Clients&FriendsMemo

COVID-19 Update: Changes to the EU Securitisation Regulations and the Capital Requirements Regulation

22 December 2020

As discussed in our previous Clients and Friends Memo[1] (the "**First Update**"), on 24 July 2020 the European Commission (the "**Commission**") published proposed amendments to the current securitisation framework set out in Regulation (EU) 2017/2402 (the "**Securitisation Regulation**")[2] with the intention of bolstering economic recovery from the COVID-19 pandemic. The Council of the EU has now published the final text in respect of those amendments, as agreed with the EU Parliament and the Commission (the "**Final Text**")[3]. The purpose of this Clients and Friends Memo is to highlight certain new provisions of the Final Text of general significance for the securitisation market.

The amendments to the Securitisation Regulation: (i) remove some regulatory obstacles to the securitisation of non-performing exposures ("**NPEs**"); and (ii) extend the framework for simple, transparent and standardised ("**STS**") securitisations to balance-sheet synthetic securitisations.

Also as discussed in the First Update, related amendments (the "**CRR Amendments**") to Regulation (EU) 575/2013 (the "**CRR**")[4] will: (i) extend the benefit of lower capital treatments to the senior tranche of balance-sheet synthetic securitisations that satisfy the STS framework; and (ii) provide for specific capital treatment for positions in NPE securitisations.

During the legislative process, the Council of the EU and the European Parliament have also taken the opportunity to add in provisions unrelated to the STS framework and the treatment of NPEs.

[1] https://www.cadwalader.com/resources/clients-friends-memos/covid-19-update-european-commission-proposes-changes-to-the-securitisation-regulation-in-response-to-covid-19#

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596024242767&uri=CELEX:52020PC0282

[3] https://www.consilium.europa.eu/media/47471/st13798-ad03-en20.pdf; https://www.consilium.europa.eu/media/47472/st13798-ad04-en20.pdf

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596024200046&uri=CELEX:52020PC0283

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Amendments Applicable to All Securitisations

Effect of Fees and Rebates on Effective Retention

The Final Text will amend Article 6(1) of the Securitisation Regulation (which sets out the requirements for risk retention), by adding the following sub-paragraph:

"In measuring the material net economic interest the retainer shall take into account any fees that may in practice be used to reduce the effective material net economic interest."

Furthermore, Article 6(7) of the Securitisation Regulation will be amended to require the European Supervisory Authorities ("**ESAs**") to draft regulatory technical standards on how this new provision affects risk retention calculations. The European Banking Authority ("**EBA**"), in co-operation with the other ESAs, is required to submit these draft regulatory technical standards to the Commission no later than six months after entry into force of the Final Text.

Subject to further clarification from EBA in the regulatory technical standards, this provision seems to require that the 5% risk retention interest should be calculated net of any fee reductions or rebates offered to the retention holder as part of a transaction.

At this stage it is unclear how this provision will be interpreted and complied with until the EBA has submitted draft technical standards; however, parties should consider this provision when calculating the 5% material net economic interest.

Requirements for SSPEs

The Final Text adds further restrictions of the ability to incorporate a Securitisation Special Purpose Entity ("**SSPE**") in certain jurisdictions, under Article 4 of the Securitisation Regulation. Under the Final Text, SSPEs may not be established in:

- a third country listed as a high-risk third country with strategic deficiencies in its regime on anti-money laundering and counter terrorist financing, or

- a third country listed in Annex I or Annex II of the EU list of non-cooperative jurisdictions for tax purposes.

The addition of this second limitation is noteworthy given the previous presence of the Cayman Islands (a jurisdiction frequently used for SSPEs) on this list during the period February – October 2020.

Jurisdiction of SSPEs

Under Article 44 (*Reports*) of the Securitisation Regulation, by 1 January 2021 and every three years thereafter, the Joint Committee of the ESAs has to publish certain reports relating to the functioning of the Securitisation Regulation (the "**Review**"). The Final Text has added "geographical location of SSPEs" as a topic to be looked at during the Review, and tasks the Commission with an assessment of the reasons behind the location choice, including the role of a favourable tax and regulatory regime.

Powers of National Regulators

Article 30(2) (*Powers of the competent authorities*) of the Securitisation Regulation contains a list of market-participant procedures subject to regular review by national regulators. The Final Text amends such provisions by reflecting the different approach to credit-granting in respect of NPEs. The amended processes and mechanisms subject to such review are:

- for non-NPE Securitisations: (i) the credit-granting criteria applied to performing exposures in accordance with Article 9; and (ii) the sound standards for selection and pricing applied to underlying exposures that are non-performing exposures as referred to in the second subparagraph of Article 9(1);

- for NPE Securitisations: the processes and mechanisms to ensure compliance with Article 9(1) preventing any abuse of the derogation provided for in the second subparagraph of Article 9(1); and

- for STS on-balance sheet securitisations: the processes and mechanisms to ensure compliance with the new Articles 26b to 26e.

Transparency and Sustainability Factors

Paragraph (4) of Article 22 (*Requirements relating to transparency*) of the Securitisation Regulation currently requires, in the case of a securitisation where the underlying exposures are residential loans, auto loans or leases, the publication of available information related to the environmental performance of the assets financed by such residential loans or auto loans or leases. The Final Text adds a further subparagraph to that provision, providing that originators may, from 1 June 2021 onwards, decide to publish the available information related to the principal adverse impacts on sustainability factors of the assets financed by the underlying exposures. The concept of "principal

adverse impacts on sustainability factors" has been taken from the EU's Sustainable Finance Disclosures Regulation (Regulation (EU) 2019/2088) ("**SFDR**")[5].

No later than three months after entry into force of Final Text, the ESAs must develop draft regulatory technical standards on the content, methodologies and presentation of such principal adverse impacts. These standards are required to "*mirror or draw upon the regulatory technical standards*" drawn up for the SFDR.

The Final Text also adds a new Article 45a (*Development of a sustainable securitisation framework*). It requires, by 1 November 2021, that the EBA, in cooperation with ESMA and EIOPA, publishes a report on developing a specific sustainable securitisation framework for the purpose of integrating sustainability-related transparency requirements into the Securitisation Regulation.

Amendments Applicable to Synthetic Securitisations

*Synthetic Excess Spread ("**SES**")*

A notable provision in the CRR Amendments relates to SES as a mechanism commonly used in some securitisations to reduce the cost of protection and the exposure at risk. The regulatory concern relates to the arbitrage that may occur when the originator of a synthetic securitisation provides credit enhancement to the protection provider by contractually designating certain amounts to cover losses, and such amounts: (i) have the effect of encumbering the originator's income statement in a way akin to an unfunded guarantee; but (ii) are not risk-weighted.

The CRR Amendments add a new paragraph (e) to article 248 (*Implicit Support*) of the CRR, which requires the determination of the exposure value of a SES to consider:

(i) any income from the securitised exposures already recognised by the originator in its income statement under the applicable accounting framework that the originator has contractually designated to the transaction as SES that is still available to absorb losses;

(ii) any SES contractually designated by the originator in any previous periods that is still available to absorb losses any SES contractually designated by the originator for the current period that is still available to absorb losses; and

(iii) any SES contractually designated by the originator for future periods.

[5] https://eur-lex.europa.eu/eli/reg/2019/2088/oj

The EBA is required to draft regulatory technical standards to specify how originators can determine the exposure value referred to above, no later than six months after the date of entry into force of the CRR Amendments.

Further, the CRR Amendments add a new paragraph to Article 256 (*Additional own funds requirements for securitisations of revolving exposures with early amortisation provisions*). Such addition requires that, for the purposes of calculating the attachment points and detachment points of a synthetic securitisation, the originator shall:

(i) treat the exposure value of the securitisation position corresponding to SES as a tranche; and

(ii) adjust the attachment points and detachment points of the other tranches it retains by adding that exposure value to the outstanding balance of the pool of underlying exposures in the securitisation.

Next Steps

The European Parliament and the Council of the EU will be called on to adopt the amendments without further discussion, possibly in February 2021, after the usual legal-linguistic revision of the text.

The amendments will apply directly to Member States 20 days following publication in the Official Journal of the European Union of the adopted legislative text.

Brexit

These amendments will not be "onshored" into the UK version of the Securitisation Regulation (the "**UK Securitisation Regulation**"), as they will not enter into force prior to the end of the Brexit transition period on 31 December 2020. It is unclear at this time whether the UK will opt to replicate these changes into the UK Securitisation Regulation. In respect of STS transactions, it is clear, however, that market participants will have to contend with two separate regimes (UK and EU).

Even without the amendments to be introduced by the Final Text, there may be areas of divergence between the two regimes. For example, the UK Securitisation Regulation will permit transactions to be classed as STS where the SSPE is established outside of the UK, provided the sponsor and originator are UK based (whereas the Securitisation Regulation requires the SSPE, sponsor and originator to be established in an EU Member State). Furthermore, there will be two separate STS notification regimes under the UK and EU legislation (requiring notification to the UK FCA and ESMA, respectively), and it is not yet clear whether the EU will recognise UK STS transactions

(while the UK has indicated it will recognise EU STS EU securitisations which have been notified as being STS prior to 31 December 2022). It is expected that the FCA will provide clarity in 2021 on how it plans to deal with regulatory technical standards under the Securitisation Regulation that have not been onshored.

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