Quick guide: The regulation of private securitisation in the EU and UK

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European securitisation transactions come in many different shapes and sizes. Not all securitisations involve the issuance of publicly traded securities as seen in the public ABS markets. In the private space, parties are sometimes surprised that their financing falls within the scope of the EU or UK securitisation regulations, especially when it does not fall within the scope of other risk retention regimes.

This guide looks at when to consider if your transaction will be viewed as a securitisation by EU or UK financial services regulators, what is meant by "private securitisation" under these regimes, and what it means for your transaction if it does fall within the scope of the rules applicable to private securitisations.

What is a "securitisation"?

The EU and UK securitisation rules both include a similar definition of "securitisation". For these purposes, a "securitisation" is a transaction or scheme in which the credit risk associated with an exposure or a pool of exposures is tranched and (i) payments in the transaction or scheme are dependent upon the performance of the exposure or of the pool of exposures, (ii) the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme and (iii) the transaction or scheme does not create specialist lending exposures.

For these purposes, a "tranche" is a contractually established segment of the credit risk of a portfolio of exposures, where different tranches entail comparatively higher or lower risks of credit loss.

There is no requirement for a securitisation transaction to involve the issuance of transferable securities. Loan structures with subordinated tranches of debt may be caught if all the elements of the definition are satisfied by that transaction or scheme.

So, in short, if a transaction involves the financing of a pool of financial assets/exposures, and there are senior and junior financing positions, it will be important to consider whether the transaction is a securitisation for EU and UK regulatory purposes.

In comparison, the US risk retention rules are scoped differently. Some transactions within the scope of the EU and UK securitisation rules will fall outside of the US risk retention rules, and vice versa. For example, the US risk retention rules only apply to asset-backed securities where there must be an issuance of "securities" for US law purposes. On the other hand, single tranche transactions may fall within the scope of the US risk retention rules but would not be within scope of the EU and UK securitisation rules.

What is a "private" securitisation?

Under the current EU and UK rules, securitisation transactions for which there is no regulatory requirement for a prospectus to be drawn up are commonly referred to as "private" securitisations, although this is not, currently, a defined term in the rules. Securitisation transactions for which there is a regulatory requirement for a prospectus to be drawn up are commonly referred to as "public" securitisations.

"Private" securitisations are subject to slightly different disclosure requirements. For "private" securitisations, there is an additional requirement to produce a transaction summary. Reporting via a registered Securitisation Repository is currently not required. There are no differences in how the other requirements, such as risk retention or credit granting standards, are applied to "private" versus "public" securitisations.

Does the transaction fall within the jurisdictional scope of either/both of the UK and EU securitisation rules?

The EU rules will apply where the transaction meets the EU definition of a "securitisation" and where one or more of certain sell-side (originator, sponsor or securitisation special purpose entity) or buy-side (institutional investor) parties is established in the EU. The UK rules will apply where the transaction meets the UK definition of a "securitisation" and where one or more of certain sell-side or buy-side parties is established in the UK. Often dual-compliance will be required because the transaction involves sell-side and buy-side parties in both the EU and the UK.

What does it mean for a transaction if it is a private securitisation within the scope of the EU and/or UK regulatory frameworks for securitisation?

These regulatory frameworks impose certain requirements on either or both of the sell-side and the buy-side, or the borrower and lender, of a private securitisation, depending on which parties fall within the jurisdictional scope of the rules. The transaction documents will contain representations and covenants relating to these obligations. The borrower's data collection systems may need adjusting to ensure ongoing requirements can be complied with.

Risk retention: An appropriate entity on the sell-side of the securitisation is required to retain, on an ongoing basis, a material net economic interest in the transaction of not less than 5%. Only certain risk retention methods are permitted, including holding a first loss piece (eg of the most junior debt) or an exposure to each tranche or position in the debt stack. Specific rules around who can act as the risk retainer may affect the structuring of a transaction, including a rule that an entity cannot act as an originator risk retainer if it has been established or operates for the sole purpose of securitising exposures. There are no differences in how risk retention requirements apply to private and public securitisations.

Disclosure and reporting: Sell-side entities are required to disclose specific data on the transaction and the underlying assets on an ongoing basis during the life of the financing. Both the EU and UK have standardised reporting templates which must be used by sell-side entities within regulatory scope. It is in the disclosure requirements that we find differences between the requirements for private and public securitisations. For private securitisations, the disclosure information does not currently need to be reported via a Securitisation Repository, although it must be made available to supervisors if requested. Additionally, there is a requirement for a transaction summary to be prepared for private securitisations, setting out certain prescribed details. This can often become quite a lengthy document.

Standards for credit granting: The rules contain some general requirements around the creation of the underlying financial assets, applicable to all securitisations. Sell-side parties are required to apply the same sound and well-defined criteria for credit-granting to exposures to be securitised as they apply to non-securitised exposures.

Due diligence requirements: Institutional investors must verify certain things prior to taking a position in a securitisation transaction. This includes that the sell-side parties have complied with the requirements listed above regarding risk retention, disclosure of information and credit granting standards. There are also ongoing monitoring requirements.

STS securitisation: Both the UK and EU securitisation rules provide for a special class of securitisation known as simple, transparent and standardised, or "STS" securitisation. The rules set out certain criteria which must be met for a securitisation to qualify as an STS securitisation. There are different criteria for asset-backed commercial paper (***ABCP***) securitisations and non-ABCP/term securitisations. The EU rules also provide for STS synthetic securitisations, whereas the UK regime does not allow for this. There is no distinction in how the STS criteria are applied to private and public securitisations. Third party verification agents are often involved to verify whether a securitisation transaction meets the STS criteria. Preferential capital requirements apply to STS securitisations for relevant institutional investors.

What happens if the rules are not complied with?

The UK and EU securitisation rules both make disciplinary measures and procedures available to supervisors in case of contravention of the rules. Possible sanctions include public notices, suspension of individual managers and financial penalties.

Looking to the future for private securitisation in the UK and EU

Each of the EU and the UK authorities are currently reviewing their respective securitisation frameworks and proposals for amendments are due to be published in 2025. One particular area of focus is the distinction between "public" and "private" securitisations, and what the respective disclosure standards should be. Significant changes are expected to be made in this area. It is likely that definitions of public and private securitisation will be introduced for each regime which will result in more securitisations being classed as public than is currently the case. In return, however, the narrower class of private securitisations are expected to benefit from less onerous disclosure requirements.

Potential changes to the EU rules

In October 2024, the European Commission published a targeted consultation on the functioning of the EU securitisation framework, which considered various policy options for reforms to both the prudential and non-prudential regulation of securitisation in the EU. The Commission has stated that it will assess and where necessary remove existing barriers which unduly restrict issuance and investments in the EU securitisation market, while safeguarding financial stability. Potential legislative policy options will be focused in the areas that currently are perceived as a barrier to securitisation issuance and investment, such as transparency, due diligence, and prudential requirements for banks and insurance companies. The Commission is due to publish its package of legislative amendments on 17 June 2025. This package of reforms will then go through a process of negotiation with the European Parliament and the Council of the European Union before finalisation.

On 31 March 2025, the Joint Committee of the European Supervisory Authorities published an evaluation report on the functioning of the EU Securitisation Regulation (the ***ESA report***), containing recommendations to amend the EU Securitisation Regulation to enhance clarity and proportionality. In relation to the distinction between "private" and "public" securitisations, the ESA report suggested broadening the definition of public securitisation to include securitisation transactions meeting any of the following criteria (i) where a prospectus has to be drawn up in compliance with the EU Prospectus Regulation, or (ii) with notes constituting securitisation positions admitted to trading on EU regulated markets, multilateral trading facilities, organised trading facilities, or other EU trading venues, or (iii) marketed to a broad range of investors and where the relevant terms and conditions are not negotiable among the parties. It is likely that the Commission's legislative proposals will follow this approach.

The ESA report also recommended introducing a simplified template for private securitisations. The Commission's legislative proposals are expected to require the European Supervisory Authorities to draft a dedicated and simplified reporting template for private securitisations, focussed on the information essential for supervision by national competent authorities.

It does seem very likely, however, that sell-side entities of private securitisations in the EU will be required to report (using the new simplified template) via a registered Securitisation Repository, but on a non-public basis to avoid confidentiality concerns.

Potential changes to the UK rules

While the current UK rules are similar to the EU rules, the Brexit process means that the UK and EU regimes are now completely separate, have already diverged in some respects and may diverge more in the future.

During the process of transferring the onshored EU securitisation laws into the UK financial regulators' rulebooks, certain targeted policy changes were made. At the same time, the FCA and PRA noted their intention to consult on further policy changes at a later stage, often referred to as "batch 2" policy changes.

The FCA and PRA are expected to publish consultation papers on the batch 2 policy changes towards the end of 2025. The main focus of the batch 2 policy changes is expected to be adjustments to the disclosure requirements, with a particular focus on the distinction between public and private securitisations. Again, it seems likely that the scope of public securitisations will be broadened, with the remaining private securitisations subject to a less onerous reporting regime, but this remains to be confirmed.

Dual-compliance

Many transactions need to be compliant with both the EU and the UK securitisation rules, either because there are sell-side entities located in both the EU and the UK, or because there are institutional investors/lenders located (or potentially located) in the EU and/or UK.

One of the policy changes made to the UK rules was to apply a principles-based approach to the information which institutional investors are required to diligence on securitisations (regardless of their "public" or "private" nature, and the location of the sell-side entities). UK institutional investors do not need to be concerned about what format reporting takes, provided they receive information sufficient to assess the risks of holding the securitisation position, including certain types of information as prescribed at a high level in the UK rules, within specified timeframes. This makes it easier for UK institutional investors to invest or lend into non-UK securitisations.

Currently, the due diligence requirements for EU institutional investors in non-EU securitisations are more challenging, as they directly refer to sell-side compliance with the EU disclosure requirements. There will be much interest in whether the Commission's legislative proposals due on 17 June will make any improvement to the EU rules in this respect.

An area to watch out for in the prospective amendments to the EU and UK rules will be a widening gap between the two regimes in how "private" and "public" securitisations are defined, the associated disclosure requirements, and whether the EU rules for institutional investors become flexible enough to ease the dual-compliance burden associated with any such divergence.

Please reach out to your usual Freshfields contacts if you would like to discuss any of these developments.

Your Freshfields team

Andrew Heathcote
Partner
T +442077164044
E andrew.heathcote@freshfields.com

Fabrice Grillo
Partner
T +33144564442
E fabrice.grillo@freshfields.com

Mandeep Lotay
Partner
T +31204857653
E mandeep.lotay@freshfields.com

Robin Helmke
Partner
T +496927308329
E robin.helmke@freshfields.com

Francesco Lombardo
Partner
T +390262530359
E francesco.lombardo@freshfields.com

Flora McLean
Partner
T +442077852739
E flora.mclean@freshfields.com

Oliver Aikens
Counsel
T +442077164352
E oliver.aikens@freshfields.com

Giuliano Marzi
Counsel
T +390262530436
E giuliano.marzi@freshfields.com

Joana Fragata
Senior Associate
T +442077164608
E joana.fragata@freshfields.com

Daniella Jammes
Senior Associate
T +442077852298
E daniella.jammes@freshfields.com

Katy Foxall
Senior Associate
T +442074273373
E katy.foxall@freshfields.com

Priyanka Mokashi
Senior Associate
T +31204857687
E priyanka.mokashi@freshfields.com

Louise Bell
Senior Associate
T +31204857616
E louise.bell@freshfields.com

Samvel Der Arsenian
Senior Associate
T +33144563376
E samvel.der-arsenian@freshfields.com

Damaris Engelschman
Associate
T +31204857631
E damaris.engelschman@freshfields.com

Jessica Wrigley
Senior Knowledge Lawyer
T +442077852020
E jessica.wrigley@freshfields.com