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A TALE OF TWO MARKETS: REGULATORY DIVERGENCE BETWEEN THE EU AND UK SECURITISATION FRAMEWORKS

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Introduction

The UK voted to leave the European Union on 23 June 2016 and then officially ceased to be an EU Member State on 31 December 2020. Nearly five years later, the long drawn-out process of Brexit has still not come to an end, as the UK and EU continue to clash over borders and trade issues. For the financial services industry, all transitional periods are now over, and full compliance with the relevant local regime is a fact of life for those regulated or doing business in the UK or EU. The pain of separation continues to be felt: the capital markets and investment industries are naturally international, but issues of double compliance arise in many transactions, and fully liquid markets cannot be achieved where investors are subject to differing requirements.

That said, are areas beginning to emerge where it may be possible to find an advantage in one regime as compared to another? Inconsistency is to be deplored, and investors may be inclined to lament that certain aspects of the UK regime are not available in the EU, and vice versa, rather than to see this as a positive. However, scrutiny of the regulatory environment by two separate sophisticated authorities may be beneficial in some ways. Broadly speaking, the UK seems inclined towards greater openness and a more pragmatic approach; the EU appears to be more reluctant to clearly tackle some important and practical aspects in regulation, but has been at the same time the author of greater innovation in regulation. It will be interesting to see how these approaches shape the (two) market(s) as divergence increases.

In this article, we review some key aspects of the ways in which the securitisation regulatory regime differs between the UK and the EU, and consider where the two paths may lead in the future.

Simple, Transparent and Standardised Securitisation

Jurisdictional Issues

When Regulation (EU) 2017/2402 (the "**EU Securitisation Regulation**") first came into force on 1 January 2019, it introduced certain new elements of the securitisation framework, including the Simple, Transparent and Standardised ("**STS**") label. The benefit of structuring a securitisation to fulfil the requirements set out in the relevant provisions of the framework is the possibility of obtaining more favourable regulatory treatment under certain EU prudential (capital) regimes. These regimes were amended by the EU Securitisation Regulation while the two regimes were the same to account for the STS label, providing an initial threshold set of requirements for assessing whether a transaction may be eligible for more advantageous capital and liquidity treatment. When the EU Securitisation Regulation was on-shored into UK law, this naturally also imported the STS framework into domestic law. While the provisions of the core requirements contained in Articles 19 to 22 and Articles 23 to 26 remained largely the same during the on-shoring process, there were (and have since been) certain legislative changes that have formed notable points of divergence.

The respective jurisdictional requirements of the EU and UK STS frameworks for a transaction to be considered STS are a particular point of difference between the EU and UK regimes, and one which is also a key area for potential further divergence. The EU regime requires that each of the originator, sponsor and SSPE of a securitisation is incorporated within the EU in order to be capable of achieving STS status, whereas the UK regime only requires a UK originator and sponsor (if applicable) for non-ABCP transactions, and only a UK sponsor for ABCP. This gives added flexibility for structuring UK non-ABCP deals with respect to the jurisdictional location for the SSPE – for example an Irish SSPE could be used for UK assets – and an ABCP programme with a UK sponsor can finance receivables originated anywhere in the world, whereas any parties wishing to establish an STS deal in the EU will have to bear in mind that the originator, sponsor and SSPE will all have to be incorporated within the EU. The UK also took a more flexible approach to the jurisdictional nexus of legacy STS transactions as part of its transitional relief, permitting any STS transaction notified as such to ESMA before 1 January 2023 to retain its STS label under the UK regime. By contrast, for EU purposes, any transitional relief effectively ended on 30 December 2020; as a result, formerly STS-compliant transactions that included a UK entity ceased to be capable of retaining the EU STS label, and consequently EU originators and sponsors involved in such a transaction had to make the applicable notifications of such event to ESMA and their national competent authorities. Losing STS status also meant that relevant institutional investors could no longer treat such transactions as STS for the purpose of obtaining more favourable regulatory treatment of their holding. This is consistent with the UK's overall approach to financial services, which has been more open to EU participants in a number of areas, while EU regulators and legislators have been loath to permit the UK access to EU markets given the UK decision to leave the union.

The initial burning question from market participants was: is it possible to structure a transaction so that it can satisfy both the UK and EU STS requirements? Except for certain grand-fathered EU transactions benefiting from UK transitional relief, as described above, on an ongoing basis (after this transitional provision comes to an end) there is no current scope for a transaction to be STS for the purposes of both regimes, despite the underlying requirements being substantially equivalent. This is an unfortunate result of jurisdictional separation and is detrimental to forming a fluid international market in high quality securitisation. There is also evidence that this will be an area that is likely to become a key point of divergence in the future. In the UK sphere there is some cause for optimism as the UK regulatory mood has aligned with calls for an STS equivalence framework that "could help promote the development of robust securitisation frameworks internationally" in response to evidence submitted for the purposes of the HM Treasury Review of the Securitisation Regulation (the "**Review**")[1]. To date, however, the EU authorities have not shown a similar level of enthusiasm for such an equivalency framework, as signs indicate that the EU STS regime may remain more protectionist in nature. In this case, divergence from the EU approach could be a welcome development for the UK industry, particularly for UK institutional investors looking to invest in European transactions whilst taking advantage of more favourable regulatory treatment on their investments at home. If such a framework were to be developed and implemented successfully, market participants may wonder if this would spur on demand within the EU regime to mirror this position, particularly if investment in key UK sectors (eg SMEs) were to benefit. However, there has been little to indicate that this will be the case so far.

Synthetic STS Securitisations

In what could be regarded as a rare silver lining of the Covid-19 pandemic for the securitisation industry, the EU adopted a package of financial services reforms designed to promote economic recovery from the Covid-19 pandemic, dubbed the "Capital Markets Recovery Package" (the "**CMRP**"), which included some advantageous changes to the EU securitisation framework. The High-Level Forum on Capital Markets Union (the "**HLF**") published a report on the Capital Markets Union[2] looking at the facilitation of an active market for legacy portfolios, and separately

1 HM Treasury, *Review of the Securitisation Regulation: Report and call for evidence response* (December 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040038/Securitisation_Regulation_Review.pdf

2 High-Level Forum on the Capital Markets Union, *Final report of the High-Level Forum on the Capital Markets Union – A new vision for Europe's capital markets* (10 June 2020): https://ec.europa.eu/info/sites/default/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf

the EBA had made proposals on the development of a synthetic STS securitisation framework.[3] Following these reports, the amendments made by the CMRP were principally directed at two areas in the EU securitisation regime: (i) extending the STS framework to on-balance-sheet synthetic securitisation, and (ii) removing regulatory obstacles to the securitisation of non-performing exposures ("**NPE**") (discussed later in this article).

The EU Securitisation Regulation, at its outset, did not include a framework for synthetic securitisations to achieve the STS label, however the EBA and European Commission had in parallel worked on producing proposals for establishing such a framework over the course of 2020. The CMRP amendments, in line with their general proposition that securitisation could be of assistance in recovering from the pandemic-induced economic difficulties, crystallised these proposals in legislative form to introduce a synthetic on-balance-sheet STS securitisation regime. The synthetic STS requirements differ in certain respects from the "traditional" securitisation STS requirements, which is understandable given the difference in nature between the products. In particular, as the transfer of credit risk in a synthetic transaction is achieved through a credit protection agreement rather than a true sale of the underlying exposures, the requirements as to simplicity concerning true sale that are applicable to a traditional STS securitisation are irrelevant to a synthetic transaction and are instead replaced with requirements such as that the assets be held on the originator's (or a group entity's) balance sheet and that the credit protection agreement is robust and compliant with CRR credit risk mitigation rules. In addition, in line with the focus on the credit protection agreement (as the principal component of a synthetic transaction), the synthetic STS regime contains certain additional specific requirements that focus on the terms of the credit protection agreement, including provisions concerning the credit events, credit protection payments, the appointment and role of a verification agent, the maintenance of a reference register, and the terms of any synthetic excess spread.

It is interesting that the EU regulators decided to finalise the work on the synthetic STS regime at the same time as the NPE securitisation framework in response to the Covid-19 pandemic, and it demonstrates a willingness to make significant changes to the existing regime. By contrast, at this time, UK regulators have not signalled any particular intention to introduce an equivalent STS framework for on-balance-sheet synthetic securitisations, so it appears that this will remain as solely a feature of the EU regime in the near term. Aspects of the current regulatory divergence like the synthetic STS regime (and the developments on certain other topics, such as sustainability and NPE securitisations discussed below) potentially indicates a greater inclination of the EU regulators towards significant innovations, whilst the UK regulators appear (to some extent) to have been more focused on broader international openness through adjusting provisions related to jurisdictional issues. This may, however, be shown to be a product of the current political context as onshoring adjustments and hopes for international equivalence take prominence ahead of a newly independent jurisdiction finding its feet and having sufficient legislative focus to implement more sweeping and fundamental regulatory changes.

3 EBA, *Report on STS framework for synthetic securitisation under Article 45 of Regulation (EU) 2017/2402*: https://www.eba.europa.eu/sites/default/documents/files/document_library/News%20and%20Press/Press%20Room/Press%20Releases/2020/EBA%20proposes%20Framework%20for%20STS%20Synthetic%20Securitisation/883430/Report%20on%20framework%20for%20STS%20syntetic%20securitisation.pdf

Disclosure

Jurisdictional Issues and Templates

Disclosure and reporting requirements are a cornerstone of the current securitisation frameworks, having been developed in an attempt to inform enhanced oversight powers for the authorities and bring greater clarity to an arguably previously opaque market. The considerable burden of complying with the securitisation regimes' expansive disclosure obligations and technical requirements has been a source of much consternation, with many calling for some proportionate relaxation of the rules. Moreover, with the creation of a jurisdictional split within Europe, Brexit brought some of the jurisdictional uncertainties and issues inherent in the EU regime's disclosure obligations closer to home. European investors had already experienced these when investing in non-European, "third country" transactions since the introduction of the current regime at the start of 2019. In the UK, there has been hope from various quarters that the UK authorities would explore the potential for addressing some of the most onerous aspects of the on-shored framework to create a more industry-friendly regime that could serve to promote securitisation rather than creating disincentives.

As such, the question is whether there may be opportunities in divergence to alleviate some of the burden of the current requirements?

One of the most debated areas of interpretation for the EU Securitisation Regulation regime has been the due diligence requirement for institutional investors contained in Article 5(1)(e), relating to the very prescriptive reporting templates originally published by ESMA and now found in the FCA handbook for UK transactions. The requirement that investors verify that the originator, sponsor or SSPE of a securitisation outside the EU has "where applicable" made available the information prescribed by Article 7 had elicited a wide variety of views on its meaning from market participants. Some interpreted "where applicable" as practically excluding third-country securitisations from the detailed reporting obligations of Article 7, while others took the view that third-country securitisations were required to comply with the template-based reporting applicable to EU sell-side entities. The UK legislators took the opportunity of the on-shoring process to seek to bring greater clarity to the third-country disclosure issue for the UK regime by: (i) specifying that the prescribed templates only apply where there are UK sell-side entities; and (ii) in a new limb, only requiring disclosure that was "substantially the same" from third-country transactions. The effect of these attempts at a clarification was not entirely transformational due to uncertainty over the exact meaning of "substantially the same". However, the changes in the UK regime have, however, generally brought some comfort for UK investors that they only need to check UK deals for full compliance with the requirements of Article 7, and perhaps also indicate a willingness on the part of the UK legislature to engage with the concerns of the industry (which could be interpreted as a positive sign for the future). Additionally, there is broad acceptance that the EU and UK template-based reporting requirements are, at least for now, sufficiently similar to satisfy the Article 5(1)(f) obligation when investing in an EU transaction. This will be tested over time, however, if (and, quite possibly, when) either jurisdiction makes any material amendments to its respective reporting requirements and/or templates which calls into question how far "substantially" can stretch. EU investors do not have a similar level of comfort, given this point is still a matter for risk appetite within the EU regime.

With respect to the outlook in the EU, there was apparent support from the HLF for the most liberal end of the spectrum in the Article 5(1)(e) debate, as it called for EU regulated investors to be granted the ability to determine whether they have received sufficient information when investing in third-country securitisations[4] (rather than having this prescribed for them). This gave the market some reason for hope that these proposals may gain broader traction within regulatory circles in the EU, which could have resolved the debate once and for all. The HLF position would have been a welcome development for the industry and would have promoted broader international reach through reducing the regulatory disincentives for EU institutional investors to invest in third-country transactions. However, more recently, there has been both contradictory and confusing guidance from the ESAs on this point, which suggests a potentially different path ahead. The first such guidance was contained in the ESAs' Opinion to the European Commission on the Jurisdictional Scope of Application of the Securitisation Regulation (the "**ESAs' Opinion**")[5], which appeared to interpret the Article 5(1)(e) requirement as clearly requiring strict equivalence between the third-country's reporting modalities and that of the EU regime's, making it "very unlikely, or at least very challenging" that EU investors could satisfy this obligation when investing in a third-country securitisation. The ESAs' Opinion proposed an equivalence framework (in opposition to the HLF's recommendation that parties be allowed to determine this for themselves). It also included an overall suggestion that EU obligations should be fulfilled by the EU entity involved in a securitisation transaction (if any) rather than any other – regardless of structural, commercial or practical considerations pointing to a different outcome. Confusingly, the subsequent ESAs' Report on the Implementation and Functioning of the Securitisation Regulation[6] seemed to backtrack on the Opinion in respect of Article 5(1)(e), instead considering the jurisdictional reach to be "ambiguous" and "detrimental to the overall efficiency of the securitisation framework". This tangled web has somewhat curtailed optimism that the EU will land on the more liberal side of the debate, and market participants should pay due caution to taking a more bullish view pending further guidance. Jurisdictional issues remain a key point for clarification in the Commission's long-awaited final report of its review of the EU securitisation framework, as the majority of responses to the related Consultation[7] called for more flexibility, specifically on the disclosure point.

In the context of this divergence, how are transaction parties and investors dealing with the knotty issues of disclosure and determining which obligations to follow? The differing interpretations and, in some cases, conflicting guidance around disclosure in the EU and UK regimes have led to the emergence of a number of different approaches, depending on the jurisdictional split of the transaction parties and investors. In the absence of any equivalence framework or other regulatory comfort, even where there is no jurisdictional touchpoint that would officially trigger dual compliance (eg a UK originator and Irish SSPE), some EU investors are nevertheless requiring dual reporting compliance with the EU regime from UK securitisations (given the uncertainties around the disclosure level of a third country securitisation described above), whether on an "issue date" or ongoing basis. This creates a degree of operational overhead that further increases the burden of the securitisation reporting requirements; while the templates are broadly the same, this is perhaps of less outright significance, but if the templates were to change further independently, then it may raise the question of how sustainable it is to comply with both regimes for reporting purposes. The UK regulators attempted to soften the operational blow of transitioning to UK-style reporting templates (following the on-shoring of the relevant retention technical standards ("**RTS**") and implementing technical standards ("**ITS**") from the EU regime with certain minimal conforming changes) by providing transitional relief until 31 March 2022, such that the disclosure obligations could be satisfied by using the EU reporting templates. As that period has come to an end, however, UK-style reporting templates are now mandatory.

EU Proposals for ESG Disclosure and the Influence of the SFDR

A particular area of current divergence between the EU and UK regimes has been the advances made by the EU regulators in pushing the sustainability agenda by incorporating provisions into EU regulatory frameworks, including the EU Securitisation Regulation. The EU has been notably active in implementing its sustainability legislative priorities and has, at this time, made much greater headway in considering appropriate provisions for a sustainable securitisation framework compared to the more embryonic developments in the UK. The EU Securitisation Regulation (and, therefore, also the UK Securitisation Regulation by default) had, since its earliest iteration, contained certain limited provision for disclosure on the environmental performance of residential loans and auto loans or leases for STS transactions (in Article 22(4)). In the EU this was, however, extended as part of the CMRP amendments to provide scope for originators of STS securitisations to elect to publish available information on the principal adverse impacts ("**PAIs**") of the financed assets on sustainability factors, and mandated the ESAs to develop RTS for such purpose. The ESAs recently published the related draft RTS to cover these disclosures, setting out the additional fields that would be used for such disclosure.

Securitisations are not currently caught within the scope of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (the "**SFDR**") (or the EU taxonomy regulation, Regulation (EU) 2020/852), as they do not fall within the

4 High-Level Forum on the Capital Markets Union, *Final report of the High-Level Forum on the Capital Markets Union – A new vision for Europe's capital markets* (10 June 2020), p 54: https://ec.europa.eu/info/sites/default/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf

5 Joint Committee of the European Supervisory Authorities, *ESAs' Opinion to the European Commission on the Jurisdictional Scope of Application of the Securitisation Regulation* (25 March 2021): https://www.esma.europa.eu/press-news/esma-news/esas-publish-joint-opinion-jurisdictional-scope-under-securitisation-regulation

6 Joint Committee of the European Supervisory Authorities, *ESAs' Report on the Implementation and Functioning of the Securitisation Regulation* (17 May 2021): https://www.esma.europa.eu/press-news/esma-news/esas%E2%80%99-report-implementation-and-functioning-securitisation-regulation

7 European Commission, *Targeted Consultation of the Functioning of the EU Securitisation Framework* (23 July 2021-17 September 2021): https://ec.europa.eu/info/consultations/finance-2021-eu-securitisation-framework_en

relevant definition of a "financial product", and as such currently lie outside of the central pillars of the new EU sustainable finance framework. Despite (or because of) this, the EU regulators have sought to import a certain equivalence to the SFDR into the securitisation framework in Article 22(6) (introduced by the CMRP amendments) by stipulating that the draft RTS on PAI disclosure should "mirror or draw upon" the draft RTS for the SFDR. As a result, in the draft RTS, the additional disclosure around the PAIs would, in the near term, form a standalone additional disclosure point on EU transactions which takes inspiration from, and is expressly aligned with, the relevant template being developed as part of the RTS for the SFDR. However, the consultation paper on the draft RTS indicates that, in due course, once the market and indicators themselves have reached greater stability and maturity, ESMA should consider updating the reporting templates of the EU Securitisation Regulation to be consistent with the draft RTS on PAI disclosure. This has been underlined by the recommendations in the EBA's Report on Developing a Framework for Sustainable Securitisation ("**EBA Report**")[8] that PAI disclosure be extended to capture all securitisations (not just STS) and for the reporting templates to be adjusted to ensure loan level data relevant for deriving the calculation of the PAI at the level of the transaction are available (for those assets covered in the ESAs' draft PAI disclosure RTS).

The prospect of having further additional reporting, no matter the context, on top of the already extensive reporting obligations of the securitisation regime is not likely to be the most welcome point of divergence for market participants and will represent an additional burden within the EU regime that is not currently present in the UK regime. However, it is consistent with the evolutionary trend of the EU regime, and a degree of guidance on required sustainability disclosure would be welcome given current indications in the market that investors require information on this. While the PAI disclosures are expressed as being voluntary (at least presently, though the EBA Report also recommended that these should become mandatory once the market matures), it seems likely that market expectations and demands, particularly from investors with defined obligations of their own under the sustainable finance framework, will tilt the balance towards these obligations becoming obligatory in practice. It will be interesting to see whether the UK developments on the sustainable finance front follow a similar path, as the UK regulators collect and digest responses to the various consultations launched on the broad topics of sustainability and sustainable finance. It appears probable that, in the interest of broader international alignment, the UK may adopt requirements that are similar to those proposed by the EU. This would also likely be needed in the longer term, so that EU investors can satisfy their due diligence requirements in respect of disclosure when investing in UK transactions.

8 EBA, *EBA Report Developing A Framework For Sustainable Securitisation* (EBA/REP/2022/06) (2 March 2022): https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Reports/2022/1027593/EBA%20report%20on%20sustainable%20securitisation.pdf

Non-Performing Exposure Securitisation and Risk Retention

NPE Securitisations

The CMRP amendments introduced changes to the risk retention, due diligence, and prudential rules with a view to removing some of the practical hurdles to securitising portfolios of NPEs, following recognition that the original regime had not been developed with these in mind. The relevant amendments included, in respect of NPE securitisations:

- the option for the servicer to retain the risk retention (provided it is an entity with relevant expertise), reflecting a better alignment of interests for NPE transactions where the effective workout of the assets is crucial;
- the calculation for the material net economic interest retention requirement on the basis of the net value of the assets after taking into account any non-refundable purchase price discount, allowing a more appropriately sized retention piece to be retained compared to retaining on the basis of the nominal value; and
- a shift in the credit granting standards obligations for NPE securitisations to focus on the selection and pricing of the exposures (rather than origination, which is likely to have occurred long before the transaction and potentially by an entity with no direct relation to the transaction).

These amendments were a sensible adjustment to the EU regime and represent a notable shift in the regulatory requirements for relevant transactions with the purpose of addressing a visible need in the wake of the recent economic turmoil. The development of a specific NPE securitisation framework within the EU regime represents a major regulatory innovation which shows that the EU regulators, despite certain more protectionist or less flexible leanings, are willing to adapt to economic need with significant legislative enhancements in a way that has been less visible so far from the UK regulators.

The UK has not yet introduced equivalent provisions, creating a regulatory divergence that currently requires EU entities structuring a relevant transaction to consider whether or not to take advantage of the more flexible options of the EU framework at the risk of shutting out UK investors (who, for example, would not be able to comply with their due diligence requirements in respect of the reduced level of retention held). There are signs, however, that this situation may be remedied in due course (at least to some extent). HM Treasury indicated in its Review that the regulators were in favour of adopting some of these beneficial amendments in the domestic regime, such as using the discounted value of the portfolio for determining the retention piece, and allowing a qualified servicer entity to act as retainer, as part of prioritising work on the UK risk retention technical standards this year. This will be a key space to watch in the coming months.

Risk Retention

Risk retention has been the centrepiece of the post-financial crisis securitisation framework. It is surprising, therefore, that a fundamental missing piece of the EU Securitisation Regulation regime since its inception has been the absence of a final set of technical standards relating to risk retention. There had been detailed work undertaken to develop risk retention rules in the form of the 2018 EBA final draft RTS, however these had languished in the EU legislative process, while the pre-Securitisation Regulation RTS[9] technically prevailed under grandfathering provisions. This has been a less than satisfactory situation, whereby the present regime's individual retention requirements, such as the sole purpose test, have lacked an official, finalised text and the market has operated on the basis of the draft position. Following a consultation process launched in June 2021, the 2018 EBA final draft RTS were finally recently reworked to accommodate relevant updates to cover the provisions introduced by the CMRP in respect of retention on NPE securitisations, and requirements for holding the synthetic excess spread as retention for synthetic securitisations. The EBA submitted the updated final draft to the European Commission on 12 April 2022.

However, as the new EU risk retention RTS had not been finalised by the end of the Brexit transition period, the pre-Securitisation Regulation retention technical standards were on-shored (with minimal changes) and, similarly to the EU, have continued to serve as a transitional measure. Following the EBA's recent submission of a final draft of the RTS to the Commission and (assuming these are adopted) the clearer picture of the future final EU retention standards, it remains to be seen what the next step will be for the UK regime and any divergence that might entail. The HM Treasury Review acknowledged that this would be an area of focus in 2022, as the UK regulators move to finalise this missing piece in the UK framework. Given evidence of the previous intention to on-shore the 2018 final draft RTS, the UK regulators' general guidance on the use of non-legislative EU materials (that these would be taken into account in interpretation), and their broad approval of those draft RTS and the current retention rules, it seems likely (though not certain) that the risk retention binding technical standards eventually adopted in the UK will be largely similar to the core EU standards. It is certain, however, that there will be divergence on certain points in the technical standards that relate (in the EU RTS) to retention aspects arising from the CMRP amendments to the EU Securitisation Regulation, unless the UK adopts equivalent rules in the meantime.

9 Commission Delegated Regulation (EU) No 625/2014 of 13 March 2014.

Reform and Outlook

It seems likely that the UK and EU regimes will continue to evolve and diverge, so the main questions relate to how much and how quickly. The HM Treasury Review indicated a direction of travel for the UK regime which could result in a more flexible regime in certain respects (compared to the EU regime) that accommodates and responds to some of the main concerns of market participants. In particular, there are signs of a positive re-evaluation of a number of onerous requirements in the current regime, and there is an indication that the UK regulators' approach will be one of greater international openness and equivalence. This would be a positive development for facilitating cross-border investment and a more fluid international market, countering some of the jurisdictional issues faced currently. However, some reciprocity on the part of the EU would be required to truly lift the present barriers to a cohesive market. The suggestion for an STS equivalence framework is one example of this greater international openness, and this would undoubtedly be a welcome development for UK institutional investors looking to invest in EU transactions. It is encouraging to see that the UK regulators have also listened to the industry's concerns around the definition of private and public securitisation and whether current disclosure requirements for private securitisations are appropriate. There is cause for hope that this may result in greater flexibility around (and potentially removal of) some of the burdensome disclosure requirements for private deals. All of these points would likely (depending on the outcome) be beneficial for structuring UK transactions; they would, however, potentially create further divergence from the EU regime and may shut out EU investors unless the transaction parties nevertheless agree to continue complying with the more onerous requirements of the EU regime as though they were applicable.

It is difficult to assess how the EU regime will evolve at this time, as the Commission's final report on the functioning of the EU securitisation regime is still outstanding. There are clearly divided views on this within the EU establishment, as the differing opinions and recommendations of, respectively, the HLF and joint ESAs' various reports indicate. The signs, in the ESAs' recent publications, that in the EU there may also be a reassessment of the jurisdictional application of key obligations of the regime is of some particular concern. In addition, the EU regulators also appear to be reappraising the division between public and private securitisations and the level of reporting required from private securitisations, however it would seem that this may take a different path from the early indications coming out of the UK regulators, and the industry may find that the scope of EU private securitisations is narrowed and public-style reporting becomes the norm for virtually all transactions. Until the final report is published, this remains a space to watch. Despite the EU regulators appearing to be less receptive to the concerns of industry in relation to known issues with the current legislation, it should be noted that the EU has taken some large steps in innovating within the securitisation framework with a view to addressing broader economic issues of sustainability and economic recovery, which addresses some more thematic points raised by industry. The foregoing reflects the functioning of the EU which always needs a consensus between Member States and national competent authorities before clearly moving forward on a more strategic point, in particular if this may result in amending an existing Regulation (which applies directly in every Member State) or enacting RTS that will be then closely followed by each national competent authority. This may explain the feeling of "unfinished business" in respect of the jurisdictional scope of the SR whilst the EU has been able to move forward on more uncontroversial topics such as NPE.

Where EU and UK compliance obligations diverge, a large part of the market will simply have to follow the lowest (or highest) common standard. However, these securitisation-specific developments also need to be set within the context of the wider scope of the UK Future Regulatory Framework Review of the UK financial services regulatory landscape, as well as the EU's own review and reform agenda. This broader background includes work that will affect the prudential rules applicable to institutional investors, such as the proposals for reform of Solvency II both in the UK and EU. Experience shows that changes to the economics of certain investments based on prudential rules can make a very significant change to the way transactions are structured (for example, the prevalence in recent years of caps rather than swaps in most private transactions and many public ABS, derives from the capital treatment of the instrument in the hands of the counterparty). It may eventually be some of these other reforms which make the most difference to where capital flows and why.

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