



Q4 2019

Intro | Croatia

- **Not only must justice be done; it must also be seen to be done.** Courts are crucial to any functioning democracy. As this edition of our newsletter will show, courts have an enormous influence on business in general, and in particular, the banking industry. Take Austria for instance, where the Supreme Court's interpretation of banking secrecy is severely impeding a functioning market for non-performing loans.

Judges are free to take unpopular decisions as they do not need to worry about whether a decision will get them re-elected or not. This freedom cannot be taken for granted but must be exercised and defended by the judiciary.

According to the latest EU Justice Scoreboard, Croatia has the most judges per inhabitant, and spends significantly more on its courts than the average EU member state. Unfortunately, this investment does not translate into public trust given that the public and companies' perception of the independence of courts and judges in Croatia is ranked the worst in the EU. Only fewer than 20 % of each of these groups give a rating of "fairly good" or "very good" according to Eurobarometer. The overwhelming reason for this mistrust is the perceived interference and pressure from government and politicians.

Regardless of whether this assessment is fair or not – courts need to guard their reputations as being completely independent from politics. The best way to assert this independence is by continuously and reliably rendering decisions based only on the law regardless of political wishes or popular opinion.



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Finance general | Austria

- **The Supreme Court has expressly changed its line of decision-making** on the recognition of collateral created under foreign jurisdictions by way of security transfer (*Sicherungsübereignung*). According to its former and now abandoned legal opinion, the Supreme Court had assumed that foreign security transfers where the transferred asset remains with the transferor, become invalid upon such asset being brought to Austria, as the mere agreement that the transferor shall hold such asset on behalf of the transferee (*Besitzkonstitut*) does not comply with the mandatory publicity requirements (*Publizitätserfordernissen*). Consequently, in the future such collateral will have to be recognised by Austrian courts even if it does not meet Austrian mandatory publicity requirements.

[Philipp Kalser](#)

Real estate finance | Poland

- **Syndication with German Pfandbriefbanks**
In the case of loan syndication with German Pfandbriefbanks (issuing covered bonds) and involving Polish companies and assets, additional collateral needs to be provided by Polish obligors. In order to comply with Pfandbriefbanks requirements (The Pfandbrief Act) and participate in syndication, those banks require (i) first-ranking mortgage established in a pfandbriefbank's name over real estate that may be directly enforced without the consent from other lenders and (ii) the Polish notarial deed on voluntary submission to enforcement. Such deed is not a security instrument itself, but expedites the enforcement proceedings as the lender does not have to provide evidence of its receivables against the borrower.

[Marcin Antczak / Weronika Kapica](#)

Market place | Slovenia

- **In July 2019, the Slovenian Constitutional Court** annulled the provision of the Banking Act previously exempting banks from the mandatory employee participation rules. These – now applicable to banks as well – require at least one third of the supervisory board (or equivalent in one-tier board structures) members to be employee representatives. Companies with over 500 employees must also have at least one workers' (executive) director. Not convinced by the Government's justifications of the *status quo* citing the necessity for higher

standards of hiring for banks' management cadre and concerns over potential conflicts of interest, the Court grounded its decision on the general constitutional principle of equality before the law.

[Jurij Lampič](#)

Consumer finance | Croatia

- **On 3 August 2019 the Croatian Supreme Court** decided on the third revision brought in the collective proceeding initiated by consumers against banks regarding CHF loans ("Decision"). The loan agreements contained a currency clause linking the principal to CHF and a right of the banks to unilaterally change variable interest rates. The Decision states that the CHF currency clauses were unfair and thus, null and void. However, since the Decision was rendered in collective proceedings it should have little to no significance for individual proceedings initiated by borrowers. Also, since the Decision ignores certain of Croatia's EU law obligations and the Croatian constitution it should have little value for borrowers' claims.

[Ozren Kobsa](#)

Corporate finance | Austria

- **For the first time the Austrian Supreme Court (OGH)** has decided on the validity of an interest floor provision in the context of a corporate loan agreement. While the OGH in recent years ruled in several decisions that a reference rate floor is invalid for consumer loans (unless a corresponding and plausible reference rate cap has been agreed), it now held that a minimum interest rate (interest floor) can be validly agreed upon in a corporate loan agreement – regardless of whether an interest cap has been put in place or not. The decision indicates that interest rate clauses (including interest floors) which are clear and individually agreed upon, determine the main performance aspects of a corporate loan agreement (and cannot be deemed mere ancillary provisions). Therefore, the OGH expressly did not apply the statutory rules which may render grossly disadvantaging ancillary provisions void (§ 879 (3) ABGB) to the interest floor clause and confirmed the validity of the interest floor.

[Matthias Pressler](#)

Finance general | Austria

- **The Austrian Supreme Court (OGH)** has held in past judgments that an assignment of loan receivables in violation of Austrian banking secrecy is null and void, unless the bank's interests are prevailing (or certain other exemptions apply) (OGH 9 Ob 34/12h; 9 Ob 62/16g). In a recent judgment the Supreme Court

concluded that this would also be true in case of an assignment of a loan receivable to a credit insurer (OGH 7 Ob 20/18v). The Supreme Court does not elaborate on possible prevailing interests of the bank. This is unfortunate because good reasons to do so would have existed: Any bank has a legitimate interest to reduce its risk exposure by obtaining insurance (which may also be eligible as risk mitigation under CRR). If the insurer pays under the insurance, the insured receivables pass over to it (and no insurer will waive this right). In our opinion, the interests of the bank are prevalent in such instances and the banking secrecy should not prevent an assignment.

[Peter Feyl / Michael Schmiedinger](#)

Special Situations | Poland

- **In 2019 two particularly interesting restructuring cases** have been (largely) completed in Poland. The first one concerns GetBack, a disgraced NPL manager, that defaulted on its c. PLN 3bln debt causing a public outcry and criminal investigations. In May 2019 an arrangement adopted by GetBack's creditors gained the court's approval. The approval is not final yet, as some creditors favoring insolvency decided to challenge it. The second case relates to Ruch, a press distribution company established in 1918, operating a network of kiosks across Poland. After a court battle, Ruch secured a restructuring for its c. PLN 200m debts.

[Daniel Radwanski](#)

Special Situations | Hungary

- **A Digitalisation and FinTech Advisory Board** was established by the Hungarian National Bank, the first of his kind in the region. The Hungarian National Bank encourages market participants to introduce FinTech innovations in a safe manner and aims to help the digital transformation of the Hungarian market. The advisory board is dedicated to supporting these goals, while its ultimate purpose is to improve the quality of financial services available to consumers and make Hungary attractive for innovative companies. In its first meeting, the advisory board discussed a FinTech strategy with the involvement of market participants.

[Virág Palguta](#)

For further information, please contact any of the individuals named above, your usual contacts at Schönherr or any member of our [banking, finance & capital markets practice group](#)