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Briefing note

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The Proposed Securitisation Regulation

The pace of regulatory change in Europe since the onset of the 2007/08 financial crisis has been blistering and shows little sign of slowing. The securitisation industry has been forced to adjust to these changes at a very demanding pace. The changes in regulation over that time have touched a broad range of areas, including derivatives, bank capital, insurance capital, liquidity coverage, regulatory due diligence and risk retention rules. Although many of these initiatives are sensible in principle, the fragmented way in which they were introduced has often presented unnecessary challenges to industry. The Securitisation Regulation proposed by the EU Commission today aims to change all that by introducing a single securitisation regulatory regime. It also introduces the idea of "simple, transparent and standardised" (STS) securitisation which would receive more favourable regulatory treatment, at least compared to other securitisation transactions. In this briefing, we discuss the main contents of the proposed regulation and the way in which it might affect our markets.

A uniform securitisation regime

As anyone involved in the European securitisation industry will be all too aware, many of the regulations affecting securitisation have been aimed at various institutions in their capacity as investors, rather than taking the US approach of focussing on "securitizers". The result of that approach has been the introduction of rules on risk retention and investor due diligence (and capital, where appropriate) in the sectoral legislation of a number of different industries, including the Capital Requirements Regulation ("**CRR**") for credit institutions and investment firms, Solvency II for insurance and reinsurance undertakings and the Alternative Investment Fund Managers Regulation ("**AIFMR**") for AIFMs. It was further expected that UCITS legislation would be amended to impose similar rules on UCITS funds. This is problematic because the obligations imposed under each of these regimes are slightly different, often with no obvious rationale for the different rules.

All of this sectoral legislation is in addition to rules imposed in slightly scattershot fashion elsewhere, such as the transparency requirements imposed under article 8b of the Credit Rating Agencies Regulation ("**CRA Regulation**") (and associated regulatory technical standards), which

Key issues

- Proposed Securitisation Regulation would introduce a single uniform regulatory framework for securitisation.
- Securitisation rules in AIFMR, and CRR largely replaced by Securitisation Regulation provisions, with Solvency II to follow.
- Risk retention and regulatory due diligence rules imposed on UCITS funds for the first time.
- Separate category of "simple, transparent and standardised" securitisations marked out for better regulatory treatment.
- Separate criteria for STS term securitisations and STS ABCP.

itself doesn't quite marry up to the items that investors are required to check under the due diligence rules in their respective pieces of sectoral legislation.

All of this is to be fixed under the Securitisation Regulation as formally proposed by the EU Commission today. The EU Commission has clearly been working long and hard to try to address many of the problems raised by industry over the years, and this proposal is a clear step in the right direction. While there are still a number of detailed technical issues that need to be addressed, the overall tone and thrust of the proposals is helpful to the securitisation markets and, we hope, will set a more positive tone for the revival of those markets, both STS and non-STS.

Under the proposed Regulation, all of the sectoral legislation relating to due diligence and risk retention is to be replaced by a new uniform regime applying to all "institutional investors", a term defined to include credit institutions, investment firms, insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision, alternative investment fund managers, UCITS management companies and internally managed UCITS. Likewise, new transparency rules contained in the Securitisation Regulation will replace those set out in Article 8b of the CRA Regulation.

Risk Retention

The new rules for risk retention will have a number of novel features compared to the existing CRR rules. The two principal changes are the introduction of a dual direct/indirect approach and the exclusion of certain originators from being risk retention holders. In addition to the changes that are obvious from the proposed Securitisation Regulation itself, a new set of regulatory technical standards ("**RTS**") will be required once the new regulation comes into force. These will replace the existing risk retention RTS in force under the CRR and may introduce further changes to the risk retention regime in addition to those described below.

Historically, EU risk retention rules have been focussed almost entirely on investors, in what has been referred to as an "indirect approach". So it has been on EU investors to check that transactions comply, regardless of where any of the other transaction parties are based. Likewise, failure to comply led to penalties (usually in capital risk weights) on investors only. The flipside of this has been that EU originators, sponsors and original lenders putting together transactions have been able to ignore the EU risk retention rules if their investor base has been outside the EU.

Under the proposed Securitisation Regulation, EU originators, sponsors and original lenders would have a direct obligation to retain the familiar 5% net economic interest. This is in addition to the obligation on EU investors to check as part of their regulatory due diligence that the retention obligation is being met. The new regulation makes clear that the retention obligation need only be fulfilled by one party and that, failing agreement for the sponsor or original lender to retain, the obligation falls on the originator. This, of course, does not remove all ambiguity, as a number of transactions will have multiple entities that would meet the definition of an "originator".

The second major change to the retention regime is that an entity will not be permitted to act as a retention holder where it "has been established or operates for the sole purpose of securitising exposures". This is a modification from a previously leaked version of the regulation that suggested the test would be a "primary purpose" test, rather than a "sole purpose" test. The new version is clearly more appropriate and workable for industry.

In any case, this change appears to be a reflection of the authorities' long-running unease with the potential for the use of SPVs to abuse the definition of "originator", which includes any entity that "purchases a third party's exposures for its own account and then securitises them". That said, the ban on retention by originators established solely to securitise exposures appears out of step with the latest expression of those concerns, being the report published by the European Banking Authority in December 2014. In that report, the EBA suggested that so-called "limb (b)" originators should be entities of real substance and that they should hold economic capital against the securitised exposures for a minimum period of time before securitising them. The test set out in the proposed Securitisation Regulation does not appear to include either of those two elements, suggesting the EU Commission takes a different view. It remains to be seen how the market will react to this new test, but it has the obvious virtue of being more of a bright line than the existing "real substance" and "minimum hold period" tests, which market participants have been struggling with for the better part of a year already. The extent to which the previous EBA tests will continue to apply needs to be considered but they are likely to retain some importance.

In addition to these two major changes, there are a number of additional minor changes to the regime that appear from the face of the proposed Securitisation Regulation. These include:

- the amendment of the "originator interest" retention option to reflect the existing practice that it can be used for any revolving securitisation (the previous text suggested that it was just for securitisations of revolving exposures); and
- the amendment of the rules concerning retention on a consolidated basis so that it no longer requires the exposures to have been originated by several different entities within the group.

Unfortunately, some changes hoped for by industry do not appear to have found favour with the Commission. Chief among these were the extension of retention on a consolidated basis beyond EU regulated institutions and an adaptation of the retention regime to allow it to fit more comfortably with managed CLOs.

As mentioned above, a degree of uncertainty will remain even after the new Securitisation Regulation is approved, because new RTS are required to be formulated to add more detail to the framework set out in the regulation. These RTS will need to be agreed by the EBA, the European Securities and Markets Authority ("**ESMA**") and the European Insurance and Occupational Pensions Authority ("**EIOPA**") and will apply to all institutional investors, thereby preserving the single regime across sectors that is a principal purpose of the new regime.

Transparency

The proposed Securitisation Regulation also includes detailed transparency requirements, combining a number of the elements familiar to market participants from the Bank of England, ECB, CRA Regulation and other disclosure regimes. From the proposed regulation, it appears that the new Securitisation Regulation rules are intended to replace Article 8b of the CRA Regulation (and Article 409 of the CRR), but interestingly Article 8b would not be repealed by this draft. Presumably that is a result of the transitional arrangements and it is intended that Article 8b will eventually be repealed, but this is not obvious from the face of the text.

The most important difference as compared to the existing Article 8b regime is that there is no explicit obligation to make information publicly available on all transactions. Instead, the obligation is to make information available to "holders of a securitisation position and to the competent authorities". While this may not always be ideal because of the specific format and substance of information to be disclosed is prescribed even for private transactions, it is a material improvement on the approach market participants had feared the authorities would take under Article 8b: that of requiring all information to be made freely publicly available, even on private deals. Instead of publication on the ESMA website contemplated by Article 8b, information will have to be provided free of charge in a timely and clear manner via a website that meets certain requirements. From the face of the regulation, however, this could be a password-protected website established by the transaction parties with access granted only to investors and the competent authorities.

Broadly, the information required to be disclosed on this website will be as follows:

- information on the securitised exposures, on a quarterly basis (for term securitisations) or information on the underlying receivables or claims on a monthly basis (for ABCP);
- all of the underlying documents required to understand the transaction, including a detailed description of the payment priorities;
- a prospectus or, where one is not drawn up, a summary of the main features of the securitisation;
- the STS notification, in the case of STS securitisations (see below);
- quarterly (for term securitisations) or monthly (for ABCP) investor reports covering the performance of the underlying exposures, the cash flows and a risk retention confirmation; and
- any price-sensitive information required to be disclosed under market abuse rules, or similar information for securitisations not subject to market abuse rules.

As with the risk retention rules, new RTS will need to be drawn up to add detail (e.g. disclosure templates for investor reports and loan-level data) to the general rules contained in the Securitisation Regulation. These new RTS would replace the RTS currently in force under Article 8b of the CRA Regulation. It is, of course, a source of some concern for industry that the loan-level data templates could change yet again, but it is hoped that they will simply be carried over from the existing templates in place under the Article 8b RTS.

Regulatory Due Diligence

The new regulatory due diligence rules broadly mirror the existing CRR rules, which is welcome. They are also a significant improvement on a previous leaked version, that suggested investors were required to "ensure" that a number of conditions were fulfilled. The version formally proposed by the Commission instead requires that institutional investors "verify [certain matters] before becoming exposed to a securitisation", which is a welcome and sensible change.

Unfortunately, one of the matters investors are required to verify is that "the originator or original lender grants **all** its credits on the basis of sound and well-defined criteria and clearly established processes for approving, amending, renewing and financing those credits and has effective systems in place to apply these criteria and processes" (emphasis added). It is not clear why it should be necessary effectively to diligence the originator/original lender itself (as opposed to the exposures being securitised) in this way, but this is not new. Rather, this is a holdover from the current AIFMR regime that AIFMs have struggled with since its introduction. The silver lining is that this verification is not required where the originator or original lender is a credit institution or investment firm. This will not be helpful for all securitisations but it does substantially narrow the scope of this problematic provision, particularly for major bank issuers in the market.

The other notable element of the proposed new regulatory due diligence rules is that there would be explicit acknowledgment that different procedures for ongoing monitoring are appropriate depending on whether the securitisation is held in the trading book or the non-trading book.

Grandfathering/ Transitional Provisions

The grandfathering rules for the proposed Securitisation Regulation have only been added recently (these were all but absent in the previous leaked version), but are broadly helpful – even if some work is still needed to ensure the intention is reflected in the technical language.

Broadly speaking, the requirements of the proposed Securitisation Regulation appear intended to apply prospectively only, so any deal issued before its entry into force will not have to comply with its rules.

The exception to this is the regulatory due diligence rules which will apply to all securitisations issued on or after 1 January 2011 or to which new exposures have been added or substituted after 31 December 2014 – a familiar grandfathering test for securitisations in the EU.

For risk retention, the current rules apply for existing deals until the maturity of those deals. The new rules are only intended to apply to securitisations issued after the Securitisation Regulation comes into force. Note, however, that the regulatory due diligence rules, which apply more broadly (see previous paragraph), require institutional investors to check that securitisations comply with the **new** risk retention rules before investing. That would appear to be an error that we would expect to be corrected before the legislation is finalised. Otherwise the grandfathering provided by one provision of the regulation is effectively taken away by another provision of the same regulation, an obviously unintended result.

A further point to note on risk retention is that (as the provisions are currently drafted) there will be an awkward intervening period between the coming into force of the Securitisation Regulation and the application of the new risk retention RTS, potentially a period of several months. For transactions closed in that period, the current risk retention RTS will continue to apply, but only until the new risk retention RTS become applicable, at which point these transactions will be subject to the new rules.

As to transparency, the transitional provisions say that originators, sponsors and issuers should continue to make the disclosures in the form of the disclosure templates annexed to the Article 8b RTS until the new transparency RTS becomes applicable. However, the disclosures must be made on the website contemplated by the Securitisation Regulation (discussed above) rather than on the ESMA-established website contemplated by the CRA Regulation and the current Article 8b RTS.

STS Securitisation – A New Hope?

Beyond introducing a uniform securitisation regulatory framework, the other major aspect of the proposed Securitisation Regulation is that it introduces the idea of "simple, transparent and standardised" or "STS" securitisation. This is the result of years of work by industry, regulators and other authorities. The essence of the idea is to differentiate the securitisation market so that transactions meeting criteria for simplicity, transparency and standardisation can be marked out for more benign regulatory treatment.

It is clear from the proposed regulation to amend the CRR (also announced today) that part of this more benign regulatory treatment is some regulatory capital relief for bank investors in securitisation. The Solvency II Delegated Act already reflects lower capital charges for insurance companies for so called "Type 1" securitisations (an earlier incarnation of the STS idea) but the criteria for this are not identical to the STS criteria proposed in the Securitisation Regulation. Although the Commission is currently proposing to amend some elements of Solvency II, and although we understand that it is intended to bring the "Type 1" criteria in line with the STS criteria eventually, that is not proposed at this time.

Similarly, we understand that it is eventually intended to bring the definition of a Level 2B securitisation under the LCR Delegated Act (which determines eligibility of securitisations to be held by banks as Level 2B high quality liquid assets for purposes of the liquidity coverage ratio) into line with the STS criteria, but that is also not proposed at this time.

Finally, the Commission has proposed to amend the European Market Infrastructure Regulation ("**EMIR**") to exempt derivatives entered into in the context of STS securitisations from the clearing obligation under EMIR. Unfortunately, however, this does nothing to mitigate the bigger problem of the two-way margining requirements still applicable to securitisation swaps (but not covered bond swaps) or to ameliorate the situation for non-STS securitisations.

The criteria to qualify as an STS securitisation are different depending on whether the transaction is a term securitisation or an ABCP deal. Both sets of criteria are lengthy, detailed and complex. As such, although there is provision for transactions pre-dating the Securitisation Regulation to be treated as STS, transactions are highly unlikely to meet the criteria unless they are structured with the specific requirements of the Securitisation Regulation in mind. Each of the sets of criteria is described below.

In order to "claim" the STS label originators, sponsors and issuers must jointly notify ESMA and their competent authority that the securitisation meets the criteria described below by means of a template to be put together by ESMA in close cooperation with the EBA and EIOPA. This will be known as an "STS notification". ESMA will then maintain a register of securitisations for which the STS label is claimed, but it is not intended that any supervisory authority will approve these claims of STS status. Rather, investors are expected to check the STS status of a securitisation on the basis of the declaration and the information required to be disclosed pursuant to the transparency requirements of the Securitisation Regulation.

Relevant competent authorities (who will broadly continue to be the sectoral competent authorities for the specific institution being supervised) are empowered to supervise, investigate and sanction breaches (including false claims to be STS) and such sanctions are to be noted by ESMA on its register of STS securitisations. Member states are required to provide at least for administrative and remedial sanctions, but they are also permitted to provide for criminal sanctions.

STS Criteria – Term Securitisations

The criteria to be an STS term securitisation, in broad terms, include the following:

Simplicity criteria

- **Sale or assignment**: The transfer of assets must be effected by a sale or assignment. On the basis of this criterion, synthetic securitisations would not qualify as STS, although we note that these are subject to further discussions. Where the sale is not immediately perfected, perfection triggers must include, at minimum (i) severe deterioration in the "seller credit quality standing"; (ii) seller default or insolvency; and (iii) unremedied breaches of contractual obligations by the seller. Clearly this range of perfection events is broader than most securitisations would have in the market.
- **Representations and warranties:** The originator, sponsor or original lender must provide representations and warranties to the best of their knowledge that the underlying assets are not encumbered or otherwise in a condition likely to adversely affect enforceability of the sale or assignment.
- **No active management**: There must be pre-determined eligibility criteria in place that do not permit active portfolio management on a discretionary basis. On the basis

of this criterion, managed CLOs would not qualify as STS.

- **Homogeneity**: The securitised assets must be homogeneous terms of asset type and may not include transferrable securities. Securitised exposures must be enforceable obligations with full recourse to debtors.
- **No re-securitisations**: The underlying exposures may not include assets that are themselves securitisations.
- **Ordinary course origination**: Assets in the securitisation must be originated in the ordinary course of the originator's or original lender's business and according to underwriting standards that are no less stringent than similar non-securitised assets. There is a specific ban on "liar" or "NINJA" loans. Loans must meet specific sectoral regulatory requirements where applicable (e.g. the Mortgage Credit Directive).
- **No defaulted loans**: No loans may be in default within the meaning of Article 178(1) of the CRR at the time of transfer into the securitisation. Clearly this criterion will be problematic for a number of asset classes, including credit card receivables, where portfolios often include assets more than 90 days overdue if these have not been charged off. Amendments could be made to make such transactions STS, however.
- **No credit-impaired obligors**: At the time of transfer into the securitisation, no loans may constitute exposures to credit impaired obligors. A credit-impaired obligor is an obligor who, to the best of the knowledge of the originator or original lender (i) has declared insolvency or similar within three years prior to the date of origination; (ii) is on an official registry of persons with adverse credit history; or (iii) has a credit assessment or credit score indicating a significantly higher than average risk of default for the type of loan in the relevant jurisdiction. This criterion is potentially problematic for a number of asset classes, because obligors who fit this description may still be perfectly acceptable risks for e.g. low-limit credit cards or secured auto loans.
- **One payment**: At least one payment must have been made at the time the loan is transferred to the securitisation. There is an exception for personal overdraft facilities, credit card receivables, trade receivables, dealer floorplan finance loans and exposures payable in a single instalment.
- **No proceeds of sale**: The repayment of the securitisation may not depend substantially on the sale of the assets securing the underlying loans. This doesn't prevent the loans being rolled over or refinanced.

Standardisation criteria

- **Risk retention**: The risk retention rules in the Securitisation Regulation must be complied with.
- **Hedging**: The interest rate and currency risks in the securitisation must be mitigated (via derivatives or otherwise), and the mitigation measures disclosed. Only derivatives to hedge interest rate and currency risk are permitted in the securitisation portfolio, and these must be documented and underwritten according to common international standards.
- **Standard referenced rates:** Any referenced interest payments for either the assets or liabilities of the securitisation must be based on generally used market interest rates, not complex formulae or derivatives.
- **No reverse waterfalls**: Where an enforcement or acceleration notice has been delivered, principal receipts must be distributed in order of seniority, with no substantial amount of cash trapped in the securitisation on each payment date. There is a ban on provisions requiring automatic liquidation of the underlying exposures at market value.
- **Early amortisation triggers**: The transaction must provide for early amortisation triggers. These must include, at minimum: (i) a deterioration in the credit quality of the underlying exposures to or below a pre-determined threshold; (ii) the occurrence of an insolvency-related event with regard to the originator or the servicer; and (iii) the value of the underlying exposures falling below a pre-determined threshold.
- **Triggers to end the revolving period**: Revolving transactions must provide for triggers to end the revolving period. These must include, at minimum: (i) a deterioration in the credit quality of the underlying exposures to or below a pre-determined threshold; (ii) the occurrence of an insolvency-related event with regard to the originator or the servicer; and (iii) a failure to generate sufficient new underlying exposures that meet the pre-determined credit quality.

- **Duties clearly specified**: The duties of the ancillary service providers (including the servicer and trustee) must be clearly specified. The servicer and its management team must have appropriate expertise and provision must be made for the continuity of servicing in the event of the default or insolvency of the servicer. Provision must also be made for the replacement of derivative counterparties, liquidity providers and the account bank upon their default, insolvency and other specified events, where applicable.
- **Default and delinquency**: The documentation must provide clearly what actions may be taken relating to delinquency and default of debtors. It must also provide clearly the priority of payments, triggers, changes in payment priority following trigger breaches and an obligation to report such breaches. Any change in the payment priority shall be reported at the time of its occurrence.
- **Conflict resolution**: The documentation must provide clearly for the timely resolution of conflicts between different classes of investors, with voting rights clearly allocated and the responsibilities of the trustee to investors clearly defined.

Transparency criteria

- **Historical data provision**: Prior to investment, the originator, sponsor and issuer must provide the investor with access to data on static and dynamic historical default and loss performance, such as delinquency and default data for substantially similar assets. This data must cover at least five years for retail exposures and seven years for non-retail exposures. The basis for claiming similarity must be disclosed.
- **External verification:** There must be external verification a sample of the underlying assets by an appropriate and independent party, including verification that the data disclosed in respect of the underlying exposures is accurate, with a confidence level of 95%.
- **Cash flow model**: The originator or sponsor must provide investors a liability cash flow model before pricing and on an ongoing basis.
- **Transparency**: The originator, sponsor and issuer must comply with the transparency requirements of the Securitisation Regulation. In addition, there is a requirement to provide certain information, including deal documentation, prior to pricing in at least draft or initial form. This is potentially problematic as it could lead to serious and differing liability risks under the Prospectus Directive regime as implemented in each of the EU Member States. Final documentation is required to be provided no later than 15 days following closing.

STS Criteria – ABCP

The criteria to be an STS ABCP deal pick up the criteria for term securitisations where relevant, and add to them. The main difference is that there are separate transaction level and programme level criteria. For ABCP issued at the programme level to be eligible, the programme must be eligible, as must every transaction included in the programme.

Transaction level criteria

- The remaining weighted average life of the assets may not exceed two years, and no underlying asset may have a residual maturity of more than three years.
- The underlying exposures may not include residential or commercial mortgages.

Programme level criteria

- The sponsor of the ABCP programme must be a credit institution supervised under the Capital Requirements Directive. That sponsor must be a liquidity facility provider (although there may be others) and must support all transactions in the ABCP programme. The sponsor must further support all liquidity and credit risks and any material dilution risks of the securitised exposures as well as any other transaction costs and programme-wide costs.
- None of the securities issued under the ABCP programme (which are required to predominantly consist of commercial paper with a final maturity of less than one year) may include call options, extension clauses or other clauses affecting the final maturity of the instrument.

Next Steps

Although years of work have gone into this project already, the pace has increased enormously recently and the Commission has only just formally proposed this regulation. From here, the proposed regulation will go to the EU Parliament and the Council of the European Union for their consideration. Each of them will consider it and, in all likelihood, propose amendments.

Following separate consideration by the Council and the Parliament, any differences between their versions will be worked out and the final text approved by both. Only following that will the legislation be able to be published in the Official Journal of the European Union and become law.

The legislative process is of course very unpredictable, but the Commission has indicated that the Securitisation Regulation is one of its priorities in the context of the Capital Markets Union Action Plan also announced today. Nonetheless, it is unlikely that the Securitisation Regulation will be published in the Official Journal before H2 2016 at the very earliest. Following publication, it is still unlikely to apply immediately, since a transitional period will be necessary for market participants to adjust and for the ESAs to produce (and the Commission to adopt) the numerous RTS required under the Regulation. All told, the new Securitisation Regulation is unlikely to apply much before the end of 2017, and it might be significantly later.

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