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BREXIT HAS HAPPENED - SO WHAT'S NEXT FOR SECURITISATIONS?

Beyond Borders – Part of the Horizon Scanning series

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The UK left the EU single market at 11:00 pm (London time) on 31 December 2020. The Trade and Cooperation Agreement between the UK and the EU that has applied since then does not deal with the regulatory detail of cross-border financing transactions. Accordingly, in the context of securitisations, the EU Securitisation Regulation continues in force, but now only applies directly to entities in the remaining 27 EU member states. UK entities are instead directly subject to the parallel, but distinct, UK Securitisation Regulation (the 'on-shored' version of the EU Securitisation Regulation, created under the European Union (Withdrawal) Act 2018 (the "EUWA")). In this briefing we explain how market participants are navigating the different regimes.

Key points

- Since the end of the Brexit implementation period, the EU Securitisation Regulation and the UK Securitisation Regulation have been two parallel, but distinct regimes. They closely resemble each other, but they are not exact mirror images.

- An entity's direct regulatory obligations depend upon where it is established, so any given entity will only have direct regulatory obligations under either the EU Securitisation Regulation or the UK Securitisation Regulation, but not both (although a structure with both EU and UK entities would be subject to both regimes).

- For new issuances, the most complex question may be whether and how to facilitate compliance by both EU and UK regulated investors with their due diligence obligations. There is a range of potential approaches to this question of dual compliance.

- For existing issuances, there is a question over how to interpret contractual references to EU regulatory provisions in the context of Brexit. The application of the common law principles of contractual construction and contractual interpretation provisions may require careful analysis in some scenarios.

- The EU and the UK are now regulating separately, with changes expected in Q1 2021 in the EU regime to deal with non-performing exposures and 'STS' balance-sheet synthetic transactions, and with both the EU and the UK due to review their securitisation regimes later this year. This raises the possibility of further regulatory divergence and the navigation of these regimes may become a more complex exercise. There is also an opportunity for market participants and regulators to consider reforms, with a view to facilitating legitimate transactions undertaken on a cross-border basis.

The parallel, but distinct, EU and UK securitisation regimes

Almost all implementing measures envisaged under both the EU Securitisation Regulation and the UK Securitisation Regulation have now been finalised:

The EU securitisation regime	The UK securitisation regime
Key 'level 1' materials	
EU Securitisation Regulation	UK Securitisation Regulation
Key 'level 2' materials (delegated acts and technical standards)	
EU transparency regulatory and implementing technical standards	UK transparency regulatory and implementing technical standards

New EU risk retention standards (draft)	New UK risk retention standards (draft)
EU homogeneity regulatory technical standards	UK homogeneity regulatory technical standards
Key 'level 3' materials and regulator guidance	
ESMA Q&A on securitisations EBA guidelines on STS criteria, ESMA guidelines on portability of information between data repositories and ESMA guidelines on data repository completeness and consistency standards	Existing EU regulator guidance was not on-shored under the EUWA, but both the PRA and the FCA expect market participants to continue to comply with it to the extent relevant The PRA and the FCA do not expect market participants to comply with new EU regulator guidance (and changes to existing EU regulator guidance), but reserve the right to modify their expectations on an issue by issue basis
	PRA and FCA joint direction on how UK regulated entities should report private securitisations PRA Supervisory Statement (SS10/18) Securitisation: General requirements and capital framework

What measures remain to be implemented under both regimes?

The new EU risk retention standards have not yet been published in the Official Journal of the European Union and therefore missed out on being on-shored into UK domestic law under the EUWA. The draft versions of the new EU risk retention standards and the new UK risk retention standards largely mirror each other, but it is uncertain when these will enter into force (or even if their entry into force will coincide). Until the new risk retention standards enter into force, the old EU risk retention standards and old UK risk retention standards (which, given the on-shoring, are substantively identical) continue to apply on a transitional basis to entities in their respective jurisdictions.

There are open questions under both regimes

In our June 2019 client briefing, we discussed certain open questions in relation to the EU Securitisation Regulation, including uncertainties related to the scope of the definition of 'securitisation' (and therefore the extent to which a particular transaction structure might trigger securitisation regulation obligations and related capital treatment) and also uncertainties over whether modifications to a legacy securitisation (concluded before the general application of the EU Securitisation Regulation commenced in January 2019) might be considered a new 'issuance', again potentially triggering securitisation regulation obligations. Because there has been no new EU regulator guidance on the definition of 'securitisation', some transaction structures continue to be difficult to characterise, with the result that certain such 'grey area' transactions may be treated as a securitisation by some counterparties while other counterparties on the same transaction may take a different view.

These open questions under the EU Securitisation Regulation are now also open questions under the UK Securitisation Regulation and, because their definitions of 'securitisation' mirror each other exactly, similar analysis currently applies in each jurisdiction.

It may be the case that in the future either the EU or the UK seeks to clarify these open questions (either via a change in legislation, regulatory guidance or even a court judgment). Any such clarification may result in further divergence and potentially an outcome in which a particular transaction structure falls within the regulatory definition of securitisation in the EU but not in the UK or vice versa. Whether or not this would cause difficulties or opportunities for market participants on particular transactions would be highly fact specific. To some extent market participants are already used to questions of this nature in transactions with a US-nexus, where the regulatory definition of 'asset-backed securities' is different from (and arguably more precise than) the EU and UK definition of 'securitisation'.

Has the law changed? Regulatory divergence caused by the on-shoring

The policy intent of the EUWA was to ensure that, as a general rule, the same rules and laws applied on the day after the UK left the single market as on the day before. The UK Securitisation Regulation therefore closely resembles the EU Securitisation Regulation, but they are not exact mirror images. The UK legislators made certain substantive modifications during the on-shoring process, with the result that a degree of substantive regulatory divergence between the two regimes arose immediately. Some examples of this are:

	The EU securitisation regime	The UK securitisation regime
To qualify for STS treatment, where must the parties be established?	Each of the sponsor, originator and SSPE must be established in the EU. Legacy STS securitisations with a UK entity issued before the end of the Brexit implementation period with a UK entity are not grandfathered and no longer benefit from EU STS prudential treatment.	For securitisations issued since 31 December 2020, the sponsor and originator must be UK established. There are no jurisdictional limitations on the SSPE. Legacy STS securitisations with an EU entity and new EU STS securitisations issued during 2021 and 2022 are grandfathered and will continue to benefit from UK STS prudential treatment.
Can regulated investors invest if the disclosure doesn't meet the letter of the transparency requirements?	As we discussed in our June 2019 briefing, there is no clear legislative basis permitting EU regulated investors to invest in UK-originated (or other third country-originated) securitisations that do not meet the letter of the EU transparency requirements. However, practice in this area is mixed.	There is a clear legislative basis permitting UK regulated investors to invest in EU-originated securitisations that do not meet the letter of UK transparency requirements. Arguably this wording is not wide enough to cover US-originated securitisations.
Definition of sponsor	The definition of 'sponsor' covers both EU and third country credit institutions, but appears only to cover EU investment firms rather than third country investment firms. This has implications for which entities can retain risk in some transactions.	The definition of 'sponsor' covers both UK and third country credit institutions as well as both UK and EU investment firms.

The UK's temporary transition power – how it works

The PRA and the FCA were empowered under the EUWA to provide transitional relief to market participants that would otherwise be subject to new or altered obligations resulting from the end of the Brexit implementation period and the application of the new UK regulatory framework. The PRA and the FCA are using this power (the "Temporary Transition Power" or "TTP") until 31 March 2022 (the "TTP Period") in relation to certain obligations under the UK Securitisation Regulation and both the PRA and the FCA have published guidance on this. Unlike the Brexit implementation period, which was the result of an agreement between the UK and the EU, the TTP Period is a result of a unilateral UK measure. There is therefore no equivalent to the TTP Period in the EU.

Obligations that benefit from the TTP include certain due diligence, risk retention and transparency obligations and the TTP allows UK entities to opt to comply either with the old EU obligation or the new UK obligation during the TTP Period. Certain new obligations under the UK Securitisation Regulation have been carved out of the TTP, including those relating to STS securitisations and the obligation on UK entities of public securitisations to publish transparency information via a UK data repository (once one is authorised by the FCA).

While the TTP is intended to facilitate firms adjusting to the new regime, it is of most help in relation to legacy transactions (where market participants will already be disclosing transparency information on the basis of the EU templates and may not be ready to switch immediately) or new transactions under existing programme structures (such as master trusts), whereas for new standalone deals it may make sense (especially for new issuers) to comply with the UK rules at the outset (rather than begin with the EU rules and switch over before the end of the TTP Period).

A somewhat more flexible UK regime?

The common theme that runs through the on-shoring changes made to the UK Securitisation Regulation and the UK's Temporary Transition Power is that the UK regime is currently relatively more flexible than the EU regime. The unilateral steps taken by the UK have the consequence of reducing (to an extent) the regulatory burden on market participants and allowing them (to an extent) to comply with both regimes.

Whether this initial flexibility is driven primarily by functional necessity (to ease the transition to the new regime) or whether it instead stems from a philosophical approach (a belief in open markets, even on a unilateral basis) is harder to discern. This does raise a question for market participants: to what extent might UK regulators be pragmatic and open to further flexibility in the longer term?

Which regime applies, the EU regime or the UK regime?

New issuances – direct obligations (imposed by regulation)

Both the EU Securitisation Regulation and the UK Securitisation Regulation are on their face extra-territorial, imposing obligations on market participants even if those entities are established in third countries. However, a market consensus has arisen that entities only have direct obligations that derive from where they are established (so UK entities only have direct obligations under the UK Securitisation Regulation and EU entities only have direct obligations under the EU Securitisation Regulation).

This means that, for transactions in which at least one of the sell-side entities (the sponsor, originator or SSPE) is established in the EU and at least one of them is established in the UK, there are direct dual compliance obligations in relation to transparency and risk retention under both the EU Securitisation Regulation and the UK Securitisation Regulation (mitigated by the TTP during the TTP Period in relation to UK obligations). Conversely, for transactions in which all of the sell-side entities are established in either the EU or the UK, there are no direct dual compliance obligations.

For many public transactions there are both EU regulated investors (which under the EU Securitisation Regulation have due diligence obligations, including verification as to risk retention compliance, before they can invest) and UK regulated investors (which now have parallel obligations under the UK Securitisation Regulation). Conversely, for true private, bilateral and intra-group transactions there may only be regulated investors in either the EU or the UK but not both.

New issuances – indirect obligations (imposed by contract, reflecting a commercial need)

We are already seeing, in the context of a number of transactions that have closed since the start of 2021, that the existence of regulated investor due diligence obligations (designed to work in tandem with transparency and risk retention obligations imposed on sell-side entities) means that sell-side entities need to consider if they have a commercial need to commit to retaining risk and providing transparency information under both UK and EU regimes upfront, and potentially also during the life of a transaction, in order to attract investors. Where this is the case, the commercial need therefore effectively imposes indirect obligations on sell-side entities that go beyond those imposed by regulation. The extent of indirect obligations was already complex question, but the end of the Brexit implementation period has now added a further layer of complexity. For example, for transactions where there are only UK sell-side entities which now only have direct obligations to retain risk and provide transparency information under the UK Securitisation Regulation, there is a new need to consider whether to contract into retaining risk and providing upfront and ongoing transparency information under the EU Securitisation Regulation (and disclose accordingly), so as to facilitate compliance by EU regulated investors with their due diligence obligations.

In some circumstances it may be helpful to consider the practice that US sell-side entities have taken in recent years in relation to public securitisations which may be marketed on a global basis, where many US sell-side entities have chosen to disclose that they are not seeking to comply with the EU Securitisation Regulation. Applying this approach to the Brexit context, EU entities would disclose that they have not undertaken to comply with the UK regime and UK entities would disclose that they have not undertaken to comply with the EU regime.

In other circumstances, a view might be taken that, due to the current regulatory proximity of the EU Securitisation Regulation and the UK Securitisation Regulation (specifically that UK transparency and risk retention obligations currently largely mirror EU due diligence obligations), coupled with the location of investors and investor preferences, it is not too onerous for a UK originator or sponsor to seek to contract into complying with EU risk retention and transparency obligations, and to disclose accordingly. Because any obligation to comply with two regimes during the life of a transaction exposes a UK originator or sponsor to the risk of future regulatory divergence (and a potential increased compliance burden), the extent of this obligation and the exact way that it is drafted requires careful thought and, where this approach has been adopted, we are currently seeing a range of different formulations. These usually fall short of an obligation to comply in full with both regulatory regimes, and instead qualify compliance with the regime (most usually the EU Securitisation Regulation) which is being opted into (by way of contract) in certain ways, such as by requiring compliance only in respect of the rules as they stand on the date of issuance, or by requiring only 'reasonable efforts' to comply with post-issuance requests for transparency information under one set of rules.

Practice in this area will no doubt evolve over time, and the approach taken on any given transaction will depend upon particular asset classes, fact patterns, investor preferences and appetite for risk. In any event, given the EU and UK securitisation regimes have only recently split (and contain a shared terminology), it is particularly important to be precise with drafting and disclosure.

New issuances – how to draft and disclose?

In the immediate aftermath of the end of the Brexit implementation period, the question over how to refer to 'retained EU law' (the distinct body of on-shored law that now applies in the UK and forms part of UK domestic law by virtue of the EUWA), and ensure that it is clearly distinguished from 'EU law' itself, represents a challenge on all cross-border transactions rather than being a specific securitisation challenge. This may be felt acutely when it comes to updating legacy documentation. Particular attention needs to be paid to boilerplate rubrics that derive from regulation and now typically need to refer to the parallel but distinct EU and UK regulations for benchmarks, credit rating agencies, PRIIPs, product governance and so forth. With the passage of time, a body of precedent will emerge, making this challenge easier.

Given that the UK leaving the EU single market is no longer a theoretical event that may occur in future, but a real event that has now occurred, practice with Brexit-related risk factors has now changed. In many circumstances it is not appropriate to try to update language from previous deals without considerable analysis. Given that the legal and regulatory framework for cross-border transactions in the post-Brexit era is now certain, the volume of Brexit risk factors (many of which tended to deal principally with uncertainty) can be expected to diminish. In areas where there continues to be a specific Brexit regulatory risk or a specific risk relating to a particular asset class, a risk factor may still need to be disclosed.

Legacy issuances – which obligations apply, as a matter of regulation and contract?

Direct obligations under both the UK Securitisation Regulation (read in conjunction with the Temporary Transition Power) and the EU Securitisation Regulation apply in relation to legacy securitisations (i.e. those issued before the end of the Brexit implementation period) in the same way that they apply to new issuances. This means that, for any given legacy securitisation, a UK entity that previously had direct obligations under the EU Securitisation Regulation no longer has these, but instead has direct obligations under the UK Securitisation Regulation (with the option to comply with these, during the TTP Period, on the basis of the EU securitisation regime in some cases). The direct obligations of EU entities are still governed by the EU Securitisation Regulation, but, for those legacy securitisations for which at least one of the sell-side entities is a UK entity, EU regulated investors who buy into the deal in the secondary market will now have to verify compliance with risk retention and credit-granting requirements under the EU Securitisation Regulation on the basis of the specific 'third country due diligence' provisions rather than the 'EU due diligence' provisions. Because of the way the on-shoring under the EUWA worked, new direct regulatory obligations will not immediately cause problems for most legacy securitisations with one or more UK entities.

The transaction documentation for many legacy securitisations includes contractual obligations that replicate, or go beyond, the direct regulatory obligations that previously applied under the EU Securitisation regime. The question over how to construe contractual obligations that refer to EU regulatory provisions after the end of the Brexit implementation period is a complex one, particularly in the case of UK entities that are no longer directly subject to EU regulation. For documentation governed by English law, the starting point is the common law rules of contractual construction, which include various principles for determining the objective intention of the parties, including commercial common sense, reasonableness, loyalty to the text and also the wider context. The transaction documentation for most securitisations will usually also include provisions designed to aid construction of statutory references, but these will often not clearly address a situation such as Brexit (where the existing body of EU law remains in place, but is replaced in the UK by a new body of law). How to balance these (potentially competing) common law principles and any applicable contractual provisions and apply them in the context of Brexit requires careful thought and in some cases bespoke advice, particularly given the absence of case law dealing with this highly specific scenario. Market understanding of this question may evolve with time, but our current experience is that:

- absent unusual drafting, existing contractual obligations of EU entities that refer to EU regulatory provisions should not be read so as to include equivalent UK regulatory provisions (although from an investor relations perspective it may make sense for EU entities to discuss with their UK regulated investors how they plan to approach transparency obligations after the end of the TTP Period described above).

- absent unusual drafting, existing contractual obligations of UK entities that refer to EU regulatory provisions should be read so as to include equivalent UK regulatory provisions (which will not in most cases lead to an increased compliance burden, given that UK entities will already be directly subject to UK regulation).
- the extent to which existing contractual obligations of UK entities that refer to EU regulatory provisions should also be read as continuing to apply to EU regulatory provisions (in addition to equivalent UK regulatory provisions) is more open to argument, and will turn on precise drafting and fact patterns. An argument can be made that these contractual obligations were designed to protect both EU and UK regulated investors (including in the secondary market) and they therefore should be read as requiring dual compliance. In any event it may make sense for UK entities to discuss with their EU regulated investors what their expectations are.

Looking to the future: reforms and regulatory divergence

The EU's regulatory system for financial services is dynamic rather than static, with the detail of regulations changing and new guidance from regulators emerging regularly, and there is no reason to think that the UK's regulatory system will be any different. Furthermore, the Trade and Cooperation Agreement between the UK and EU gives both of them broad regulatory freedom in relation to their respective financial services frameworks. Given the clear statements from both the EU and the UK relating to their desire for regulatory autonomy, it seems that further divergence, going beyond that caused by the UK leaving the single market and the on-shoring process, is probable and will arise both from actions taken by the EU and from actions taken by the UK.

EU reforms – COVID capital markets quick fixes

As we discussed at the end of last year, the EU's legislative process for its COVID capital market quick-fix package is ongoing and it therefore missed out on being on-shored into UK domestic law. This package includes amendments to the EU Securitisation Regulation to (a) create a specific regulatory framework for non-performing exposures and (b) create an STS framework for balance sheet synthetic securitisations, as well as related amendments to the EU CRR.

As the UK economy and financial services sector is subject to similar pressures that have driven these EU changes, it might be thought logical that the UK should make parallel changes to the UK Securitisation Regulation and the UK CRR. However, the UK might also wish to test whether the EU's changes are the right ones to address these pressures as they arise in the UK. A balance may need to be struck by the PRA between ensuring that high prudential standards are maintained and its new duty (when the Financial Services Bill currently going through Parliament comes into force later this year) to have regard, when formulating UK capital requirements rules, to '*the likely effect of the rules on the relative standing of the United Kingdom as a place for internationally active credit institutions and investment firms to be based or to carry on activities*'. Finally, any new UK legislation would need to find a way through the competing pressures on the UK government's legislative timetable and, given the UK is slated to review the UK securitisation regime later in 2021, any changes to the UK regime may well be postponed until then.

EU reforms – capital markets union and the review of the EU Securitisation Regulation

The EU is due to begin its review of the EU Securitisation Regulation this year and publish that review, likely accompanied by a legislative proposal, during Q4 2021. The Commission's September 2020 capital markets union action plan confirms there will be a particular focus on SMEs and the green transition, the capacity of the current framework to adequately reflect the effective riskiness of both STS and non-STS securitisation instruments, the appropriateness of disclosure requirements, the process for recognising significant risk transfer and the prudential treatment of cash and synthetic securitisations.

As we discussed last year, it is hoped that the Commission take forward some of the proposals highlighted in the earlier High Level Forum report, aimed at making cross-border securitisations easier. Among a set of other sensible reforms, the High Level Forum invites the Commission to: "*allow an EU-regulated investor in third-country securitisations to determine whether it has received sufficient information... [and clarify] that Article 5.1 (e) does not apply to a third country originator/ sponsor or SSPE. Rather such third country originator, sponsor and SSPE must ensure that the EU-regulated investor has received sufficient information to meet the requirements for due diligence proportionate to the risk profile of the securitisation exposure*." This reform would make it significantly easier for EU-established institutional investors to invest in US-originated and UK-originated securitisations on the basis of a pragmatic "*sufficient information*" test. If the EU were to adopt the High Level Forum's proposal, the EU Securitisation Regulation would become more flexible than the UK Securitisation Regulation, which is currently limited by the "*substantially the* *same*" test in Article 5(1)(f). UK policy makers should certainly consider whether they should make similar reforms to the UK Securitisation Regulation, whether or not the EU progresses this proposal.

UK reforms – what are the Chancellor's plans?

Within the broader arena of financial services and capital markets, the Chancellor has been clear on some of the regulatory reforms that the UK will take forward. Many of these reforms are within the scope of the Financial Services Bill or are currently under consultation. The Future Regulatory Framework Review, under which the UK government is proposing to depart from the EU model of financial services regulation (wherein the technical detail of rules are contained within delegated acts and technical standards, which go through a lengthy legislative process) and move to a model under which the technical detail of rules is left to the PRA and the FCA (which should in theory be more agile), may in the longer term result in a UK securitisation regime that looks rather different from the current framework. This difference may extend not only to the process of enacting rules, but also to their style and level of prescriptive detail, particularly if the suggestions made by Sam Woods, deputy governor for prudential regulation at the Bank of England, are taken forward.

However, in terms of specific changes to the UK Securitisation Regulation, while we know that HM Treasury is required to review it and report on it to Parliament during 2021, there has been no specific comment from the UK government on reforms that it might make, but that should not stop market participants from laying some groundwork.

UK reforms – what might market participants wish for?

Different institutions with different business models in different market segments are impacted by regulation in different ways. There won't therefore necessarily even be agreement among UK market participants on the specific reforms that they think should be made to the UK Securitisation Regulation. As a starting point, the key conceptual questions for many market participants will be (a) the extent to which particular transaction structures that do not give rise to systemic or prudential risk can be undertaken by UK entities efficiently and economically (the 'regulatory optimum' question) and (b) the extent to which UK entities on either the buy-side or the sell-side are able to transact with overseas entities or in relation to overseas assets, both within the EU and further afield (the 'regulatory interoperability' question).

In terms of regulatory optimum, it is worth UK policy makers considering if transparency and due diligence obligations under the UK Securitisation Regulation, which (reflecting their parallels under the EU Securitisation Regulation) are highly prescriptive and which go beyond those in most other jurisdictions, are appropriate outside the EU single market. There may be an argument that the obligation for disclosure and due diligence should be principles-based and that this might achieve the same policy objective but with a lower burden. This might particularly be the case in relation to private, bilateral and intragroup transactions.

In terms of regulatory interoperability, neither the EU Securitisation Regulation nor the UK Securitisation Regulation currently contain a formal equivalence framework and, in any event, it has been widely reported that the EU has been reluctant to make equivalence determinations in relation to the UK's financial services regulatory framework. But both the EU Securitisation Regulation and the UK Securitisation Regulation do contain provisions that deliberately provide for (or deliberately exclude) third country entities. There are a number of potential amendments that UK regulators could consider making to these provisions with a view to supporting cross-border activity. For example, the UK could create an STS equivalence framework and determine that the EU STS regime (and potentially other regimes that meet the Basel Committee on Banking Supervision's criteria for simple, transparent and comparable securitisations, such as that of Japan) is equivalent to the UK regime. This might be of interest to UK regulated investors and would match the Chancellor's 'openness' rhetoric and the principles expressed in HM Treasury's guidance on equivalence in financial services. In relation to transparency information, UK regulators could publish guidance confirming that UK entities would be able to meet their UK (principles-based) transparency requirements on the basis of meeting EU standards (or even US standards). This would minimise the compliance burden on those UK sell-side entities that wished to ensure investment by EU regulated investors, without imposing a burden on those UK sell-side entities that don't have that commercial need.

Conclusion

It is still too early to make any definitive conclusions on the longer term impact of Brexit on the European securitisation market. In the shorter term, because of the way on-shoring under the EUWA worked, many transactions continue largely as before, with drafting changes rather than significant structuring changes, though particular attention must be paid to the location of counterparties.

Both the EU Securitisation Regulation and the UK Securitisation Regulation are works-in-progress, meaning that their current status is by no means the final word. There is therefore an opportunity for both industry and regulators to think creatively, with a view to ensuring that market participants are able to undertake legitimate transactions safely, easily and on a global basis.

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