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A Cross-Jurisdictional Study of Securitisation: Need for a Uniform Legal Regime

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Abstract

Securitisation is the process of bundling financial assets and raising funds by issuing securities backed by those financial assets. The process of securitisation can be carried out by establishing the special purpose vehicle (SPV) in a jurisdiction different to the originator's jurisdiction. This results in a situation where the process of securitisation would be regulated by more than one legal system. Hence, compliance with the provisions of both the legal regimes would be necessary. However, dual compliance is may not be feasible in several situations owing to the differences in risk retention requirements, homogeneity thresholds and even the definition of securitisation. The discrepancies in the securitisation laws across legal regimes create problems for multinational securitisations. The aim of this project to compare and contrast the EU and US legal regimes on securitisation to demonstrate the legal challenges that arise in cross-border securitisation. The first part of this paper delves into the relevant legal provisions in the European Union and it is followed by a section on US securitisation laws. The third part analyses the fundamental differences in the two legal systems and exposits the compliance challenges and practical problems arising from the same. The conclusion sums up the discussion and builds a case for harmonizing securitisation laws within the OECD framework to develop a uniform global regime.

Keywords: *Securitisation, financial asset, homogeneity, risk retention, cash flow, credit, re-securitisation, banks, security receipts, special purpose vehicle*

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INTRODUCTION

Structured finance is a term that refers to financing options that are tailored so as to diversify and distribute risk among various classes of investors. The structure entails the creation of a SPV to insulate investors from exposure to the risks associated with the financing parties. Project finance, complex lease arrangements and securitisation are popular structured risk transfer mechanisms in international finance. Structured finance took a major hit after the subprime crisis of 2008–2009 [1]. The European financial markets were not directly affected but they certainly felt the aftermath of the crash. All forms of complex structured finance were tainted though it was mainly sub-prime mortgages that amplified the financial crisis. The sophisticated process of securitisation also significantly suffered in terms of perception value and volume. The markets in Europe and the US have been rather subdued since then but they are certainly witnessing a slow but steady recovery [2].

The process of securitisation entails bundling and reproducing cash flow backed financial assets as securities. The financial assets being pooled may be individual loans, credit card receivables or even actionable claims. Securitisation is carried out by banks and other credit institutions seeking to transfer the risk associated with their loans. Transfer of the financial assets allows banks to release the tied-in capital and utilize the same to create new loans, apart from serving as a risk minimization strategy in true-sale securitisations. Broadly, securitisation may be categorized as synthetic and true-sale. In the latter, there is effective legal transfer of the pooled financial assets to the SPV that acts as the issuer of securities. Hence, this is an off-balance sheet transaction and the SPV is entitled to the cash flows and sale proceeds from the concerned assets. In contrast, a synthetic securitisation does not entail a true-sale and there is no transfer of legal title. There is no real asset and the securitisation is supported by cash receivables only. Credit derivatives such as credit default swaps (CDS) fall under this category. The underlying asset continues to remain on the books of the originator since this is an on balance sheet transaction.

The process of securitisation is regulating under banking laws and there are restriction on the type of assets that can be securitized, the category of investors who shall be eligible to purchase the security receipts and upper limits on risk exposure, among others. Some jurisdictions overregulate and micro-regulate securitisation while others tend to have obscure laws that have large lacunae [3]. There is no uniformity and standardization across national legal systems and this shortcoming hampers the discovery of the immense potential that cross-border securitisation provides. It is surprising that there are significant differences between the US and EU compliance requirements for securitisation. Hence, obtaining an exemption under one legal system as per the STS standard would not necessarily allow easier legal compliance in another jurisdiction. This creates further problems since there is no legal clarity. The uncertainties reflect in the overall performance of the global securitisation market. The OECD has recognised the need for uniform securitisation regimes [4] but there have been no significant advancements in this regard.

EU SECURITISATION LAW

The European Banking Authority (EBA) acknowledged the superior market outcomes that securitisation can bring and affirmed its commitment to weakening Europe's overreliance on traditional banks [5]. The European Central Bank and Basel Committee on Banking Supervision and International Organization of Securities Commissions [6] have noted that the major factors hampering securitisation are macroeconomic factors and the robust availability of cheaper refinancing options such as external commercial borrowings. The In 2013, the EU announced that it is on a path to reinforcing the financial markets of Europe and consolidating them through its 'capital markets union' initiative [7]. In furtherance of the same, new securitisation laws have been introduced and they came into force on January 17, 2018. Legacy securitisations will be grandfathered and they will be able to use the STS qualification after January 1, 2019. The STS Regulations mainly apply to transactions completed after January 1, 2019 but legacy securitisations outstanding on that date will also be eligible to use the STS benefits if the structure meets certain procedural requirements at the time of notification to the European Securities and Markets Authority and certain credit-granting criteria requirements at the time of origination.

The STS regulations for the first time recognise non-EU investment firms and non-EU credit institutions as sponsors. This raises several questions about the legal framework for cross-border securitisation involving the EU. The third section of this paper deals with a sample scenario involving EU and US cross-border securitisation to demonstrate the problems arising out of differences in the legal regimes and questions of extra-territoriality.

The legislative overhaul seeks to encourage prudent securitisation practises in Europe. The two new securitisation regulations are:

1. Regulation (EU) 2017/2402 on simple, transparent and standardized securitisation (STS)
2. Regulation (EU) 2017/2401 on securitisation prudential regulations (SPR) to amend capital requirements regulations (CRR).

The main aim behind the new regulations is to identify and promote STS securitisations. The STS regulations provide a criteria for the same and covers aspects such as due diligence, risk retention and transparency rules. The CRR has been accordingly amended to bring it in line with the requirements under the STS regulations.

Simple Transparent and Standardized Securitisations

In the erstwhile EU legal provisions, the applicable set of rules was investor-centric [8]. The STS Regulation delineates due diligence requirements that apply to "institutional investors" [9]. For example, securitisation provisions in the CRR, Solvency II Delegated Act and Alternative Investment Fund (AIF) Manager Regulations are engaged when credit institutions or investment firms, insurance or reinsurance undertakings or AIF managers (respectively) are investing. The responsibility is on the investor to see that disclosures are made and compliance with risk retention and other requirements are up to the mark. Categories such as multilateral development banks were excluded from the purview of the erstwhile legislation [10].

Under the new STS Regulation, the investor-oriented approach is done away with and a common set of rules have been introduced for STS securitisations carried out through public and private transactions. As mentioned earlier, the STS Regulation lays down the eligibility criteria for qualifying under the STS category for both term securitisations and asset-backed commercial papers (ABCP). ABCP is most commonly issued in the auto industry and auto loans, auto leases and equipment leases back them.

Homogeneity Requirement

The major requirement for STS is the homogeneity of underlying assets. The STS Regulations have been strictly censured for the ambiguity in the eligibility criteria provided for homogeneity of underlying asset pools. Homogeneity may be commercially understood to refer to an asset type that is characterized by sufficiently similar in all contractual, credit risk, prepayment and cash-flow related aspects. However, there is no statutory clarity on how granular the condition will be, meaning whether the pool of assets will have to be grouped as per similarity in character or on the basis of commonality in class.

The benefits of STS are only available in true sale asset-backed securitisations (ABS). Synthetic securitisations do not meet the STS criteria owing to their intricate complexities. As far as ABCP transactions are concerned, the STS eligibility criteria also consider the homogeneity of the maturities of the underlying pool of assets. The remaining weighted average life of the supporting assets should not be longer than one year and the transactions should not have a residual maturing exceeding three years. An exception is provided to the auto industry and ABCP backed by auto loans and leases may have a remaining exposure weighted average life of a maximum of three and a half years, if the underlying assets do not have a residual maturity exceeding six years.

The STS Regulation proscribes deliberate securitisation of assets that face a higher likelihood of suffering losses compared to the other assets on the originator's balance sheet. In any case, the originator is free to choose assets with above average credit risk profile for the purpose of securitisation if the same is intimated to the investors and authorities.

The aim of the regulations is to encourage STS securitisations but the preferential regulatory capital norms do not apply in all cases. Commercial mortgage-backed securitisations (CMBS) where the underlying loans are frequently sold to repay the CMBS obligations are excluded from the STS eligibility criteria. Certain types of securitisation are very unlikely to be able to satisfy STS criteria; these include securitisations of non-performing loans, managed CLOs and CMBS. The exclusion of securitisations such as CMBS, certain synthetic and more actively managed structures that are historically well performing simply on account of their complex and opaque nature seems rather unreasonable. The EBA has recognised that synthetic securitisations that transfer credit risk through off-balance sheet transactions have been executed rather well in the past [11]. Only traditional ABS and ABCP receive better capital treatment as per the new STS and SPR Regulations. It would be wiser to identify specific categories of synthetic securitisations that are more stable and offer them better capital treatment. For instance, senior retained tranches of synthetic transactions comprising cashbacked credit from private investors who have deposited cash in the originator institution are very stable and historically well performing. They can be offered better regulatory capital terms without hampering the safety of securitisation process.

Third Party Certification

Originators, sponsors and issuers are jointly responsible for assigning the STS qualification and the Regulations provide consequences for false designations. Third parties may also attest to the meeting of STS eligibility criteria but merely securing third-party certification would not free the originators, sponsors and issuers from the consequences of a wrongful designation. For the purpose of the third party certification, the certifying third party must be independent, professionally qualified, experienced, knowledgeable and well-reputed. Charges, if any, should be non-discriminatory and calculated on a cost-recovery basis. Entities such as credit institutions, investment firms, insurance undertakings and credit rating agencies are not eligible to act as third party certifiers.

The originator, sponsor or SSPE is permitted to use the services of an authorised third party certification agent to assess the compliance of a securitisation with the STS criteria. However, it is made clear that (i) the originator, sponsor and SSPE would remain liable for any incorrect notification and (ii) a certification would not affect the obligation placed on institutional investors to assess whether a securitisation labelled as STS has actually satisfied the criteria.

Institutional investors are permitted to rely "to an appropriate extent" on the STS notification and the information contained within it, but "without solely or mechanistically relying on that notification or information".

Preferential Prudential Treatment

Under the SPR, there is a bipartite test for assessing if a transaction is eligible for preferential prudential treatment.

1. The transaction needs to meet the prudential eligibility criteria. For instance, the supporting asset pool per se should not have a weighting above a certain threshold.
2. The transaction needs to satisfy additional criteria including maximum borrower concentrations and loan to value limits.

Risk Retention

Risk retention as a regulatory mechanism evolved to allay the fears of originators and investors, in light of the great recession and thrust their mutual interest in securitisation. The CRR framework for securitisation stands repealed as of 1st January 2019 and it has been replaced by Regulation EU/2017/2402 and amending Regulation EU/2017/2401. However, all transactions need to be grandfathered. As per the terms of the old CRR securitisation regime, originators, lenders and sponsors are required to always hold a minimum 5% stake in all transactions. The indirect obligation upon the EU institutional investors to meet risk retention requirements is retained in the new due diligence rules and the level is maintained at 5% but STS Regulation departs from the existing CRR approach. Under the CRR, the onus is on investors to ensure that risk retention requirements are satisfied. Current market practice is to include contractual provisions to that effect in the transaction documentation. Under the STS Regulation, there is a direct risk retention obligation on originators, sponsors and original lenders. This means that EU originators and sponsors are required to meet the requirements even if it is not necessary on part of the investors. This risk retention rule covers any originator, sponsor or original lender, including corporates and not just institutional entities regulated under sectoral legislation. However, entities solely established for or operating in securitizing exposures are not originators under the risk retention rules.

It is provided in the STS Regulation that all institutional investors be required to qualify their investment choices by a clear-cut criteria and well-defined process, apart from meeting the risk retention requisites. Institutional investors are also required to set up detailed mechanisms and procedures to keep tabs on asset viability, the regular compliance by the originator, sponsor and lender with statutory thresholds, among others. Further, the institutional investors must display a strong grasp of securitisation investments and management. The regulators need to be assured of their comprehension and commercial skills.

The loan-by-loan disclosure requirements in the Credit Rating Agency Regulation (known as "Article 8b" disclosure) are reproduced in the STS Regulation. The information to be produced ranges from credit quality to performance data and cash flows, and must be provided to investors on a quarterly basis for ABS or a monthly basis for ABCP. Again, there is a dual responsibility on the originator to produce the information and on the investor to request it.

Ban on Re-Securitisations

Re-securitisation is a process where the supporting exposures include other securitized positions. This process has faced stringent regulations ever since the financial crisis and the STS Regulation ban them altogether, subject to grandfathering and limited carve-outs. The exceptions include ABCP structures, situations where the securitisation is used to make the credit institution viable as a going concern, where securitisation is used to facilitate the winding up of a credit institution or to preserve the interest of investors in cases where the supporting asset pool is non-performing. Given the historical treatment of re-securitisations the complete ban is not completely unforeseen and in any case, owing to prolonged capital charges, such transactions are seldom carried out.

Ban on Self-Certified Loans

Further, securitisations backed by unverified loans that fall under residential mortgage-backed securitisations (RMBS) umbrella are prohibited by the STS Regulation. Such loans do not have extensive background checks and both the borrower and the relevant intermediaries are aware that the lender has not followed the routine vetting process. The prohibition has kicked in and it has been in effect with respect to securitisations done after 1st January 2019 and it applies to all underlying facilities that were originated after the Mortgage Credit Directive (MCD) came into force in March 2016.

The securitisation of residential loans originated since 20 March 2014 that were marketed and underwritten on the premise that the loan applicant or intermediaries were made aware that the information provided by the loan applicant might not be verified by the lender (often referred to as ‘self-certified’ mortgages) is prohibited.

Lack of Procedural Clarity

The EBA should consider including an illustrative list of asset classifications and risk factors that should be evaluated while assessing whether a pool of assets meets the homogeneity requirement. Generally, the risks range from the type of obligor, credit facility and collateral to repayment mechanics and sector-specific problems. Additionally, the EBA should introduce technical standards to elucidate the procedural aspects of the STS Regulations such as standard forms and reporting templates.

Penalty

Under the erstwhile regime, the penal provisions provide for a punitive capital charge against investors’ balance sheets in cases of non-compliance. Under the new legal framework, the capital charge provision will continue to apply in cases of failure to meet due diligence requirements. However, sanctions for non-compliance could vary along national lines and include administrative or criminal sanctions. The EU States have wide discretion in creating effective, proportionate and dissuasive sanctions. They must take into account whether the infringement was intentional or resulting from negligence, and must take into account the materiality, gravity and duration of the infringement. While taking into account intention or negligence suggests a move away from strict liability for non-compliance, the sanctions framework creates a minefield of compliance issues that could discourage cross-border securitisation and runs contrary to the stated aim of CMU.

Credit Granting Requirements

It is mandatory that consistent criteria are followed by lenders, sponsors and originators to assess the exposures that are securitised and those that are retained on the balance sheet. The adopted criteria must be clear and detailed. Further, originators who acquire third-party exposures for the purpose of securitisation must crosscheck and confirm that the original lender abided by a consistent credit granting requirement. Grandfathering provisions are available for certain old transactions under the current rules.

Restrictions on Selling Securitisations to Retail Clients

Specific conditions will have to be met before a “seller” of a securitisation position can sell that position to a retail client. This restriction, alongside the Markets in Financial Instruments Directive (MiFID II) and Packaged Retail and Insurance-based Investment Products (PRIIPS) regimes, means that originators, issuers other parties involved in marketing and distribution will have to be very careful about the target market for securitisations.

Requirements for SSPEs

The STS Regulation introduces a prohibition against SSPEs being established in certain types of jurisdiction, including those which are considered high-risk by the Financial Action Task Force and those which have not signed up to OECD agreements for the exchange of information on tax matters.

US SECURITISATION LAW

The US credit risk retention rules [12] were adopted in December 2014 to implement the mandate of Section 941(b) of the Dodd-Frank Act Wall Street Reform and Consumer Protection Act of 2010, which has been codified as Section 15G of the Securities Exchange Act of 1934. The US Risk Retention Rules and their Impact on Non-US Securitisations (US Rules) reported on the final US risk retention rules were adopted in October 2014 [13] and apply since December 24 2016 to asset-backed securities (ABS) issued on or after December 24 2016 with respect to all asset classes. Residential mortgage-backed securities (RMBS) have been covered under the rules since December 24 2015.

The US Rules apply to sponsors of securitization transactions within the jurisdiction of the United States, but the territorial scope is not very clear and so the US Rules provide a limited safe harbor for certain foreign transactions [14]. Under this safe harbor, the risk retention requirements do not apply to a securitization transaction if:

- The securities are not required to be and are not registered under the Securities Act of 1933.
- No more than 10 percent of the dollar value (or equivalent if sold in a foreign currency) of all classes of ABS interests are sold or transferred to US persons or for the account or benefit of US persons.
- Neither the sponsor nor the issuing entity is organized under the laws of the United States.
- And no more than 25 percent (based on unpaid principal balance) of the securitized assets were acquired by the sponsor or issuing entity, directly or indirectly, from a majority-owned affiliate of the sponsor or issuing entity that is organized under the laws of the United States or a US state, or an unincorporated branch or office of the sponsor or issuing entity that is located in the United States [15].

The foreign safe harbour is not available for any transaction or series of transactions that technically complies with the safe harbor but is part of a plan or scheme to evade the risk retention requirements. The US rules apply widely, and the safe harbor excludes only those transactions with limited effect on US interests, underwriting standards, risk management practices, or US investors [16].

The US rules apply to any “securitization transaction,” which is defined as “an offer and sale of asset-backed securities (ABS) by an issuing entity.” The ABS definition encompasses all securities that are collateralized by self-liquidating financial assets that allow security holders to receive payments based primarily on the cash flows from those assets, whether offered publicly or privately, including collateralized debt obligations, securities issued or guaranteed by a government-sponsored enterprise and any security that the SEC, by rule, determines to be an asset-backed security. Synthetic securitizations, such as transactions effectuated through the use of credit default swaps, total return swaps, or other derivatives, are not covered.

Under the US rules, risk must be held by the sponsor, which is the entity that transfers assets and sets a securitisation transaction into motion. The sponsor may initiate by selling the asset directly or in an indirect manner, through other parties including affiliates. Apart from the requirement that the sponsor be the entity that organizes the securitisation transaction and sells assets to the issuing entity, other major factors are that the sponsor must be responsible for choosing the asset pool and participating in securitization activities directly through employees. The sponsor must not be a mere namesake party; the sponsor must be actively involved by itself and not merely at the direction of third parties.

Further, the sponsor owns the equity of the depositor, forms the issuing entity, chooses the parties to the securitisation transaction, involves itself in deciding their fees and contracts, structures the securitisation and supervises the making of legal documents for the securitisation process. In the case of multiple sponsors, one sponsor must be designated as the holding sponsor and it is responsible for holding the risk required under the law. The other sponsors must oversee the holding sponsor's compliance with the legal requirements. The sponsor or the holding sponsor, in the case of multiple sponsors, may retain a part of the mandated risk and spread the rest across its affiliates where it has majority control or with which it is under common majority control. The issuing entity is excluded from the statutory definition of majority-owned affiliate.

Exemption

All bond managers are mandated to retain 5% credit risk in mortgage-backed securitisations unless they involve qualified residential mortgages (QRMs) [16]. Under the US rules, securitizations consisting solely of performing QRM are exempt. The definition of QRM includes loans that meet the definition of "qualified mortgage". Securitizations with an asset pool consisting entirely of qualified commercial loans, commercial real estate loans, or consumer auto loans (but not auto leases) underwritten to high standards are exempt from the risk retention requirements. Qualified commercial loans, commercial real estate loans, or consumer auto loans securitized in blended pools with nonqualified assets will have a zero percent risk retention requirement, so long as overall risk retention with respect to the securitized pool is a minimum of 2.5 percent, but blended pool treatment is not available for QRMs.

Restrictions on Hedging and Transfer

Under the US rules, a sponsor or majority-owned affiliate holding a required risk retention interest generally may not transfer that interest except to another majority-owned affiliate (or, if held by a majority-owned affiliate, to the sponsor), with other parties permitted to hold the required interest being subject to similar restrictions.

Neither a sponsor nor any affiliate may pledge an interest it is required to retain as collateral for any financing (including a transaction structured as a repurchase agreement) unless the financing is full recourse to the borrower. "Full recourse" is not defined, but at a minimum any financing of the risk retention piece clearly should be full recourse by its terms to the financing sponsor or majority-owned affiliate, placing no restrictions on the ability of the lenders to enforce the terms of the financing against that entity. In the event of a default under such a financing where the retained interest is taken by the lender, the borrower will have violated the prohibition on transfer.

COMPARATIVE ANALYSIS OF EU & US SECURITISATIONS

There are several major differences between the EU and the US securitisation regimes [17]. The problem is further amplified by Brexit. The European Union (Withdrawal) Act would carry over the content of pre-Brexit EU law as on the date the UK leaves the EU. Hence, the STS and SPR Regulations will be incorporated into UK domestic law by virtue of the Withdrawal Act. However, the regulatory technical standards that the EU intends to release in the future to support the new regulations will not be effective before the withdrawal date and they will not automatically become part of the UK legal regime. This may lead to situation where UK partially follows EU securitisation laws, thereby further amplifying the compliance challenges in cross-border securitisation. Further, any securitisation which involves a non-EU originator, sponsor or SSPE will not be able to qualify as STS since there is no third country equivalence regime applicable to non-EU parties. This is a major consideration for UK-based originators as they will be non-EU parties post-Brexit.

Meaning of Securitisation

There is a difference in the manner of definition of the term securitisation broadly speaking; the US Rules are applicable in the case of 'securitisation transactions' and the EU Rules cover 'securitisations'. The two terms may seem synonymous but they are understood rather different under the two legal systems. The EU rules apply to any transaction or scheme, whereby the credit risk associated with an exposure or pool of exposures is trenched, such that:

1. Payments in the transaction or scheme are dependent upon the performance of the exposure or pool of exposures; and
2. The subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme.

Under the EU Rules, 'loan' and 'security' are not distinguished and they cover processes that fall within the ambit of securitisation, as defined. One of the criteria for securitisation is creation of tranches to segregate the risks associated with various exposures. However, the US rules kick in when a 'security' that qualifies as ABS under Exchange Act is issued. The difference between a security and a loan is unclear but facilities arrangements that do not entail note issues will not fall under the ambit of the US rules. It is not expressly mandated under the US rules that trenching be carried out.

Risk Retention Requirements

The EU Rules earlier made the investor organizations responsible for ascertaining that credit risk retention norms are met. The risk had to be retained by the sponsor, lender or originator, as applicable but the EU investors needed to ensure that the norm is satisfied. If no EU investors were involved, risk retention was not technically required. This scheme resulted in ambiguities and uncertainties regarding legal compliance. Hence, the new EU Rules adopt a more direct approach similar to the US rules.

The understanding of sponsor is not consistent in the US and the EU rules; the former takes a broader view than the latter. Under the EU rules, a sponsor is an institution such as a bank or an investment firm that manages a securitisation transaction. Further, in case there is more than one sponsor, the risk retention norms may be fulfilled by the sponsors pro rata or by one sponsor as agreed commonly. In case a single sponsor is to be chosen, factors such as common interest with investors, fee structure, role in organizing securitisation scheme and relevant risk exposures must be considered and a decision taken objectively.

Under the US rules, originator is understood as the original entity creating a financial asset for the purpose of securitisation. Risks can be allocated only to the original entities or originators that contribute a minimum 20% of the assets in the pool of assets. The risks acquired by the originator must be in the same ratio as originally decided by the sponsor and the latter is liable to ensure that the originator complies.

In contrast, the EU rules adopt a wider approach in the matter of risk allocation to the originator, which is understood as an entity involved in the original debt agreement or an entity that purchases third party exposure for the purpose of securitisation. However, entities that only purchase third party exposures and securitize them immediately are not permitted. Further, original lenders may also hold the required credit risk. This brings the EU rules closer to the US rules. In the case of more than one originator or original lender, each may hold risk pro rata to the total exposure in the securitisation transaction. In case a single originator or original lender chooses to hold the mandated risk, it must be the entity that is organizing the securitisation process or the entity that has contributed more than 50% of the total exposure in the securitisation transaction. There is no option for affiliates to share the risk, unlike the US rules.

Exemption

The US rules exclude securitizations that have government guarantees for the pooled assets and partially exempt transactions that are backed by student loans originated under the Federal Family Education Loan Program (FFELP) and only require a risk retention ranging from 0–3% on a case-to-case basis. The exemptions under the EU rules are narrower. Similar to the US rules, securitisations that have government guarantee are excluded. Further, transactions that are guaranteed by institutions having 50% or lesser risk weight as per CRR and those guaranteed by multilateral development banks as provided under articles 405(3) and 405(4) of the CRR are exempted. In contrast to the US rules, there is no asset class that qualifies as a whole for exemption under the EU rules.

CONCLUSION

Securitisation is a double-edged sword that can be economically beneficial if it is structured effectively as a funding channel. It has been argued that securitisation can help alleviate the finance problems faced by small, medium and micro enterprises since increased lending capacity of banks helps smaller industries obtain funding. Further, as early as 1990s, it was acknowledged that the elderly home owners can also benefit from this process since they have an idle asset and the process of reverse mortgage may not be very beneficial to banks per se but securitisation of the financial asset would lead to greater returns for the originator [18]. It is important that the pooled assets are not co-mingled and managed in separate silos in a transparent manner. Since securitisation is largely lawyer-made law in India, the trigger events should be clearly identified and there should be perfection of legal title to avoid problems. It is also important to ensure that the security receipts are properly rated since the instrument is too complex and finding the true value may not always be a straightforward process. Hence, it is understandable that most jurisdictions seek to overregulate and micro-regulate it. However, there should be some uniformity and standardization across national legal systems to facilitate the discovery of the immense potential that cross-border securitisation provides. It is surprising that there are significant differences between the US and EU compliance requirements for securitisation. Hence, obtaining an exemption under one legal system as per the STS standard would not necessarily allow easier legal compliance in another jurisdiction. Further, it should be noted that the securitisation laws are vague at best or non-existent at worst in some jurisdictions. This creates further problems since there is no legal clarity. The uncertainties reflect in the overall performance of the global securitisation market. The OECD has recognised the need for uniform securitisation regimes and it is high time developing and developed countries decide on a common basic framework.

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