SECURITISATION REPORTING – REVISITING THE DISTINCTION BETWEEN PUBLIC AND PRIVATE SECURITISATIONS

INTRODUCTION

Both the EU and UK regulators are reviewing the distinction between public and private securitisations and the reporting obligations applicable to each such type of securitisation. Given that European securitisations are typically structured to attract both UK and EU investors, if changes in the UK do not dovetail with changes in the EU, the effect will be to impose on the securitisation market reporting obligations that are more complex and more onerous (even if the intention of both UK and EU regulators is the opposite).

THE CURRENT POSITION

There is a distinction between "private securitisations" and "public securitisations" in both EU and UK law. A public securitisation exists, for EU purposes, where an EU prospectus is required. A public securitisation exists, for UK purposes, where a UK prospectus is required.

Both in the EU and UK, at present, whether or not a securitisation is public or private has limited consequences in relation to the disclosure required. In the case of public securitisations (but not private securitisations) information must be disclosed via an approved securitisation repository, and (absent a prospectus) a transaction summary must be prepared for private securitisations. However, both public and private securitisations must report on an ongoing basis on the same prescribed templates (such templates being, as between the EU and UK, substantially the same).

This, however, may change.

MARKET VIEWS AND REGULATORY RESPONSE

Some market participants have taken the view that the current requirement for private securitisations to report on the basis of the current templates (which are shared with public securitisations) (or on templates at all) is disproportionate, given that investors in closely held private deals are able, at the outset, to ask securitisers to commit to providing such reporting as is most useful to them. Others consider that some standardised reporting of private securitisations should be done (in some form or other) primarily so that supervisors have market intelligence.

These views are being considered by regulators in the UK and in the EU.

The European Commission, in its October 2022 report, invited ESMA to "draw up a [new] dedicated template for private securitisation transactions that is tailored particularly to supervisors' need to gain an overview of the market and of the main features of the private transactions." ESMA consulted, until March 2024, on four potential options.

In the UK, the FCA and PRA are expected to consult, in late 2024 or in 2025, as to whether the disclosure templates for private securitisations could be more proportionate or principles-based so as to become less extensive than those for public securitisations, whilst still supporting the provision of sufficient information by manufacturers of securitisations to investors.

In addition, regulators are revisiting the existing distinction between public and private securitisations. In the UK, the FCA is considering the possibility of expanding the current definition of a public securitisation. The FCA has suggested that such expansion could cover:

(i) securitisations that are subject to primary listings on UK regulated markets or similar non-UK markets where the originator, sponsor or SSPE is located in the UK (thereby excluding overseas securitisations);

(ii) primary admissions to trading on an appropriate UK multilateral trading facility (MTF) and similar non-UK venues, where there is at least one UK manufacturer; and/or

(iii) securitisations where there is at least one UK manufacturer and where a public announcement or other general communication is made to a wide audience of potential investors, intended to solicit expressions of interest as part of the primary marketing of the securitisation.

In the EU, amendments to the definitions of public and private securitisations are unlikely in the near term, given that would require an amendment to the "level 1" legislation. However, amendments to the disclosure templates for each (which can be achieved more easily) may result in a greater practical difference between the two.

It is possible, as a result of the reviews described above, that a greater distinction will be drawn between public and private securitisations, with differing disclosure requirements for each. It may be, for example, that public securitisations and private securitisations will need to disclose on the basis of differing prescribed templates. Those templates may differ as between the EU and UK.

It may also be that what it means for a securitisation to be public or private will change, and may also differ as between the EU and UK.

A SINGLE EUROPEAN SECURITISATION MARKET WITH DIFFERING RULES

Where, in a securitisation, all key sell-side entities (in particular, the originator, original lender, SSPE and, if applicable, the sponsor) are established in the UK, subject to the need to target non-UK investors, the UK's regulatory framework (and not the regulatory framework of any other jurisdiction) would be the only regulatory framework that applies.

Similarly, where all key sell-side entities are established in the EU, subject to the need to target UK investors, the EU's regulatory framework (and not the UK's regulatory framework) applies (subject, also, to the need to target non-EU investors).

In practice, however, there is a single European securitisation market that is not split between the UK and the EU. Many deals are structured to be investable by investors across Europe. Even where both buy-side and sell-side parties are established in the UK (or the EU), investors will want the ability to sell their positions to affiliates or other investors which may be established in the EU (or the UK).

The EU securitisation framework applicable to EU investors (and related regulatory guidance) means that for a securitisation to be investable by EU investors, those EU investors must be able to satisfy themselves that the securitisation meets certain EU norms. This leads to many securitisations, and their sell-side participants, seeking to comply both with UK and EU regulatory reporting and disclosure standards, as described below.

At present, when investing in securitisations where the originator, sponsor and issuer are established outside the UK, UK investors must verify only that the originator, sponsor or issuer has, where applicable, made available information "substantially the same" as would have been required if the originator, sponsor or issuer were established in the UK. At present, this enables UK investors to invest in EU securitisations (even if those EU securitisations report only on the basis of the – at present - slightly different EU templates).

The EU position differs, with EU regulatory guidance suggesting that EU investors must ensure that securitisations in which they invest report on the basis of the prescribed EU templates (and limiting the ability for EU investors to view reporting on the basis of UK templates, or on any other basis, as sufficient). In practice this means that UK securitisations – which will typically seek to attract EU investors – will often in practice provide both EU and UK templates. There is, however, variation in the market as to whether UK originators and servicers will provide contractual undertakings to provide EU reporting, and whether non-European securitisations will provide such reporting.

IMPACT OF RECENT CHANGES IN THE UK

The rules for UK investors investing in securitisations are set to become more flexible from November 2024. UK investors will need to verify the sufficiency of the information that has been made available to enable them to independently assess the risk of holding the

securitisation position, that certain minimum requirements are satisfied and that there is a commitment from the sell side to make further information available on an ongoing basis. This will allow UK investors to invest in securitisations even where the information disclosed is not substantially the same as that required to be disclosed by UK securitisations. This should assist UK investors in investing in securitisations globally (whether or not those securitisations report on the basis of the prescribed UK templates).

The forthcoming changes in the UK will assist UK investors in accessing EU markets if reporting standards diverge in the future. However, this will be of less assistance to EU investors, and to UK securitisers which seek EU investors: if UK and EU reporting standards diverge, unless corresponding flexibility is introduced in the EU, UK securitisers targeting EU investors will face a practical dual-compliance burden that EU securitisers do not.

WHY CARE IS REQUIRED - RISK OF UNINTENDED CONSEQUENCES

As described above, European securitisers (whether established in the UK or EU) must in practice consider the disclosure standards that apply in both the EU and UK.

Given that whether a securitisation is public or private for UK or EU purposes depends on whether or not a prospectus is published in the UK or the EU (as applicable), the same securitisation may be treated as public under one regime and private under the other, typically because a prospectus will usually only be (formally) 'published' in an EU jurisdiction or the UK, but not both.

At present, regulatory obligations relating to public and private securitisations are substantially similar, meaning that this idiosyncratic position does not in practice lead to conflicting obligations. However, the forthcoming EU and UK proposals to amend the disclosure obligations for private securitisations may lead to substantial differences in the reporting requirements for public and private securitisations, and may lead to a change in what securitisations are treated as public and private.

It is, therefore, now more important than ever that UK and EU disclosure rules are consistent, both in relation to disclosure templates and the categorisation of securitisations as between public and private.

If EU and UK regulatory requirements diverge such that European securitisers aiming to attract both UK and EU investors in practice need to disclose on the basis of two different requirements (for example, as a result of differing templates and as a result of a securitisation being treated as public in one jurisdiction but private in another), that is likely to increase the burden on market participants to dually comply with both EU and UK requirements.

This would increase friction in the market and - should divergence occur to a significant extent - market fragmentation could result. A risk is that this may occur as an unintended consequence of efforts of both EU and UK investors to streamline requirements and vitalise the market.

This could present an opportunity for EU and UK regulators to work together. Absent that, it may be that any new private securitisation disclosure rules in one jurisdiction need to be proposed only after the rules in the other become clear.

NEXT STEPS

In the UK, the FCA and PRA are expected to publish further consultations on the distinction in disclosure requirements for private and public securitisations in late 2024 or in 2025. ESMA is currently considering feedback given in response to its 2023 consultation, although the outcome and timeline for any EU policy changes is not yet clear. It will be important for market participants to provide feedback as needed.

CONTACT

GUY O'KEEFE
PARTNER
T: +44(0)20 7090 3299
E: Guy.Okeefe@Slaughterandmay.com

OLIVER WICKER
PARTNER
T: +44(0)20 7090 3995
E: Oliver.Wicker@Slaughterandmay.com

ROBERT BYK
PARTNER
T: +44(0)20 7090 3435
E: Robert.Byk@SlaughterandMay.com

DAVID THOMAS
SENIOR ASSOCIATE
T: +44(0)20 7090 3817
E: David.Thomas@SlaughterandMay.com

RICHARD JONES
PARTNER AND HEAD OF SECURITISATION
T: +44(0)20 7090 4733
E: Richard.Jones@SlaughterandMay.com

CHARLIE MCGAREL-GROVES
PARTNER
T: +44(0)20 7090 3579
E: Charlie.Mcgarel-Groves@SlaughterandMay.com

CAROLINE PHILLIPS
PARTNER
T: +44(0)20 7090 3884
E: Caroline.Phillips@SlaughterandMay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650