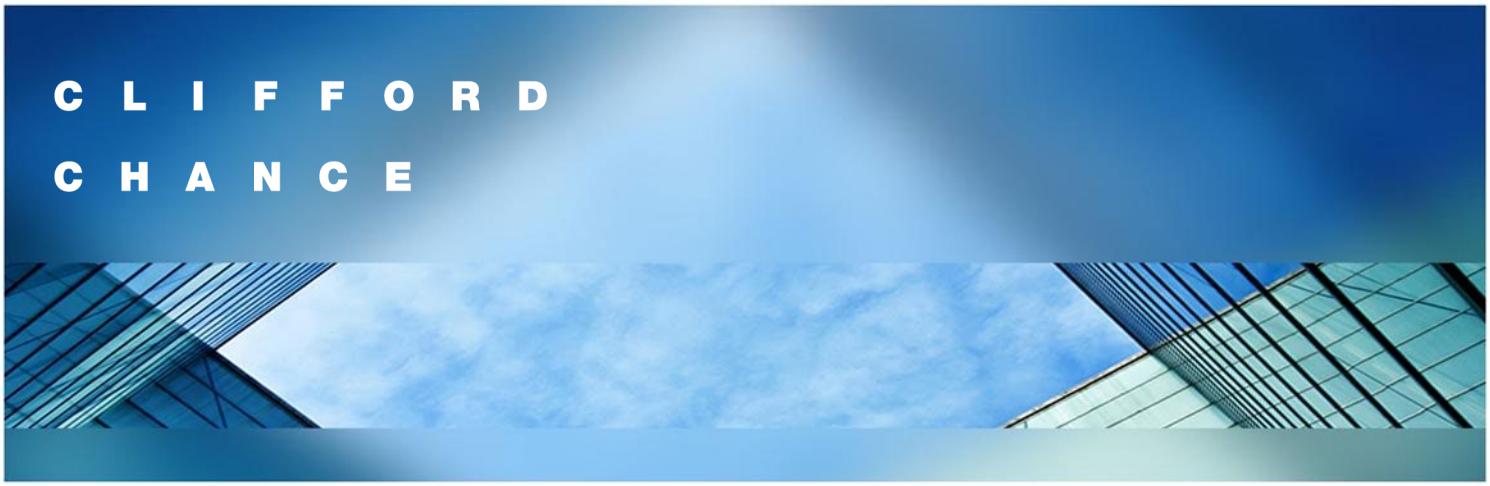

EU PUBLISHES REVIEW OF SECURITISATION REGULATION

Yesterday, the European Commission published its long-awaited review report on the functioning of the EU Securitisation Regulation (the "**EUSR**"). The report generally concludes that the EUSR is fit for purpose and does not put forward any proposals to amend the EUSR itself (the so-called "level 1 text"). It does, however, set out a number of suggestions to improve how the Regulation functions (especially around disclosure templates) and contains some important guidance on how certain problematic provisions of the EUSR should be interpreted (including Article 5(1)(e), that dictates what information EU institutional investors need to invest in non-EU securitisations). We set out a summary below.

Key issues

- European Commission is not planning to revise the level 1 text of the Securitisation Regulation, but has offered a number of interpretations of that text
- The most important of those interpretations is a clarification that EU institutional investors may not invest in non-EU securitisations unless they get EU-style disclosure
- The Commission has also given a mandate to ESMA to revise the disclosure templates, suggesting simplification of existing templates and the creation of a new, simplified template for private securitisations
- The private securitisation template would seek to address supervisors' need for information to effectively supervise markets

The review report addresses some, but by no means all, of the issues raised by industry in the AFME response to the consultation the Commission issued as part of its preparation for this report. The report says nothing about any of the prudential issues market participants consider to be perhaps the most pressing regulatory issues, preferring to wait until the European regulators have had a chance to offer advice on this.

Definition of "private securitisations"

The Commission rejects the need to adjust the definition of private securitisation, presumably because this would require level 1 change which they want to avoid. They encourage supervisors to continue monitoring developments, but also seem to accept the argument of industry that highly detailed, prescriptive templates are not appropriate in that context. See below re proposals to ESMA to draw up simplified templates for private securitisations.

Disclosure Templates

The Commission acknowledges there is a general feeling that the transparency and due diligence requirements are disproportionate. As such, they invite ESMA to review the disclosure templates generally. In particular, the commission says ESMA should "se*ek to address possible technical difficulties in completing the information required in certain fields, remove possibly unnecessary fields and align them more closely with investors'*

needs. As part of this work, ESMA should consider whether information on a loan-by-loan basis is useful and proportionate to investors' needs for all types of securitisations." This is in line with market expectations that there will be some consideration as to whether loan by loan level data on very granular / dynamic pools is helpful for revolving asset classes such as credit cards.

On private securitisations, where the disclosure and due diligence requirements are perhaps most disproportionate, the Commission has taken a very helpful approach of a kind that acknowledges and seeks to accommodate the arguments industry has been making for a long time about private deals needing less regulatory intervention for a variety of reasons, including the very different power dynamics between investors and borrowers in that context. The Commission invites "ESMA to draw up a dedicated template for private securitisation transactions that is tailored particularly to supervisors' need to gain an overview of the market and of the main features of the private transactions…A dedicated template for private securitisations is expected to simplify considerably the transparency requirements for private securitisations…This new template could replace the existing templates for all private securitisations. It would ensure that supervisors receive the information they need, while investors in private securitisations could obtain any additional information they require in bilaterally agreed formats, unconstrained by the content of the standardised templates."

Interpretation Guidance from Commission

The major immediate impact of this report is likely to come from the guidance on a number of interpretation issues under the EUSR.

EU investors investing in non-EU securitisations

- The Commission makes a pretty clear statement that Article 5(1)(e) EUSR requires EU institutional investors to get all the same information in respect of third country securitisations as they would get from EU securitisations. The guidance notes that EU institutional investors should not differentiate from a due diligence perspective between EU vs non-EU securitisations and that it should not be left to the discretion of the investors to decide whether they are in receipt of "materially comparable information".

- On the face of it, this guidance suggests therefore that any EU investor subject to the Article 5 due diligence obligations is required to be in receipt of the same information and in particular the same reporting in the same format as if the securitisation was issued in the EU, including but not limited to, provision of such information on the relevant EU templates. The Commission acknowledges that this "de facto excludes EU institutional investors from investing in certain third-country securitisations".

- The Commission notes that some of the concerns may be remedied by the eventual introduction of more simplified templates for private securitisations (as non-EU securitisations would generally be "private" securitisations for these purposes) – however, from a practical perspective such template is likely to take some time (a year or more) to be made available.

Jurisdictional scope of application – The Commission firmly rejects the suggestion from the European Supervisory Authorities (ESMA, EBA and EIOPA) that EU-based parties should be required to fulfil all the sell-side obligations under Articles 6, 7 and 9 of the EUSR, saying that that interpretation is "not supported by the legal text" and pointing out that EU institutional investors still have to check that the substance of those obligations is being fulfilled before they can buy a third country securitisation.

Article 9 Verification of credit standards – The Commission offers a very helpful interpretation of the Article 9 obligation to verify credit standards as it applies to sponsors. Many people have pointed out that it is very awkward to have this obligation apply to sponsors since – by their nature – they are not the ones extending credit on transactions they sponsor. The Commission simply points out that if that if "*the sponsor…does not apply any credit-granting standards since it does not grant credit on its own account, Article 9(1) cannot in practice impose a valid direct obligation on the sponsor*."

Scope of "institutional investors" – The Commission has clarified which AIFMs are in-scope of the definition of "institutional investor" (and thereby caught by the Article 5 EUSR due diligence obligations). In brief, they have confirmed that *sub-threshold AIFMs are in scope*. They have also confirmed that third country AIFMs who market and manage funds in the EU are in scope, but only in respect of funds marketed or managed in the EU.

Additional points to note

Beyond the above, the Commission's report also included some less notable (but still important) points. In particular:

- The Commission found that there was no need to establish an equivalence regime for STS, as they do not consider there to be any third country regimes that could come close to being equivalent. This is presumably driven in large part by a wider drive to avoid reopening the level 1 text. They expressly say they would be willing to re-consider if the situation changes, though.

- The Commission fully endorsed the central recommendation of the EBA report on sustainable securitisation, which was to adapt the proposed EU Green Bond Standard to accommodate securitisation.

- The Commission rejected the need to change the approach to third party verifiers of STS status and also rejected the need for a system of limited-licenced banks that would perform the functions of SSPEs.

- They appear to disagree with some national competent authorities re comments made about the lack of information they have had to supervise the securitisation markets, saying "*the Commission is of the opinion that the Securitisation Regulation provides for all the supervisory tools that might be needed*". They do, however, endorse the idea that it might be sensible in the

long run to apply a lead regulator approach for securitisations spanning multiple EU Member States.

- The Commission refuses to say very much at all about the prudential aspects of the securitisation regulatory regime, specifically the capital requirements for banks under CRR and for insurers under Solvency II. They likewise stay silent on the Liquidity Coverage Ratio. All of this remains on the back-burner pending the ESAs' response to the Commission's call for advice (which had a deadline of 1 September 2022) on these issues.

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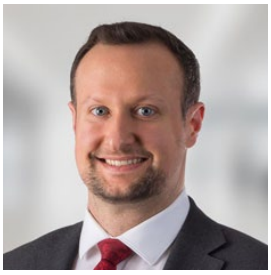

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