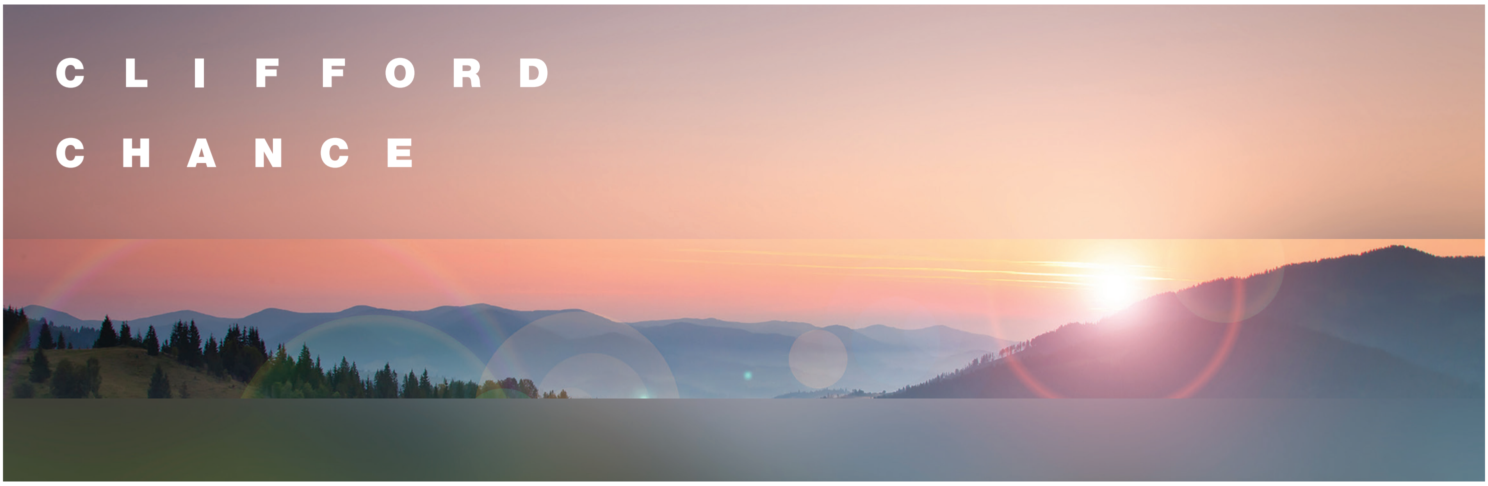

THE FUTURE OF THE SECURITISATION REGULATIONS IN THE EU AND UK: BREXIT AND BEYOND

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The UK's withdrawal from the EU continues to present a number of challenges for parties doing cross-channel business. The securitisation regulatory frameworks in the UK and the EU, once unified, have already begun to diverge in substance as well as form. This has meant market participants need to consider which of the regimes apply to them and to their transaction counterparties, and what compromises are necessary to continue to get deals done. In this article, we examine some of the divergence that has already happened, consider areas of possible future development of each regime and review how market participants are managing the increased complexity that results from having to comply with the new regulatory landscapes.

Introduction

The EU Securitisation Regulation (Regulation (EU) 2017/2402 (the "**EUSR**"))began to apply on 1 January 2019, consolidating securitisation rules previously found in various EU regulations and directives, into a single harmonised securitisation regulatory framework. When the Brexit transition period ended at the end of 2020, the European Union (Withdrawal) Act 2018 (the "**Withdrawal Act**") onshored the EUSR and simultaneously made a number of changes to it. The EUSR as it forms part of UK domestic law by virtue of the Withdrawal Act is commonly referred to as the UK Securitisation Regulation (the "**UKSR**"). Not long after the end of the Brexit transition period, the EU approved a number of changes to the EUSR as part of its COVID economic recovery plan known as the "Capital Markets Recovery Package" (or "**CMRP**").

The UK's onshoring changes and the EU's CMRP changes are already creating the need for market participants to be conscious of cross-channel differences and decide whether to make explicit provision for them. In addition, because the regimes are no longer tied into lockstep, parties are also having to contemplate (and allocate) the risk of further divergence during the life of their deals. Indeed, further divergence is not a mere fanciful possibility; quite the opposite, it is a virtual certainty. The EU and the UK have each recently completed a wide-ranging consultation process on their respective securitisation regulatory frameworks, and each of them is likely to make amendments to its regime following this exercise, though (at the time of writing) only the UK's exercise has produced a final report so far[1]. The real questions, then, are how much the regimes will diverge, how quickly they will diverge and in what way they will do so.

As a result, entities regulated by one regime entering into transactions with counterparties regulated by the other may face difficult negotiations over how to deal with any mismatches in their rights and obligations at the time the deal is done, and also how to allocate the risk of any further mismatches arising as a result of future changes in law during the life of the transaction. The classic example is that parties may find that the "sell-side" requirements of the regime by which they are regulated as to risk retention and transparency do not meet the standards required to be verified as part of the "buy-side" due diligence requirements of the regime by which their investors are regulated.

Securitisation regulatory framework

Although the EUSR had been in place for two years by the end of the transition period, certain key elements of it had not yet been settled. The level 1 EUSR text requires a large number of key level 2 measures, known as regulatory technical standards and implementing technical standards (respectively, "**RTS**" and "**ITS**"), and level 3 measures, known as guidelines and Q&As, in order to explain and further specify its requirements. These level 2 and 3 measures are each developed by one or more of the European Supervisory Authorities ("**ESAs**") – the European Banking Authority ("**EBA**"), the European Securities and Markets Authority ("**ESMA**") and the European Insurance and Occupational Pensions Authority ("**EIOPA**") – to give further detail on the practical application of the level one text of the EUSR. However, some of these measures were not yet in force at the end of the Brexit transition period. To the extent that level 2 measures were in force and applicable at the end of the transition period, they were onshored into the UK regime. As to level 3 measures, the FCA and the PRA both published guidance to the effect that EU non-legislative materials published before the end of the transition period should continue to be applied in the UK to the extent that they remain relevant and unless or until they are changed by UK authorities. Further smoothing the transition was the relatively broad exercise of the temporary transitional power (the "**TTP**") by the PRA and the FCA, that permitted UK entities to delay implementing many onshoring amendments to Securitisation Regulation obligations until the end of March 2022.

Risk retention requirements

The most important of the level 2 measures that were not in force at the end of the transition period were the RTS in relation to the EUSR's risk retention requirements. The result of this is that the EU market has been relying on an old RTS adopted under the CRR[2] for detailed risk retention rules. This has been problematic because – while the market does have the level 1 text of the EUSR, a number of common risk retention structures rely on the more detailed rules set out in the CRR RTS. These include risk retention via full-support liquidity facility, vertical retention via a vertical tranche of the securitised asset(s) rather than the securitisation's liabilities and the way to deal with risk retention where there are multiple originators, original lenders or sponsors. There is the further issue that a number of new elements have been introduced into the risk

1 Review of the Securitisation Regulation: Report and call for evidence response, December 2021 (the "**HMT Review Report**")

2 Commission Delegated Regulation (EU) No 625/2014 (the "**CRR RTS**").

retention framework since the CRR RTS was adopted, both by the original EUSR and the CMRP amendments. These include a formalisation of the ban on "sole purpose originators" and rules around fees paid to the risk retaining entity, both of which would benefit from the clarity that could come from a final RTS.

The uncertainty here has been amplified by the fact that the transitional rules set out in the EUSR grandfather only pre-EUSR deals, rather than deals done in reliance on the EUSR transitional rules. So any deal structured since 1 January 2019 in reliance on the CRR RTS but that does not comply with the final EUSR RTS on risk retention (when it eventually begins to apply) would theoretically cease to be compliant and would need to be restructured or wound up. It seems likely, however, that the market and regulators should be able to take a pragmatic approach to these deals, particularly if they have been structured with an eye to compliance with the CRR RTS and EBA's most recent draft risk retention RTS.

This situation does not look likely to be resolved for at least a few months, since (at the time of writing) the EBA has not yet published a final draft of the EUSR risk retention RTS[3] ready for adoption by the Commission. Mitigating the uncertainty is the high degree of consistency in the EBA's publications on risk retention. On most common market issues, the CRR RTS, the 2018 Draft RTS, and the consultation draft RTS published by the EBA in June 2021 (the "**2021 Consultation Draft RTS**") take a common – or at least a similar – approach. This has allowed the market to plan on the basis that the shared approach among the three texts is likely to be preserved in the final EUSR risk retention RTS. This cannot help, however, with novel issues under the original EUSR or the CMRP amendments, in respect of which the market has less reassurance until the final risk retention RTS are adopted.

UK onshoring

Relatively few changes were made to the Securitisation Regulation risk retention requirements as part of the onshoring process, so the EU and UK risk retention frameworks remained more or less identical in practice until the CMRP amendments came into effect in the EU in April 2021. Since no EUSR risk retention RTS had been adopted by the end of the Brexit transition period, no RTS could be onshored (although the PRA and FCA indicated an intention to onshore the 2018 Draft RTS more or less "as is" if they were adopted by the EU in time). As in the EU, the CRR RTS (onshored) continue to apply as a transitional measure. Also, like the EU, the UK has not yet adopted any risk retention technical standards (the UK equivalent to both RTS and ITS are called "binding technical standards", or "**BTS**"). The UK authorities' guidance about the continued application of EU non-legislative materials has been widely interpreted as guidance to the effect that the UK authorities broadly agree with the approach to risk retention proposed to be taken by the EBA in the 2018 Draft RTS. UK-regulated parties can therefore have some confidence that, if they follow the provisions of the CRR RTS and the 2018 Draft RTS, they will not find themselves at odds with their regulator when BTS are published in the UK in relation to the UKSR's risk retention requirements. The 2021 Consultation Draft RTS was published after the end of the Brexit transition period, so that is less relevant in the UK context. The

3 For these purposes we are ignoring the Final Draft RTS published in July 2018 (EBA/RTS/2018/01) (the "**2018 Draft RTS**"), since the consultation on a revised version taking into account the CMRP amendments to the EU risk retention rules makes clear that that version will not now be adopted by the Commission.

changes between the 2018 Draft RTS and the 2021 Consultation Draft RTS largely result from the need for the latter to deal with the (EU only) CMRP changes in any event.

Divergence, now and in the future

As explained above, the main problem caused by divergence is that deals structured to one jurisdiction's standards will not automatically meet the other jurisdiction's standards, making it more difficult to offer securitisations on a cross-border basis. Already, the EU's CMRP changes mean that certain NPL securitisations in the EU have to choose between taking advantage of the additional flexibility in the EU (principally, using the servicer as a risk retainer and measuring the 5% retention on the price the assets are sold into the deal, rather than their nominal value) and having access to UK investors. The other area of difficulty is that – since the end of the Brexit transition period – EU investors have not been permitted to recognise retention on a consolidated basis[4] where the parent institution is a UK institution. From 1 April 2022, the end of the TTP will mean that the reverse will be true as well, meaning UK investors will no longer be able to recognise retention on a consolidated basis where the parent is an EU entity.

The differences in risk retention rules that have arisen so far have been relatively minor irritants in that they only affect particular categories of deal, in that they can be relatively easily accommodated by structural adjustments, or both. It has been very helpful that the rules have otherwise been functionally identical. But what of the future? With one exception, the signs are encouraging. HM Treasury have confirmed that they generally view the current risk retention arrangements as satisfactory. So while they will look at areas of possible improvement, these would generally expand the range of flexibility available to parties when structuring their transactions. A few possibilities on the table include adjusting the rules for managed CLOs (including allowing the transfer of the risk retention in the event of a change in manager), NPL securitisations (possibly in a manner similar to the EU), allowing L-shaped retention (combination vertical and horizontal, as permitted in the US) and permitting synthetic excess spread to count as a risk retention piece on synthetic securitisations. On the EU side, no final report from the Commission's general EUSR review exercise has yet been published at the time of writing, but one specific question about risk retention from that exercise is cause for some concern. That question was about the possibility of requiring the risk retainer to be an EU entity in order to be recognised for EU purposes. If implemented, this would have the potential to require a variety of commercially inappropriate outcomes (e.g. retention by an EU original lender who is otherwise nothing to do with the deal because the securitisation "originator" who bought and securitised the portfolio is outside the EU) and could significantly hamper the ability of parties to conduct cross-border securitisation business.

Based on the evidence we've seen so far, it seems inevitable that the regimes will diverge, but it should still be possible to structure transactions in such a way as to cater for this. After all, this has been the approach taken for cross-border EU and US risk retention regimes for a number of years now. The regimes are – and for the foreseeable future are likely to remain – relatively similar, meaning (bar the potential EU requirement for the risk retention piece to be held in the EU) it should not become

4 As contemplated by Article 6(4) of each of the UKSR and the EUSR.

necessary to duplicate risk retention for the various different jurisdictions. It does, however, mean a bit more structuring complexity, and probably a need to comply with the risk retention rules of the jurisdiction that requires the largest risk retention piece. It also means managing the risk of further divergence during the life of the transaction. While in the past these issues have not always been covered in contracts (meaning each party bears its own regulatory risk but not the other party's), the recent tendency of EU legislation to provide little or no grandfathering threatens to make that a less tenable practice. Investors, for example, may try to mitigate the risks of future deviation by contractually requiring risk retainers to comply with both, or the stricter of the two, regimes. Naturally, this might be a difficult position to accept. A less sophisticated UK originator may quite justifiably not wish to be obliged monitor and comply with EU regulation with which it would otherwise have no connection. A more moderate position might be that the originator, original lender or sponsor is required to comply with the foreign regime as in force as at the closing date of the transaction, but then there may be a concern that the investor can no longer meet its ongoing due diligence obligations under the securitisation regulatory framework to which it is subject if stricter technical standards (or a more fundamental change) are adopted at a later date.

Transparency requirements

Comparable risks also apply in relation to other sell-side requirements of the securitisation regulatory framework, and their corresponding buy-side verification obligations. The EUSR and UKSR contain transparency requirements, which oblige the originator, sponsor and SSPE of a securitisation to make available certain information in relation to the securitisation before entry into and during the life of the securitisation. In a similar manner to the risk retention requirements, investors subject to the UKSR and EUSR are required to verify that the originator, sponsor or SSPE of a securitisation makes available the necessary information. Unlike the risk retention requirements however, RTS and ITS in relation to the EUSR's transparency requirements (Commission Delegated Regulation (EU) 2020/1224 (the "**EU Transparency RTS**") and Commission Implementing Regulation (EU) 2020/1225 (the "**EU Transparency ITS**")) were in force at the end of the transition period, and therefore became part of retained EU law, with only minor changes to the EU Transparency RTS (for example by referring to the FCA, PRA and the UK Pensions Regulator in place of references to competent authorities). This means that, with effect from the end of the transition period, divergent (albeit only minorly so) templates have existed for compliance with reporting obligations under the UKSR and under the EUSR.

As with risk retention, the exercise of the TTP by the FCA and PRA has helped to smooth the transition. Indeed, since the TTP permits compliance with old EU-style obligations, and since the reporting templates in the EU have not changed since the end of the transition period, in many ways the problems of divergence have yet to become a reality. Many UK originators have taken advantage of the TTP to carry on publishing their Article 7 reporting on EU templates, thereby eliminating any issues EU investors might have carrying out their Article 5 diligence obligations to check they're getting the right disclosure. Since UK investors have also benefitted from the standstill direction under the TTP, they have been permitted to accept EU templates even from UK originators for the purposes of carrying out their diligence obligations under Article 5 of the UKSR. The main change on the sell side, then, has been the need for UK sell-side entities to report to securitisation repositories in the UK (and sometimes also in the EU in order to meet investor demands), since the repository reporting obligation was carved out of the standstill direction for obvious reasons.

From 1 April 2022, however, reporting on UK templates will be required. Strictly from the sell-side perspective, this change is relatively straightforward. The EU and UK templates are virtually identical, and UK sell-side entities have had fifteen months to make them. The trouble arises when the needs of the buy side are taken into account.

EU buy side issues

EU institutional investors have been struggling with Article 5(1)(e) ever since it began to apply on 1 January 2019. It requires them to check the sell-side parties have "where applicable" made available the information required to be disclosed by Article 7. The meaning of the words "where applicable" has been the subject of much debate, the details of which we will not rehearse here. Suffice it to say that there are a variety of views about what information institutional investors are required to obtain from third country sell-side entities. The most risk-averse investors require Article 7 side disclosure even from third country deals, whereas the most robust investors think they are fulfilling their obligations so long as they ensure they receive information that (in their judgment) allows them to properly understand the deal and the underlying assets. Unsurprisingly, most investors fall somewhere between these extremes.

The result of that uncertainty is that many EU institutional investors would feel able to buy a UK securitisation with only UK-style disclosure. There are nevertheless a significant number of large investors who feel more comfortable with EU-style disclosure to an EU repository (especially where there is a listing of a UK deal on an EU regulated market, as is frequently the case, e.g. with UK RMBS deals being admitted to trading on the regulated market of the Irish Stock Exchange). For this reason, and because the templates are so similar as to make dual reporting reasonably feasible for a sophisticated originator, a number of UK deals have provided for reporting on both UK templates and EU templates following the end of the TTP.

UK buy side issues

As part of the UK's onshoring process, it tried to settle the Article 5(1)(e) debate, making clear that UK institutional investors would have to check that Article 7 UKSR style disclosure was being made only in respect of UK sell-side entities. Where they were dealing with third country transactions, UK investors would only have to check they were getting "substantially the same" information as would have been required of a UK deal, provided with "substantially the same" frequency and modalities.

This has had the effect of narrowing the range of the debate on both ends. In the UK, the most robust investors no longer have scope to take quite so broad a view of the discretion granted to them to decide what information they need. Conversely, those investors least happy to take legal risk have some comfort that they do not need to get the exact information that would be required of a UK deal – provided it is "substantially the same" then that is sufficient.

For deals offered from outside Europe, UK investors on the more robust end of the spectrum find themselves with less legislative wiggle-room than their EU counterparts who are not constrained by an explicit requirement to obtain substantially the same information from third country deals as they would get from their own domestic deals.

So far as cross-channel business is concerned, though, the onshoring changes are a boon. At the moment, the market is very comfortable that EU and UK disclosure templates and repositories are "substantially the same". This makes it easy for UK institutional investors to invest in EUSR-compliant securitisations without having to make special provision to ensure they get the disclosure they need to fulfil their regulatory due diligence obligations. This will of course have to be kept under review as the regimes continue to diverge.

The future of securitisation disclosure obligations

This an area that is likely to change reasonably substantially over the medium term. Neither the UK (based on the UKSR review report from HM Treasury) nor the EU (based on the commentary by the ESAs, the questions in the Commission's consultation document and the industry response to it) is especially satisfied with the way disclosure obligations are working at the moment. There is a lot of focus – and general dissatisfaction – in both jurisdictions on the distinction between public and private securitisations, that brings with it the obligation to report to a securitisation repository.

In the UK, it seems likely that the distinction between public and private securitisations will be re-examined, along with the consequences of that distinction. In particular, HM Treasury has indicated that the requirement for a formal, approved prospectus may not always be the appropriate metric for distinguishing between a public and a private deal, and have acknowledged that "there may be certain specific situations in which more flexibility as to the format and content of disclosures would be beneficial, provided there is still sufficient information disclosed"[5]. They have said they will reconsider "both how securitisations are categorised as either public or private and what kinds of disclosure requirements are appropriate for private securitisations."[6] This strongly suggests that fairly significant changes are on the cards for the securitisation disclosure system in the UK, meaning that significant divergence from the EU system in the medium term is fairly likely. It is worth noting, however, that the disclosure templates for public securitisations are not explicitly up for fundamental review, so it may be that the divergence is more nuanced, with public securitisations staying relatively aligned between the EU and the UK, but private securitisations diverging more significantly.

Things are more difficult to predict on the EU side, partly because (at the time of writing) the Commission has not yet published its report following its own wide-ranging review of the EUSR[7]. We do, however, have the published views of the ESAs[8], the views of the High Level Forum on the Capital Markets Union[9] and the Commission's

5 HMT Review Report, paragraph 4.26.
6 HMT Review Report, paragraph 4.27.
7 https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2021-eu-securitisation-framework-consultation-document_en.pdf
8 Notably from the ESAs' review report on the EUSR and their Opinion on the jurisdictional scope of application of the EUSR.
9 https://ec.europa.eu/info/sites/default/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf

Capital Markets Union 2020 action plan[10], all of which are summarised in our briefing from June 2021. As we set out in that briefing, the direction of travel indicated by those publications is somewhat in tension. The ESAs' views tend toward more detailed and prescriptive rules about disclosure (and corresponding diligence obligations), whereas the High Level Forum and the Commission are a bit more nuanced and seem open to the idea of being less prescriptive. As with the UK, the emphasis of the discussion so far is not really about disclosure templates (with the exception of providing additional information about sustainability, already provided for optionally in the CMRP amendments) meaning that there is no reason to think that templates will change significantly in the short term, though the EBA report on sustainable securitisation (discussed in more detail in our article entitled "ESG Securitisation: Accelerating after a slow start") suggests expanding sustainability information requirements to all securitisations. This will also need to be reassessed after the Commission's review report, which is expected to be published within the next month or so.

Practicalities of managing divergence

Already many EU institutional investors are insisting on EU templates (and reporting to EU securitisation repositories where appropriate). If the level of divergence increases, so too will the number of investors on the EU side who feel they need to insist on this. Likewise, as divergence increases, it is possible that a point will come when UK investors can no longer comfortably conclude that the reporting obligations imposed under the EUSR are "substantially the same" as those imposed under the UKSR and will need to take contractual steps to ensure that they are receiving the information they need.

Market participants on both sell and buy sides, and in both the UK and the EU, will therefore need to consider the extent to which they provide for cross-channel distribution of transactions. Sell-side parties on each side of the channel will need to consider the extent to which they want their deals to be available to institutional investors on the other side of the channel. If that is a priority, it will likely come at the cost of providing some assurance to buy-side parties that they will be able to do their regulatory diligence throughout the life of the deal. The practical impact of this assurance may be negligible, but if the regimes diverge significantly, the costs could be significant too.

Other areas of development on the horizon

Beyond the basic risk retention, disclosure and due diligence obligations discussed above, there are a number of other areas where either there have been already been divergences between the EU and the UK or there are possibilities for divergence on the horizon. These include.

- **STS**: The substantive requirements for STS in the UK and the EU have stayed relatively similar, but each system is self-contained, in that each requires sell-side entities to be within its own borders (though the UK regime permits non-UK issuers). There is, however, more of a clear indication in the UK of a desire to open the STS system up (probably by means of an equivalence system) so that the benefits of the

10 https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-2020-action-plan_en.

STS system can be extended to cross-border business. The main EU suggestion for changing the STS system is an unspecified allusion by the ESAs that they would like to examine whether the STS criteria could be simplified without reducing the quality of the standard.

- **ESG provisions**: Both the EU and the UK are developing their regimes for ESG finance, in significantly different ways. The UK is focussing on general requirements, such as the proposed Sustainability Disclosure Requirements announced by the Chancellor[11] in October 2021 and on which input has been requested by the FCA[12]. The EU, on the other hand, is taking a multi-pronged approach, with a number of requirements at the corporate[13], asset management[14] and bond-issuer[15] levels. There is a separate taxonomy regulation[16] that underpins all of this. In addition, there is an initiative for specific sustainability considerations to be introduced in the context of securitisation, with a report from the EBA on the topic recently published. This separate provision is despite the fact that securitisation is already explicitly included in the scope of the EU Green Bond Standard proposal (although the main recommendation of the EBA report on sustainable securitisation is that that label should be better adapted to the needs of the securitisation market).

In terms of wider regulatory movement, there is also a possibility of using the UK's newfound regulatory independence from the EU to reform the structure of the securitisation regulatory framework in the UK. This is part of a wider review (beyond the securitisation review exercise) called the "Future Regulatory Framework Review" which is looking at the wider system of financial regulation in the UK.

As applied to securitisation, one of the key proposals being considered is to move much of the regulatory framework from primary legislation (the EU model) to rules and guidance made by the regulators, the FCA and the PRA, through their Handbooks. This would allow policy to be made at a level closer to the individuals who have direct knowledge and experience of markets. It would also permit increased flexibility for UK authorities in adapting to changes in those securitisation markets. One possible downside of this change would be that it would represent a second significant shift in the securitisation regulatory framework (the first being Brexit onshoring) in the space of a couple of years – with all of the time and costs associated with updating compliance systems that entails.

Conclusion

So far the common solution to the problem of regulatory uncertainty and divergence, as is often the case in securitisation transactions, has been to agree sensible and commercially pragmatic contractual provisions. In part because of relatively small scale

11 https://www.gov.uk/government/news/chancellor-sets-new-standards-for-environmental-reporting-to-weed-out-greenwashing-and-support-transition-to-a-greener-financial-system
12 https://www.fca.org.uk/publications/discussion-papers/dp21-4-sustainability-disclosure-requirements-investment-labels
13 For example, the proposed Corporate Sustainability Due Diligence Directive: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145
14 For example, the Sustainable Finance Disclosures Regulation: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019R2088
15 For example, the proposed EU Green Bond Standard: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/european-green-bond-standard_en
16 https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en#regulation

of divergence between the EU and UK regimes, these have so far been relatively easy to agree. However, unless and untill a formal equivalence regime is available or some other market consensus is reached as to common ground between the UK and EU regimes, we anticipate agreeing methods for compliance to become increasingly difficult as the UK and EU continue to work seemingly independently on their respective regulatory frameworks, as evidenced by HM Treasury's lack of intention to make the change to allow for synthetic STS securitisation that has already been made by the EU.

Of course, it is worth bearing in mind in all of this that "divergence" is only a subject we discuss because we are used to the UK and the remaining EU countries being aligned as a single market with a single regulatory framework. In that context, all of these issues around different risk retention rules and disclosure requirements make sense and may sound cumbersome and even a little bit daunting.

However, if we stand back, this mindset has been with us for as long as there has been international commerce. European (EU and UK) sell-side entities wanting to sell into the United States are used to having to comply with US rules, for example. Henceforth, they will have to take similar approaches for each other as well. So it would appear that the future is simply that cross-channel business will become more cumbersome and costly, with the advantages that the UK and EU previously enjoyed when dealing with each other (as compared to, say dealing with the US) being eroded over time.

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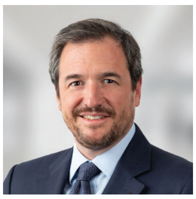

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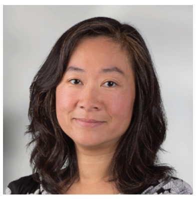

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