

Alert

ESMA Template Reporting To Be Required for EU Institutions Which Invest in Non-EU Securitisations

13 October 2022

The European Commission (the “Commission”), on 10 Oct. 2022, provided the European Parliament with a report on the functioning of the EU Securitisation Regulation¹. In this report the Commission concluded that EU institutional investors in non-EU securitisations are not meeting their verification obligations under the Securitisation Regulation if the reporting requirements stipulated by the Securitisation Regulation, notably the use of European Securities and Markets Authority (“ESMA”) templates, are not complied with.

To date it has been a grey area as to whether non-EU securitisations (i.e. transactions which involve no EU originator, CLO manager or issuer) were required to report using the ESMA templates. The market practice which has developed has been not to use the ESMA templates and for that fact to be disclosed in the offering documents, with the onus placed upon investors to decide whether or not they may invest in the transaction in the absence of these.

The Commission has invited ESMA to revisit its existing disclosure templates for securitisations, including considering removal of unnecessary fields or fields that are technically difficult to complete, and aligning the templates more closely to investors’ needs. As part of this, the Commission suggests that ESMA should consider whether loan-by-loan information is useful and proportionate to investors’ needs for all securitisations. The Commission also invited ESMA to propose a more simplified form of reporting template for private securitisations (i.e. those for which there is no Prospectus Regulation Prospectus), which currently is the status of most non-EU securitisations.

Market Impact

For future non-EU CLOs and securitisations we expect that EU investors will now require the documentation to include a commitment for reporting to be provided in the format prescribed by the ESMA templates as a condition to investing in such transactions.

It should also be noted that the Securitisation Regulation prescribes certain disclosures to be made prior to pricing. This includes the provision of transaction documentation to investors. In Europe this has been done in draft form with such documentation stated to be subject to amendment and finalisation prior to closing. Moving forward, EU investors may also seek similar disclosures in relation to non-EU transactions.

For existing transactions there is a question as to whether there will be any grandfathering. As this circumstance is not a change in law, but rather the Commission providing its interpretation of the existing law, the Commission may view grandfathering as inappropriate.

¹<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0517>

Therefore, CLO and securitisation managers, originators and arrangers may receive calls from EU investors requesting that they incorporate ESMA template reporting into existing deals. Failing that some EU investors could feel obliged to sell positions. We believe that, as it is not in the EU's interests to compel a fire sale which would result in losses to EU financial institutions, regulators will be accommodating when it comes to requirements for exiting positions.

Any future simplification by ESMA of the reporting templates would only have prospective effect. The Commission did not suggest that EU investors may wait for ESMA to produce new streamlined templates before implementing the reporting for non-EU transactions.

What are the ESMA reporting templates?

The EU Securitisation Regulation required ESMA to design reporting requirements for securitisations containing information on their underlying exposures, structure and performance. ESMA published templates differentiated by asset class and whether or not the securitisation is an asset-backed commercial paper issuance. Most transactions will need to use two of the templates, the first being the one relating to the particular underlying exposure asset class, so in the case of CLOs the one for corporate loans, and secondly the investor report template.

The reports are required to be made available on a quarterly basis and within at least one month of the related interest payment date. The cut-off date for information included in the report is no more than two months prior to the report date.

Contractually the obligation to report would usually be imposed on the issuer, with the CLO manager and trustee agreeing to provide support. It has also become common for the issuer to sub-contract its reporting obligation to specialist reporting providers.

UK Investors

The Commission's pronouncements should not impact UK investors. Indeed the UK Securitisation Regulation explicitly provides that non-UK securitisations do not need to report on UK templates (which are equivalent to the ESMA ones) as long as they make available information which is substantially the same as that which would have been made available for UK securitisations.

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