This is a draft chapter/article. The final version is available in The Role of the EU in Transnational Legal Ordering - Standards, Contracts and Codes edited by Marta Cantero Gamito and Hans -W. Micklitz, published in 2020, Edward Elgar Publishing Ltd https://doi.org/10.4337/9781788118415.00016. The material cannot be used for any other purpose without further permission of the publisher, and is for private use only.

EU Securitisation Regulation: legal ordering in symbiosis with transnational bodies

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Abstract

This Chapter studies the EU Securitisation Regulation of 2017, with particular focus on its criteria for simple, transparent and standardised (STS) securitisation, as an instance of transnational legal ordering. Two discrete aspects of transnationalisation stand out. The first aspect explains why the Securitisation Regulation should be regarded as transnational legal ordering, although it is by form ordinary EU legislation. The explanation is found in what can be described as a symbiotic relationship between the EU and transnational bodies, particularly the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO), and in the involvement of a broad epistemic community in international finance. The second aspect of transnationalisation focuses on the potential extra-EU effects of the Securitisation Regulation. Possible scenarios include fragmentation of global markets, but also the Securitisation Regulation becoming a model for other jurisdictions, and norm export through a future equivalence regime for third-country securitisers.

Keywords: securitisation, STS securitisation, financial regulation, transnationalisation, EU, external effects

1 Introduction

At the end of 2017, the EU adopted the Securitisation Regulation,[1] accompanied by related amendments to prudential requirements for credit institutions and investment firms.[2] The Securitisation Regulation forms a regulatory layer on top of Member State laws and legal practices, affecting both the legality and feasibility of securitisation transactions and schemes in the EU. It recasts earlier fragmentary and sector-specific legislation and introduces a general, cross-sectoral regime with a new incentive-based regulatory approach, involving a set of criteria for 'simple, transparent and standardised' ('STS') securitisation.[3]

This Chapter studies the Securitisation Regulation as an instance of transnational legal ordering.[4] While the Securitisation Regulation represents internally oriented and formal EU lawmaking, it builds on much broader expert work, including at the global level. Particularly significant is the work of the Basel

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[1] Parliament and Council Regulation (EU) 2017/2402 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 [2017] OJ L347/35 (Securitisation Regulation). The Securitisation Regulation entered into force on 17 January 2018 and will apply from 1 January 2019 (Art 48). This time gap enables drafting and adopting the regulatory and implementing technical standards necessary for its functioning.

[2] Parliament and Council Regulation (EU) 2017/2401 of 12 December 2017 amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms [2017] OJ L347/1.

[3] See Commission, 'Proposal for a Regulation of the European Parliament and of the Council laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012' COM (2015) 472 final, 13.

[4] The notion of transnational legal ordering used here broadly follows Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015) 7–21.

Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO), both of which exemplify transnational bodies in financial regulation.[5] The relationship between transnational bodies and the EU shows symbiotic attributes in the light of the Securitisation Regulation. The symbiosis appears mutualistic in that all parties are able to advance their aims, while the exact source of regulatory ideas or influence is often difficult to pinpoint. Another aspect of transnationalisation here is that the Securitisation Regulation holds some potential for extra-EU effects, including export of its provisions, policy choices and underlying values.

We proceed as follows. Section 2 describes securitisation as a financing technique to the extent necessary to follow the discussion. It also explains the dual aim of the Securitisation Regulation to 'restart' or 'revive' EU securitisation markets and at the same time to make them more 'sustainable'.[6] Section 3 discusses the two main categories of norms by which the Securitisation Regulation aims to steer market actor behaviour. These are, on the one hand, rules that directly prescribe or prohibit certain action, and, on the other hand, the STS criteria, which affect actor behaviour through more indirect incentives. The STS criteria, in particular, have transnational origins, which the Section attempts to trace. Section 4 focuses on the different aspects of sustainability in the Securitisation Regulation. What adds particular interest to the promotion of sustainability from the standpoint of transnational legal ordering is that the EU is often expected to show particular responsibility in its actions, an expectation supported by primary EU law. Section 5 discusses the potential extra-EU effects of the Securitisation Regulation, completing our account of transnationalisation. The Chapter concludes with a summary in Section 6.

2 Securitisation and the dual aim of the Securitisation Regulation

In media and colloquial speech, one typical description of securitisation is 'a process where assets, such as mortgages, auto loans or consumer credit, are packed together and sold on to investors as bonds'.[7] While this is correct, understanding regulatory needs and means requires some familiarity with the legal structure of securitisation. The following basic structure suffices for the rest of this Chapter.

Securitisation generally involves pooling together of credit claims and refinancing the pool by selling it to a specially established company or other entity, termed 'securitisation special purpose entity' ('SSPE') in the Securitisation Regulation.[8] The SSPE in turn finances the purchase by issuing debt securities (bonds) backed by the pool, to be sold to investors in capital markets. Issued debt securities are often divided into tranches so that they come with different risk and return profiles (different levels of seniority) to cater for different investor preferences. Investors receive interest payments funded by payments made by the debtors of the credit claims. In this way, the risk associated with the credit claims is transferred from the originator of securitisation (say, a lender bank) to the SSPE and ultimately to third-party investors.[9]

The Securitisation Regulation forms part of the Commission's Capital Markets Union plan, which in general terms aims to diversify sources of financing (reduce reliance on banks), unlock capital for the

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[5] See Tony Porter, 'Post-crisis Transnational Financial Regulation and Complexity in Global Governance' in Tony Porter (ed), *Transnational Financial Regulation after the Crisis* (Routledge 2014) 7–11.
[6] See COM (2015) 472 final, 3, 7, 58.
[7] Thomas Hale, 'EU Lawmakers Reach Deal on Securitisation Market Reforms', *Financial Times* (London, 30 May 2017) <www.ft.com/content/6870f240-bb19-369b-b069-3f6247078cc4> accessed 30 September 2018.
[8] Securitisation Regulation, Art 2. Other common terms meaning the same are 'special purpose entity' ('SPE') and 'special purpose vehicle' ('SPV').
[9] See Association for Financial Markets in Europe (AFME), 'High-Quality Securitisation for Europe: The Market at a Crossroads' (2014) 5, available at <www.afme.eu/en/reports/publications/afme-high-quality-securitisation-for-europe> accessed 30 September 2018. AFME notes that investors are 'typically banks' treasury departments, insurance companies and a range of investment funds'.

economy and promote cross-border investment.[10] The Securitisation Regulation itself pursues a dual aim regarding EU securitisation markets, namely to 'restart markets' (aim 1) 'on a more sustainable basis' (aim 2).[11] Both aims should be seen in connection with the financial crisis of 2007–08.

The aim of restarting markets is understandable against the backdrop that in Europe issuance to third-party investors dropped from a peak of EUR 477.6 billion in 2006 to 'almost nothing' in 2009,[12] after which recovery has been slow.[13] The Commission and co-legislators wish to promote recovery because they see securitisation as 'an important element of well-functioning financial markets', as follows:

> Soundly structured securitisation is an important channel for diversifying funding sources and allocating risk more widely within the Union financial system. It allows for a broader distribution of financial-sector risk and can help free up originators' balance sheets to allow for further lending to the economy. Overall, it can improve efficiencies in the financial system and provide additional investment opportunities. Securitisation can create a bridge between credit institutions and capital markets with an indirect benefit for businesses and citizens (through, for example, less expensive loans and business financing, and credits for immovable property and credit cards).[14]

In the Commission's estimate, returning to pre-crisis average issuance levels could enable credit institutions to provide EUR 100–150 billion of additional credit to the private sector.[15]

The aim of promoting sustainability recognises the role that certain uses and abuses of securitisation played among the causes of the US subprime mortgage crisis, which resulted in the global financial crisis.[16] Accordingly, the Commission has called for 'creating a sustainable market for securitisation, without repeating the mistakes made before the crisis'. One particular concern for the Commission is investor protection and systemic risk management by preventing the recurrence of so-called originate-to-distribute models, in which lenders apply lax underwriting standards because they know that credit risk will be passed on to third-party investors. Other concerns include avoiding a weakening of investor due diligence, which may result from overreliance on third parties such as credit rating agencies.[17] The co-legislators emphasise, among other things, 'the risks of increased interconnectedness and of excessive leverage that securitisation raises'. Thus, the Securitisation Regulation enhances microprudential supervision of financial institutions participating in securitisation markets as well as macroprudential oversight of securitisation markets, including by the European Systemic Risk Board (ESRB).[18]

The main means under the Securitisation Regulation to 'restart markets on a more sustainable basis' is to identify STS (simple, transparent and standardised) securitisations, so that these can be afforded

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[10] See <https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/what-capital-markets-union_en> accessed 30 September 2018; Commission, 'Action Plan on Building a Capital Markets Union' (Communication) COM (2015) 468 final.

[11] COM (2015) 472 final, 3. See the Securitisation Regulation, Rec 2.

[12] AFME (n 9) 14.

[13] According to AFME statistics, annual European placed issuance (that is, issuance placed with third-party investors) rose above EUR 100 billion (to EUR 111.7 billion) in 2017 for the first time after the financial crisis. See AFME, 'Data Snapshot: AFME Securitisation: Q2 2018', available at <www.afme.eu/globalassets/downloads/data/securitisation/2018/afme-stn-securitisation-data-snapshot-q2-2018.pdf> accessed 30 September 2018.

[14] Securitisation Regulation, Rec 4. See COM (2015) 472 final, 19–20.

[15] COM (2015) 472 final, 11.

[16] For a concise overview of the various causes, see Mark Blyth, *Austerity: The History of a Dangerous Idea* (OUP 2013) 21–31. See also Orkun Akseli, 'Was Securitisation the Culprit? Explanation of Legal Processes behind Creation of Mortgage-Backed Sub-prime Securities' in Joanna Gray and Orkun Akseli (eds), *Financial Regulation in Crisis? The Role of Law and the Failure of Northern Rock* (Edward Elgar 2011) 2–13.

[17] COM (2015) 472 final, 2–3, 8, 23.

[18] Securitisation Regulation, Rec 4.

more risk-sensitive regulatory (prudential) treatment.[19] As for the aim of restarting markets, this approach appears promising because the post-crisis regulatory framework is generally seen as holding back the growth of securitisation. According to the Association for Financial Markets in Europe (AFME), the 'regulatory treatment was calibrated to reflect the weak performance of some US securitised assets – notably, US sub-prime mortgages – during the financial crisis, rather than the strong performance of European securitisation'.[20] As for the aim of promoting sustainability, the Commission importantly states that '[t]here is no intention to undo what has been put in place in the EU to address the risks inherent in highly complex, opaque and risky securitisation'.[21]

3 Norm categories in the Securitisation Regulation: rules and the STS criteria

The Securitisation Regulation aims to steer market actor behaviour by norms that can be divided into two main categories. The first category comprises rules that directly prescribe or prohibit certain action ('rules'). The second category consists in the STS criteria, which affect actor behaviour through more indirect incentives ('STS criteria'). We start with a brief look at each category and then focus on the transnational origins of the STS criteria.

The rules express, among other things, requirements, restrictions and conditions addressed to different participants in the chain of transactions that securitisation involves. This chain begins with the granting of credit to individual debtors and ends in the selling of debt securities to third-party investors. The following examples are taken from the 'General Provisions' (Chapter 1) and 'Provisions Applicable to All Securitisations' (Chapter 2) of the Securitisation Regulation, sequenced here according to the transaction chain, rather than article numbering.

To begin with, the 'Criteria for credit-granting' (Article 9) require that originators, sponsors and original lenders apply to exposures (credit claims, receivables) to be securitised 'the same sound and well-defined criteria for credit-granting which they apply to non-securitised exposures'. The specification of how this is to be achieved emphasises assessment of creditworthiness. The 'Ban on resecuritisation' (Article 8) provides that the underlying exposures in a securitisation (the securities of which were issued on or after 1 January 2019) must not include securitisation positions, but this may be permissible for a number of 'legitimate purposes'.

The 'Requirements for SSPEs' (Article 4) restrict the third countries in which an SSPE can be established, with the aim of excluding 'high-risk and non-cooperative jurisdictions' and ensuring information exchange on tax matters. The requirement of 'Risk retention' (Article 6) provides that the originator, sponsor or original lender must 'retain on an ongoing basis a material net economic interest in the securitisation of not less than 5 %', and detailed guidance is given on how this requirement is to be fulfilled. The requirement is meant to align the interests of originators, sponsors, original lenders and investors.[22] The 'Transparency requirements for originators, sponsors and SSPEs' (Article 7) comprise an elaborate list of information duties towards holders of a securitisation position, competent authorities and potential investors.

'Selling of securitisations to retail clients' (Article 3) is only allowed under a set of conditions, including performance of a suitability test. Finally, the 'Due-diligence requirements for institutional investors' (Article 5) consist of matters that an institutional investor must verify or assess before holding a securitisation position, or do while holding a securitisation position. In sum, the rules in 'General Provisions'

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[19] ibid Recs 2–3.
[20] AFME (n 9) 4. AFME represents global and European banks and other capital market players.
[21] COM (2015) 472 final, 3.
[22] Securitisation Regulation, Rec 10.

and ‘Provisions Applicable to All Securitisations’ cover more or less the entire transaction chain of securitisation.

In turn, the STS criteria serve the framework that the Securitisation Regulation creates for STS securitisations. The role of the STS criteria is to identify securitisations that fit into the STS framework, so that investments in them may benefit from more risk-sensitive prudential treatment, including preferential treatment in terms of capital requirements, as enacted separately.[23] Importantly, the availability of more risk-sensitive prudential treatment is expected to incentivise securitisations that fulfil the STS criteria, and thereby advance the dual aim of market restarting and sustainability.[24]

The STS criteria include specific requirements for simplicity (Article 20), standardisation (Article 21) and transparency (Article 22). These are discussed in Section 4 below.[25] Securitisers (originators, sponsors and SSPEs) may label their securitisation ‘STS’ only where the securitisation meets all these requirements. Further conditions are that an ‘STS notification’ of the securitisation has been made to the European Securities and Markets Authority (ESMA), which has then included the securitisation in a list maintained on its official website.[26]

While the STS criteria form part of EU secondary legislation, the EU cannot claim all credit for them as a regulatory idea. This is because the STS criteria have transnational origins and should be seen as part of global efforts to develop criteria for safer or higher quality securitisation. In fact, it is difficult if not impossible to pinpoint the exact role of the EU in these efforts.

Recital 19 of the Securitisation Regulation names two essential bases for the STS criteria: first, the Basel Committee on Banking Supervision (BCBS) and International Organization of Securities Commissions (IOSCO) criteria of 23 July 2015 ‘for identifying simple, transparent and comparable securitisations in the framework of capital sufficiency for securitisations’; second (and ‘in particular’), the European Banking Authority (EBA) opinion of 7 July 2015 ‘on a European framework for qualifying securitisation’. A closer look

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[23] For the amended prudential treatment for credit institutions and investment firms, see Reg (EU) 2017/2401. Correspondingly for insurers, see Commission Delegated Regulation (EU) 2018/1221 of 1 June 2018 amending Delegated Regulation (EU) 2015/35 as regards the calculation of regulatory capital requirements for securitisations and simple, transparent and standardised securitisations held by insurance and reinsurance undertakings [2018] OJ L227/1. We should note that preferential treatment of STS securitisations may result in either higher or lower capital requirements compared to those under the pre-amendment rules. This is because the amendments also address ‘excessively low risk weights for highly-rated securitisation tranches and, conversely, excessively high risk weights for low-rated tranches’, as noted in Rec 3 of Reg (EU) 2017/2401. For a detailed analysis, taking into account the different calculation approaches, credit quality steps and the maturity of securitisation positions, see Andrea Flunker, Tanja Schlösser and Andrea Weber, ‘The New European Framework for ABS Transactions’ (Deloitte White Paper No 81, 2018) 25–33, available at <www2.deloitte.com/content/dam/Deloitte/de/Documents/financial-services/Deloitte_European%20regulatory%20framework%20for%20ABS.pdf> accessed 30 September 2018. See also Gerard Kastelein, ‘Securitization in the Capital Markets Union: One Step Forward, Two Steps Back’ in Danny Busch, Emilios Avgouleas and Guido Ferrarini (eds), *Capital Markets Union in Europe* (OUP 2018) 483. In Kastelein’s view, the Commission’s press releases, emphasising differential treatment for STS securitisations, have created ‘the wrong impression that the [capital requirement] rules would be relaxed compared to the current situation’.

[24] According to Flunker, Schlösser and Weber (n 23, at 32), from the standpoint of investor institutions, ‘equity capital relief for high-quality securitisations appears desirable and is fundamentally capable of stimulating investment in certain securitisation positions’, provided that ‘the STS classification does not give rise to any difficulties or doubts’ and ‘alternative investments available to the institutions do not require a lower level of regulatory capital in comparison’. On earlier EU steps towards differentiated regulatory treatment, concerning the prudential requirements for insurers and the liquidity of credit institutions, see COM (2015) 472 final, 4–5.

[25] For simplicity, this Chapter only discusses provisions on long-term securitisation. Corresponding requirements for short-term securitisation known as ABCP (asset-backed commercial paper) securitisation are found in Arts 23–6 of the Securitisation Regulation.

[26] Securitisation Regulation, Arts 18 and 27. An STS securitisation does not benefit from more risk-sensitive prudential treatment automatically, but must comply with additional requirements laid down in the capital requirement rules. For an overview, see Kastelein (n 23) 480–81.

at these bases gives further insights into the development of the STS criteria, especially regarding the EU's role in the transnational processes involved.

The BCBS and IOSCO, whose joint Task Force on Securitisation Markets (TFSM) was charged with the groundwork for the above-mentioned criteria, do not specifically mention the EU in their account of developing the criteria. They state, rather generally, that the 'TFSM collected data, surveyed national authorities and market participants, and undertook bilateral interviews as part of its assessment of securitisation markets'. Based on this work, they 'published for consultation 14 criteria to identify certain features of simple, transparent and comparable securitisations'.[27]

However, the Commission mentions the following, describing its own collection and use of expertise: 'The Commission has gained valuable insights through its participation in the discussions and exchange of views informing the BCBS-IOSCO joint task force on securitisation markets and through its involvement in the BCBS work on the review of the capital treatment.'[28] In the BCBS, the EU is represented by the European Central Bank (ECB) and the Single Supervisory Mechanism, while the Commission and the EBA are observers,[29] which can be 'involved in task forces and working groups, and may contribute comments on consultative papers'.[30] We should note the role of the ECB and the EBA as producers of influential discussion papers.[31] In IOSCO, the Commission and ESMA are associate members (ESMA is also an observer to the IOSCO Board).[32] All in all, the relationship of the EU to the BCBS and IOSCO appears to have been a two-way street in terms of information and influence. If this observation is correct, then the EU can be credited for participating even in the transnational origins of the STS criteria.

It is also useful to look at how the EBA has perceived its work in relation to work by the BCBS and IOSCO. In one telling passage the EBA observes that the recommendations provided in its report 'will have to be revisited depending on the progress and decisions taken by the Basel and IOSCO Committees on the definition of a simple transparent and comparable securitisations framework, at the global level, and the re-calibration of the BCBS 2014 securitisation framework to provide regulatory recognition to STC securitisations'. And further: 'The criteria proposed in this report for the definition of qualifying securitisations may have to be amended based on the final STC [simple, transparent and comparable] framework adopted at the global level.'[33] Given that the STS criteria are based 'in particular' on the EBA

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[27] Basel Committee on Banking Supervision and Board of the International Organization of Securities Commissions (BCBS and IOSCO Board), *Criteria for Identifying Simple, Transparent and Comparable Securitisations* (Bank for International Settlements 2015) 4, available at <www.bis.org/bcbs/publ/d332.pdf> accessed 30 September 2018.

[28] COM (2015) 472 final, 11.

[29] <www.bis.org/bcbs/membership.htm> accessed 30 September 2018.

[30] Jan Wouters and Jed Odermatt, 'International Banking Standards, Private Law, and the European Union' in Marise Cremona and Hans-W Micklitz (eds), *Private Law in the External Relations of the EU* (OUP 2016) 184.

[31] For a brief account, see Deloitte, 'STS Easy as STC, Easy as 1, 2, 3. Or Is It? Operational Efforts to Revive the Securitisation Market' (February 2016, updated May 2018) 2, available at <www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/deloitte-uk-fs-banking-sts-easy-as-stc.pdf> accessed 30 September 2018. Deloitte refers to a joint paper by the Bank of England (BoE) and the ECB in May 2014, suggesting it as 'the first public move by central banks to consider differentiating between securitisation transactions that met certain qualifying criteria', and to a paper by the EBA in October 2014. Deloitte also notes that a joint paper by the BCBS and IOSCO in December 2014 'touched many of the same topics as the ECB/BoE paper of six months earlier, but it also drew together some of the wider thinking that had gone on globally'.

[32] <www.iosco.org/about/?subsection=membership&memid=2> accessed 30 September 2018. See Antonio Marcacci, 'The EU in the Transnational Financial Regulatory Arena: The Case of IOSCO' in Cremona and Micklitz (n 30) 215–19.

[33] European Banking Authority, 'EBA Report on Qualifying Securitisation: Response to the Commission's Call for Advice of January 2014 on Long-Term Financing' (2015) 112, available at <www.eba.europa.eu/documents/10180/950548/EBA+report+on+qualifying+securitisation.pdf> accessed 30 September 2018. The report accompanies the 'Opinion of the European Banking Authority on a European Framework for Qualifying Securitisation' (EBA/Op/2015/14, 7 July 2015), available at <www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-14+Opinion+on+qualifying+securitisation.pdf> accessed 30 September 2018.

opinion, the above implies that the STS criteria aim to avoid unnecessary contradictions with the corresponding global criteria. Even so, the STS and STC criteria are far from being identical.[34]

We could continue mapping the various transnational influences behind the STS criteria on the basis of further written sources, but that would probably never result in a full picture. This is because part of the influences is likely to be more nebulous by nature, and probably best explained as workings of an epistemic community in international finance.[35] This relates to what Daniel Mügge describes as 'the emergence over the years of a transatlantic circle of financial regulators, experts, and professionals who share a common understanding of the regulatory world they inhabit'.[36] What fits into this picture is the Commission telling that it 'has met with public authorities, central banks, private sector representatives and the IMF' to collect information and views on securitisation.[37] Moreover, private actors have developed their own notions (and labels) of 'high-quality securitisation', which have probably informed the broader epistemic community.[38] In fact, the discussions of such notions first started within the industry.[39]

In sum, the EU has played a role in global efforts to develop criteria for safer or higher quality securitisation. The European STS criteria should be seen as part of those efforts, while the global STC criteria have provided an essential basis for the STS criteria. The relationship between the EU and the relevant transnational bodies, particularly the BCBS and IOSCO, can be described as a mutualistic symbiosis in that all parties manage to advance their aims. To be sure, they share the same aims to a great extent. This symbiotic relationship and the involvement of a broad epistemic community, if nothing else, justify speaking of the Securitisation Regulation as transnational legal ordering.

The BCBS and IOSCO have received input from the EU in the shape of information and expertise. What is more, they have been presented with a partial concretisation of their transnationally developed regulatory model, and consequently a partial substantiation of the global efforts involved. Indeed, the STS criteria can be understood as a European elaborated incarnation of the global STC criteria, despite clear differences between the two, and as a vessel for transnationally developed regulatory ideas.[40]

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[34] The original STC criteria comprise 14 criteria, each of which relates to one or more of the three purposes: simplicity, transparency and comparability. In addition, each criterion addresses one of the following types of risk: asset risk ('Generic criteria relating to the underlying asset pool'), structural risk ('Transparency around the securitisation structure') or fiduciary and servicer risk ('Governance of key parties to the securitisation process'). See BCBS and IOSCO Board (n 27) 5–13. The original set of criteria was supplemented with additional criteria when the STC criteria were incorporated in the Basel III capital framework for securitisation (document references in n 40 below). For a detailed comparison between the STC criteria and STS criteria as proposed by the Commission, see Dominic M Lerario, 'The Basel Committee and the International Organization of Securities Commissions' "Criteria for Identifying Simple, Transparent and Comparable Securitisations": Not So Simple', 42–67, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727772> accessed 30 September 2018. Lerario finds (at 44) that '[a]lthough similar, these two legal frameworks could, if adopted by different jurisdictions, lead to legal heterogeneity and instability'.

[35] On the notion of epistemic community, see generally Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 International Organization 1, 3. Briefly defined, an epistemic community is 'a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area'. According to Haas, the members of an epistemic community share normative and principled beliefs, causal beliefs, notions of knowledge validity, and have a common policy enterprise, meaning 'a set of common practices associated with a set of problems to which their professional competence is directed'.

[36] Daniel Mügge, 'Introduction' in Daniel Mügge (ed), *Europe and the Governance of Global Finance* (OUP 2014) 3–4.

[37] COM (2015) 472 final, 11. The Commission notes having built in its own public consultations on three public consultations carried out in 2014 by the ECB and the Bank of England, the BCBS and IOSCO, and the EBA, respectively.

[38] AFME (n 9) 8. AFME refers to the Prime Collateralised Securities (PCS) industry initiative. See <http://pcsmarket.org> accessed 30 September 2018.

[39] See Deloitte (n 31) 2.

[40] cf BCBS and IOSCO Board (n 27) 3. The BCBS and IOSCO note that the STC criteria 'are not, of themselves, a prescription for regulatory action'. Therefore, one may question the correctness of calling them a 'regulatory model'.

Alternatively, the Securitisation Regulation and the STS criteria can be seen as something to which transnational normativity attaches, and from which transnational normativity acquires its legality, meaning here its legal form and legal authority. The EU in turn has received a transnationally developed regulatory model to build on and adapt for its purposes.[41] Arguably, a transnational regulatory model comes with transnational normativity and a degree of justificatory and legitimating force.

4 Sustainability in the Securitisation Regulation

The only time the Securitisation Regulation explicitly mentions sustainability is a reference in Recital 2 to 'the Commission's priority objective of supporting job creation and a return to sustainable growth'. In contrast, the Commission Proposal for a Securitisation Regulation mentions it several times, usually in connection with the intention to create a sustainable market for securitisation. The Commission Proposal does not define 'sustainability', but uses it often in considerations of financial stability and investor protection, with references to the lessons of the US subprime mortgage crisis and the global financial crisis.[42] Clearly, then, in the Commission Proposal and the Securitisation Regulation, sustainability is seen above all as the desirable functioning of securitisation markets, rather than as attainment of (non-financial) goals external to those markets.

We noted in Section 3 that the 'General Provisions' (Chapter 1) and 'Provisions Applicable to All Securitisations' (Chapter 2) of the Securitisation Regulation deal with different links (and participants) in the chain of transactions that securitisation involves. Covering the entire securitisation chain in this way is indeed advisable from the perspective of sustainability as the desirable functioning of securitisation markets. For example, the problem of originate-to-distribute models and irresponsible or even abusive lending practices most likely cannot be tackled by merely regulating lending standards and supervision.[43] What is needed in addition is regulation of the other links in the transaction chain so as to diminish the demand for securitised debt of dubious lending standards and the profitability of originate-to-distribute models.[44]

However, the primary contribution of the Securitisation Regulation to creating a sustainable securitisation market is the STS criteria (and recalibrated prudential treatment). As the BCBS and IOSBO note, '[a]n important lesson from the 2007–09 financial crisis was that the securitisation structure itself can represent a source of risk'. This is so because 'complex and opaque structures may render it unfeasible for some investors to understand the cash flow-generating mechanism and where disruptions may arise in the future'.[45] The STS criteria attempt to incentivise market actors away from such structures (with the

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But the STC criteria should be regarded as a regulatory model at least since they were incorporated in the Basel III capital framework for securitisation. See Basel Committee on Banking Supervision, *Basel III Document: Revisions to the Securitisation Framework*, Amended to Include the Alternative Capital Treatment for 'Simple, Transparent and Comparable' Securitisations, 11 December 2014 (rev July 2016) (Bank for International Settlements 2016), available at <www.bis.org/bcbs/publ/d374.pdf> accessed 30 September 2018; Basel Committee on Banking Supervision, *Standard: Capital Treatment for Short-Term 'Simple, Transparent and Comparable' Securitisations*, May 2018 (Bank for International Settlements 2018), available at <www.bis.org/bcbs/publ/d442.pdf> accessed 30 September 2018.

[41] COM (2015) 472 final, 5.

[42] ibid 2–10.

[43] See Robert J Shiller, *Finance and the Good Society* (Princeton University Press 2012) 51. Shiller writes: 'There remains so much in the process of issuing a mortgage that simply cannot be seen and policed by the government.' He points out the typical imbalance between 'the least financially informed party, the future homeowner(s), and sophisticated professional financial representatives'. In the Securitisation Regulation, securitisations of residential loans are subject to certain special requirements regarding the marketing and underwriting of loans. See Arts 9(2) and 20(10).

[44] See Teemu Juutilainen, 'Law-Based Commodification of Private Debt' (2016) 22 European Law Journal 743, 752–3.

[45] BCBS and IOSCO Board (n 27) 3.

availability of more risk-sensitive prudential treatment to STS securitisations). As regards the risks of STS securitisation, the Commission explains: 'The "STS standard" does not mean that the securitisation concerned is free of risks, but means that the product respects a number of criteria and that a prudent and diligent investor will be able to analyse the risk involved.'[46]

The STS criteria comprise specific requirements for simplicity (Article 20), standardisation (Article 21) and transparency (Article 22).[47] The following examples are meant to provide a brief but representative overview of the types of requirement. Therefore, the discussion is necessarily selective and simplified.

The simplicity requirements include that the title to the underlying exposures (credit claims, receivables) must be acquired by the SSPE by way of a true sale or assignment or transfer with the same legal effect in a manner enforceable against the seller or any other third party (Article 20(1));[48] the underlying exposures acquired by the SSPE must meet predetermined, clear and documented eligibility criteria which do not allow active portfolio management of the exposures on a discretionary basis (Article 20(7)); the securitisation must be backed by a pool of underlying exposures that are homogeneous in terms of asset type, taking into account the cash flow-related specific characteristics of the asset type, and a pool of underlying exposures must comprise only one asset type (Article 20(8)); the underlying exposures must not include any securitisation position, that is to say, resecuritisation is not allowed (Article 20(9)); the underlying exposures must be originated in the ordinary course of the originator's or original lender's business pursuant to underwriting standards no less stringent than those applied at the time of origination to similar exposures that are not securitised (Article 20(10)).

The standardisation requirements include that the originator, sponsor or original lender must satisfy the risk-retention requirement in accordance with Article 6 (Article 21(1)); the interest-rate and currency risks arising from the securitisation must be appropriately mitigated, disclosing any measures to that effect; the SSPE must not enter into derivative contracts, except for hedging interest-rate or currency risks, and must ensure that the pool of underlying exposures does not include derivatives (Article 21(2)); any referenced interest payments under the securitisation assets and liabilities must be based on generally used market interest rates, or generally used sectoral rates reflective of the cost of funds, and must not reference complex formulae or derivatives (Article 21(3)). Further standardisation requirements concern, among other things, the effects of an enforcement or an acceleration notice (Article 21(4)) and the contents of the transaction documentation (Article 21(6)–(10)).

The transparency requirements mainly include information duties, such as making available data on static and dynamic historical default and loss performance for substantially similar exposures to those being securitised (Article 22(1)) and a liability cash flow model (Article 22(3)). Additionally, they include external verification of a sample of the underlying exposures before issuance of the securities resulting from the securitisation (Article 22(2)) and STS securitisation-specific modifications to certain transparency requirements applicable to all securitisations (Article 22(5)).

One transparency requirement should be mentioned separately because it broadens the idea of sustainability in the Securitisation Regulation beyond financial stability, investor protection and other goals immediately related to the functioning of securitisation markets, namely to environmental considerations.[49] This requirement, found in Article 22(4), provides that in a securitisation where the

[46] COM (2015) 472 final, 15.

[47] The corresponding provisions on ABCP (asset-backed commercial paper) securitisations in Arts 23–6 are again omitted from discussion.

[48] This requirement entails that synthetic securitisations currently cannot be STS. In a synthetic securitisation, the credit risk of the underlying exposures is transferred through a derivative contract or guarantees. See the Securitisation Regulation, Rec 24 and Art 45.

[49] For the broader context, see Commission, 'Action Plan: Financing Sustainable Growth' (Communication) COM (2018) 97 final, 2. The term 'sustainable finance', the Commission notes, 'generally refers to the process of taking due account of environmental and social considerations in investment decision-making, leading to increased investments

underlying exposures are residential loans or auto loans or leases, the originator and sponsor must publish the available information related to the environmental performance of the assets financed by such loans or leases. Moreover, the need to extend this provision to securitisation where the underlying exposures are not residential loans or auto loans or leases will be reviewed by 1 January 2022, 'with a view to mainstreaming environmental, social and governance disclosure' (Article 46(f)).

Another noteworthy sustainability-related provision, and a further aspect of sustainability, is found in Article 4, 'Requirements for SSPEs' (one of the 'General Provisions' of Chapter 1). Indeed, these requirements can be linked to social considerations of sustainability.[50] They provide that SSPEs must not be established in a third country if (a) the third country is listed as a high-risk and non-cooperative jurisdiction by the Financial Action Task Force (FATF),[51] or (b) the third country has not signed an agreement with a Member State to ensure full compliance with certain standards of the Organisation for Economic Co-operation and Development (OECD) on exchange of information on tax matters, and effectiveness of that exchange, including any multilateral tax agreements. Besides broadening sustainability considerations, the FATF and OECD connection further completes the picture of the Securitisation Regulation as legal ordering in symbiosis with transnational bodies.

It is not the purpose of this Chapter to assess the sufficiency of the STS criteria or other 'sustainability features' (to coin a term for them) in the Securitisation Regulation. Still, we should note that the effects of these features depend on several other factors, including supervision. Doubts have been raised in the literature, among other things because the main supervisory tasks and powers are allocated to national authorities (Articles 29–30).[52] At the central level, the three European Supervisory Authorities (ESAs, that is, ESMA, the EBA and EIOPA, the European Insurance and Occupational Pensions Authority) play chiefly coordinating roles (Article 36). However, the European Systemic Risk Board (ESRB) is entrusted with macroprudential oversight of the EU securitisation market (Article 31).

How should we assess the sustainability features of the Securitisation Regulation from the standpoint of transnational legal ordering? Speaking of the Securitisation Regulation as transnational legal ordering was justified in Section 3 above largely on the basis of symbiotic attributes in the relationship between the EU and transnational bodies, particularly the BCBS and IOSCO, the developers of the STC criteria. But the STS criteria deviated significantly from the STC criteria even in the Commission Proposal for a Securitisation Regulation.[53] Further deviations and additional sustainability features were introduced and debated in the course of the EU legislative process, which culminated in terms of content with the interinstitutional compromise of 30 May 2017.[54] What happened in the adoption of the Securitisation Regulation at the end of 2017 was that the transnational regulatory model and transnational normativity of

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in longer-term and sustainable activities', while 'environmental considerations refer to climate change mitigation and adaptation, as well as the environment more broadly and related risks' (footnote omitted).

[50] ibid. According to the Commission, the social considerations of sustainable finance 'may refer to issues of inequality, inclusiveness, labour relations, investment in human capital and communities'.

[51] The FATF is an intergovernmental body to set standards and promote efficient implementation of measures for combating threats to the integrity of the international financial system, especially money laundering and terrorist financing. See <www.fatf-gafi.org> accessed 30 September 2018. See also Wouters and Odermatt (n 30) 188–9.

[52] See Vincenzo Bavoso, 'High Quality Securitisation and EU Capital Markets Union – Is It Possible?' (2017) 7 Accounting, Economics, and Law: A Convivium (issue 3) 24–5, available at <www.degruyter.com/downloadpdf/j/ael.2017.7.issue-3/ael-2016-0008/ael-2016-0008.pdf> accessed 30 September 2018. Bavoso discusses the Commission Proposal for a Securitisation Regulation (COM (2015) 472 final).

[53] See Lerario (n 34) 42–67.

[54] For details, see European Parliament, 'Common Rules and New Framework for Securitisation' (Briefing: EU Legislation in Progress, January 2018) 5–8, available at <www.europarl.europa.eu/RegData/etudes/BRIE/2017/608777/EPRS_BRI(2017)608777_EN.pdf> accessed 30 September 2018.

the global STC criteria were partially – but just partially – legalised, that is to say, vested with legal form and legal authority, that is, those of EU secondary legislation.

This partiality, insofar as it results from sustainability features, is consistent with the general observation that the EU is often expected to show particular responsibility in its actions. Indeed, these expectations find strong support in EU primary law.[55] From the standpoint of transnational normativity, and transnational bodies, partiality may be seen as a mixed blessing. On the one hand, partial legalisation should be better than no legalisation at all. On the other hand, partial legalisation that involves European idiosyncrasies, whether or not they count as sustainability features, easily reduces cross-border compatibility with the rest of the world. This calls for attention whenever the EU engages in transnational legal ordering.

5 Securitisation Regulation and extra-EU effects

Viewed from outside the EU, the Securitisation Regulation probably appears uninviting. The reasons include its detailedness and unfamiliar content. Even if an external actor knows the STC criteria developed by the BCBS and IOSCO and recognises their family resemblance with the STS criteria in the Securitisation Regulation, differences between the two are likely to cause confusion.[56]

What is more, the Securitisation Regulation effectively shuts third-country securitisers out of the STS framework. This follows from Article 18, according to which '[t]he originator, sponsor and SSPE involved in a securitisation considered STS shall be established in the Union'. The following quote from Alexander Batchvarov of Merrill Lynch may well reflect a common sentiment within the industry: 'This is just another brick in the wall of the domestication and fragmentation of global capital markets. Suddenly, anything that Europeans buy outside Europe becomes non-STS.'[57]

Although it currently seems that shutting third-country securitisers out of the STS framework and consequently compartmentalising global securitisation markets will be the main external effects of the Securitisation Regulation, this is not necessarily so. We can imagine at least two scenarios where the Securitisation Regulation affects the development of law outside the EU. In effect, this would mean export of the provisions, policy choices and underlying values of the Securitisation Regulation, to a greater or lesser extent. Such scenarios can be referred to as secondary transnationalisation, provided that the Securitisation Regulation in itself is accepted as an instance of transnational legal ordering (primary transnationalisation), as proposed in this Chapter on the basis of the symbiotic relationship between the EU and transnational bodies, particularly the BCBS and IOSCO, and the involvement of a broad epistemic community in international finance.

In one scenario, the Securitisation Regulation becomes a model followed by other jurisdictions due to its substantive merits. This seems unlikely given that regulatory preferences vary between jurisdictions, while the Securitisation Regulation represents a legislative compromise reached under particular circumstances,[58] rather than an optimal universal model. But it is not impossible either. Indeed, Steven L Schwarcz, a prominent US scholar, argues that 'Europe's STS proposal goes a long way towards addressing complexity [as a cause of market failures]; the United States should consider a similar regulatory

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[55] See, in particular, Art 3 of the Consolidated Version of the Treaty on European Union [2016] OJ C202/1.

[56] See Lerario (n 34) 44–5.

[57] Thomas Hale and Jim Brunsden, 'EU and US Securitisation Split Worries Investors', *Financial Times* (London, 6 January 2016) <www.ft.com/content/7f98d60a-b46b-11e5-b147-e5e5bba42e51> accessed 30 September 2018. cf Annelise Riles, 'Managing Regulatory Arbitrage: A Conflict of Laws Approach' (2014) 47 Cornell International Law Journal 63, 75. Riles makes the general point that regulatory differences can be beneficial in financial contagion situations as 'a "safety valve" against spreading financial crisis' (footnote omitted).

[58] See European Parliament (n 54) 5–8.

approach'.[59] Now, jurisdictions planning to introduce a similar regulatory approach may be more inclined towards adopting the global STC criteria than the European STS criteria, but the STS criteria and the related rules and regulatory and implementing technical standards may prove to be useful models for turning the STC criteria into more concrete and detailed domestic rules.[60] The EU is an 'early mover' in regulation of so-called high-quality securitisation, so other jurisdictions may wish to follow the EU so as to benefit from the efforts it has invested in the Securitisation Regulation.

Another scenario involves introducing an equivalence regime for third-country securitisers. In simple terms, the idea of an equivalence regime is that it 'allows countries with similar enough legislation to the EU to operate under their own rules without forcing firms to comply with two sets of laws'.[61] Most of EU legislation on financial regulation from recent years enables the Commission to carry out equivalence assessments and adopt equivalence decisions,[62] but this is not the case with the Securitisation Regulation, apparently for Brexit-related reasons.[63]

Introduction of an equivalence regime in the future is quite possible, especially since this matter is included in the review provisions of Article 46 of the Securitisation Regulation. In Article 46(e), the Commission is tasked with considering, for a report to be presented by 1 January 2022, 'whether in the area of STS securitisations an equivalence regime could be introduced for third-country originators, sponsors and SSPEs, taking into consideration international developments in the area of securitisation, in particular initiatives on simple, transparent and comparable securitisations'. An equivalence regime could result in the Securitisation Regulation causing external effects, even export of the STS criteria. For, as Eilís Ferran more generally explains, 'the EU equivalence regime for third countries operates as a mechanism for the export of EU financial regulation: as the price for access, the EU insists on the third-country rules being close to its own and will do a deep dive into the third-country requirements to check that this is the case'.[64]

However, the reference in Article 46(e) to 'initiatives on simple, transparent and comparable securitisations' may be taken as a hint that equivalence would not be assessed strictly in reference to the European STS criteria, but rather to a set of broader principles that the STS criteria and the global STC criteria share. This would be in line with the scholarly literature more generally calling for 'a less heavy-handed, outcomes-oriented approach' to equivalence assessments.[65] The main export would then not be the STS criteria as such, but a broader transnationally developed regulatory model embodied by the STS criteria.

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[59] Steven L Schwarcz, 'A Global Perspective on Securitized Debt' in Busch, Avgouleas and Ferrarini (n 23) 502. However, in the STC context, Schwarcz refers to 'hearsay that some US regulators might not want to allow preferential regulatory capital treatment for high-quality securitization transactions'.

[60] cf Marke Raines, 'UK Regulation of Term Securitization Following a Hard Brexit' in (2018) 13 Capital Markets Law Journal 534, 559–64. Discussing a 'hard Brexit' scenario, Raines seems to suggest that the UK Parliament should reject both 'the STS regime' and 'the BCBS STC principles' as being based on 'a false premise' regarding the dangerousness of term securitisation.

[61] Fiona Maxwell, 'Brexit Cracks Europe's Capital Markets Vision', *Politico* (8 February 2018) <www.politico.eu/article/brexit-cracks-europes-capital-markets-vision> accessed 30 September 2018.

[62] See <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/recognition-non-eu-financial-frameworks-equivalence-decisions_en> accessed 30 September 2018; Commission, 'EU Equivalence Decisions in Financial Services Policy: An Assessment' (Commission Staff Working Document) SWD (2017) 102 final, available at <https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017_en.pdf> accessed 30 September 2018.

[63] See Niamh Moloney, 'EU Financial Governance after Brexit: The Rise of Technocracy and the Absorption of the UK's Withdrawal' in Kern Alexander, Catherine Barnard, Eilís Ferran, Andrew Lang and Niamh Moloney, *Brexit and Financial Services: Law and Policy* (Hart Publishing 2018) 89; Niamh Moloney, 'Capital Markets Union, Third Countries and Equivalence: Law, Markets and Brexit' in Busch, Avgouleas and Ferrarini (n 23) 100–101.

[64] Eilís Ferran, 'Regulatory Parity in Post-Brexit UK–EU Financial Regulation: EU Norms, International Financial Standards or a Hybrid Model?' in Alexander et al (n 63) 16.

[65] ibid 19.

6 Conclusion

This Chapter set out to study the new EU Securitisation Regulation as an instance of transnational legal ordering. To sum up the findings, we return to two discrete aspects of transnationalisation. These can be called primary and secondary transnationalisation for the purposes of presentation.

Primary transnationalisation explains why it is apt to speak of the Securitisation Regulation as transnational legal ordering, even though it is ordinary EU legislation. The explanation is found in the relationship between the EU and transnational bodies, particularly the BCBS and IOSCO, and in the involvement of a broad epistemic community in international finance. The relationship between the EU and the transnational bodies can be described as a mutualistic symbiosis in that all parties are able to advance their aims. The global STC criteria jointly developed by the BCBS and IOSCO were an essential basis for the European STS criteria in the Securitisation Regulation. The EU in turn provided the BCBS and IOSCO with information and expertise. Even more importantly, by adopting the Securitisation Regulation the EU has partially legalised the transnational regulatory model and transnational normativity of the STC criteria, that is, has vested them with legal form and legal authority. This legalisation is merely partial because the STS criteria deviated significantly from the STC criteria even in the Commission Proposal for a Securitisation Regulation and further deviations were added in the course of the EU legislative process. Many of the deviations can be explained as additional 'sustainability features', whether motivated by investor protection, financial stability or environmental considerations – or by crime prevention and security or exchange of information in tax matters, which are causes that complement our picture of transnationalisation and the symbiosis observation with two further transnational bodies, namely the FATF and the OECD.

Secondary transnationalisation in turn focuses on effects that the Securitisation Regulation may have outside the EU. The Securitisation Regulation in its current form will shut third-country securitisers out of the STS framework and may thus cause fragmentation of global markets. But these are not necessarily the only, or the most significant, extra-EU effects that the Securitisation Regulation may produce. Indeed, the Securitisation Regulation could affect the development of law in other jurisdictions in at least two conceivable ways. First, the Securitisation Regulation could become a model for other jurisdictions due to its substantive merits. The EU being an 'early mover' in this area may incentivise others to follow its choices so as to save costs of developing legislation. Second, introduction of an equivalence regime for third-country securitisers, which is preliminarily envisioned in the review provisions of the Securitisation Regulation, could result in export of the STS criteria or a set of broader principles shared by the STS criteria and the STC criteria.