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Legal and Economic Aspects of Debt Securitisation with Involvement of Special Purpose Corporation[1]

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Keywords

Debt securitisation, a special purpose corporation, a special purpose vehicle, special purpose company, securitisation fund, assignment of receivables, sub-participation contract, securities, bonds

Abstract

Securitisation is an asset management method aimed at issuing securities based on a separate set of claims. With this method, private entities and public entities delivering public tasks can have access to investment financing or operational financial through the capital market, bypassing a credit risk. It is achieved by bringing to a swap of a package of claims due to the entity with cash raised through issuing securities (e.g., bonds) backed by the debt obligations (claims). The paper presents legal and economic rules for organising the debt securitisation process involving a special purpose commercial law company set up to issue securities, which, next to securitisation through a securitisation fund, is one of the two types of securitisation of claims governed by Polish law. This paper was written within the research project financed by the National Science Centre No. DEC-2013/08/A/HS5/00642.

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Introduction

Next to traditional crediting, securitisation is an effective financing-raising instrument available to entrepreneurs and public entities. It involves issuing securities backed by the existing resources of specific claims.[2] In such case, by issuing securities, the initiator of the securitisation can get hold of necessary financing in the form of cash. As the next step, the securities are bought back from assets generated from a pool of claims separated at an earlier stage. The pool serves as the economic basis for the securitisation process. For this reason, the initiator of securitisation may raise financing via the capital market where the success of the whole process is backed by the quality of its assets (the quality of the securitised debt) and not by the initiator of the process.[3] The above shows that a securitisation operation brings a number of benefits to its initiators, as it offers them the opportunity to reduce their risk (a credit risk in particular) and minimise the cost of financing their enterprises, along with the opportunity to access, often anonymously, the financial market and improve the effectiveness of management of a separated pool of claims by accelerating financial cashflows which can be discounted in own business projects.[4] It is that, by liquidating claims, the initiator of securitisation may raise cash to finance his development and current operations.[5]

I. General Structural Concepts and Legal Nature of a Special Purpose Company Carrying Out Securitisation Operation

A securitisation process is based on the provisions of the Banking Law Act[6] and the Investment Fund Law Act.[7] While they do not offer a legal definition of

2 Charles Austin Stone, Anne Zissu and Jess Lederman (eds), *Asset Securitisation: Theory and Practice in Europe* (Euromoney Publications 1991) 221; Jerzy Węcławski, 'Sekurytyzacja – nowa forma finansowania przedsiębiorstw' [Securitization - a new form of financing enterprises] (1994) 8 Bank i Kredyt 43, 43–44; Łukasz Reksa, 'Sekurytyzacja wierzytelności na rynkach międzynarodowych' [Securitization of debts on international markets] (2004) 2 Bank i Kredyt, 59, 61 et subsq.; Izabela Kidacka, *Finanse zintegrowane. Sekurytyzacja, struktury finansowe* [Integrated Finance. Securitization, financial structures] (Difin 2006) 91 and subsq.

3 Aneta Waszkiewicz, *Ryzyko sekurytyzacji a kryzys finansowy* [S*ecuritization risk and financial crisis*] (Szkoła Główna Handlowa 2011) 21 and subsq.

4 European Securitisation Forum, *A Framework for European Securitisation* (London 2002) 15–16.

5 Patrycja Zawadzka, *Instrumenty finansowe w gospodarce gminy* [*Financial instruments in the commune economy*] (Wolters Kluwer 2015) 412 et subsq.; Leszek Mazur, *Prawo bankowe. Komentarz* [*Banking law. Comment*] (CH Beck 2005) 443 et subseq.

6 Act of 29 August 1997 (uniform text Dz. U. of 2020 item 1896).

7 Act of 27 May 2004 (uniform text Dz. U. of 2020 item 95, 695).

securitisation, they define several legal institutions, which represent an important element in the entire process of securitisation. It can be used to distinguish between some basic securitisation variants, largely in terms of the type of the entity emitting securities and in terms of securitisation procedures, representing the normative basis for the classification (cf provisions of art 92a of the Banking Law Act and art 2 item 30, 31 and 32 and art 183–195 of the Investment Fund Law Act[8]). The legal nature of the issuer of securities in the securitisation process is of essence in terms of the deliberations presented below as, in the securitisation process, the issuer may be either a securitisation fund (an intermediary)[9] or a special purpose company,[10] whose participation in the securitisation will be discussed in this paper. According to the above-mentioned provisions, the potential securitisation procedures to be followed by either an SPV or a securitisation fund may be either securitisation by a debt assignment contract (assignment of claims) or a sub-participation contract (see art 92a para 1 of the Banking Law[11]).

However, note that the above-specified regulations govern the claims securitisation process only when it is initiated by a bank with a securitisation fund acting as an intermediary. In case of other entities, which initiate the process, general contracting rules are applied,[12] including, in particular, the contractual freedom principle[13].

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8 A bill of the Securitisation Law Act submitted on 23 July 2003 during the 4 office terms of the Polish Parliament was not adopted; cf Parliamentary publication no 2080 of the Polish Parliament 4 office term.

9 For more information about organisation and operation of securitisation funds and their types see: Anna Zwolińska-Doboszyńska, 'Sekurytyzacja wierzytelności z udziałem funduszy sekurytyzacyjnych na tle innych uregulowań dotyczących sekurytyzacji' [Securitization of receivables with the participation of securitization funds compared to other regulations concerning securitization] (2005) 2 Przegląd Prawa Handlowego 17–25.

10 Cf art 92a para 3 of the Banking Law Act and art 183 of the Investment Fund Law Act.

11 Cf Bartłomiej Smolarek, 'Sekurytyzacyjna umowa subpartycypacyjna' [Securitization sub-participation agreement] (2009) 8 Przegląd Prawa Handlowego, 49 et subseq.

12 Cf Grzegorz Borowski, 'Fundusz sekurytyzacyjny' [Securitization fund] in Rafał Mroczkowski (ed), *Ustawa o funduszach inwestycyjnych. Komentarz* [*Act on investment funds. Comment*] (Wolters Kluwer 2014) 629 et subseq.

13 By way of example, note that the legislator gives some specific requirements to banks and securitisation funds in the securitisation process. In principle, these requirements do not apply directly to the securitisation operation performed through an SPV. However, the character of these requirements is by no means normative and their applicability, if not directly stipulated in the contract, may arise from a doctrinal demand at most. For instance, it applies to the requirement of 'homogeneity in kind' of the claims eligible for securitisation in one and the same pool of debt or a criterion such as a regular generation of capital by claims arising from art 2 item 30 of the Investment Fund Law Act. Similarly, as detailed further on in the paper, there are some prohibited types of relations specified in art 92a para 4 of the Banking Law Act prohibiting any capital or organisational relationship between

In the light of the above, securitisation can be defined as a process where the initiator of the securitisation (the arranger), that is, the entity holding some claims to claims, separates a respective pool of the claims and, subsequently, enters into a civil law contract for assignment of the claims (receivables) or into a sub-participation contract with an issuing entity – which may be a company or a securitisation fund. The issuing entity issues some securities (their type chiefly dependent on the legal nature of the entity: these may be bonds or investment certificates, etc.), meets the claims from the securities it issued from funds, which, in the economic sense, come from debtors of the previously separated pool of claims.

According to the above-presented definition, the first important phase of the securitisation process is selecting the issuer of securities by the securitisation initiator (also by a public entity in order to have a public task delivered[14]). Securitisation using an SPV as the issuer consists in setting up an appropriate commercial law company (a limited liability company or a joint-stock company), which then issues some securities backed with securitised claims. On the other hand, securitisation by a securitisation fund uses an existing securitisation fund, that is, a legal person set up on the basis of provisions of art 183 of the Investment Fund Law Act whose sole business is placing funds collected as a result of public or non-public proposal to acquire investment certificates into securities, money market instruments and other property rights specified in the same Act), which in the legal and organisational terms is a (standard or non-standard) closed investment fund), which issues investment certificates to collect funds to acquire claims.[15]

Focusing further only on the process of securitising claims by an SPV, bear in mind that this type of securitisation consists in setting up a commercial law company – a joint-stock company or a limited liability company, for the purpose of issuing specific securities backed with securitised claims. By definition, the company is a *special purpose vehicle – SPV* or a *special purpose company – SPC, or a special purpose entity – SPE*,[16] which may be set up either by the initiator of securitisation or by another entity, including, in particular, an advisory

initiator of securitisation and the SPV set up for the securitisation purposes (see deliberations on pages 6 to 8).

14 Cf Wojciech Szydło, 'Prawna dopuszczalność sekurytyzacji wierzytelności gminnych' [Legal Admissibility of Securitizing Receivables of Municipalities] (2012) 3 Samorząd Terytorialny 42 and subseq.

15 Zwolińska-Doboszyńska (n 9) 21–23.

16 The terms: SPV, SPC and SPE may be used interchangeably in the paper.

entity such as a law office, rating agency, for the purpose of planning, organising and creating the entire securitisation structure.[17]

It seems that, from the business and organisational point of view, the SPV should be, in principle, a limited liability company, which offers more flexibility in the sense of management than a joint-stock company (typically, limited liability companies offer more purely personal elements, making them similar to partnerships) as well as those that require considerably lower financial investment related to their setting up (a lower amount of the required share capital than joint-stock companies.[18] Such a company could also retain its one-person shareholder structure with the initiator of securitisation himself as the sole shareholder. This could be beneficial from the point of view of economic security of the initiator as, being the sole shareholder, he would not have, and in any case, any personal liability for the company's liabilities as the company is a separate, independent legal entity. Even in case of liquidation or bankruptcy of the company, the liability for its obligations does not burden assets of its founder and shareholder in any way.[19]

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17 Izabela Aleksandra Raczkowska, *Sekurytyzacja wierzytelności bankowych. Podstawowe zagadnienia prawne* [*Securitization of bank receivables. Basic legal issues*] (KiK-Konieczny i Kruszewski 2001) 31 et subseq; Svetlana Gudkova, *Sekurytyzacja należności kredytowych banków* [*Securitization of bank credit claims*] (Wyższa Szkoła Przedsiębiorczości i Zarządzania 2002) 23.

18 More about the rules for setting up, foundation and financing limited liability companies and joint stock companies c.f. Andrzej Kidyba and Anna Rachwał, 'Ustawowe typy spółek handlowych. Spółki kapitałowe' [Statutory types of commercial companies. Capital companies] in Stanisław Włodyka (ed), *Prawo spółek handlowych, System Prawa Handlowego, tom 2* [*Commercial Companies Law, System of Commercial Law, vol.2*] (CH Beck 2012) 699 and subseq. and the literature referred therein.

19 A potential liability of the securitisation initiator could only arise if he has underwritten the bonds issued by the SPV or guaranteed the SPV's obligation arising from a bank loan agreement (a loan, if any, given to the company by the bank for repayment of debt in exchange for the claims acquired or subject to the subparticipation) or, relatively, if the initiator of securitisation decided on assuming liability for some specific obligations of the SPV. Such methods may include e.g. "joint or accumulative accession to debt" where, as a result of the accession, the existing debtor is not released from the debt and the creditor gains a new debtor as a joint and several co-debtor. The new joint and several co-debtor would not, in this case, be liable for a third party's debt (contrary to the surety contract where the guarantor obligates himself to the creditor to perform the obligation only in case of the debtor's default (876 par. 1 of the Civil Code). - the guarantor's liability is only a subsidiary liability) but, in this case, is is liable as for his own debt. Consequently, the liability of the person accessing the debt is spontaneous while, at the same time, it remains joint and several (in case of joint and several liabilities, a creditor may demand performance, in part or in whole, from all debtors jointly, from some of them or from each of them separately and satisfaction of the creditor by any of the debtors releases the others - see art. 355 par. 1 of the Civil Code). In this case, the latter concept is related to a more stringer regime (i.e. a spontaneous liability). However, on the other hand, such transaction is safer for a debtor and that is why a potential creditor could be more prone to make such a transaction as e.g. giving a loan to the SPV on considerably better conditions. Liability for third party's liability cf Piotr Machnikowski, in *Prawo zobowiązań – część ogólna* [*The law of obligations - general part*] (Andrzej Olejniczak ed, CH Beck 2009) 428 and subseq. and the literature mentioned therein.

There is no doubt that, when setting up an SPV, Commercial Code provisions should apply[20] to all the activities leading to signing the Articles of Association of a limited liability company or setting up a joint-stock company and having it entered in the entrepreneurs' registry, with the SPV-founding entity acquiring, at the same time, all its shares or stock (as the founder, as defined in the Commercial Code). It is important that, from the start, the entity setting up an SPV held all its shares or stock. Similarly, when setting up an SPV by the above-mentioned advisor; however, in such case, the initiator of securitisation loses the opportunity of having a more active impact on such created SPV, while undoubtedly, such solution limits his securitisation risks which he solely bears. In such case, according to the general principles of accounting, the financial statements of the advisor, the SPV and other companies, if any, forming a capital group, could be consolidated, that is, combined by summing up respective items of the financial statements of the dominant entity, subsidiaries and co-dependent entities, which are not companies, subject to necessary exemptions and adjustments (cf art 2 item 45 and art 55 et subseq. of the Accounting law Act[21]). However, in this case, one may also imagine a certain hybrid ownership structure of an SPV with its shares or stock held by several entities, for example, the initiator of the securitisation and advisor. Such ownership structure would also, to some degree, represent a certain limitation of a risk of the securitisation initiator.

Note that, in the case when securitisation is initiated by a bank, additional attention should be paid to the rule laid down in art 92a para 3 and 4 of the Banking Law Act. While it gives a bank the opportunity to transfer (assign) its receivables to a commercial company (which is not a society of investment funds which form a securitisation fund or a securitisation fund), to avoid increasing or deteriorating the bank's liquidity 'the issuing entity, onto which claims have been transferred, cannot have any capital or organisational relation with the bank transferring the claims and its activity may only including buying receivables and issuing securities (...) as well as performance of any related activities' (art 92a para 4 of the Act).[22] It seems that no other entity securitising its receivables via an SPV other than a bank is tied by the restriction arising from the above-mentioned normative principle. On the other hand, consider whether the SPV set up by the bank is not restricted anyway in its freedom to transact any other business except for acquisition of securitised claims followed by issuing securities on the basis of the same and perform any other actions related to these operations only.[23]

20 Act of 15 September 2000 (uniform text Dz.U. of 2020, item 1526, as amended).

21 Act of 29 September 1994 uniform text Dz. U. of 2019 item 351, as amended.

22 Zawadzka (n 5) 418.

23 Raczkowska (n 17) 32.

Otherwise, the risk related to investing in the securities issued by such SPV would be considerably higher. Therefore, one should clearly state that, irrespective of the nature of the entity initiating securitisation, the sole business transacted by the company it sets up should only involve securitisation of claims operations. The above indicates that the company should only occupy itself with the acquisition of claims or rights to such claims, issuing securities on their basis, some investment of funding raised from such issues as well as collecting debt from securitised claims. Considering the Polish Business Classification, such type of business should be marked as follows: section K (financial and insurance activities); part 64 (financial services activity, excluding insurance and pension funds); group 64.9 (other financial service activity, except for insurance and pension funds); class 64.99; subclass 64.99.Z (other financial service activity, n.c.e., except for insurance and pension funds).[24]

However, in this case, it does not seem justified to apply, by analogy, the other prohibition specified in art 92a para 4 of the Banking Law Act, that is, prohibition of a capital or organisational ties between the initiator of securitisation and commercial company being set up for these purposes and in the case when the initiator set up the SPV himself, obligate him to dispose of the shares or stock he holds in the SPV even before entering into the debt assignment contract. In the case when securitisation is initiated by a bank, the above-mentioned prohibition is reasonably justified as, in such a case, the risk related to the securitised debt, which is typically amounts due to the bank from loans or credits given by the bank, would go back to the bank. It shows that the restriction is aimed at avoiding transfer of risk onto the bank; but only the economic and factual risk since, in legal terms, the SPV, being a separate and independent legal entity, is liable itself for its liabilities both to the initiator of securitisation, buyers of securities or to the bank. When securitisation is initiated by entities other than bank, the risk related to the securitised debt may be incomparably lower than in case of amounts due to banks.

However, in each configuration of entities, such an SPV should transact a business in the normative sense of the concept (and, specifically, as defined by the provisions of art 2 of the Entrepreneurs' law Act[25]), that is, transact profit-oriented business. At first sight, one would think that it is not quite necessary that such an SPV focuses on profit making as the SPV's role is largely to deliver securities debt by collecting the debt arising from the obligations net to pay back its own emitted securities, which may not necessarily be done for the purpose of generating a profit. However, note that only entities transacting business that

24 Cf annext to the regulation of the Ministers' Council of 24 December 2007 on the Polish Business Classification (PKD) (Dz. U. No. 251, item 1885).

25 Act of 6 March 2018 (uniform text Dz. U. of 2018 item 1282, as amended).

have a legal personality at the same time, are allowed to issue bonds, that is, one of the types of securities issued when backed with securitised claims. For this reason, if an SPV intends to issue the bonds backed with the securitised debt obligations, its founders should make sure that the SPV's Articles of Association or Statues provided for the requirement to transact business by the SPV.

The requirement that an SPV set up for the purpose of securitisation transacted business (i.e., operated for profit or was profit-oriented), not only when it intends, on the basis of securities claims, issue bonds, should not be considered a restriction of a content of transactions made by the company in business trading. In spite of the requirement to operate for profit, the SPV will not be initially forced to demand from the securitisation initiator to agree to a possibly low amount of a mutual performance of the SPV in exchange for acquiring from him the claims or the right to performances from the claims (when compared to the nominal value of the claims) so that, consequently, the SPV's profit is as high as possible. Nevertheless, note that, to classify operations of the SPV as business (transacting business), the entire business project must be profit-oriented while individual elements/activities involved in the business do not need to be profit oriented. Consequently, in some cases, some activities of the PPV will not be profit-oriented and, to the contrary, may be oriented towards suffering certain losses, which does not disqualify the operations from 'business' category. As emphasised in the literature, it is essential to have an overall assessment of the business and its general direction and not the classification made separately and individual activities that form the business.[26] In consequence, the SPV discussed in the paper could continue searching for its profits, for example, by placing with an economic benefit the funds raised from investors in exchange for its securities (bonds) it issues or, alternatively, by profitable investment into funds successively raised from debtors of securitised debt. Also, bear in mind that in case of entrepreneurs who transact business, the intention which accompanies them (and is mandatory in this context) to transact business for profit does not need to mean that such profits will actually come. If they do not come, the very fact will not be disqualifying for the business run by the company as business in the normative sense of the term.[27]

26 Adam Daniel Szczygielski, *Zasady prawa handlowego, tom I* [*Principles of Commercial Law, Vol. I*] (Prasa Prawnicza 1936) 136; Tadeusz Dziurzyński, Zygmunt Fenichel and Mieczysław Honzatko, *Kodeks handlowy. Komentarz* [*Commercial Code. Comment*] (Księgarnia Powszechna 1935) 12; Marek Szydło, *Swoboda działalności gospodarczej* [*Freedom of economic activity*] (CH Beck 2005) 41–42.

27 Szydło (n 26) 41–42.

II. Activities Performed by an SPC Further to the Claims Securitisation Process

After setting up an SPC, the initiator of securitisation should enter into respective contracts with the SPC for the purpose of transferring the securitised claims onto the SPC. These should be either a debt assignment contract debt or a sub-participation agreement (cf art 92a para 1 of the Banking Law). The legislator distinguished between the two basic variants of the contract, irrespective of whether the issuing entity is the SPC or a securitisation fund. With that, he allowed securitisation through assignment of debt (a debt assignment contract), which requires entering into a contract where the creditor – assignor (the initiator of securitisation) will transfer the debt to a third party's assets – to the assets of an assignee (here to the assets of an SPC), where, in consequence of the process, the assignor will lose the claims and the assignee will obtain them so that the latter could next issue securities and securitise through sub-participation,[28] which here involves entering into a contract with the SPC (or the securitisation fund) for transferring all the performances received by the initiator of securitisation or the party having the right to performances from the securitised debt from a specific pool of claims or from specific claims.[29]

For the company to perform the contracts for assignment of claims, which it executed and then to pay the amounts due to the assignor in exchange for the claims, which have been acquired or are subject to subparticipation, the company must possess appropriate funds. The funds can be raised by the SPC either through a loan from a commercial bank or, as a case may be, from funds raised from bondholders holding bonds issued by the company or, right away directly from the above-mentioned bond holders. With such financial instruments, the SPC will be able to rise sufficient financing to be transferred to the assignor for assigning or which are subject to sub-participation of the claims. A loan, if any, will be paid back by the SPC with the funds received in the future from the bondholders buying the SPC's bonds, which represent the tangible base for repayment of the loan.

It may seem that the optimum solution to finance the project would be the case when the assignor receives the claims, as appropriate, in exchange for securitised claims only when the SPC, in turn, had amounts due from bondholders for the bonds it has issued already booked on its accounts. In such case, funds raised through the bond issue would be transferred to assignees and the future proceeds from the securitised debt would satisfy the bondholders' claims. Nevertheless, a loan would speed up the process of raising the financing by the

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28 Cf art 183 para 4 of the Investment Securitisation Law Act.

29 Cf Smolarek (n 11) 49 et subseq.

company. Still, to raise it, the SPC would need to cover some additional costs to service it (such as bank's margin and interest). In addition, as mentioned above, consider that, as an option, in the case when the SPC is applying for a loan, that the initiator of securitisation is forced to guarantee the loan by entering a loan surety agreement with the bank to underwrite obligations of the SPC, who is the borrower. For this reason, in this case, a potential deferral by the initiator of securitisation of payments from the claims subject to the assignment or sub-participation could be considered for the period until the company receives funds from the bonds it issued. In such case, securitisation could come at a lower cost as the SPC would not need to apply for a loan. At the same time, the initiator of securitisation could obtain a slightly higher price in exchange for assignment of the claims on SPC or claims subject to sub-participation since it will no longer be required to guarantee the additional profit margin to the company, where the profit margin would be required for repayment of interest on the loan by the SPC.

One could also consider deciding on the need to seek from the potential bond buyers even before they are issued by the company, of a contractual warranty (e.g., such as a preliminary sales contract) that indeed, they intend to acquire the bonds on the conditions laid down by the SPC, that is, at a specific nominal value of the bonds and their interest, which could contribute to reducing the time of waiting for payment for securities debt by the initiator of securitisation, while also avoiding the need to take out a bank loan to pay these amounts by the SPC. In such case, the bond issue process would be considerably shorter and an SPC would need less time, potentially, to collect the funds, it may need to pay back its dues to the securitisation investor.

However, when an SPC needs to enter into a loan agreement with a bank, the amount needed to pay back the interest on the loan can be potentially generated by the company owing to calculating the amount due from the SPC to the securitisation initiator (in exchange for the claims acquired or which are subject to debt sub-participation) at a level which is even lower (i.e., lower by the value of the interest) than the nominal value of securitised debt less the amount the company needs for paying out the interest on the bonds due the bondholders. This way, the initiator of securitisation would certainly suffer a certain additional loss; however, the loss would come as a necessary cost of rising swiftly the funding needed by the SPC to pay back the interest on the loan.

In the light of the above, ideally, the SPC should strive to avoid contracting the above-mentioned loan but, the SPC would then need assurance early enough (by negotiations with potential bond buyers) as to the economic success of its planned bond issue. On the other hand, in case when the SPC is not financially liquid (e.g., due to the fact that some claims it acquired will be future (deferred) claims, the financial support such as a capital injection may come from the assignor. The SPC will be obligated to use such a support solely for financing its current operations, for example, to cover the costs of bond issue as it is difficult to imagine that the initiator of securitisation supports the SPC so that it pays back itself in exchange for securitised claims.

The next step in the actions taken by the SPC will involve issuing bonds backed by the securitised claims. Bonds are securities issued in a series, that is, representing asset rights divided into an agreed number of equal units, in which the issuer states that he is in debt to the owner of the bonds (the bondholder) and shall make a pecuniary or non-pecuniary performance in his favour (cf art 4 of the Bond Law Act[30]). This is why bonds are often referred to as debt securities since the claim that the buyer of the instrument (the bondholder) is backed with the issuer's debt correlated with the bond.[31] For this reason, the bond instrument, the SPV would need to represent that he is a debtor of the bond buyer, that is, of a bondholder. In this case, a bond issue will not result in a transfer in favour of the obligors on the (securitised) debt underwriting the bonds. As a result, due to debt securitisation of claims, buyers of the bonds issued by a special capital company would be entitled to one special claim against the client (for delivering on the performance promised in the bond documents) and not a claim against debtors from the securitised pool or a claim against the initiator.[32]

Also, note that bonds do not need to come as a document but only when so decided by the issuer. Rights from bonds that do not come as documents arise upon their recording in the register (which may be kept by: Krajowy Depozyt Papierów Wartościowych S.A. [National Securities Deposit, a joint-stock company], an investment company or a bank) and vested into the person identified therein as holder of the bonds (art 5a of the Bonds Law Act). In case of bonds that do not come as documents, issuer and bondholders' right and obligations will be laid down in the terms and conditions of the issue (art 5b of the above-mentioned piece of legislation).

The issuer (here: the SPC) is liable with all its assets for the liabilities arising from the bonds (art 8 para 1 of the Bond Law Act). In the content of the bonds, the issuer may limit his liability for obligations arising from the bonds and cap it at the amount of the proceeds or the value of the assets of the enterprise, to which the bondholder uses the priority right according to the rules set out in art 23a (income-bearing bonds) (art 8 para 2 of the above-mentioned piece of legislation). In turn, art 23 of the Bond Law Act governs the institution of income-bearing

30 More about bonds cf Ireneusz Weiss, in *Prawo papierów wartościowych, System Prawa Prywatnego, tom 19* [*Securities Law, Private Law System, vol. 19*] (Andrzej Szymański ed, CH Beck 2006) 374 and subseq. and the literature listed therein.

31 Ludwik Sobolewski, *Obligacje i inne papiery dłużne* [*Bonds and other debt securities*] (CH Beck 1999) 6.

32 Raczkowska (n 17) 66.

bonds, which may award the bondholder the right to satisfy his claims by having priority over other issuer's creditors: 1) from all or a part of, proceeds or from all or a part of assets of the enterprises financed from the funds raised through the issue of the bonds or 2) from all or some proceeds from other enterprises specified by the issuer.

Bonds may be issued by the company through: 1) a public offering mentioned in art 3 para 1 of the Act on Public Offering and Conditions of Introducing Financial Instruments to Organised Trading System and on Public Companies Law Act,[33] 2) a public offering bonds in a manner specified in art 3 para 1 of the Act mentioned in item 1, where the bonds are exempt from the provisions of the same, 3) an offer to acquire bonds in a manner other than that specified in item 1 and 2 (art 9 of the Bond Law Act).

The funds raised by the SPC from the issue of the bonds should be used by the SPC primarily to pay back its debt to the assignor under the claims acquired or subject to sub-participation. In turn, along with the SPC recovering the debt arising from securities, bondholders should be paid back and, in particular, they should receive the appropriate side performance in the form of interest. However, if the SPC had contracted a bank loan to pay back the amounts due to the assignor, the repayment should be made specifically owing to the funds obtained from debtors of securities claims.

After the entire above-described operation is completed, the SPC may be dissolved by the virtue of a resolution adopted by the shareholders' meeting, while its assets, if any, would form a part of shareholders' assets.

Also note that, apart from the above-described activities, an SPC could also enter into the following civil law contracts, whose function is related to the securitisation operation discussed in the paper: 1) a consulting contract (e.g., with a law office) where such consultant could also act as a commercial sub-issuer[34]; 2) a contract for a rating (executed with a professional pre-defined rating agency) to receive a rating, that is, have the securities issued by the SPC assessed; 3) a contract for servicing securitised claims, executed with the entity, which is obligated to accept, in the name of the SPC and on its account, funds from the SPC's debtors and to pursue, in the SPC's name and on its account, the claims related to non-performance or inappropriate performance of obligations by debtors of the securitised claims.

[33] Act of 29 July 2005 (uniform text Dz. U. of 2019 item 623, as amended).

[34] Cf art 4 item 13 of the Act of 29 July 2005.

III. Benefits from Debt Securitisation by SC

Use of claims of an SPC in the securitisation process seems a good but often underestimated solution. In such case, the initiator of securitisation indisputably benefits from the fact of 'booking out' the claims from the balance sheet of the securitisation initiator and moving them to an SPC swapped for cash paid to him by the SPC.[35] What is more, the initiator of securitisation is given the opportunity to establish the economic (financial) conditions of the transaction discussed in this paper in a manner that he finds acceptable and beneficial. However, when assigning or sub-participating his future claims to or in favour of an SPC, in exchange for the claims, he may obtain the amount that is the difference between the nominal value of the future claims and the amount that the SPC would pay him in exchange for securitised claims. But the difference should remain in the SPC designated for interest pay-out to the bondholders holding the bonds to be next issued by the above-mentioned SPC. In this context, note that, on the basis of claims acquired in the process (or which come as the subject-matter of the sub-participation contract signed with the initiator), the SPC will then issue bonds and it is very likely that the bonds will be acquired by different (large) financial institutions that would expect a return on their investment in the bonds at a specific rate of return in each financial year. The nominal value of the issued bonds should be then the same as the amount to be paid by the SPC to the initiator in exchange for securities claims, which are assigned or sub-participated.

Here, it is obvious that the economic success of the above-described securitisation performed with an SPC, would depend on only whether the claims can be recovered in full but also that would be conditional to finding some specific institutional investors ready to invest their funds into buying bonds issued by the SPC. Searching for such investors should be initiated as early as possible, potentially even before delivering the operation described in this paper, that is, even before the SPC is set up to enter the contract for assignment of receivables or a contract for sub-participation is signed. Here, one should make sure that the investors are interested in acquiring the whole pool of the bonds to be issued and whether they are going to agree on the proposed cap on the interest on the nominal value of the bonds issued. However, if, during negotiations with the above-mentioned potential investors, it turns out that they would still expect a higher interest rate on the future bonds issued by the SPC then, naturally, the fee that the SPC could pay to the initiator in exchange for the claims subject to the assignment or sub-participation would need to be relatively lower.

Through securitisation with an SPC, the initiator of securitisation is able to exercise a far-reaching capital and organisational control over such company so

35 Zawadzka (n 5) 415 and subseq.

that the economic success of the entire operation is guaranteed. In such case, it is also possible to supervise the method of using the amounts obtained from securitisation of claims by the SPC as well as how the amounts raised through the issue of securities by the SPC are invested, while bearing in mind that setting up of an SPC and the necessity to supervise it as appropriate (as regards the securitisation operation it conducts) is related with certain additional expenditures and costs.

IV. Closing Remarks

The deliberations made in the paper may lead to the conclusion that securitisation of claims through an SPC is an enterprise that brings more profit to the initiator than securitisation through a fund, since it gives more opportunities for raising a higher amount in exchange for securitised debt than when securitising through the securitisation fund. Obviously, the amount will be dependent, in particular, on the interest rate of the bonds issued by the SPC, to be guaranteed by the SPC when meeting potential investors' expectations half-way. The lower the interest rate is, the higher amount will be received by the initiator of the securitisation in exchange for the securitised debt and, this way, the SPC will have more funds to finance its current operations.

On the other hand, in case of an alternative option to securitise claims through a securitisation fund, it should be considered that, at present, there are over dozen securitisation funds operating in Poland licensed by the Financial Supervision Commission. All the funds offer relatively unfavourable financial terms of potential securitisation to potential investors. In exchange for acquisition of a pool of claims, they would be willing to pay to the initiator of securitisation (i.e., the creditor) an amount representing not more than the equivalent of 3 to 50% of the value of acquired claims.[36] It happens even when the claims acquired by the fund (and securitised) is not non-performing and there is a positive outlook as to its repayment and, on top of that, the acquired claims have collateral (e.g., material collateral). The amounts offered to the potential securitisation investors by securitisation funds in exchange for the claims acquired in the process are, in such case, sufficiently unattractive to discourage the investors from taking the offer of the securitisation fund and resign from the opportunity to use this method of securitisation. For this reason, a relatively small number of securitisation with involvement of securitisation funds has been observed in Poland.

However, on the other hand, there are certain advantages of securitisation through the securitisation fund. First, the initiator of securitisation does not need

36 The data largely apply to banks' claims against their borrowers.

to be involved in the entire complicated process, which implies the need to enter into a series of contracts, conducting complicated analyses, engaging human resources required in such case and so on. In such case, all these activities and actions are taken by a specialised entity – a securitisation fund and its cooperating institutions (entrepreneurs). Nevertheless, a loss (in the economic sense), which may reach up to several dozen percent of the value of the securitised claim, which accompanies securitisation, is too high for many entities to be counterbalanced by the last above-mentioned advantages (in an economically justified and acceptable manner).

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