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UK Securitisation Regulation reforms - AFME proposals on the definition of public and private securitisation

AFME members[1] would like to thank the FCA and the PRA for their ongoing engagement on the important issue of the definition of public securitisations and the reporting and transparency regime more generally. AFME welcomes the opportunity to provide additional feedback to the FCA and the PRA on certain issues and challenges associated with the existing calibration of the transparency and disclosure regime, as well as the potential expansion of the universe of transactions captured by the definition of "public" securitisations, ahead of the release of the second consultation by the FCA and the PRA on securitisation, which we expect will include matters related to the transparency regime.

As mentioned in the Joint Associations' response (the "**Joint Associations CP Response**")[2] to the PRA and FCA consultations on the draft rules relating to securitisation,[3] any discussion on the form, content and hosting of deal reports is tightly linked with the discussion on how the broader transparency and reporting regime is going to be re-configured. Proper calibration of the transparency and reporting framework is essential to the uninterrupted

[1] AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME advocates stable, competitive, sustainable European financial markets that support economic growth and benefit society.

[2] https://www.afme.eu/Portals/0/DispatchFeaturedImages/AFME_UK%20Finance_CREFC%20Europe%20Response%20to%20PRA_FCA%20CPs.pdf

[3] Namely (i) PRA CP15/23 of 27 July 2023 setting out the draft PRA Rulebook: CRR firms, non-CRR firms, Solvency II firms and non-Solvency II firms: Securitisation Instrument [2024] (the "**PRA Consultation Materials**"), and (ii) FCA CP23/17 of 7 August 2023 setting out the draft FCA Securitisation (Smarter Regulatory Framework) Instrument 2023 (together with the PRA Consultation Materials, the "**Consultation Materials**"), as supplemented by the addendum published by the FCA on 16 October 2023.

functioning of the securitisation markets, as well as to the competitiveness of the UK securitisation markets. AFME members are looking forward to publication of the second consultation paper, including proposals relating to transparency and disclosure. In anticipation of that publication, we would like to submit a few additional responses clarifying and building on the position set out in the Joint Associations CP Response.

1. GENERAL OBSERVATIONS

As mentioned in the Joint Associations CP Response, AFME members would strongly discourage application of a solely mechanistic approach which looks solely or predominantly at certain types of listing to revising the disclosure framework for public and private securitisations. That is even more important if the effect of the reforms would be to expand the population of transactions which are subject to a public securitisation disclosure regime – unless such regime provides for an appropriately crafted series of exemptions which would allow listed transactions nonetheless to be treated as private, or as providing standardised reporting in a form broadly accepted by a particular segment of the market, meaning that the sell-side parties could limit reporting to customised reports in a form and manner acceptable to investors. Whilst we appreciate the appeal to create a clear and simple rule for differentiation between public and private securitisations, given our experience with the Securitisation Regulation disclosure regime, such an approach will inevitably fail to adequately reflect the very broad range of securitisation structures and commercial drivers behind them.

AFME members understand that the FCA and the PRA intend to expand the scope of public transactions by looking at listing on a regulated market or an MTF in the UK or the EEA as the main, or sole distinguishing feature of a public securitisation. Assuming that the two pillars of a public securitisation regime are (1) the requirement to use prescribed forms of reporting templates; and (2) the requirement to use securitisation repositories for hosting deal reports, a potential alternative framework could be as follows:

1.1 ***Private transactions***: As discussed in the Joint Associations CP Consultation Response, AFME believes that the structure of the rules on transparency and disclosure has to remain such that a securitisation should be assumed private unless it meets the specified criteria of a public securitisation (as to which see below). Private transactions should be exempted from the mandatory use of standardised reporting templates and from the obligation to make available information and reports through UK-registered securitisation repositories. Given the much closer relationship between the manufacturers and investors on private transactions, or the existence of a market standard reporting broadly accepted by investors in a particular product, rather than being bound by prescriptive regulatory requirements, the relevant parties should be allowed the flexibility both as to the form in which reports and information are provided and as to how that information is made available. Therefore, any rules on this should not go beyond the requirement to make information available in a manner and form agreed to/accepted by investors, with the frequency agreed with investors (subject, perhaps, to minimum frequencies imposed by regulation) and to provide supervisors with copies of whatever

information is so agreed. We appreciate that supervisors may also have a legitimate need for standardised information adequately to monitor and supervise the market. It would also be acceptable for supervisors to impose minimum information requirements designed to meet their own needs in this respect, provided that the information so required is limited, high-level, and the cost of its collection and reporting is justified by the regulatory benefits obtained through receipt of such information.

AFME members understand that the FCA and the PRA are contemplating lifting the requirement to provide standardised templated reporting for private securitisations and that, instead, reporting on private securitisations will be in the form agreed with the investors in such transactions rather than in a form mandated by the regulator.[4] AFME members would welcome such reform and further assume that private securitisations will continue to be exempt from the obligation to submit deal information and reports to the UK-registered securitisation repositories, with the relevant reporting being available through market standard means of communication (such as email) or via a dedicated secure website.

1.2 ***Public transactions***: As mentioned above, AFME understands that the FCA and PRA are considering using listing on a regulated market or an MTF in the UK or the EEA stock exchanges as the main distinguishing feature for defining a public securitisation.

AFME understands that such an approach is primarily driven by the difficulties with capturing, within the statutory definition, other factors which often determine whether a transaction is genuinely public or private. AFME appreciates the issues with creating an all-encompassing definition which would be sensitive enough to work adequately for the very broad range of securitisation products. However, for the reasons discussed in previous submissions, AFME firmly believes that such a mechanistic approach to defining public securitisations can only work if it is combined with a properly calibrated exemptions regime based on a list of exemptions from the public securitisation regime which would capture the variabilities that make a transaction – which may otherwise look like a public securitisation – effectively private.

As to listing as a criterion, AFME appreciates the focus on capturing listing venues which require disclosure similar to that which is required under the UK Prospectus Regulation – i.e., the regulated markets and MTFs with listing requirements substantially similar to regulated markets in the UK and the EEA.[5] It would indeed be helpful to ensure that venues which don't require the same level of disclosure (and which typically do not provide the same levels of liquidity) are excluded.

[4] As mentioned in the Joint Associations CP Response, AFME members would welcome a further clarification exempting intra-group or fully retained transactions from the reporting requirements altogether for as long as the relevant transactions remain held within the same group, or fully retained, respectively.

[5] For example, listings on venues like the Third Market of the Vienna Stock Exchange require only a short form listing wrapper to be produced. AFME believes that such listing venues should not be captured by the definition of a public securitisation as they do not typically provide the same levels of liquidity, or indeed, disclosure to investors and are exclusively used for bilateral / private transactions.

AFME understands that public securitisations would be subject to the requirement to use standardised reporting templates and to report to a UK-registered securitisation repository, as is the case at present.

Exemptions regime: as mentioned above and in AFME's previous submissions on the matter, listing a securitisation transaction on a regulated market or an MTF in the UK or in the EU (in parlance of the tax authorities, a "recognised stock exchange") is often driven by the requirement to rely on the quoted Eurobond exemption – as opposed to the need for access to, or the intention to create, a public market in the relevant securities. It should be noted that the vast majority of the most commonly used listing venues in the UK and in the EEA do indeed qualify as "recognised stock exchanges" for the purposes of the quoted Eurobond exemption, and there is indeed a very significant number of effectively private transactions (SRT transactions being one good example) which are listed on MTFs solely and precisely for that reason.[6] Additionally, as noted above, there exist segments in the market which provide standardised reporting in a form broadly accepted by investors in such market, such reporting being made available in addition to the templated reporting required by the Securitisation Regulation.[7] Therefore, it is of paramount importance that the reconfigured transparency and disclosure framework acknowledges these facts.

AFME believes this could be effectively done through a series of exemptions which would take a transaction which technically qualifies as a public securitisation under the revised definition out of the public securitisation regime (meaning that neither the templated reporting requirement nor the requirement to report to a UK-registered securitisation repository would apply).[8]

Such exemptions could be made available in one of the following circumstances set out below as "Option 1", "Option 2" and "Option 3" (these exemptions are not intended to be mutually exclusive):

> *Option 1 – Express acknowledgement by investor of reporting package*: the revised reporting framework should allow an exemption for transactions in respect of which the reporting package has been negotiated with the relevant investor(s) directly and/or which has been expressly acknowledged by investors as satisfactory. This could take form of an investor representation letter which would be commonly signed by investors on private securitisation

[6] By way of a further clarification, one of the main issues with re-defining the public securitisations by reference to listing on a regulated market or MTF in the UK or their respective overseas equivalent is that it would set an extremely broad perimeter capturing pretty much all recognised stock exchanges which are used in the context of European securitisations, including those which are used for the sole purpose of obtaining the benefit of a quoted Eurobond exemption. It is difficult for the market participants to know which venues would be viewed as overseas equivalents of a regulated market or MTF in the UK, and additionally, it is not easy to switch away from the venue which has historically been used for a particular product and/or issuer due to other factors such as disclosure requirements, familiarity of investors with that particular market/venue and familiarity of the exchange with that particular product. Therefore, an approach which would look at a narrower set of venues for the purposes of defining a "public" securitisation would seem more appropriate.

[7] This would be different for different asset classes; for some asset classes, this could include the Bank of England loan level data templates.

[8] An appropriately calibrated series of exemptions could also counter the potential risk of listing venue shopping and help increase attractiveness of UK listings.

transactions, or another form of investor confirmation, and which can serve as proof that the conditions for this exemption have been satisfied;[9]

Option 2 – Limited number of investors: as noted in previous feedback on the point, there exists a significant number of transactions which may be listed on a "recognised stock exchange" but which are effectively private transactions due to the limited number of investors.[10] These transactions would typically also not be marketed in a way consistent with a public offer (i.e., there won't be a public market announcement intended to solicit offers and/or an arranger / lead manager bank performing the standard marketing and syndication activities). AFME members would strongly encourage the granting of an exemption to transactions with a limited number of investors (for example, under 10-15[11] unique[12] investors, or by reference to another commonly used private placement exemption);

Option 3 – Accepted market reporting standard: availability to investors of high-quality comprehensive data which allows them effectively to perform credit analysis and monitor their investments on an ongoing basis is at the heart of the securitisation transparency and disclosure framework. As noted above, there exist some markets at present which have developed standardised forms of loan-level and investor reports which pre-date the securitisation regulation, and which satisfy the investors' requirements. It is also possible that new products/markets having similar standardisation may develop in the future. Although the principle underpinning this exemption would be different from that which underpins Options 1 and 2 above, AFME believes that, for the products/markets for which a market-accepted standardised reporting exists, a prime example of which are European CLOs

[9] It should be noted that investor representation letters (either as standalone documents or as representations given by investors in the securitisation documentation) are fairly common on bilateral or small club transactions, including synthetic securitisations. Those require investors expressly to acknowledge that the information provided to them in connection with a transaction has been received and carefully reviewed by the relevant investor(s) and is sufficient for that investor(s) to make an informed decision on the relevant investment. It is not uncommon for these representations be "daisy chained" for subsequent transfers of securitisation positions whereby each subsequent purchaser of the relevant securitisation instrument is required to give the same representations as an original investor.

[10] This could be policed through controls on sell-down of securities in the secondary market, or through introduction of an appropriate distribution compliance period.

[11] This number was chosen provisionally based on the state of the securitisation market as of the date of this letter. For general context, the UK Prospectus Regulation includes a public offer exemption if the number of investors is under 150. AFME members recognise and accept that the exemption under the UK Prospectus Regulation is set at that level in the context of a deeper, and more liquid, market with a more granular investor based compared to the ABS market. At the same time, AFME members note the regulator's the growth element of the secondary international competitiveness and growth objective which, it is hoped, would help to grow the investor base in the future. Finally, further consideration could be usefully given to potential confusion with the use of term "public" for transactions with a fairly limited – compared to other markets – number of investors. AFME and its members would welcome a further discussion on the topic.

[12] It is fairly common practice in the securitisation markets that financial investor clients may use multiple different funds run by the same asset manager/asset manager group to invest in the same transaction (for example, a participation in a particular securitisation could be allocated between 6-8+ funds managed by the same manager). For the purposes of exemption under Option 2, it is important that all such investors are not counted separately as they are – in effect – part of the "group" and are relying on the same manager performing the due diligence for all of them.

(as to which see below for more detail), an exemption could be made available if transaction reporting is available in the form recognised by the relevant market, as could be evidenced by certification by one of the recognised industry associations.

In addition to the above, intra-group or fully retained transactions which are by their very nature private should be exempt as well even where they are listed on a regulated market or an MTF. Finally, we assume that it is not the intention that the public transaction disclosure regime should apply to genuinely overseas transactions such as, for example, a transaction with a UK issuer which is aimed exclusively at third country investors and is registered with SEC.

Exemptions should be made available on the basis of clear disclosure to investors (and to the relevant UK supervisor under the UK private securitisation notification regime) as to the specific exemption on which the relevant transaction is purporting to rely. Once an election to rely on an exemption is made, it should apply throughout the life of the relevant transaction – unless, of course, its terms are appropriately amended so that the transaction no longer relies on an exemption and elects instead to deliver the public securitisation reporting package (and the relevant changes are notified to all investors and to the relevant UK supervisor(s)).[13] Reporting on a securitisation transaction falling under one of the exemptions will be provided in the form agreed with the investors or in the form which is customary for the relevant market, and which would generally enable a UK investor to conclude that sufficient information has been provided to enable it to conduct the necessary due diligence.

AFME members believe that the approach summarised above would be extremely helpful. More nuanced regulation of reporting on securitisations which may have features typically associated with public transactions (and which would be otherwise captured under the revised definition of a "public securitisation") based on a number of carefully crafted exemptions would seem like an elegant solution to address the complexity and variability of the product range covered by the securitisation requirements and deliver maximum flexibility and efficiency of regulation without taking away any of the important investor protections. It would also be helpful to address potential dual compliance considerations and remove unnecessary burdensome reporting on UK securitisations which are placed with the third country institutional investors who require a reporting package different from that which is produced by UK manufacturers.

In all cases it will be necessary for sell-side parties to provide investors with sufficient information for them to make a meaningful independent assessment of the proposed investment as is set out in the proposed due diligence rules. It would be unproblematic, therefore, if authorities felt so inclined, to also impose this more

[13] The switch from relying on an exemption to full public transactions disclosure regime would involve amendments to the transaction documents to include undertakings by the relevant parties to provide information in templated format to the UK-registered securitisation repositories and such other changes as may be required to ensure that the required reports and information are provided in accordance with the applicable requirements for public transactions. For Option 2, this could be combined with the removal of any sell-down restrictions, or be supported by a rule that no such switch would be permitted during the relevant distribution compliance period.

generally standard of disclosure on the sell side and have it apply to private transactions.

As mentioned in the Joint Associations CP Response, AFME would be very happy to engage further on this matter as part of the second phase of consultations.

1.3 ***Use of UK-registered securitisation repositories***: as mentioned above, the exemptions approach discussed in the previous section should also apply to the use of UK-registered securitisation repositories (and of course, AFME assumes that private transactions will continue to be exempt from this requirement). As AFME members noted previously, there is no material difference to investors in terms of availability via repository given that it is the content of information that is relevant rather than the method by which that information is made available.[14] [15] At the same time, their involvement tends to increase compliance costs (both in terms of additional fees and administrative burden) the benefits of which, as noted above, are not obvious. Finally, any changes in the forms of templates are likely to require additional time and effort on the part of repositories, as well as reporting entities and/or the respective service providers, to adjust to the new reporting standards, all of which puts the cost to benefit ratio into question, particularly in light of the competitiveness element of the secondary international competitiveness and growth objective.

2. SPECIFIC COMMENTS

In terms of the feedback on specific issues with the existing reporting templates, assuming a form of those will continue to apply to public securitisations (under the revised definition), AFME members would like to make the following observations:

2.1 ***General***: AFME appreciates engagement from the FCA and the request to provide feedback on some specific questions relating to public securitisation templates. AFME provided an additional submission on 17 November 2023 (the "**Additional Submission**"), but it would like to flag that proper member engagement on this matter was not possible in the limited timeframe allowed for this response. AFME understands that engagement with the industry on the reporting templates is expected during the second phase of the consultations and notes that it may provide further feedback as part of that process that is better informed by subsequent member engagement.

2.2 ***Consumer, credit cards and trade receivables ABS***: as flagged in the Joint Associations CP Response, AFME members believe that for granular, homogenous

[14] See paragraphs 24 and 25 of the AFME and UK Finance Response to HMT Call for Evidence on UK Securitisation Regulation dated 2 September 2021: https://www.afme.eu/Portals/0/DispatchFeaturedImages/AFME-UK%20Finance%20Response%20to%20HMT%20Call%20for%20Evidence%20on%20UK%20Sec%20Reg.pdf (the "**2021 Response to HMT Call for Evidence**").

[15] Additionally, although it is a more granular point, investors have repeatedly flagged that reporting in XML format is not particularly helpful as it is not the format which can be reviewed by a human eye. It is often the case that when investors do attempt to use reports filed with the securitisation repositories, they have to be re-converted back into Excel or other readable format which is inefficient, time consuming and runs contrary to the very idea of information being available to support investor due diligence.

asset classes, such as credit cards, consumer loans, small-ticket auto leases/loans[16] and trade receivables, reporting on individual underlying exposures is not useful, and that reporting of aggregated data should be allowed instead. This will be consistent with investor feedback provided previously. On this point, AFME would like to refer to the Additional Submission and, in particular, the example for aggregated data reporting for credit cards included in the Additional Submission.

2.3 ***CLOs***: as mentioned in the Joint Associations CP Response, since the roll-out of the templated reporting regime in 2019, European CLOs have been providing first two and then three sets of deal reports (market standard reports, reports based on the ESMA templates and more recently, also reports based on the FCA templates). Only one of these sets – the market standard reports – is actually being used by the investors. This is due to high standardisation of reporting which preceded the securitisation regulation reporting regime, and its consistency with how CLO investors would like to receive and analyse information[17]. Additionally, a number of fields for which the reporting templates prescribed specific calculations or determinations differ from how the relevant metrices would typically be calculated in the European leveraged loan market[18]. Finally, all European CLOs are currently private securitisations, and investor feedback indicates that CLO investors do not believe that reporting to UK-registered securitisation repositories would provide additional benefits to them. On that basis, should CLOs be re-classified as public securitisations, AFME members would strongly encourage an exemption to be made available to UK CLO manufacturers as described in Option 3 above.

2.4 ***CMBS***: CMBS transactions are another example of an asset class for which market standards and recommendations, including the European Investor Reporting Package, were developed by the industry under the auspices of CREFC Europe post the global financial crisis[19] [20]. Given the amount of effort undertaken by the industry to adopt the ESMA/FCA templated reporting, particular care should be exercised in connection with the review of the UK reporting templates – unless it is to pare back the very extensive list of data fields against which disclosure is currently made. Additionally, as with CLOs (although for a different reason), CMBS transactions have traditionally been listed on professional investor markets (such as GEM), as opposed to main investor markets.[21] Therefore, should CMBS be re-classified as public securitisations, AFME members would strongly encourage one of the exemptions described above to be made available to CMBS manufacturers as described in Option

[16] These transactions should also be exempted from the requirement to report on a loan-by-loan basis in favour of aggregated data.
[17] Disclosure documents for European (and indeed US CLOs) include a fairly detailed description of what is typically included in the deal reports.
[18] More detailed feedback on individual fields will be provided as part of the second phase of the consultations.
[19] See https://www.crefceurope.org/pages/cmbs.
[20] Additionally, it is fairly standard market practice on CMBS transactions to provide additional reporting on defaulted loans which are transferred into special servicing. Therefore, certain additional reporting continues to be provided on this type of transactions in addition to the prescribed templated reporting.
[21] The choice of listing venue is often driven by lack or insufficient level of cooperation, or difficulty of obtaining information, from the underlying obligors which typically does not allow to satisfy all the relevant listing requirements for listing on the main market.

3 above or, if the relevant transaction is, in effect, private, on the basis of one of the exemptions discussed in Option 1 or 2 above.

2.5 ***Synthetic securitisations***: AFME understands that the FCA and the PRA would like to receive feedback on potential issues associated with the application of public templates to synthetic securitisations. As a general observation (and in line with the feedback provided in the Joint Associations CP Response), AFME members would like to note that all of the synthetic securitisations are, by their very nature, private. AFME would therefore strongly urge the FCA and the PRA to remove the requirement for the use of mandatory reporting templates in the context of the private synthetic securitisations for the reasons summarised in the response by the International Association of Credit Portfolio Managers to the Consultation Materials. Any attempt to treat synthetic transactions as public securitisations, especially in the absence of a "comply or explain" reporting option (as discussed further below) would fail to acknowledge their nature and be very detrimental to the market.

2.6 ***RMBS transactions***: AFME would like to refer the FCA and the PRA to the Additional Submission for specific feedback on data inputs.

2.7 ***Auto / leases ABS transactions***: AFME would like to refer the FCA and the PRA to the Additional Submission for specific feedback on data inputs.

2.8 ***Tolerance thresholds***: as mentioned in the Joint Associations CP Response, AFME members strongly support the decision to not adopt the ESMA guidelines on the use of "no data" options. Given that the EU guidelines do not reflect the UK securitisation data for all relevant asset classes, it is important that the UK reforms do not introduce any rules which mirror the EU approach on the matter.

2.9 ***Confidentiality and a "comply or explain" reporting option***: as discussed in detail in AFME's previous submissions,[22] confidentiality restrictions (whether those which exist by operation of law or contract) and general market sensitivities remain an issue for a number of asset classes, including CMBS, CLOs, dealer floor plan, NPL and synthetic securitisations. In some instances, due to the more heterogenous nature of the underlying exposures, even providing loan-level information on an anonymised basis using the applicable reporting template does not remove the risks associated with the potential to "reverse-engineer" sensitive information on the underlying exposures and obligors. Therefore, appropriate adjustment to the reporting options in the regulatory reporting templates (which are currently limited to "no data" (ND1 to ND5) options) should be allowed to deal with such situations. For example, to the extent mandatory reporting templates apply, these confidentiality concerns could be addressed by introducing in the relevant reporting fields a "comply or explain" reporting option instead of (or in addition to) "no data" options.

2.10 ***Events-based reporting***: AFME members would encourage the FCA and the PRA to remove the requirement for the use of prescribed templates for event-based

[22] https://www.afme.eu/Portals/0/DispatchFeaturedImages/COM%20AFME%20Response%20to%20Article%2046%20Consultation%2030%20Sept%202021%20Submission.pdf

reporting. This would be consistent with how the reporting of inside information under Regulation (EU) No 596/2014 (the "**Market Abuse Regulation**") is done – and also with the very nature of reportable events themselves.[23] Please also refer to the Additional Submission for more detail.

In closing, AFME members would like to thank the FCA and the PRA again for their time and effort in engaging with the industry on this fairly complex issue. AFME members highly value the care and attention the FCA and PRA are taking in considering changes to the transparency and reporting regime for private and public securitisations. Finding a workable solution to the multiple issues highlighted by the industry in previous submissions is a challenging task but AFME members believe that a combination of a clear exemption for manufacturers of genuinely private / bilateral transactions and availability of a properly calibrated set of exemptions summarised in this submission should help create a smarter reporting framework for both investors and manufacturers.

[23] As the FCA would no doubt recall, there indeed exists an overlap between event-based reporting under the securitisation regulation rules and the Market Abuse Regulation for listed transactions, which was flagged by the industry at the earlier stages of consultations on the EU securitisation regulation framework. This duplication of reporting requirements does not seem to serve any meaningful role in the protection of investors. Ideally, it should be removed altogether, but at the very least, the prescribed templates for event-based reports should be dropped. AFME members acknowledge that this may require a corresponding revision of the investor report template.

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