

## CHANGING TIMES: RECENT DEVELOPMENTS IN THE UK AND EU SECURITISATION REGULATORY FRAMEWORKS

The UK and EU securitisation regulatory frameworks have been a hive of activity in July 2023. The European Commission has adopted final draft regulatory technical standards on risk retention, ESMA has published an updated set of questions and answers on the EU Securitisation Regulation, and, in the UK, HM Treasury has published a near-final version of the statutory instrument replacing the UK Securitisation Regulation. This briefing looks at these recent developments and what they mean for the market, as well as the possible next steps for the regulation of securitisation in the UK and EU.

### INTRODUCTION

July 2023 has seen significant developments in the UK and EU securitisation regulatory frameworks. On 7 July 2023, the European Commission published the Commission-adopted text of regulatory technical standards on risk retention under Regulation (EU) 2017/2402 (the "**EU Securitisation Regulation**"). On 11 July 2023, HM Treasury ("**HMT**") published a near-final version of the "Securitisation Regulations 2023" statutory instrument, which will replace Regulation (EU) 2017/2402 as it forms part of domestic law of the UK by virtue of the European Union (Withdrawal) Act 2018 (the "**UK Securitisation Regulation**"). On 13 July 2023, the European Securities and Markets Authority ("**ESMA**") published a revised version of its questions and answers ("**Q&A**") on the EU Securitisation Regulation.

### COMMISSION-ADOPTED RISK RETENTION RTS

The adoption by the European Commission on 7 July 2023 of draft regulatory technical standards on risk retention under the EU Securitisation Regulation (the "**2023 Draft RR RTS**")<sup>1</sup> brings us nearer to the end of waiting for a full set of risk retention rules under the EU's securitisation regulatory framework and comes almost five years after the European Banking Authority ("**EBA**") published its first draft. The Commission-adopted text follows the publication

#### Key issues

- The European Commission's adopted final draft regulatory technical standards on risk retention contain a number of cosmetic and clarificatory changes to the EBA's final draft published in April 2022, and two more significant changes – to the "sole purpose" test and to the risk retention requirements in relation to securitisations of debt instruments.
- HMT has published a near-final version of the "Securitisation Regulations 2023" SI, which will replace the UK Securitisation Regulation, and set a deadline of 21 August 2023 for "technical comments".
- ESMA has published a revised version of its Q&A on the EU Securitisation Regulation, updating responses on a number of topics, including delegation of reporting responsibility, and covering new topics, including the process for reporting amendments to transaction documents.

<sup>1</sup> [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2023\)1563&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2023)1563&lang=en)

by the EBA in April 2022 of its revised final draft regulatory technical standards on risk retention (the "**2022 Draft RR RTS**"). While the Commission-adopted text is very similar in substance to the EBA's revised final draft on which it was based, there are several cosmetic and clarificatory changes. Two more material changes we have noted are as follows:

- The "sole purpose" test set out in Article 2(7) of the 2023 Draft RR RTS has subtly shifted from that set out in the EBA's 2022 Draft RR RTS. The familiar tests relating to resources/assets and governance still apply, but while the 2022 Draft RR RTS set them out as a list of factors to be taken into account in order to determine whether an entity has been established or operates for the sole purpose of securitising exposures, the 2023 Draft RR RTS now reads "where all of the following applies", such that, where an entity meets all of the criteria set out in Article 2(7), it will not be considered to have been established or to operate for the sole purpose of securitising exposures. The 2023 Draft RR RTS are silent as to the treatment of an entity that does not meet all of the criteria.
- In relation to securitisations of debt instruments, a new Article 16 of the 2023 Draft RR RTS provides that the risk retention requirements are deemed to be fulfilled where the securitisation is exclusively of an entity's own issued debt instruments (including its own covered bonds where they meet the requirements of the new EU directive on covered bonds).

## Next steps

The next stage is for the European Parliament and Council to scrutinise the Commission-adopted text, which can take up to three months. Assuming, as we expect, that there are no objections, the final text will be published in the Official Journal and will enter into force on the 20th day following its publication. This is expected in Q4 2023 or Q1 2024. In the meantime, the transitional provisions under Article 43(8) of the EU Securitisation Regulation provide for the continued application of Chapters I, II and III and Article 22 of the risk retention regulatory technical standards under the Capital Requirements Regulation (Delegated Regulation (EU) 625/2014) (the "**CRR RR RTS**"), which will cease to apply once the new regulatory technical standards become effective.

As noted below, consultations on new rules to be made by the Financial Conduct Authority ("**FCA**") and the Prudential Regulatory Authority ("**PRA**") regulating the UK's securitisation market as part of the UK's post-Brexit regulatory framework for financial services are expected in Q3 2023. It will be interesting to see whether the FCA's and PRA's proposals in relation to risk retention substantively follow the Commission-adopted text or whether market participants will need to prepare for future divergence.

## "SECURITISATION REGULATIONS 2023" UK STATUTORY INSTRUMENT

On 11 July 2023, HMT published a near-final version of the "Securitisation Regulations 2023" statutory instrument (the "**latest SI**") and an accompanying policy note (the "**Policy Note**"),<sup>2</sup> as part of a suite of policy papers and statutory instruments relating to the implementation of the new 'Smarter Regulatory Framework' for financial services. It follows the enactment of the

<sup>2</sup> <https://www.gov.uk/government/publications/securitisation-regulations-2023-draft-si-and-policy-note>

Financial Services and Markets Act 2023 ("**FSMA 2023**"), the key piece of legislation which implements the UK's post-Brexit regulatory framework for financial services.<sup>3</sup> The government's stated aims are for smarter, more nimble, financial services regulation tailored for the UK, focused on long-term growth and international competitiveness.

The latest SI is an updated version of the illustrative draft statutory instrument on securitisation regulation published as part of the Edinburgh Reforms package in December 2022 (the "**illustrative SI**"). The illustrative SI sets out a framework for moving much of the detailed rules regulating the UK's securitisation market from primary legislation to the rulebooks of the regulators, the FCA and the PRA.<sup>4</sup> This would bring the regulation of securitisation in line with other financial services regulation in the UK.

### **Developments in the latest SI from the illustrative SI**

The developments in the latest SI from the illustrative SI are not significant. The latest SI retains the overall framework for greater regulator rulemaking and retains the requirement for the FCA and PRA to have regard to the "coherence of the overall framework for the regulation of securitisation" when making rules relating to securitisation. The Policy Note accompanying the latest SI also confirms the SI will enable reforms identified in HMT's "*Review of the Securitisation Regulation*" published in December 2021 to be taken forward.

The changes made to the latest SI include:

- **narrowing the scope of the definition of "institutional investor"** so that the UK due diligence requirements now only apply to UK AIFMs (instead of also applying to AIFMs with a registered office outside the UK);
- **clarifying the ban on the use of securitisation special purpose entities in certain high-risk or non-cooperative jurisdictions**, so that it applies to originators and sponsors of securitisations and prospective institutional investors in securitisations with such securitisation special purpose entities;
- **a new power of direction for the FCA** in respect of authorised firms as well as other entities not authorised by it who engage in certain designated activities in relation to securitisation. This relates to the "designated activities regime", introduced by FSMA 2023, which enables the FCA to make rules in respect of activities, products, or conduct which may not be regulated activities under FSMA 2000, and which apply to a broader range of entities than authorised persons;
- **a framework for recognising "STS equivalent non-UK securitisations"**, which allows for HMT to specify other countries or territories whose law and practice in relation to a specific type of securitisation has equivalent effect to applicable UK law in relation to STS securitisation, such that securitisations of that type from those countries or territories will be treated the same as STS securitisations in the UK; and
- **reforms intended to clarify the due diligence requirements for UK occupational pension schemes investing in securitisations.** This

<sup>3</sup> For more detail on FSMA 2023, please see our July 2023 briefing entitled "[UK Financial Services and Markets Act 2023: Building a 'smarter regulatory framework'](#)"

<sup>4</sup> Please see our December 2022 briefing entitled "[UK Edinburgh Reforms: the new securitisation framework?](#)" for more detail.

includes taking a more "principle-based" approach to the requirements as to disclosures provided by originators, sponsors and securitisation special purpose entities of UK and non-UK securitisations, rather than requiring the provision of information substantially the same as that to be provided under Article 7 of the current UK Securitisation Regulation. The Policy Note notes that HMT "will update the exact legal drafting in the draft SI after the publication of the FCA and PRA draft rules which will deliver this change for other institutional investors". This would suggest that FCA and PRA draft rules for other institutional investors will mirror this "principle-based" approach.

## Next steps

The Policy Note states that the latest SI is a near-final version, though technical comments provided by 21 August 2023 will be considered to the extent they are "focused on any changes that need to be made to this draft instrument to achieve the outcomes the government seeks to achieve through these reforms". As such, it seems unlikely that further significant changes will be made to the latest SI before it is laid before parliament.

HMT has stated it intends to enact the latest SI by the end of 2023 (parliamentary schedules permitting). Some provisions, such as those providing the regulators with powers tailored to the new regime, will come into force immediately, with the remainder coming into force when the current UK Securitisation Regulation and related retained EU law is repealed and replaced by the new FCA and PRA rules. Consultations on these new rules are expected in Q3 2023, after which HMT may lay a further statutory instrument for any consequential amendments which need to be made.

From what we have seen so far, FSMA 2023 and the latest SI on the regulation of UK securitisation support the stated policy aims of shifting the regulatory regime away from primary legislators and instead towards more "nimble" regulators. Given the UK's securitisation regime will ultimately be governed in large part by the regulators' rulebooks, further details will be revealed when the Q3 2023 consultations by the FCA and PRA on their new rules are released.

## REVISED ESMA Q&A

On 13 July 2027, ESMA published a revised version of its Q&A on the EU Securitisation Regulation (the "**Revised Q&A**").<sup>5</sup> The Revised Q&A includes updates to ESMA's responses and some new guidance on a number of topics, including:

- **amendments to transaction documents** – the Revised Q&A clarifies that, when transaction documents are amended and new documentation is made available pursuant to the EU Securitisation Regulation, the original documents should not be deleted and replaced with the amended documentation to ensure "the completeness and consistency of the documentation during a transaction lifecycle";<sup>6</sup>
- **templated reporting in the context of "self-securitisation"** – the Revised Q&A considers a new question about whether "In the context of

<sup>5</sup> [https://www.esma.europa.eu/sites/default/files/library/esma33-128-563\\_questions\\_and\\_answers\\_on\\_securitisation.pdf](https://www.esma.europa.eu/sites/default/files/library/esma33-128-563_questions_and_answers_on_securitisation.pdf)

<sup>6</sup> Revised Q&A, A5.1.28.

securitisation transactions where the subscriber of the ABS notes is the Originator itself (i.e. a so-called self-securitisation), [it is] still mandatory to produce the [loan-level report]". ESMA notes that "The Securitisation Regulation does not make any distinctions between holders of a securitisation position or potential investors who are the originator itself and those who are a separate entity from the originator" and that the templated reporting requirements apply to all securitisation transactions, even those which are self-securitisations (although we should note that this guidance assumes such a transaction is a securitisation and therefore relates to the consequential treatment);

- **delegation of responsibility for XML conversion** – the Revised Q&A states that, although submission of data in a non-compliant form to a securitisation repository should be rejected as non-compliant, reporting entities can outsource the conversion of non-XML data to the correct format (implicitly, through the securitisation repositories who provide such services); and
- **certain aspects of templated reporting** – in relation to the completion of the non-performing exposure annex for written-off loans under a securitisation of otherwise performing exposures, the Revised Q&A notes that written-off amounts should only be reported under the non-performing exposure reporting annex if the relevant securitisation is considered a "non-performing exposure securitisation" within the meaning of Article 2(3) of the Article 7 disclosure regulatory technical standards (Commission Delegated Regulation (EU) 2020/1224).

Market participants may wish to review the Revised Q&A to see whether any of the new or updated responses relate to issues relevant to them.

## CONCLUSION

Overall, July 2023 has proven an exciting month for followers of regulatory developments in the UK and EU securitisation markets. The 2023 Draft RR RTS, if it enters into force as expected in Q4 2023 or Q1 2024, will conclude the chapter on updates to the risk retention guidance under the EU Securitisation Regulation and bring long-awaited certainty on the topic to the European securitisation markets, which have so far had to rely on established market practice and the now very dated CRR RR RTS. Similarly, the latest SI provides reassurance that the new regulatory framework is shaping up in line with the previously declared policy objectives and reveals a more detailed, and specific, footprint for the future of the regulation of securitisation in the UK under the post-Brexit regulatory framework for financial services and FSMA 2023. A good example of that is the changes to disclosure requirements for UK occupational pension schemes which may be expected to be rolled out to other types of investors, and clarifications around non-UK AIFMs which are both positive developments for the buy-side. Finally, ESMA's Revised Q&A provides ongoing guidance in relation to the highly technical area that is the EU securitisation templated disclosure regime.

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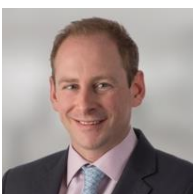
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