acted negligently and not in good faith, the responsible authority, ie, the regulator of the originator, shall impose administrative sanctions and shall also inform ESMA without delay to include the sanctions concerned in its list of STS notifications in order to inform investors of the sanctions and the reliability of the STS notifications. Therefore, originators, sponsors or securitisation vehicles are required to prepare their reports carefully in order to avoid damage to their reputation.

4.3 Credit Risk Retention

ABS that are intended to be placed with institutional investors (as defined in the SR) – ie, credit institutes, insurance enterprises, reinsurers, AIFMs or UCITs – must comply with the risk retention requirements pursuant to Article 6 of the SR. The originator, sponsor or original lender of a securitisation shall retain, on an ongoing basis, a material net economic interest in the securitisation of not less than 5%. This retention of the material net economic interest in the securitisation can only be achieved by:

- the retention of not less than 5% of the nominal value of each tranche sold or transferred to investors (“vertical slice”);
- the retention of the originator′s interest of not less than 5% of the nominal value of each securitised exposures (in the case of revolving securitisations);
- the retention of randomly selected exposures, equivalent to not less than 5% of the nominal value of the securitised exposures;
- the retention of the first loss tranche; or
- the retention of a first loss exposure of not less than 5% of every securitised exposure in the securitisation.

The material net economic interest shall not be split among different types of retainers, or be subject to any credit-risk mitigation or hedging.

It is an administrative offence pursuant to Section 56 (5c) of the German Banking Act (KWG) to infringe the SR by deliberately or negligently failing to hold the required risk retention contrary

to Article 6(1) of the SR. Administrative penalties awarded against legal entities and partnerships must not exceed the higher of EUR5 million or 10% of the entities' turnover (Section 56 (6a) of the German Banking Act (KWG)).

4.4 Periodic Reporting

ABS that are intended to be placed with institutional investors (as defined in the SR) need to comply with the transparency requirements of Article 7 of the SR. ABS quarterly investor reports and ABCP monthly investor reports are to be published to the competent authorities and, upon request, to potential investors (as per Article 7 of the SR). The originator and the sponsor in the case of ABS and the sponsor at ABCP programme level shall be responsible for compliance with Article 7 of the SR.

The originator, sponsor and SPE of a securitisation shall designate amongst themselves one entity to fulfil the information requirements. The entity designated shall make the information for a securitisation transaction available by means of a securitisation repository. Where no securitisation repository is registered in accordance with Article 10 of the SR, the entity designated to fulfil the requirements shall make the information available by means of a website which meets certain requirements as set forth in Article 7(2) of the SR.

If an originator, sponsor, original lender or SPE breaches the requirements of, inter alia, Article 7 of the SR, the supervisory authority may order the permanent cessation of the acts or conduct that gave rise to the breach and may require that their repetition be prevented (Section 48(1) of the German Banking Act (KWG)).

It is an administrative offence to infringe the SR by deliberately or negligently failing to provide information, or by failing to do so correctly, completely, in the prescribed manner or in good time, contrary to the first to fourth or fifth subparagraphs of Article 7(1) of the SR. For Germany, the competent authority is BaFin pursuant to Article 7(1) and Article 29(4) of the SR and the implementation law *Gesetz zur Anpassung von Finanzmarktgesetzen an die Verordnung (EU) 2017/2402 und an die durch die Verordnung (EU) 2017/2401 geänderte Verordnung (EU) Nr. 575/2013*.

4.5 Activities of Rating Agencies

Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013, amending Regulation (EC) No 1060/2009 on credit rating agencies (the CRA3 Regulation), sets out a compulsory process of registration with the ESMA for rating agencies (RA). German public ABS that shall serve as collateral for Eurosystem purposes (ECB collateral) are typically rated by two rating agencies and are structured to comply with ECB collateral eligibility criteria.

4.6 Treatment of Securitisation in Financial Entities

Credit institutions and investment firms have to calculate their regulatory capital as provided for under the Capital Requirements Regulation (CRR).

The regulatory capital risk weight of a securitisation position will depend, in particular, on the question of whether a securitisation position results from a traditional securitisation or meets the requirements of a simple, transparent and standardised securitisation (an STS securitisation) as defined by the SR.

Articles 20 to 22 of the SR define the STS criteria for non-ABCP securitisations as:

- for simple securitisation (Article 20 of the SR):
  - (a) legal true sale and no severe claw-back risk;
  - (b) specified perfection triggers;
  - (c) the seller's rep assets are neither encumbered, nor is transfer of them unenforceable;
  - (d) clear eligibility criteria, no active portfolio management on a discretionary basis, and any later-transferred assets meet the initial criteria;
  - (e) the assets are homogenous in terms of asset type, with full recourse to debtors (and guarantors), defined periodic payments (and sale proceeds) and no transferrable securities other than unlisted corporate bonds;
  - (f) the assets do not include securitisations;
  - (g) the assets originated in ordinary course of business, there are credit underwriting criteria and no "self-cert" residential loans;
  - (h) there are no assets in default, or exposures to credit-impaired obligors;
  - (i) at least one payment has been made (with exceptions); and
  - (j) repayment does not depend substantially on the refinancing or sale of assets;
- for standardised securitisation (Article 21 of the SR):
  - (a) risk retention as per Article 6 of the SR;
  - (b) interest rate and currency risks are hedged as per common standards, and there are no other derivatives;
  - (c) interest payments match market rates or the "sectoral" cost of funds, and are not complex – ie, there are:
    - (i) sequential payments and no cash trapping after enforcement or acceleration notice;
    - (ii) specified triggers for sequential payments;
    - (iii) specified triggers for early amortisation or termination of revolving periods (if any);
    - (iv) provisions for continuity of servicing, replacement of liquidity and derivatives, etc;
    - (v) servicer experience and documented policies, procedures and controls;
    - (vi) clear and consistent definitions, remedies and actions relating to delinquency, default, etc; and
  - (d) provisions for timely resolution of conflicts between classes of investors, clearly defined voting rights allocated to noteholders, etc; and
- for transparent securitisation (Article 22 of the SR):
  - (a) at least five years of historical data for similar exposures;
  - (b) third-party verification of asset samples before issuance;
  - (c) provision of a liability cash flow model to investors before pricing, and on an ongoing basis;
  - (d) for residential loans and auto loans or leases, disclosure of environmental performance;
  - (e) disclosure by the originator and sponsor as per Article 7 of the SR – ie, of loan level data before pricing, transaction documents, prospectus or transaction summary and STS notification drafts before pricing; and
  - (f) provision of final documents within 15 days after closing.

4.7 Use of Derivatives

Derivatives can be used in securitisation in different forms. In true sale securitisations, derivatives are most often used to hedge mismatches in the interest rate calculation (eg, fixed income from receivables against floating interest under the notes or no interest-bearing receivables

against floating interest under the notes, but also different sources of interest rate calculations). In multi-jurisdictional trade receivables transactions, there can be also mismatches between the sources and uses if different currencies are involved and currency swaps become necessary.

There are different ways to hedge the currency or interest risks: there can be an exact match of hedging like under a balance-guaranteed swap where the notional amount of the swap is automatically adjusted to the corresponding receivables balance. Balance-guaranteed swaps are rather expensive because of the unpredictability of the receivables balance. Part of the unpredictability can be hedged by a back-to-back swap which needs to be structured in a way that defaults on the back swap do not affect the front swap and no credit risk must be taken back by the originator through the back swap to not jeopardise the true sale of the sale of receivables. Alternatively, corridors can be used either for the interest rate by using caps or floors or for the notional amount which oblige the SPE to enter into swap amendments if the corridor between the notional amount of the swap and the receivables balance exceeds a certain level.

In synthetic securitisation transactions derivatives are used by banks for the regulatory risk transfer and by SPEs to hedge interest rate risks and to hedge currency exchange risks. To the extent the SPE invests proceeds in eligible investments asset protection swaps (eg, total return swaps) may also become necessary.

Regulation of Derivatives

Derivatives are generally regulated by Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 (EMIR). EMIR provides, inter alia, for central clearing of derivatives (because the bespoke nature of the derivatives used in securitisations in most cases does not apply) or for collateral posting. Such collateral posting obligation applies already to non-financial counterparties exceeding a certain threshold for the type of derivative. Naturally, the SPE would not have the financial resources to provide such collateral if the threshold is exceeded.

For STS-compliant securitisations there is an exemption from the clearing obligation (and collateral posting obligation) if the relevant derivative contract is concluded by a securitisation SPE in connection with an STS-securitisation and if the counterparty credit risk is adequately mitigated in accordance with Article 2 of the Commission Delegated Regulation (EU) 2020/447. This means that the transaction must provide for the following features (in addition to being STS-compliant):

- the swap counterparty must rank at least pari passu with the most senior investors (unless the counterparty is the defaulting or affected party); and
- the most senior notes are subject to a credit enhancement of more than 2% of the outstanding balance of these notes.

4.8 Investor Protection

The SR intends to provide investor protection to institutional investors (as defined in the SR) – ie, credit institutes, insurance enterprises, reinsurers, AIFMs or UCITs. Investor protection is achieved in particular by means of:

- pre-investment due diligence requirements for institutional investors (Article 5 of the SR);

- the originator, sponsor and original lender of a securitisation retaining, on an ongoing basis, a material net economic interest in the securitisation of not less than 5% (Article 6 of the SR);
- transparency requirements for the underlying exposures (loan-level information, documentation, investor reporting) (Article 7 of the SR);
- the ban on re-securitisations (Article 8 of the SR);
- the obligation to disclose the originator's criteria for the granting of credit (Article 9 of the SR); and
- the obligation to hold data in a securitisation repository (Article 17 of the SR).

4.9 Banks Securitising Financial Assets

The legal environment for securitisations of German regulated institutions is governed by the provisions of the CRR and the SR. When German financial institutions securitise financial assets, they often use the German securitisation platform provider TSI and often structure securitisation transactions in line with the collateral requirements of the ECB.

4.10 SPEs or Other Entities

German law does not provide for specific legislation relating to SPEs as securitisation companies, however, for regulatory purposes, the KWG contains definitions of the terms refinance enterprise, refinance intermediary and SPE (Section 1 (24) to (26) KWG) (for further details, see **1.2 Special Purpose Entities**).

4.11 Activities Avoided by SPEs or Other Securitisation Entities

There is no legislation available in Germany that defines activities to be avoided by SPEs or other securitisation entities. Restrictions on SPEs or other securitisation entities result from rating criteria or the requirements defined by securitisation platform providers like TSI or PCS. For further details, see **1.2 Special Purpose Entities**.

4.12 Material Forms of Credit Enhancement

German securitisations can benefit from various forms of credit enhancement. However, if the issuer retains a significant interest in the credit risk attached to a sold and transferred financial asset, there is a risk that the transfer of a sold and assigned receivable under a receivables purchase agreement could be questioned and re-characterised as an assignment of receivables for security purposes (*Sicherungszession*) – ie, as a secured lending transaction – with respect to receivables that will be purchased on a recourse basis.

This risk should be mitigated if the terms of the receivables purchase do not have the economic effect that the credit risk (*Delkredererisiko*) of the receivables has been factually retained by the seller, despite the sale and assignment of them. This would be the case if the credit risk participation retained by the seller (due to, for example, retained purchase price provisions, default risk reserves, etc) were not at arm's length for a non-recourse receivables sale. It should be noted in this context that retained dilution reserves or yield reserves or deemed collections due to broken representations and warranties will not impact the German legal true sale analysis.

Credit enhancement means a contractual arrangement whereby the credit quality of a position in a securitisation is improved in relation to what it would have been if the enhancement had not been provided, including the enhancement provided by more junior tranches in the securitisation and other types of credit protection (Article 4 (1) 65 of the CRR).

Credit enhancement can be provided to a securitisation transaction in various forms, for example:

- the subordination of junior notes or the granting of subordinated loans to the issuer;
- deferred purchase price provisions;
- over-collateralisation (sale and transfer of financial assets to the issuer at a value greater than that of the consideration paid for them);
- excess spread (interest-bearing financial assets generating a greater interest cash flow than the coupon of the issued ABS, or, in the case of non-interest-bearing assets, the discount being greater than the coupon); and/or
- cash reserves.

Re-characterisation

In particular, deferred purchase price provisions, excessive discounts or the transfer of receivables on a recourse basis could result in the risk (due to the participation in the sold and transferred receivable retained by the originator) that the sale and assignment of a receivable could be re-characterised as an assignment for security purposes (*Sicherungsabtretung*).

It is the prevailing view among legal practitioners that re-characterisation is dependent on the degree of default risk retained by the seller. A re-characterisation is excluded if the securitised assets have been properly registered in a refinance register (*Refinanzierungsregister*), because the securitised and registered assets can be segregated in case of a subsequent insolvency of the refinance enterprise (seller) as provided for under Section 22j of the KWG (see **1.4 Construction of Bankruptcy-Remote Transactions**).

Treatment as a Secured Loan

Where a transaction which is intended to constitute a sale results in the sold receivables no longer being entered in the originator's balance sheet under generally applicable German accounting rules, it is less likely to be treated as a secured loan, because the analysis of whether a sale constitutes a secured loan or a sale must follow a commercial approach.

Where a transaction is treated as a secured loan for accounting and/or tax purposes, the risk of it also being treated as a secured loan for legal purposes (including for the purposes of an analysis in the context of Section 166 of the *Insolvenzordnung* or Insolvency Statute) increases (see the final paragraph of **1.1 Insolvency Laws**).

4.13 Participation of Government-Sponsored Entities

There are currently no German government-sponsored entities active in German securitisations.

4.14 Entities Investing in Securitisation

In 2018, according to TSI, UK investors (41%) followed by Benelux investors (11%) and US investors (10%) invested in European ABS. In 2018, European ABS was placed predominantly to funds (52%), pension funds (15%) and banks (29%).

5. Documentation

5.1 Bankruptcy-Remote Transfers

Under German law-governed true sale securitisations, the bankruptcy remote transfer of the assets to be securitised is typically achieved by core transaction documents, consisting of:

- a receivables purchase agreement (RPA), entered into between the originator and the issuer;
- a servicing agreement entered into between the originator in its capacity as servicer, the security trustee as trustee and the issuer;
- a security trust agreement entered into between, among others, the issuer and the transaction security trustee; and
- a data trust agreement in the case of sensitive personal obligor data or aspects which are covered by the principle of banking secrecy (*Bankgeheimnis*).

Core Provisions of the RPA

The RPA defines the following in detail:

- the receivables to be sold to the issuer (eg, by reference to an asset list);
- the purchase price to be paid by the issuer to the originator as equivalent for the transfer; and
- any collateral transferred by the originator to the issuer that secures the performance of the sold receivables.

The originator typically warrants that:

- the sold receivables legally exist and will not be impaired or reduced by obligor defences or set-off rights;
- the originator holds good and unencumbered title to the sold receivables;
- the sold receivables comply with the eligibility criteria;
- the originator will not amend its credit and collection policy without the issuer's consent; and
- the credit and collection policy applied by the originator to the sold receivables is consistent with the credit and collection policy applied by the originator to its own (not securitised) receivables.

The RPA further stipulates that the originator must be deemed to have received deemed collections or benefits from indemnities if collections on the sold receivables will be reduced by non-credit risk or non-default risk-related shortfalls. Under German law, notification of the obligor on the sale of a securitised receivable is not a requirement for the perfection of the issuer's title in the acquired receivables.

German RPAs typically provide that the obligor of the sold receivables is not notified on the sale of the securitised receivables by the originator to the issuer as long as the originator is in compliance with its contractual obligations under the RPA and the servicing agreement and in good financial standing. However, the issuer reserves the right to inform the obligor of the acquisition of the securitised receivables upon occurrence of an obligor notification event, which is typically combined with a servicer replacement event.

Core Provisions of the Servicing Agreement

Under a tripartite servicing agreement entered into between the originator in its capacity as servicer, the issuer and the security trustee as trustee, the issuer appoints the originator as its servicer to service, administer, collect and enforce the securitised receivables and available receivables collateral (eg, financed or leased vehicles) in accordance with the originator's credit and collection policy and to transfer collections on securitised receivables to the issuer. The servicing agreement typically provides for indemnifications for any losses or damages arising from the issuer's reliance on information, representations, warranties and reports derived from or included in servicer reports or any claims which arise from the servicer's collection activities. Servic-

ing agreements typically provide for the replacement of the originator/servicer by a third-party replacement servicer if a servicer replacement event is triggered.

Core Provisions of the Trust Agreement
The security trustee, originator/servicer, the issuer and all other transaction parties enter into a trust agreement. Pursuant to the terms of this trust agreement, the security trustee will on-transfer all assets and the related collateral acquired from the originator, and all claims against the servicer and other transaction parties, as note collateral to the security trustee. The security trustee will hold the collateral in trust for the beneficiaries, which include the noteholders. The key elements of the trust agreement are the definition of the priority of payments (waterfall provisions), as well as the acceptance of the limited recourse and non-petition clauses by all transaction parties. The trust agreement contains issuer undertakings to the security trustee, namely:

- not to sell or charge the collateral;
- to refrain from all actions and omissions to act which may result in a significant decrease in the value or loss of the collateral;
- to have independent directors; and
- not to enter into any other agreements unless such agreements contain limited recourse, non-petition and limitation on payments provisions, as defined in detail in the trust agreement.

Core Provisions of the Data Trust Agreement
In order not to disclose sensitive obligor data which are subject to restrictions resulting from data privacy and are subject to disclosure restrictions resulting from the principle of banking secrecy (*Bankgeheimnis*) to the issuer, the RPA will contain provisions that the originator will disclose the identity (ie, name and address) of the obligor of bank loan receivables to the issuer only in encrypted form and that the decryption key will be safe kept by a data trustee. As a data trustee, BaFin proposes to use a credit institution licensed to do banking business in the EU or the EEA. However, in practice, data trustees are not always credit institutions. The data trust agreement provides that the identity of the respective obligors will not be disclosed to the issuer as long as the originator/servicer services the securitised receivables on behalf of the issuer. Upon replacement of the originator/servicer by a third-party replacement servicer (eg, in the case of servicer's insolvency or of a significant default of its obligations), the data trustee will provide the replacement servicer with the decryption key, enabling the replacement servicer to collect the securitised receivables on behalf of the issuer.

Corporate Administration Agreement
The issuer and a corporate service provider (as administrator) enter into a corporate administration agreement to provide corporate services to the issuer. The independent directors provided by the corporate service provider to the issuer are obliged to ensure that the issuer does not carry out any activities, and, in particular, does not incur any financial indebtedness, other than as required for the specific securitisation transaction.

5.2 Principal Warranties
See **5.1 Bankruptcy-Remote Transfers**.

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

See **5.1 Bankruptcy-Remote Transfers**.

5.7 Principal Indemnities

See **5.1 Bankruptcy-Remote Transfers**.

6. Roles and Responsibilities of the Parties

6.1 Issuers

Issuers are insolvency remote special-purpose vehicles, see **1.2 Special Purpose Entities**.

6.2 Sponsors

The sponsor is the party that usually initiates the securitisation transaction. The sponsor can be the originator of the receivables to be securitised or an affiliate, often being the parent company of the originator.

6.3 Underwriters and Placement Agents

Underwriters are also referred to as managers and/or arrangers, and are typically banks. Underwriters are responsible for arranging the securitisation transactions and for the marketing thereof. Together with the originator – which may also act as arranger – the underwriters underwrite the notes issued by the issuer.

6.4 Servicers

Servicing is usually undertaken by the seller (also referred to as originator) of the receivables.

6.5 Investors

Investors are typically banks or other financial institutions. The investors fund the issuer by subscribing the notes and paying the respective purchase price.

6.6 Trustees

Trustees are usually also referred to as “security trustees” or “collateral agents”. Their function is to hold and administer (and in an enforcement scenario, also to enforce) the security granted over the assets of the issuer. The security is to be held in favour of the secured parties, in particular the noteholders. Trustees are often professional trust corporations, in some cases being affiliates of banks.

7. Synthetic Securitisation

7.1 Synthetic Securitisation Regulation and Structure

Institutions in Germany primarily use, and have in the past often used, synthetic securitisations for the purpose of regulatory risk transfer. The regulatory regime of synthetic securitisations is governed by the CRR. The current SR provides that the criteria for STS securitisations) do not apply to synthetic securitisations. On 2 July 2019, the EBA presented during a public hearing, together with a legislative proposal, a report on the feasibility of a specific framework for STS securitisations limited to balance-sheet synthetic securitisation. The EBA published a discussion paper on 24 September 2019 with the title “Draft Report on STS Framework for Synthetic Securitisation Under Article 45 of Regulation (EU) 2017/2402” and proposed a framework for STS synthetic securitisation on 6 May 2020.

In June 2020, the High-Level Forum for the completion of the capital market union presented its final report, which contained recommendations on securitisation, including synthetic securitisation. Further, on 24 July 2020, the European Commission published a proposal for a Regulation amending the SR and setting out certain standards for a synthetic simple, transparent

and standardised synthetic securitisation. On 16 December 2020, the Council of the European Union published final compromise proposals. The European Parliament Committee on Economic and Monetary Affairs adopted them on 14 January 2021. ESMA submitted its Final Report on technical standards specifying content and format of the STS notification for synthetic securitisations to the European Commission on 12 October 2021.

A synthetic securitisation is a securitisation where the transfer of risk is achieved by the use of a credit derivative or a financial guarantee, and the exposures being securitised remain exposures of the originator institution (Article 242, paragraph 11 of the CRR). The credit derivative and financial guarantee is granted by a securitisation SPV (or directly by the protection seller) to the originator with respect to a specific loan portfolio. By setting the relevant attachment point and detachment point for losses of interest and capital under the loan portfolio, the synthetic securitisation and first loss piece will be tranched.

Interest or Capital Loss

If an interest or capital loss is determined under the loan portfolio due to a failure to pay, a bankruptcy or, under certain conditions, a restructuring, and is verified under the credit derivative or the financial guarantee within the relevant attachment and detachment points, then the securitisation SPV will be required to make a relevant payment to the originator under the credit derivative or financial guarantee. These payment obligations are funded by way of the proceeds from the issuance of a credit-linked note to investors. The cash proceeds from such an issuance serve as collateral and funding basis for the potential loss payments under the credit derivative or the financial guarantee.

A synthetic securitisation will be recognised for regulatory risk transfer purposes if the requirements of Article 244 of the CRR have been satisfied. This requires, inter alia, that the originator institution:

- had transferred significant risk to third parties, either through funded or unfunded credit protection; and
- applies a 1.250% risk weight to all securitisation positions it holds in the securitisation or deducts these securitisation positions from its common equity tier 1 items in accordance with Article 36, paragraph 1 (k) of the CRR.

A regulatory risk transfer can also be achieved by an unfunded credit protection – ie, without raising debt from capital market investors. In this case, the originator will enter into a credit default swap structure in accordance with the aforementioned CRR requirements.

Regulatory and Legal Questions

Many other regulatory and legal questions arise in the context of synthetic securitisations and must be taken into account when structuring a transaction, including whether or not the derivatives regulation applies and whether or not the granting of a financial guarantee is subject to a licence requirement. There are also limitations with respect to investors, for example, the German regulatory BaFin required the market to have investor protection criteria in place for credit-linked notes offered to retail investors.

The proposal for the introduction of STS compliant synthetic securitisations was well received by the market because there is a high demand for such product to reinforce banks’ balance sheets and lower capital charges for STS compliant investments would open synthetic securitisations to a wider range of institutional investors.

Proposed criteria for STS synthetic securitisation are based on the studies of previous transaction and on what the legislator regarded as low risk. The proposed criteria include:

- on-balance sheet securitisations;
- originator authorised or licensed in the EU;
- held on balance sheet by the originator;
- receivables originated as part of the core business of the originator;
- no use of double hedge;
- credit protection complies with the credit risk rules as set out in Article 249 CRR;
- defined list of representations and warranties that are given by the originator;
- predetermined and transparent eligibility criteria for the underlying reference claims;
- no active management of the reference portfolio;
- homogenous pool;
- no securitisation position as reference claim;
- fully disclosed underwriting standards;
- assessment of the reference borrowers' creditworthiness meets criteria of Article 8 of Directive 2008/48/EC (or equivalent);
- originator or lender are experienced in origination;
- no defaulted exposures;
- compliance with risk retention requirements;
- collateral is in the same currency as credit protection payment;
- derivatives are only used for hedging;
- standard interest rate calculation methods are used;
- transaction provides for sequential amortisation or trigger for change to sequential amortisation;
- use of adequate early amortisation triggers or loss triggers in revolving/replenishing transactions;
- use of register with underlying exposures;
- transparency on data for at least five years;
- credit events include failure to pay, bankruptcy and (unless financial guarantee is used) restructuring;
- credit protection is based on actual losses;
- extension of credit protection for workout process;
- use verification agent (appointed by the originator);
- credit protection meets certain criteria; and
- enforceability of credit protection confirmed by legal opinion.

8. Specific Asset Types

8.1 Common Financial Assets

German securitisations refer to a wide range of financial assets, most commonly:

- bank loan receivables;
- consumer loan receivables;
- auto loan receivables;
- auto lease receivables;
- SME loans; or
- trade receivables.

Due to the strong standing of German covered bonds (*Pfandbriefe*), true sale CMBS or RMBS securitisations are less common in the German market. However, synthetic CMBS, RMBS or ship portfolio securitisations have been seen in the German market with a focus on regulatory risk transfer. In contrast to other jurisdictions, credit card or student loan securitisations are of no relevance in Germany. Due to legal implications, whole-business securitisations or the securitisation of operating lease receivables are also difficult to implement.

8.2 Common Structures

The basic structure of a German securitisation transaction does not generally change based

solely on the underlying securitised financial asset.

A driver for the securitisation of bank assets is the originator's intention to utilise ABS bonds as ECB collateral. It is therefore essential, in particular for retained transactions, that such transactions comply with the ECB's collateral requirements.

In line with the ECB′s collateral eligibility criteria, securitisations of German credit institutions comply with ECB′s loan level templates. The eligibility of assets is assessed by the national central banks (NCBs) according to the criteria specified in the Eurosystem legal framework for monetary policy instruments. Detailed rules governing the individual eligibility criteria for eligible assets can be found in Part Four of Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60), as last amended.

The examination of whether an ABS issuance complies with applicable eligibility criteria is done by the relevant NCB in the country of admission to trading. The NCB verifies the eligibility of the bonds to be submitted as collateral with participation of the NCB bank in the originator′s country. In the case of eligible bonds, the decision is announced and the bonds are listed on the Eligible Assets Data Base (EADB) website of the ECB.

Expected new structures can be described as sustainable or green ABS. In June 2022, the EBA issued in June 2022 a report on developing a framework for sustainable securitisations for exploring whether and how EU regulations on sustainable finance, including the EU Green Bond Standard, the EU Taxanomy and Sustainable Finance Disclosure Regulations can be applied. Prior to the establishment of a dedicated framework for green securitsations, green ABS is mostly used as a label for securitising green assets (ie, financial assets originated from the financing or leasing of zero-emission vehicles). Due to the dominance of covered bonds (*Pfandbriefe*) in the German market, it is expected that green residential mortgage-backed securities (RMBS) or commercial mortgage-backed securities (CMBS) will have a smaller relevance compared to other markets. It is also expected that green or social securitisations will be enhanced by investors dedicated to green or social investment standards.

Mayer Brown LLP has more than 100 structured finance lawyers in offices across the Americas, Asia and Europe and one of the largest structured finance practices in the world – and with that size comes the knowledge, experience and manpower to tackle transactions of any scale in any jurisdiction. The firm carried out the first CLO transaction in 1988, the first partially enhanced multi-seller commercial paper conduit in 1989 and the first TSI-certified securitisation in Germany (Driver One) in 2004. It has experience in the conduit, CDO and synthetic markets, and expertise in the areas of securitisation of intellectual property and non-performing loans, securitisation as an acquisition financing tool, large rescue structures for distressed assets or structured credit products and other hybrids or derivatives. Globally, Mayer Brown advises intensively on auto-related securitisations. Its German securitisation practice advises on all aspects of securitisation and structured finance transactions, including trade receivables securitisations, factoring and asset-based lending transactions.

Authors

Dr Patrick Scholl is a partner and head of Mayer Brown's German debt capital markets practice and advises on debt capital transactions, debt issue programmes, derivative products, synthetic securitisations and repackagings. He regularly advises on securitisations, with a focus on synthetic structures as well as on bond issues, Schuldschein loans and registered notes (Namensschuldverschreibungen), buy-backs, and structured notes platforms. Patrick is heavily involved in equity-linked, credit-linked, fund-linked, commodity-linked and other derivatives, including repo and stock lending, master agreements for derivatives, collateralised derivatives and retail structured products.

Andreas Lange is a banking and finance partner in Mayer Brown's Frankfurt office and focuses on securitisation, regulatory banking law, derivatives and other asset-backed financing forms. He advises predominantly in the area of securitisation (loan, lease and trade receivables), ABCP and other types of asset-backed financing, including asset-based lending, factoring and supply chain finance. He also has considerable experience in derivatives, loan financing and regulatory questions.

Dr Ralf Hesdahl is a partner in the Frankfurt office of Mayer Brown's banking and finance practice and focuses on securitisation, capital markets, and banking. He has experience in advising arrangers, issuers and originators on public and private securitisation transactions. He focuses in particular on the securitisation of consumer loans, auto loans, auto leases and trade receivables. In addition to his securitisation practice, Ralf advises intensively on asset-based lending and factoring transactions. He served as transaction counsel at the first TSI-certified securitisation transaction, Driver One.

Kirsten Schürmann is a counsel in the Frankfurt office of Mayer Brown's banking and finance practice. She advises on banking and finance, securitisation and capital markets issues. Kirsten has experience in national and international matters across a broad spectrum of asset-based lending transactions, securitisation transactions (with a focus on German auto loan, consumer loan and trade receivables) and distressed debt transactions, as well as supply chain finance.

Mayer Brown LLP

Friedrich-Ebert-Anlage 35-37
60327 Frankfurt am Main
Germany

Tel: +49 69 7941 0
Fax: +49 69 7941 100
Email: alange@mayerbrown.com
Web: www.mayerbrown.com

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