Clients&FriendsMemo

The New UK Securitisation Rules : A Practical Overview and Comparison

6 May 2024

On 30 April 2024, the Financial Conduct Authority (the "**FCA**") published Policy Statement PS24/4 ("**PS24/4**") setting out the final FCA Securitisation Sourcebook ("**SECN**"). Subject to the repeal of the Securitisation Regulation and related technical standards currently in force in the UK (the "**UK SecReg**"), SECN now has an implementation date of 1 November 2024. At the same time, the Prudential Regulation Authority (the "**PRA**") published its policy statement PS7/24 – Securitisation: General requirements, including the new Securitisation Part of the PRA Rulebook which is also due, subject to the repeal of the UK SecReg, to come onstream on 1 November 2024.

Background and new legislative architecture

In August 2023's CP23/17 (see our note on this here), the FCA set out its proposals for firm-facing rules on securitisations to be effectively transferred into the FCA's rulebooks. PS24/4 is the result of that consultation process, and as before, the approach is largely to preserve the existing provisions of UK SecReg, but subject to *"targeted policy changes"* of a generally clarificatory nature. The PRA went through a parallel consultation exercise with CP 15/23 (see our note on this here).

The resulting 'lift and shift' of firm-facing rules is part of the exercise to repeal and replace retained EU law, with some of the balance of provisions from UK SecReg set out in domestic legislation. This means that the securitisation regulation in the UK (collectively, the "**New UK Rules**") will comprise (as applicable):

- the Securitisation Regulations 2024;
- the Securitisation (Amendment) Regulations 2024;
- SECN; and
- the Securitisation Part of the PRA Rulebook.

Scope

The New UK Rules continue to apply to relevant entities 'established in the United Kingdom', meaning entities constituted under UK law with a head or registered office in the UK. This is as

set out in CP23/17, but PS24/4 has added text where necessary to clarify when the rules only apply to entities 'established in the United Kingdom'.

Approach to rules

On rule drafting, important points to note include a reiteration of CP23/17's confirmation that there will be no changes in this iteration of the New UK Rules to the way firms populate or submit templates. In addition, the FCA has acknowledged industry feedback about the potential unintended consequences of drafting divergences (compliance costs and regulatory uncertainty), and both aligned drafting and ordering of shared rules, and reduced discrepancies between FCA due diligence rules for authorised institutional investors and trustees and managers of Occupational Pension Schemes, for example.

EU Non-Legislative Materials and Existing EU Recitals

Market participants requested more clarity on the applicability of existing EU guidance and the original recitals set out in the EU Securitisation Regulation. In terms of existing EU guidance, the PRA and the FCA confirmed that pre-Brexit EU guidance can still be used, provided that it has not been withdrawn or superseded. While they declined to completely endorse the recitals set out in the EU Securitisation Regulation, they did, however, incorporate some of the recitals into the rules themselves.

Transitional and implementation periods

Both regulators have acknowledged industry feedback, and: (i) now allow a 6-month implementation period for the New UK Rules to 1 November 2024; and (ii) have added transitional provisions for securitisations set up before the application date of the New UK Rules (such that those securitisations will continue to be subject to the current rules after the New UK Rules apply). Note that the commencement order that will revoke the UK SecReg has not yet been laid before Parliament, and while His Majesty's Treasury anticipates making the commencement order later this year, the FCA will consider delaying or revoking SECN if that order is not made (with the same applying to the PRA in respect of the Securitisation Part of the PRA Rulebook).

Future Consultations

While CP23/17 did include discussion points on the definitions of public and private securitisation, feedback on that topic is not included in PS24/4 but will be used to inform a future consultation and relevant proposals for rule changes tabled for Q4 2024/Q1 2025. Also included in the upcoming Regulatory Initiatives Grid are policy changes for the associated template reporting regime, including enhancing ESG reporting. The FCA promises that *"[a]ny potential changes would aim to make the reporting regime more proportionate".*

New UK Rules at a glance

While the New UK Rules (and the revised EU Regulatory Technical Standards relating to the risk retention requirements of 7 July 2023 and the transparency requirements of 16 October 2019 (together, the "**Current EU Rules**")), to a large extent replicate previously published drafts, we set out below a summary of the key changes that have been introduced by the New UK Rules (relative to the rules that are currently in force in the UK) as well as a comparison, where relevant, against the corresponding Current EU Rules.

Risk Retention

Resecuritisation—contiguous tranches not a resecuritisation

- The Current UK Rules include a helpful statement confirming that the re-tranching of a tranche issued in a securitisation will not, in and of itself, constitute a resecuritisation, and although included in the section on risk retention in the New UK Rules, the accompanying guidance in the FCA Policy Statement makes it clear that such structures should not be considered resecuritisations for the purposes of the general prohibition on resecuritisations.
- The Current EU Rules include a similar statement, also contained within their risk retention provisions (and although no corresponding interpretive guidance exists, we would expect this statement to be construed in the same way as under the New UK Rules).

NPE securitisation—purchase price not nominal amount

- The New UK Rules confirm (consistent with the Current EU Rules), that for the purposes of calculating the required retention when applying the 5% test to the relevant securitised portfolio, it is permissible to use purchase prices rather than nominal values for non-performing exposures.
- Importantly, whilst "non-performing" is helpfully defined widely so as to include, for example, both defaults and impairments, the ability to use purchase prices for the above calculation is limited to such exposures as are contained in "NPE securitisations". These are limited to securitisations where the applicable securitised portfolio comprises at least 90% non-performing exposures at commencement and at the time of any reinvestment.

Change of retainer—can change upon insolvency

- The New UK Rules confirm that it is permissible to change the entity holding the risk retention in the case of such entity's insolvency.
- Notably, the New UK Rules do not include the additional reference made in the Current EU Rules to situations where the risk retainer is unable to continue to act as retainer due to "legal reasons beyond its control". We would not regard the absence of this reference from the New UK Rules to be a material limitation in practice, however, it being limited to the very narrow circumstance of illegality in respect of the continued ability of the retention holder to hold and retain.
- More significantly, neither the New UK Rules nor the Current EU Rules offer any exception to the obligation to hold and retain where, for example, a transfer would facilitate a corporate reorganisation or business sale, or in cases where the risk retainer also performs the role of

sponsor or manager of the transaction and either resigns from such role or is removed "for cause" under the terms of the securitisation documentation. Securitisation participants subject to either set of rules should therefore continue to assume that a change of retainer would not be permitted in these circumstances (and will therefore need to continue to analyse the potential impact on retention compliance).

Requirements to be an originator—sole purpose test

- Consistent with the position in earlier drafts, the New UK Rules reference certain factors that must be taken into account when assessing whether an originator has been established and is operating for the "sole purpose" of securitising exposures (and is therefore deemed not to be an eligible risk retainer).
- The above factors include the extent to which the originator has material other assets and business beyond securitisation and related risk retention, as well as the adequacy of its decision-making and corporate governance arrangements.
- By contrast, the Current EU Rules, while broadly following the above, focus instead on whether the securitisation (and related risk retention assets) and business comprise the originator's "predominant source of revenue". This is potentially a greater hurdle for some originators to overcome, particularly when an originator has significant leverage and will, as a result, have material payment obligations which would need to be met predominantly from other sources of revenue in order to pass the test.
- On the other hand, unlike the New UK Rules, the Current EU Rules reference the above factors not as considerations to be taken into account, but as facts which, if all are present, would mean that the originator is not a sole purpose originator. In that sense, the Current EU Rules offer more flexibility than the New UK Rules, since all (or any) of the above factors do not, strictly speaking, need to be present in order to pass the test.
- That said, it has been our experience that originators are typically able to satisfy either of the formulations mentioned above, and therefore we do not consider it likely that this apparent divergence between the New UK Rules and the Current EU Rules will be meaningful in practice.

Contingent/synthetic retention—ability to retain

- The New UK Rules (like the Current EU Rules) helpfully extend the ability to hold retention on an unfunded basis, i.e., synthetically or on a contingent basis such as in the form of a guarantee – and without having to cash collateralise the exposure – beyond credit institutions to certain investment firms subject to prudential regulation (and also insurers and reinsurers).
- Such widening of this permission is to be welcomed, particularly in relation to those investment firms within scope for whom synthetic or contingent risk retention will now become a possibility, potentially on an entirely unfunded basis.

Hedging the retention—when permitted

- The New UK Rules provide a helpful addition on this topic, since the old UK rules (and the Current EU Rules) refer only to the requirement that permitted hedging not hedge the credit risk of the retained interest or securitisation exposures.
- The New UK Rules now expressly permit hedging – including of credit risk – so long as such hedging was initiated as a "prudent element of credit-granting or risk management" prior to the commencement of the relevant securitisation, and the hedging doesn't differentiate between the originator's securitised and non-securitised credit risk.
- This is a welcome clarification for risk retainers such as banks and investment firms who may continue to employ their pre-existing credit risk management strategies which may extend to include the originator's exposures to assets that it subsequently securitises (including through its holding of a securitisation retention position).

Fee arrangements—whether retention is affected

- Unlike the Current EU Rules, the New UK Rules do not expressly contemplate how fees may be obtained by the risk retainer in connection with a securitisation without impacting (for example, by being required to be netted against and thereby effectively reducing) the originator's retained net economic interest.
- While the Current EU Rules provide a helpful clarification – in particular by referring to arms' length fees that are comparable to those paid in similar transactions being disregarded – market participants have, in our experience, already been operating on this basis (for example, in relation to fee sharing arrangements in respect of collateral management fees on CLOs) and we would not therefore regard the absence of a similar statement from the New UK Rules as being material.

Due Diligence/Transparency Requirements

Template requirements—when required

- Under the New UK Rules, institutional investors subject to the rules' due diligence requirements will no longer need to verify compliance by sponsors, originators and securitisation issuers with transparency obligations to the extent of the requirement to produce disclosure templates.
- Instead, investors will now only need to ensure that certain prescribed information is provided – regardless of format – and that the information provided is sufficient for them to independently assess the risks of holding the securitisation position.
- As a result, the expectation would be that the investor reporting required to be provided under the relevant securitisation's transaction documentation should in most cases be sufficient for compliance with the due diligence requirements by investors subject to the New UK Rules.
- Were there to be a UK sponsor, originator or SSPE, however, the disclosure templates would still need to be provided under the New UK Rules (due to such entities being separately subject to those rules' transparency requirements).

- By contrast, the Current EU Rules require investors subject to the due diligence obligations under those rules to ensure that the responsible entity prepares disclosure templates (even when those entities are located outside the EU and therefore would not be under an obligation to provide those templates themselves).
- A comparison of the information requirements for investor due diligence referred to above, as well as the relevant transparency obligations between the New UK Rules and the Current EU Rules, including the applicability of the relevant templates in various scenarios, is set out in the annexes to this note.

Provision of initial information—when required

- The New UK Rules clarify that the initial information prescribed by the rules' transparency requirements is to be provided "at pricing" in the case of public transactions, and at the time of the "[original] commitment to invest" in the case of private transactions. This is useful in that it clarifies the position as regards private transactions where there is no acknowledged pricing date (and is in any case consistent with current market practice).
- The above clarification should also assist in the case of investors acquiring securitisation positions in the secondary market, as there will now be no doubt under the New UK Rules that verification by such investors of the transaction's compliance prior to the date of their commitment to invest will not be required.
- A further useful clarification has been included in the New UK Rules to the effect that only a "draft or initial form" of the required transaction documentation is required to be made available before pricing, with final documentation to follow within 15 days after closing (and which is also consistent with current market practice).

Due diligence obligations—permitted delegation

- The New UK Rules confirm that whilst a delegation of due diligence obligations can be made by an investor subject to the rules to a person who is not so subject (such as, for example, delegation by a UK AIFM to a non-UK AIFM), the investor so delegating will not be relieved of responsibility for compliance under the rules (unless the entity to whom the duties are delegated is itself an institutional investor also subject to the rules).

Importantly, the grandfathering period mentioned above will not apply to this change, meaning that the new rule will apply even with respect to transactions (and therefore any related delegation arrangements) entered into before the go-live date for the New UK Rules.

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Annex 1

Comparison of certain institutional investor due diligence requirements

EU Securitisation Regulation Requirement	FCA Rulebook Requirement	PRA Rulebook Requirement	Notes
Prior to holding a securitisation position, an institutional investor is required to verify:			
Article 5(1)(a) Where originator/original lender is in the EU, credit granting is on the basis of sound, well-defined criteria and clearly established processes for approving, etc., with effective systems in place to apply criteria in accordance with Article 9(1) Trade receivables not originated in the form of a loan are carved out of the credit granting criteria by virtue of Recital (14) to the EU Securitisation Regulation	SECN 4.2.1 R (1)(a) / Chapter 2, Article 5(1)(a) Where originator/original lender is in the UK, credit granting (unless in respect of trade receivables not originated in the form of a loan) is on the basis of sound, well-defined criteria and clearly established processes for approving, etc., with effective systems in place to apply criteria in accordance with SECN 8.2/Article 9(1)		No practical difference
Article 5(1)(b) Where originator/original lender is outside the EU, credit granting is on the basis of sound, well-defined criteria and clearly established processes for approving, etc., with effective systems in place to apply criteria Trade receivables not originated in the form of a loan are carved out of the credit granting criteria by virtue of	SECN 4.2.1 R (1)(a) / Chapter 2, Article 5(1)(b) Where originator/original lender is outside the UK, credit granting (unless in respect of trade receivables not originated in the form of a loan) is on the basis of sound, well-defined criteria and clearly established processes for approving, etc., with effective systems in place to apply criteria		No practical difference

EU Securitisation Regulation Requirement	FCA Rulebook Requirement	PRA Rulebook Requirement	Notes
Recital (14) to the EU Securitisation Regulation			
Article 5(1)(c) Where originator/sponsor/original lender is in the EU, it retains a material net economic interest in accordance with Article 6 and is disclosed in accordance with Article 7	SECN 4.2.1 R (1)(a) / Chapter 2, Article 5(1)(c) Where originator/sponsor/original lender is in the UK, it retains a material net economic interest in accordance with Article 6 and is disclosed in accordance with SECN 5, 6, 11 and 12[1]/Article 7 and Chapters 5 and 6[2]		No practical difference
Article 5(1)(d) Where originator/sponsor/original lender is outside the EU, it retains a material net economic interest of not less than 5% determined in accordance with Article 6 and is disclosed to institutional investors	SECN 4.2.1 R (1)(a) / Chapter 2, Article 5(1)(d) Where originator/sponsor/original lender is not in the UK, it retains a material net economic interest of not less than 5% determined in accordance with SECN 5/Article 6 and is disclosed to institutional investors		No practical difference
Article 5(1)(e) Originator/sponsor/SSPE has made available the information required by and in accordance with Article 7 EU Commission confirmed that this requirement applies regardless of location of originator/sponsor/SSPE	SECN 4.2.1 R (1)(e) / Chapter 2, Article 5(1)(e) Originator/sponsor/SSPE has made available sufficient information to enable independent assessment of the risks and committed to make further information available on an ongoing basis, as appropriate *SECN 4.2.1 R (1)(e) / Chapter 2, Article 5(1)(e) specifies the minimum information required*		FCA Rulebook and PRA Rulebook provide that adequacy of information is based on sufficiency to enable independent assessment rather than prescribed templates

[1] SECN 11 and 12 of the FCA Rulebook set out template reporting requirements

[2] Chapters 5 and 6 of the PRA Rulebook set out template reporting requirements

EU Securitisation Regulation Requirement	FCA Rulebook Requirement	PRA Rulebook Requirement	Notes
An institutional investor must verify that the following information shall be made available by originator/sponsor/SSPE[3]			
Article 7(1)(a) Non-ABCP transactions: Quarterly reports on underlying exposures in template form	Details of underlying exposures, at least quarterly for non-ABCP transactions No requirement for template form		
Article 7(1)(a) ABCP transactions: Monthly reports on underlying receivables or credit claims in template form	Details of underlying receivables or credit claims, at least monthly for ABCP transactions No requirement for template form		
Article 7(1)(b) Underlying documentation to be provided before pricing	All information on legal documentation needed to understand the transaction In the case of primary market: - before pricing or commitment to invest in draft form - no later than 15 days after closing in final form - updated as soon as practicable after material change In the case of secondary market: - before commitment to invest in final form - updated as soon as practicable after material change		The FCA Rulebook and PRA Rulebook include detail as to timing for primary/secondary trades In addition, they specify that only draft documents are required ahead of pricing or commitment to invest and provide 15 days to make final documents available after closing
Article 7(1)(c) Where a prospectus has not been prepared, a transaction summary to be provided before pricing	Any approved prospectus or other offering or marketing document prepared In the case of primary market: - before pricing or commitment to invest in draft form - no later than 15 days after closing in final form		The FCA Rulebook and PRA Rulebook include detail as to timing for primary/secondary trades In addition, they specify that only draft documents are required ahead of pricing or commitment to invest and

[3] Availability of information is by reference to Article 7 under EU Securitisation Regulation. FCA Rulebook and PRA Rulebook instead provide specific requirements in the due diligence provisions.

EU Securitisation Regulation Requirement	FCA Rulebook Requirement	PRA Rulebook Requirement	Notes
	In the case of secondary market: - before commitment to invest in final form		provide 15 days to make final documents available after closing FCA Rulebook and PRA Rulebook do not include the concept of a transaction summary for the purposes of investor due diligence (note it is still included with respect to the direct obligation to provide information summarised below) Transactions with non-EU/UK originator/sponsor/SSPE and only UK investors would therefore no longer be required to include a transaction summary
Article 7(1)(e) Non-ABCP transactions: Quarterly investor reports in template form	Investor reports detailing credit quality/performance; triggers; cash flows; calculation and modality of retention, at least quarterly for non-ABCP transactions No requirement for template form		
Article 7(1)(e) ABCP transactions: Monthly investor reports in template form	Investor reports detailing credit quality/performance; triggers; cash flows; calculation and modality of retention, at least monthly for ABCP transactions No requirement for template form		
Article 7(1)(f) Inside information reports without delay	No equivalent is provided for in the FCA Rulebook or the PRA Rulebook for investor due diligence purposes		
Article 7(1)(g) Significant event reports without delay	Information describing changes or events materially affecting the transaction, including breaches of obligations as soon as practicable following the material change or event		

Annex 2

Comparison of certain direct transparency requirements applicable to Originator/Sponsor/SSPE subject to EU Securitisation Regulation/FCA Rulebook/PRA Rulebook

EU Securitisation Regulation Requirement	FCA Rulebook Requirement	PRA Rulebook Requirement	Notes
Silent as to scope: market view is that this applies to originators/sponsors/SSPEs established in the EU	SECN 6.1.1 Specifically applicable to originators/sponsors/SSPEs established in the UK	Article 1.1 Applies to PRA authorised firms that are UK undertakings in their capacity as originator/sponsor	No practical difference
Article 7(1) Information to be made available to holders of a securitisation position, competent authorities and, upon request, potential investors	SECN 6.2.1 Information to be made available to holders of a securitisation position, the FCA and, upon request, potential investors	Article 7(1) Information to be made available to holders of a securitisation position, the PRA and, upon request, potential investors	No practical difference
Article 7(1)(a) Non-ABCP transactions: Quarterly reports on underlying exposures in template form Simultaneous with info under Article 7(1)(e) at the latest one month after due date for payment of interest	SECN 6.2.1 R (1) / Article 7(1)(a) Details of underlying exposures, at least quarterly for non-ABCP transactions in template form SECN 6.2.2 R (1) / Article 7(1) Simultaneous with info under SECN 6.2.1 R (5) / Article 7(1)(e) at the latest one month after due date for payment of interest		No practical difference
Article 7(1)(a) ABCP transactions: Monthly reports on underlying receivables or credit claims in template form Simultaneous with info under Article 7(1)(e) at the latest one month after	SECN 6.2.1 R (1) / Article 7(1)(a) Details of underlying exposures, at least monthly for ABCP transactions in template form SECN 6.2.2 R (1) / Article 7(1)		No practical difference

EU Securitisation Regulation Requirement	FCA Rulebook Requirement	PRA Rulebook Requirement	Notes
end of period covered by report	Simultaneous with info under SECN 6.2.1 R (5) / Article 7(1)(e) at the latest one month after end of period covered by report		
Article 7(1)(b) Underlying documentation to be provided before pricing	SECN 6.2.1 R (2) / Article 7(1)(b) Underlying documentation essential for the understanding of the transaction SECN 6.2.2 R (2) / Article 7(1) - before pricing or original commitment to invest in draft form - no later than 15 days after closing in final form		The FCA Rulebook and PRA Rulebook specify that only draft documents are required ahead of pricing or *original* commitment to invest and provide 15 days to make final documents available after closing
Article 7(1)(c) Where a prospectus has not been prepared, a transaction summary to be provided before pricing	SECN 6.2.1 R (3) / Article 7(1)(c) Where a prospectus is not required to be drawn up, a transaction summary or overview of main features of the transaction SECN 6.2.2 R (2) / Article 7(1) - before pricing or original commitment to invest in draft form - no later than 15 days after closing in final form		The FCA Rulebook and PRA Rulebook specify that only draft documents are required ahead of pricing or *original* commitment to invest and provide 15 days to make final documents available after closing
Article 7(1)(e) Non-ABCP transactions: Quarterly investor reports in template form Simultaneous with info under Article 7(1)(a) at the latest one month after end of period covered by report	SECN 6.2.1 R (5) / Article 7(1)(e) Investor reports detailing credit quality/performance; triggers; cash flows; calculation and modality of retention, at least quarterly for non-ABCP transactions in template form SECN 6.2.2 R (1) / Article 7(1) Simultaneous with info under SECN 6.2.1 R (1) / Article 7(1)(a) at the latest one month after end of period covered by report		No practical difference

EU Securitisation Regulation Requirement	FCA Rulebook Requirement	PRA Rulebook Requirement	Notes
Article 7(1)(e) ABCP transactions: Monthly investor reports in template form	SECN 6.2.1 R (5) / Article 7(1)(e) Investor reports detailing credit quality/performance; triggers; cash flows; calculation and modality of retention, at least monthly quarterly for ABCP transactions in template form SECN 6.2.2 R (1) / Article 7(1) Simultaneous with info under SECN 6.2.1 R (1) / Article 7(1)(a) at the latest one month after end of period covered by report		No practical difference
Article 7(1)(f) Inside information reports without delay	SECN 6.2.1 R (6) / Article 7(1)(f) Inside information reports SECN 6.2.4 R / Article 7(1) Information is to be made available without delay		No practical difference
Article 7(1)(g) Significant event reports without delay	SECN 6.2.1 R (7) / Article 7(1)(g) Significant event reports SECN 6.2.4 R / Article 7(1) Information is to be made available without delay		No practical difference
Article 7(2) Information to be made available by means of a securitisation repository, except where a prospectus is not required to be drawn up	SECN 6.3.3 / Article 7(2) Information to be made available by means of a securitisation repository, except where a prospectus is not required to be drawn up		No practical difference

EU Securitisation Regulation Requirement	FCA Rulebook Requirement	PRA Rulebook Requirement	Notes
Article 7(3) ESMA to develop RTS – these apply in respect of reporting on underlying exposures and investor reports	SECN 6.2.1 Direct reference to SECN 11 and SECN 12 where detailed reporting requirements (including template reporting) are specified	Article 7(1) Direct reference to Chapters 5 and 6 where detailed reporting requirements (including template reporting) are specified	

Annex 3

Summary of template reporting requirements by reference to location of Originator/Sponsor/SSPE and investors

	UK Investors	**EU Investors**	**UK and EU Investors**	**No UK or EU Investors**
Originator/Sponsor in the UK and is an FCA or PRA authorised person	FCA/PRA required ESMA not required	FCA/PRA required ESMA required	FCA/PRA required ESMA required	FCA/PRA required ESMA not required
Originator/Sponsor/SSPE in the EU	FCA/PRA not required ESMA required	FCA/PRA not required ESMA required	FCA/PRA not required ESMA required	FCA/PRA not required ESMA required
Originator/Sponsor/SSPE outside the EU and outside the UK	FCA/PRA not required ESMA not required	FCA/PRA not required ESMA required	FCA/PRA not required ESMA required	FCA/PRA not required ESMA not required

Key: Template reporting is not required

Template reporting is required