

**HM Treasury**

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Submitted by email

11 September 2023

**Securitisation Regulations 2023 draft statutory instrument and policy note**

On behalf of the Association for Financial Markets in Europe ("**AFME**") and its members, we welcome the opportunity to provide technical comments in relation to the Securitisation Regulations 2023 draft statutory instrument (the "**draft SI**") published by HM Treasury ("**HMT**") on 11 July 2023.

Members of AFME are encouraged by the opportunities presented by the smarter financial services regulatory framework ("**Smarter Regulatory Framework**") and the implementation of measures under the Financial Services and Markets Act 2023 (the "**FSMA 2023**") to adapt the UK securitisation regulatory framework to the rulebook model of regulation under the Financial Services and Markets Act 2000. Members are hoping for a successful realisation of the aims of HMT's review of the UK Securitisation Regulation in 2021 to support and develop securitisation markets in the UK and to increase their contribution to the real economy through the adoption of the Securitisation Regulations 2023 statutory instrument (the "**SI**"), together with the rules to be made thereunder by the Financial Conduct Authority and the Prudential Regulation Authority.

In this letter we will make some specific technical comments in respect of the transitional provisions under the draft SI (both generically and as they relate to STS securitisations), as well as some general observations on implementation of the Smarter Regulatory Framework. These are aimed at ensuring that the SI achieves the desired outcomes as set out in HMT's "Policy Note – The Securitisation Regulations 2023" dated July 2023 and that it supports consistent and uninterrupted application of the regulatory framework and smooth transition to the Smarter Regulatory Framework regime.

**Transitional provisions and 'grandfathering'**

*Transitional provisions*

AFME has some concerns that the transitional provisions provided for in part 11 (*Transitional provisions*) of, and schedule 3 (*Transitional provisions*) to, the draft SI may, unintentionally, leave a gap in the regulatory framework so far as the treatment of grandfathered "pre-2019 securitisations" is concerned, and risk interrupting or inadvertently changing the treatment of securitisations the securities of which were issued on or after 1 January 2019.

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### *Transitional provisions in relation to pre-2019 securitisations*

Paragraphs (2) and (3) of regulation 59 (*Saving for certain pre-2019 securitisations*) state that the revocation of the EU Securitisation Regulation 2017 (as defined in the draft SI) and the Securitisation Regulations 2018 does not affect the application of paragraphs 2 to 4A of Article 43 of the EU Securitisation Regulation 2017 or the Securitisation Regulations 2018 to pre-2019 securitisations (which provisions currently establish the position in relation to pre-2019 STS securitisations).

Absent any further clarification or amendment, the effect of section 1(1) of, and schedule 1 to, the FSMA 2023 will be to revoke the application of paragraphs 5 to 9 of Article 43 of the EU Securitisation Regulation 2017, including provisions under paragraphs 5 to 9 of the EU Securitisation Regulation 2017 which contain helpful transitional provisions dealing with, among other things, the regulatory position for securitisations the securities of which were issued before 1 January 2019 (including securitisations the securities of which were issued on or after 1 January 2011 but before 1 January 2019 and securitisations the securities of which were issued before 1 January 2011)<sup>[1]</sup> and which reflect the key historic milestones in changes to the securitisation regulatory regime in the broader European securitisation markets and afford clarity for both the sell-side and the buy-side on their respective obligations in respect of different vintages of existing securitisations.

Revocation of the provisions included in paragraphs 5 to 9 of Article 43 of the EU Securitisation Regulation 2017, without clarifying what transitional provisions should apply to pre-2019 securitisations, would have an unintended consequence of leaving a gap in regulatory certainty of treatment of those securitisations. AFME assumes that this gap is an unintended drafting consequence of the way in which the transitional provisions currently included in the draft SI are set out, and that the intention is that treatment of pre-2019 securitisations should not be affected by the SI, such that the position that previously applied to pre-2019 securitisations under article 43 (*Transitional provisions*) of the EU Securitisation Regulation 2017 continues to apply. AFME would therefore suggest that part 11 (*Transitional provisions*) of the draft SI is amended to provide for the continuing application of all relevant transitional provisions under the EU Securitisation Regulation 2017 (instead of just paragraphs 2 to 4A) to pre-2019 securitisations. This should avoid any change in the treatment of pre-2019 securitisations which may be held by UK investors at the time the SI becomes effective. In the absence of those changes, it seems to us that the technical outcome of the SI and the FSMA 2023 would be that there is no certainty as to which regulatory regime should apply to pre-2019 securitisations in the UK.

### *Transitional provisions in relation to post-2019 securitisations*

Further, AFME would welcome clarity on the intended treatment of securitisations the securities of which were issued on or after 1 January 2019<sup>[2]</sup> ("**post-2019 securitisations**").

AFME notes that it is a generally accepted practice in the securitisation markets for regulatory changes not to take place with retrospective effect, and for repeals of existing regimes not to affect the transitional provisions for the regime in force immediately prior to

<sup>1)</sup> Or, in the case of securitisations which do not involve the issuance of securities, securitisations the initial securitisation positions of which are created before 1 January 2019.

<sup>2)</sup> Or, in the case of securitisations which do not involve the issuance of securities, securitisations the initial securitisation positions of which are created on or after 1 January 2019.

the repeal. In this regard, we believe the approach to transitional provisions set out in article 43 (*Transitional provisions*) of the EU Securitisation Regulation 2017, which acknowledges different vintages of existing securitisations by reference to the regulatory regime that was applicable at the time the securitisation was created, to be helpful.

As such, AFME suggest that the transitional provisions set out in part 11 (*Transitional provisions*) of the draft SI should be expanded (possibly in a manner similar to that used in article 43 (*Transitional provisions*) of the EU Securitisation Regulation 2017) to include transitional provisions for post-2019 securitisations, such that post-2019 securitisations continue to be regulated in accordance with the regulatory framework applicable at the time of their creation, and that any transitional relief or "grandfathering" from which those securitisations may benefit is preserved.

This, together with AFME's suggestions in relation to pre-2019 securitisations above, should allow for the continuous and uninterrupted regulatory treatment of pre-existing securitisations, and should avoid the risk of regulatory uncertainty for market participants due to the risk that a previously compliant securitisation is deemed no longer compliant due to an unintended change in regulatory interpretation.

#### *Grandfathering of EU STS transactions*

In relation to the STS securitisation provisions of the draft SI, AFME assumes that the intention is that, consistent with the approach taken when onshoring the Securitisation Regulation (EU) 2017/2402 (the "**EU Securitisation Regulation**") in Article 18 of the Securitisation (Amendment) (EU Exit) Regulations 2019, securitisations that were considered STS under the EU Securitisation Regulation prior to the end of the Brexit implementation period should continue to be considered STS under the draft SI.

Accordingly, AFME would like to suggest the following 'tidy-up' changes:

- to the definition of "relevant securitisation" for the purposes of designating a securitisation as STS set out in regulation 13(2) of the draft SI, to ensure that all STS notifications notified before the date falling 4 years after IP completion date (and not just STS securitisation notified during the period of 4 years beginning with IP completion day) are included:

(2) A "relevant securitisation" is—

(a) a securitisation—

- (i) which meets all the requirements of Section 1 or Section 2 of Chapter 4 of the EU Securitisation Regulation 2017,
- (ii) of which ESMA was notified pursuant to Article 27(1) of that Regulation before ~~the date falling the end of the period of~~ 4 years ~~beginning with~~ after IP completion day, and

- (iii) which is included in the list referred to in Article 27(5) of that Regulation; or
  - (b) a STS equivalent non-UK securitisation.
- to paragraphs (1), (2) and (6) regulations 35(6) of the draft SI, to correct minor issues, to address the same issue referred to in relation to regulation 13(2) above, and to ensure that only EU STS securitisations which are still recorded on ESMA's list of STS securitisations maintained under Article 27(5) of the EU Securitisation Regulation 2017 (and not securitisations which were previously EU STS securitisations but are subsequently removed from that list on account of no longer being considered to be STS) are captured:

35.—(1) Subject to paragraph (2), before holding a securitisation position, the trustees or managers of an occupational pension scheme which is ~~who are~~ not the originator, sponsor or original lender must verify the following matters— ...

(2) In the case of a fully-supported ABCP programme, the sponsor (not the trustees or managers of the occupational pensions scheme) must verify the matters referred to in paragraph (1)(a) or (b), as applicable.

...

(6) In paragraph (3)(c), the reference to a securitisation notified under regulation 11(1) includes a reference to a securitisation of which ESMA was notified pursuant to Article 27(1) of the EU Securitisation Regulation 2017, by a person established in an EEA State, before the date falling the ~~end of the period of~~ 4 years after beginning with ~~IP completion day~~ and which is included in the list referred to in Article 27(5) of that Regulation, and for the purposes of this paragraph ...

For ease of reference, AFME would also suggest that a definition of "IP completion day" is included in the draft SI.

## General observations

As HMT will be aware, due to the breadth and complexity of the securitisation market, market participants frequently rely on a combination of previous regulatory guidance (which may still, in some cases, pre-date the current version of legislation by a considerable time),<sup>[3]</sup> as well as market practice to determine whether transactions, or certain features of

<sup>3]</sup> One example of this is the "Guidelines on the implementation, validation and assessment of Advanced Measurement (AMA) and Internal Ratings Based (IRB) Approaches (GL10)", which include useful materials on the classification of specialised lending exposures, published by the Committee of European Banking Supervisors in 2006, which is still a useful reference point in analysing the specialised lending exemption under the EU Securitisation Regulation 2017.

transactions, will be compliant with the applicable regulatory requirements. The existing securitisation regulatory framework is very much a product of many years of thought, consideration, and application by market participants. While AFME acknowledges that the Smarter Regulatory Framework necessitates a wholesale replacement of the securitisation regulatory framework in the UK (and is, of course, supportive of creation of a more flexible approach to securitisation regulation), AFME is concerned that too mechanistic an approach to replacement of the existing rules might inadvertently lead to additional uncertainty, which does not exist today, for UK in-scope entities with regard to the interpretation of rules in respect of certain products and their structural features which is currently based on legacy regulatory guidance which is not being expressly "on-boarded" onto the Smarter Regulatory Framework.

In that regard, AFME notes that, when the UK left the EU, both the FCA and the PRA made statements indicating broadly the ongoing applicability of EU non-legislative materials to "onshored" EU legislation in so far as they remained relevant in the UK,<sup>[4]</sup> which formed a helpful bridge supporting an uninterrupted and continuous application of rules which were not expressly altered as part of the regulatory changes. AFME would welcome a similar form of a policy statement from HMT in the explanatory / policy note accompanying the SI which would acknowledge the existence and continuing applicability of previously issued non-legislative materials and guidance, both by EU and UK regulators, unless the new regulatory framework created by the SI expressly alters the position as it exists under the relevant guidance today. Such policy statement included in the explanatory / policy note would help to ensure the certainty and consistency of treatment of existing (and indeed new) securitisation positions and ultimately serve as promoting one of the main ambitions of the Smarter Regulatory Framework, which is to secure the UK's position as a global financial hub, whilst minimising unnecessary disruption to the industry.

## Conclusion

In closing, we would emphasise that AFME welcomes and supports HMT's objectives of supporting and developing securitisation markets in the UK with a view to increasing their contribution to the real economy and their competitiveness among other international securitisation markets. We are grateful for the opportunity to provide technical comments in

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<sup>4]</sup> FCA, "Brexit: our approach to EU non-legislative materials" (October 2020) <<https://www.fca.org.uk/publication/corporate/brexit-our-approach-to-eu-non-legislative-materials.pdf>> accessed on 6 September 2023; Bank of England and PRA, "Bank of England and PRA Statement of Policy: Interpretation of EU Guidelines and Recommendations: Bank of England and PRA approach after the UK's withdrawal from the EU" (August 2022) <<https://www.bankofengland.co.uk/-/media/boe/files/paper/2021/interpretation-of-eu-guidelines-and-recommendations-boe-and-pra-approach-sop-november-2022.pdf>> accessed on 6 September 2023

relation to the draft SI and we would be happy to answer any further questions that you may have.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Shaun Baddeley', with a stylized flourish at the end.

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