



Brussels, 10.10.2022
COM(2022) 517 final

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

On the functioning of the Securitisation Regulation

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

On the functioning of the Securitisation Regulation

Contents

1. Introduction.....	2
2. Market developments	4
3. The effects of the Regulation	5
4. Risk retention	7
5. Due diligence and transparency	9
6. Private securitisations	10
6.1 Disproportionate rise in the number of private securitisations?.....	10
6.2 Sufficient information for investors and supervisors on private securitisations?	11
6.3 Definition of private securitisation	12
7. STS equivalence.....	13
8. Sustainable securitisation.....	14
9. Third-party verification of STS criteria	17
10. Securitisation special purpose entities (SSPEs)	17
11. Jurisdictional scope.....	18
11.1 Sell-side obligations	18
11.2 Buy-side obligations – availability of disclosures	20
11.3 Buy-side obligations – AIFM investors	21
12. Supervision of securitisation	23
13. Prudential treatment of securitisations	24
14. Conclusion	25

1. Introduction

Securitisation is the process of turning non-fungible loans, or the cash-flows stemming from them, into marketable securities. This tool, therefore, makes a significant contribution to a well-functioning financial system that efficiently finances the real economy, as it frees up capacity on banks' balance sheets, which enables them to provide new credit to businesses, including small and medium-sized companies. It acts as an important tool for capital, liquidity and risk management in banks. Furthermore, securitisation makes new asset classes accessible to investors, thus providing diversified investment opportunities for long-term investors.

However, 15 years after the great financial crisis, securitisation still suffers from a perceived stigma as a complex financing engineering tool from that time. It is well known that loosely regulated securitisation contributed in a significant way to the US subprime mortgage market crisis, which rapidly spread through the global financial system with far-reaching consequences for taxpayers and companies in the EU and beyond.

The European securitisation markets did not suffer the same problems as the US ones¹. Nevertheless, issuing and investing in the EU markets slumped drastically. In the wake of the great financial crisis, central banks² and many stakeholders agreed on the need to revive the EU securitisation market. The European Commission therefore committed to the goal of reviving the securitisation market in the EU on a safe and sustainable basis. In the 2014 investment plan for Europe, the Commission identified the creation of a flourishing market of high-quality securitisations as one of the five areas where immediate action was needed and included this action in the list of building blocks for a Capital Markets Union.³

Following up on these policy commitments, in 2015 the Commission proposed a comprehensive legal framework consisting of a new Securitisation Regulation and targeted changes to the prudential treatment of securitisation.

The negotiations between the co-legislators - the European Parliament and the Council - concluded in 2017. Regulation (EU) 2017/2402⁴ (the 'Securitisation Regulation') and Regulation (EU) 2017/2401, amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms, entered into application on 1 January 2019.

The Securitisation Regulation builds on a number of provisions that were already in place and which had been partly amended in reaction to the crisis. These provisions, however, were scattered across a large number of sectoral legal acts that applied to different market entities, including: (i) the Capital

¹ See Commission staff working document, Impact assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council laying down common rules on securitisation and creating a European framework for simple and transparent securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 and Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms, 30.9.2015 (SWD (2015)185 final).

² The case for a better functioning securitisation market in the European Union: A discussion paper, Bank of England and the European Central Bank, https://www.ecb.europa.eu/pub/pdf/other/ecb-boe_case_better_functioning_securitisation_market_en.pdf.

³ Action plan on building a Capital Markets Union, 20.9.2015 (COM/2015/0468 final), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0468>

⁴ Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012.

Requirements Regulation (CRR) for banks⁵; (ii) the Solvency II Directive⁶ for insurers; and (iii) the Undertakings for the Collective Investment in Transferable Securities (UCITS)⁷ and Alternative Investment Fund Managers (AIFM⁸) directives for asset managers. The Securitisation Regulation creates a single and harmonised legal framework for the main parties involved in a securitisation transaction. These are original lenders, originators, sponsors, securitisation special purpose vehicles and institutional investors participating in the EU securitisation market. In addition, the Securitisation Regulation creates a specific framework for simple, transparent and standardised (STS) true-sale securitisations⁹ to improve the transparency and reduce the complexity of the market.

The importance of a well-functioning securitisation market to provide sufficient credit to the real economy was once again underlined by the Capital Markets Recovery Package¹⁰ to help the EU economy to recover from the COVID-19 pandemic. The package included amendments to the Securitisation Regulation with the aim of expanding the scope of the STS regime to on-balance-sheet synthetic securitisations¹¹ and to remove certain regulatory impediments to the securitisation of non-performing exposures. These amendments were adopted by the European Parliament and Council in March 2021.

More than three years after the entry into application of the new securitisation framework, and as announced in the 2020 Capital Markets Union action plan¹², this report takes stock of the development of the market and discusses important aspects of the legal framework. This report fulfils the Commission's legal mandate under Article 46 of the Securitisation Regulation to present a report to the European Parliament and to the Council on the functioning of the Securitisation Regulation, accompanied, if appropriate, by a legislative proposal. It also fulfils the legal mandate under Article 45a (3) to report to the co-legislators on the creation of a specific sustainable securitisation framework, building on the relevant European Banking Authority (EBA) report. This report also addresses the issues raised by the European supervisory authorities' (ESAs) opinion of 25 March 2021 to the European Commission on the jurisdictional scope¹³ (the 'Joint Committee opinion'), by providing legal interpretations of certain provisions of the Securitisation Regulation. It also takes into account the recommendations made by a high-level forum on the Capital Markets Union, created by the Commission in 2019.¹⁴

⁵ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (*OJ L 176*, 27.6.2013, p. 1).

⁶ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (*OJ L 335*, 17.12.2009, p. 1).

⁷ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (*OJ L 302*, 17.11.2009, p. 32).

⁸ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (*OJ L 174*, 1.7.2011, p. 1).

⁹ A true-sale securitisation involves the transfer of the economic interest in the exposures being securitised through the transfer of ownership of those exposures to special purpose entity.

¹⁰ See https://ec.europa.eu/info/publications/200722-proposal-capital-markets-recovery_en

¹¹ In contrast to a true-sale securitisation, in a synthetic securitisation the underlying credit risk associated with a pool of loans is transferred by the use of credit derivatives or guarantees, and the exposures being securitised remain exposures of the originator.

¹² Action 6 of the action plan: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:590:FIN>

¹³ ESA's opinion to the European Commission on the jurisdictional scope of application of the Securitisation Regulation, JC 2021 16. https://www.esma.europa.eu/sites/default/files/library/jc_2021_16_-_esas_opinion_on_jurisdictional_scope_of_application_of_the_securitisation_regulation_003.pdf

¹⁴ Final report of the high-level forum on the Capital Markets Union 'A new vision for Europe's capital markets' https://ec.europa.eu/info/files/200610-cmu-high-level-forum-final-report_en.

The report draws from a number of sources, in particular the extensive analysis made by the securitisation subcommittee of the Joint Committee of the ESAs, which has been published in two documents: (i) the report on the implementation and functioning of the Securitisation Regulation¹⁵ (17 May 2021, the ‘Joint Committee report’); and (ii) the Joint Committee opinion. Moreover, the Commission carried out a targeted public consultation that received 56 replies (‘the consultation’). This attracted interest from a broad range of market participants, from both the buy-side and the sell-side of the market, as well as from public authorities and academics. A feedback statement¹⁶ providing a detailed summary of the responses received accompanies this report.

In line with the legal mandates, this report focuses on aspects of the securitisation framework pertaining to the Securitisation Regulation. Issues related to the prudential treatment of securitisation for banks and insurance companies are currently the subject of a call for advice to the ESA’s Joint Committee¹⁷ and will be assessed by the Commission once that requested advice has been delivered. This report and its conclusions do not in any way pre-empt the assessment and possible decisions that the Commission will make on the suitability of the current prudential regime.

The report focuses on the functioning of: (i) the risk retention requirement; (ii) the due diligence and transparency requirements; (iii) the rules and definition for private securitisations; (iv) the case for an STS equivalence regime; (v) a regime for sustainable securitisation; (vi) the function of the third-party verification of STS; and (vii) the case for establishing a system of limited-licence banks to replace the current structure of true-sale securitisation built around securitisation special purpose entities (SSPEs). The report also considers issues around the jurisdictional scope of the Securitisation Regulation, as raised in the Joint Committee opinion, and provides legal interpretations in that context. Based on the Joint Committee report, this document assesses the current state of supervision and concludes with an overview of the ongoing and upcoming work on the prudential treatment of securitisation.

2. Market developments

At present it is difficult to obtain a reliable and comprehensive estimate of the size of the securitisation market in the EU. With time, securitisation repositories will be able to provide a full account of public securitisations, but there currently remains a large number of active legacy transactions, i.e. issued before 1 January 2019, that do not need to be reported to the repositories. The volume of securitisations reported to the securitisation repositories stood at around EUR 460 billion on 6 April 2022, whereas market estimates of the size of the public securitisations market in the euro area (excluding collateralised loan obligations) at the end of 2021 stood at nearly EUR 750 billion. In addition, there is currently no official information on the exact size of the private securitisations market, due to the fact that such transactions are currently only reported to securitisation repositories on a voluntary basis, and supervisors have so far not collected such data systematically. According to

¹⁵ Joint Committee report on the implementation and functioning of the Securitisation Regulation JC 2021 31. https://www.eiopa.europa.eu/document-library/report/joint-committee-report-implementation-and-functioning-of-securitisation_en

¹⁶ https://finance.ec.europa.eu/document/download/4ce4c935-06eb-4a35-a475-3b7224982242_en?filename=2021-eu-securitisation-framework-summary-of-responses_en.pdf

¹⁷ https://www.eba.europa.eu/sites/default/documents/files/document_library/About%20Us/Missions%20and%20tasks/Call%20for%20Advice/2021/CfA%20to%20JC%20for%20securitisation%20in%20prudential%20framework%20review/1022482/CfA%20cover%20letter_final.pdf

the European Benchmarking Exercise for private securitisations¹⁸, the overall market is estimated to be at least EUR 189 billion in total commitments. This estimate, however, includes UK transactions.

According to market estimates, after several years of decline¹⁹, the outstanding balance of securitisation transactions in the EU has been stable since the entry into application of the Securitisation Regulation in 2019. The balance decreased by 11.9% between 2015 and the end of 2021, exhibiting a similar dynamic as the UK market, while the US securitisation market grew substantially during this period²⁰. The dominant type of securitisation is the residential mortgage-backed security, which represented nearly 60% of the EU market at the end of 2021, followed by securitisation backed up by SME loans, consumer credit and auto loans.

An alternative source of data is the common reporting for consolidated, sub-consolidated and solo capital requirements (COREP), which includes true-sale securitisations, synthetic securitisations and asset-backed commercial papers held or originated by banks. This source has the benefit of including private transactions, albeit with the caveat that transactions without a participating bank are not within its scope. According to this data source, the outstanding amount of transactions increased from EUR 1 080 million in 2018 to EUR 1 300 million in 2021, suggesting an increase in securitisation activity among banks since the Securitisation Regulation became applicable.

3. The effects of the Regulation

Background and findings

Impact on the functioning of the market for securitisation in the EU

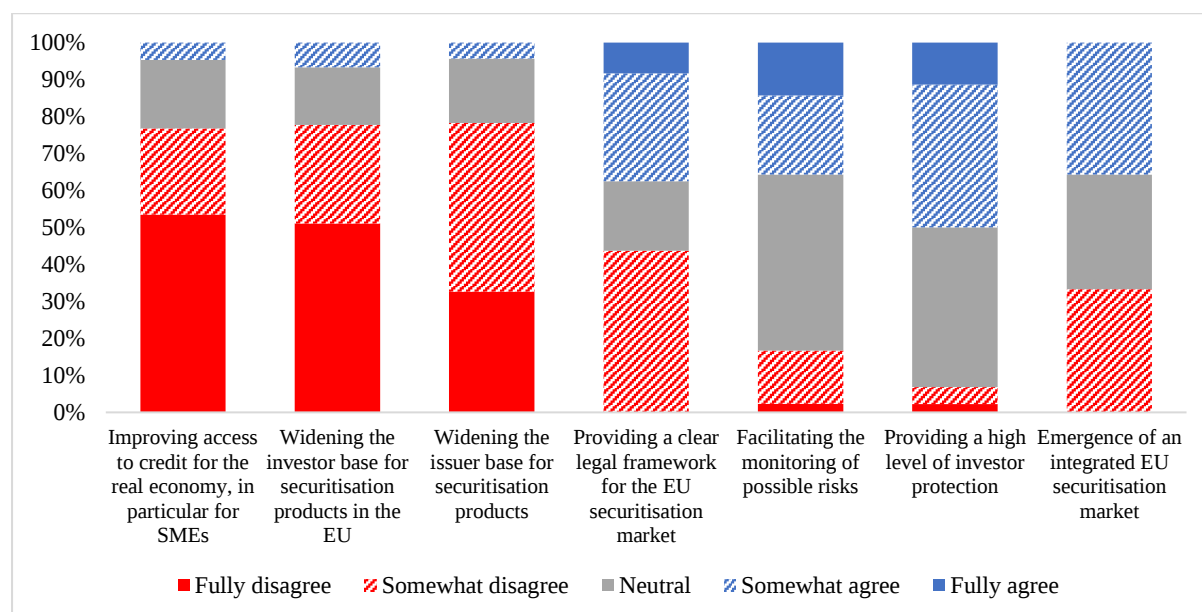
Most respondents to the consultation were generally supportive of the existing legal framework. Respondents also considered that the Securitisation Regulation had only applied for a relatively short period of time and together with exogenous factors, such as the COVID-19 pandemic and increased liquidity through monetary policy instruments, this made it difficult to fully assess the effects.

¹⁸ European Benchmarking Exercise (EBE) for Private Securitisations, 1 December 2021, <https://www.afme.eu/publications/reports/details/European-Benchmarking-Exercise-EBE-for-Private-Securitisations>.

¹⁹ The figures do not include collateralised loan obligations. Source: AFME Securitisation Data Report Q4 2021 and 2021 Full Year, 15 March 2022.

²⁰ Comparison with the United States' securitisation market should take into account its different structure, dominated by the activities of government-sponsored entities, which account for the overwhelming majority of securitisation issuance in the US, as well as differences in its accounting and prudential rules.

Figure 1: Summary of responses to Question 1: Has the Securitisation Regulation been successful in achieving the following objectives?



According to respondents, the new legal framework has been most effective with regard to the policy aim of **providing a high level of investor protection** through risk retention and information availability. Some respondents questioned the proportionality of the compliance costs. It was generally acknowledged that the Regulation had facilitated further **integration**, but that the EU securitisation market was still developing. However, respondents noted that the market remains fragmented between Member States, which seems to limit the economies of scale that could be achieved. Respondents also highlighted that further integration of the EU securitisation market depends on factors other than the Securitisation Regulation itself, such as monetary policy, supervisory infrastructure and progress on the broader Capital Markets Union action plan. A majority of respondents agreed that the Securitisation Regulation provides a **clear legal framework**, while underlining that certain parts could be improved, and recognised that the Securitisation Regulation has facilitated the **monitoring of possible risks**, although not necessarily for private securitisations.

A majority of respondents from the industry did not think that securitisation has improved **access to credit for the real economy**, including SMEs. Similarly, industry respondents did not witness a **widening of the investor or issuer base** during the first years of implementation of the Securitisation Regulation. On the contrary, respondents stated that the number of investors from some major sectors, such as insurance companies, has decreased.

Overall, respondents felt that the Securitisation Regulation has so far brought no tangible benefit to the real economy and SME lending. In particular, this is because the market's volume has not increased since the introduction of the Securitisation Regulation, especially for SME loans.

Impact of the STS label

At the end of March 2022, 620 traditional and 19 on-balance-sheet²¹ STS securitisations had been notified to the European Securities and Markets Authority (ESMA). The most common type of underlying assets in STS securitisations are trade receivables, usually by way of asset-backed commercial paper transactions, followed by auto loans/leases and residential mortgage-backed

²¹ The first STS on-balance-sheet securitisations were notified to ESMA on 22 June 2021.

securities. According to the Joint Committee report, the main benefit that market participants see in the STS label is the preferential regulatory treatment attached to it. As a result of this, banks and insurance companies benefit from a lower capital charge on the positions notified as STS compared to non-STS securitisations (see Figure 2).

Figure 2: Main benefits and challenges of the STS label

Benefits of STS	Relative score	Challenges of STS	Relative score
Capital treatment	4.2	Complexity of STS criteria	3.9
Wider investor base	3.4	Restrictiveness of criteria	3.7
Pricing	3.3	Legal penalties	3.7
Standardisation	3.1	Compliance costs	3.6
Transparency	3.0	Insufficient clarity of criteria	3.5

Source: Joint Committee Report

Relative score from 0 (not relevant) to 5 (extremely relevant)

The Commission's assessment

On the overall market situation, the Commission acknowledges the feedback from industry which indicates that securitisation issuance is still muted. However, in the absence of a comprehensive data source that captures all segments of the market, it is not possible to confidently determine the situation for the entire market. In this respect, supervisors are encouraged to make further efforts to get a better grasp, in particular, of the size of the private securitisation market. Moreover, at this stage it is not clear to what extent market developments can be attributed to the impact of the regulatory regime, and to what extent exogenous factors have been more decisive.

The Commission has not come across or been made aware of significant concerns about the credit quality of EU securitisations, despite the relatively adverse macroeconomic environment, which suggests that the EU securitisation market is on a solid footing.

The Commission notes that the STS label has been taken up and broadly accepted by the market. It serves its purpose of helping investors identify high-quality structures and helps to remove the stigma attached to securitisation. The Commission and the ESAs will continue to monitor the market and provide market participants with guidance and clarity as necessary on the interpretation of the STS criteria, to help them navigate the legal framework.

The Commission is of the opinion that the Securitisation Regulation seems overall to be fit for purpose and does not see the need for major legislative change at this juncture. Having said that, the Commission takes note of the concerns expressed by stakeholders and acknowledges that there is room for fine-tuning on certain aspects (see Sections 5 and 6).

4. Risk retention

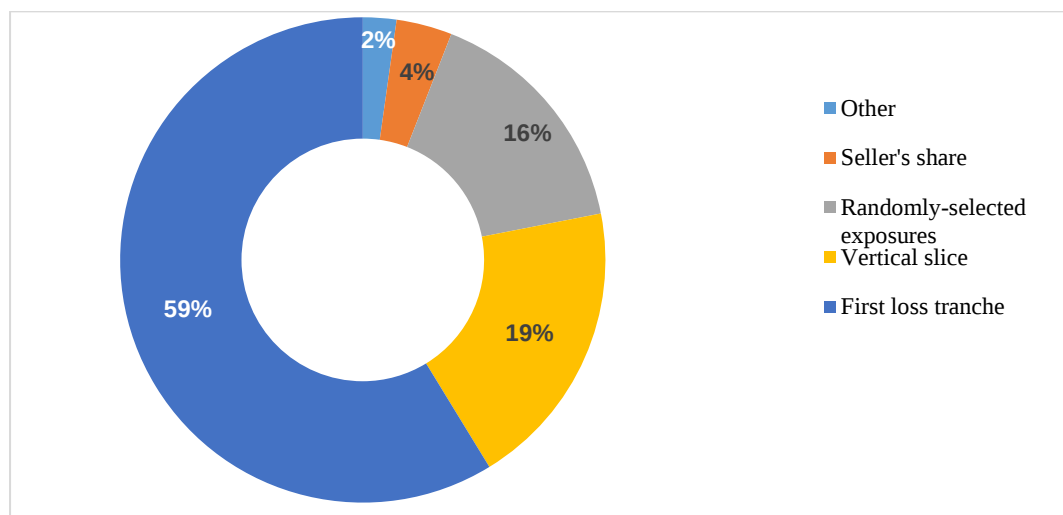
Background and findings

In order to prevent a misalignment of incentives between the issuers and buyers of a securitisation, Article 6 of the Securitisation Regulation requires originators, sponsors or original lenders (and servicers, in the case of securitisation of non-performing exposures) to hold at least a 5% net economic interest in the securitisation throughout the life of the transaction. In addition to this direct obligation, there is also an indirect verification of the risk retention requirement whereby institutional investors are only allowed to hold securitisation positions where at least a 5% material net economic interest is retained.

According to information from the European Data Warehouse²² securitisation repository, the most common retention method among public long-term securitisations was ‘first loss’, whereby the retainer keeps the first credit loss up to at least 5% of the nominal value of the securitised exposures (see Figure 3).

Figure 3: Use of retention methods in public term securitisations, % of total

Source: European Data Warehouse



As private securitisations are not required to report to the securitisation repositories, it is more difficult to obtain systematically data on the risk retention methods in private deals. According to COREP data on the banks involved in securitisation transactions, the most common retention method among synthetic transactions seeking the recognition of significant risk transfer (SRT) to free up capital (which are typically private transactions), is the ‘vertical slice’. This means that the originator, sponsor or original lender retains at least 5% of each tranche sold or transferred to investors. This method of retention was used by 80% of the synthetic SRT transactions in 2020 – 2021.

The Joint Committee report did not find deficiencies in how the risk retention framework is applied. However, the regulatory technical standards mandated by Article 6(7) of the Securitisation Regulation, which sets out the specifics of the risk retention procedures, have not yet been adopted by the Commission. This may have resulted in some legal uncertainty for market participants²³. ‘Plain vanilla’ transactions appear not to have been affected by this lack of detailed provisions, as the risk retention requirements largely carried over already existing provisions from the Capital Requirements Regulation, and credit institutions in particular are familiar with them.

The Commission’s assessment

The data shows that all available retention methods are being used by the market. There is no evidence that any of the risk retention methods allowed by the Securitisation Regulation is inadequate. The Commission therefore does not see a need to revise the risk retention requirements, but invites the EBA to continue monitoring the application of these requirements. Going forward, it may be

²² European Data Warehouse (EDW) is one of the two securitisation repositories, authorised so far. Securitisation repositories have the task to centrally collect data on securitisations in the EU and to provide this data to investors and supervisors.

²³ The EBA has recently adopted an updated version of the aforementioned technical standards as a result of the amendments to the risk retention provisions with the Capital Markets Recovery Package. The final report was submitted to the Commission on 12 April 2022.

appropriate to examine in more detail why and in what circumstances market participants privilege one retention method over the other and how effective each retention method is in retaining a proportion of the transaction.

5. Due diligence and transparency

Background and findings

The Securitisation Regulation requires that institutional investors conduct thorough due diligence before holding a securitisation position. A prudent and diligent analysis of the risks involved in a securitisation critically depends on access to information. To facilitate investors' due diligence and support competent authorities in supervision, Article 7 requires originators, sponsors and SSPEs to make available all relevant documentation describing the features of the securitisation, and to regularly disclose all materially relevant data on the credit quality and performance of underlying exposures. Information is submitted to the securitisation repositories by means of standardised templates. One part of investors' duties of due diligence is to check that the securitisation complies with the transparency requirements in the Securitisation Regulation.

The consultation asked for feedback on the proportionality of the disclosure and due diligence requirements, investors' due diligence procedures, and the usefulness of the data disclosure templates. Most respondents, in particular those representing the industry, did not consider the due diligence and transparency requirements as proportionate. These stakeholders found the provisions too prescriptive and strict, especially when compared with the framework applicable to similar instruments, such as covered bonds. In addition, respondents thought that the provisions fail to fully take account of the specificities of a deal, in particular whether it is public or private (see also Section 6 on private securitisations). Industry respondents also saw a lack of proportionality in the application of transparency rules to third country securitisations. This creates uncertainty as to investors' ability to comply with their due diligence obligations when investing in such transactions (see Section 11). Those who considered the current regime proportionate focused on the benefit of standardised disclosures to help investors analyse the features of a complex securitisation transaction.

Most respondents concurred that the information provided under Article 7 of the Securitisation Regulation is sufficient for investors' due diligence needs. Some stakeholders argued that this information is actually excessive and that investors might not use it, but instead rely on their existing due diligence arrangements that were in place before the Securitisation Regulation entered into force. A number of respondents identified specific fields in the templates which they deemed problematic for various reasons, e.g. multiple fields for similar information or lack of clarity on the usefulness of certain information required by the templates. On the impact of loan-by-loan information disclosure, most stakeholders found it generally useful for all asset classes, unless the portfolio is composed of a large number of exposures, in which case the impact of an individual exposure on the performance of the securitised pool is small.

Most stakeholders believed that the disclosure regime can therefore be simplified without impairing the co-legislators' objective of protecting institutional investors and of facilitating supervision. Most responses, including from several public authorities, suggested that the transparency requirements should be better aligned with the needs of investors, particularly for private securitisations.

The Joint Committee report also reviewed the impact of the due diligence and transparency requirements. On due diligence, the report did not see a need for legal changes and recommended clarification on the jurisdictional scope of the provisions (see Section 11) and greater effort from the national competent authorities to make the supervision of due diligence more effective. On the transparency provisions, the main recommendations were to improve convergence and coordination in

the area of supervision, and to monitor further the impact of the disclosure templates, arguing that it was too early at that stage for a comprehensive evaluation of how the templates work.

The Commission's assessment

The transparency and due diligence provisions in the Securitisation Regulation are inherently linked since transparency should facilitate due diligence. The reporting of information that is not used by investors should thus be avoided as it implies unnecessary compliance costs with little benefit.

Even if the transparency framework has only applied fully since June 2021 with the authorisation of the first securitisation repositories, the disclosure templates have been in use, at least in parts of the market, since they were adopted by ESMA in January 2019. Therefore, the Commission considers that the templates have been in use for a sufficient amount of time to allow for any potentially significant shortcomings to become apparent. The feedback to the consultation points out areas where the usefulness of the disclosure templates might indeed be limited.

The Commission therefore invites ESMA to review the disclosure templates for underlying exposures in securitisation. ESMA should in particular seek to address possible technical difficulties in completing the information required in certain fields, remove possibly unnecessary fields and align them more closely with investors' needs. As part of this work, ESMA should consider whether information on a loan-by-loan basis is useful and proportionate to investors' needs for all types of securitisations.

6. Private securitisations

Private securitisations are defined as securitisations where no prospectus has to be drawn up in accordance with Directive 2003/71/EC. Private securitisations have to fulfil the same regulatory requirements as public securitisations, apart from being exempted from having to use the securitisation repository to disclose the information prescribed by Article 7 of the Securitisation Regulation.

6.1 Disproportionate rise in the number of private securitisations?

Background and findings

Private securitisations are a significant additional source of financing for businesses.. Private securitisations, for the most part, serve very specific market niches, for instance: (i) where the direct relationship between investor and originator is important; (ii) where the issuer needs to control access to particularly sensitive business data; or (iii) where the transaction volumes are too small to justify the cost of public issuance.

At the same time, the co-legislators were concerned that such deals might be used to circumvent the more onerous transparency requirements for public securitisations. They therefore asked the Commission to assess whether there had been a disproportionate rise in the number of these transactions and whether this was motivated by a desire to avoid the transparency obligations of public transactions. In this context, an increase in these transactions could be 'disproportionate' if it is suspected that private securitisations replace transactions that would otherwise be done publicly.

The Joint Committee report pointed out that the number of private STS securitisations has indeed risen considerably since March 2019. Three quarters of all STS transactions in 2020 were private compared to only one third of all STS securitisations in 2019. According to the information on STS securitisations published on the ESMA website, the number of private transactions has fallen again in 2021, accounting for less than 60% of all STS securitisations. Data on the number of non-STs transactions as well as their volume were, however, not included in the Joint Committee report.

Industry respondents to the consultation considered that these figures for STS private securitisations are misleading and a consequence of the new regulatory framework for the following reasons: First, the very broad definition of securitisation applied by the Securitisation Regulation earmarked certain transactions as private securitisations that had previously been considered as bank lending. Second, most private transactions, and especially asset-backed commercial paper (ABCP) transactions, had been renewed/rolled over many times and are now visible because they have been restructured to STS transactions and therefore show up on the ESMA register.

The Commission's assessment

The Commission acknowledges that adaptations to the new regulatory framework might be contributing to the rise in the number of private securitisations since the date of application of the new securitisation framework. Against that background, a period of 2 years is not considered enough to establish with certainty whether or not there has been a real shift from public to private transactions. The Commission also notes that data is not available on the number of private non-STs transactions, nor on the volume of transactions which makes a comprehensive assessment of the market development of private transactions difficult.

While a definite conclusion cannot be reached as to whether there is a consistent rise in the number and volume of private securitisations that is not mirrored by a proportionate rise in public transactions, the Commission cannot assess whether such a rise is motivated by the aim of avoiding the transparency obligations of public transactions. The Commission therefore invites the Joint Committee to continue monitoring developments in the volumes of private and public transactions and to track the volume of non-STs transactions and the overall volume of transactions. Based on these additional data, the Commission will revisit the question in due course.

6.2 Sufficient information for investors and supervisors on private securitisations?

Background and findings

Currently, there is no dedicated template for private securitisations, but originators, sponsors or SSPEs of private securitisations have to fill in the extensive templates that are also used for public securitisations, although these do not need to be provided via a securitisation repository. Some national competent authorities request basic information on private deals via individual forms.

Views were split on whether templates add value to private securitisations: some industry respondents (irrespective of whether they act as investor or originator in the securitisation market) and most public authorities saw the benefit of standardised templates. Other respondents questioned the usefulness of templates for providing transparency on private securitisations, particularly for private synthetic deals where information needs are very specific.

Most industry respondents argued that under the current system, supervisors and investors have enough information to, respectively, monitor market developments and perform thorough due diligence.

While industry respondents believed that the current Article 7 templates should also provide enough information on private securitisations for supervisors, the feedback from public authorities on this question was split. Two supervisors tended to agree, while the majority of the supervisors supported the views of the Joint Committee report which noted difficulties for supervisors in being sufficiently well informed about the existence and the parameters of the transactions.

The Commission's assessment

The Commission agrees with the view that standardised templates help to provide information that is of sufficiently high quality and sufficiently easy to process by the different recipients. At the same

time, the Commission acknowledges that, because of the bespoke nature of private securitisation, investors in such transactions need more tailor-made information than the ESMA templates might be able to provide. The Commission has no indication to question the claim of industry respondents that investors in private deals have a structurally strong enough position to request and receive all the information they need for thorough due diligence. But while the information submitted via the ESMA templates might be of less relevance to investors than originally assumed by the co-legislators, standardised information on the existing private transactions is still essential for supervisors to quickly gain an overview of market developments and to identify transactions that they might want to subject to detailed supervisory scrutiny. The different ad hoc forms that several supervisors have created to this end suggest that ESMA's current detailed templates might not be fully appropriate for easily gaining an accurate overview of the private securitisation market.

In light of these considerations, the Commission invites ESMA to draw up a dedicated template for private securitisation transactions that is tailored particularly to supervisors' need to gain an overview of the market and of the main features of the private transactions. Having different templates for private and public securitisations is also legally possible, as Article 7(3) of the Securitisation Regulation allows for the development of templates 'taking into account the usefulness of the information for the holder of the securitisation position'. A dedicated template for private securitisations is expected to simplify considerably the transparency requirements for private securitisations. At the same time, it will serve the need of supervisors to receive sufficient information on private transactions.

This new template could replace the existing templates for all private securitisations. It would ensure that supervisors receive the information they need, while investors in private securitisations could obtain any additional information they require in bilaterally agreed formats, unconstrained by the content of the standardised templates. While issuers do not have to submit templates for private securitisations to a repository, the Commission considers that there is no obstacle to supervisors obtaining that information since Article 7 requires issuers to make this information available to supervisors. The Commission considers that supervisors should enforce that obligation and use the information in the templates for their work. The ESAs could use their existing powers to ensure that the information is received by the supervisors in ways that make it readily usable.

It may be that notifications submitted individually by originators, sponsors or SSPEs, instead of via securitisation repositories, are considerably more difficult to process and that quality checks of securitisation repositories are indispensable for high quality data. If this is the case then the recommendation of the report to register information on private deals via securitisation repositories, for the supervisors' benefit, could be a way forward in the longer term, once the Commission decides to make a proposal to amend the Securitisation Regulation.

6.3 Definition of private securitisation

Background and Findings

A significant majority of respondents to the consultation were in favour of amending the definition of what constitutes a private securitisation. However, a significant number of these respondents advocated for a different definition, assuming that certain transactions labelled as private could be exempt from transparency requirements altogether. Similarly, the Joint Committee report also favoured amending the definition to make it more precise and to completely exempt from transparency requirements a sub-set of what currently constitutes private transactions (e.g. transactions that happen intra-group with no third-party investor).

The Commission's assessment

In the Commission's view, it does not seem appropriate to change the definition of private securitisation in the Securitisation Regulation. While it would be possible to make the definition more specific, the current definition is clear-cut and working well overall. Supporters of a new definition acknowledge that a better definition of private securitisation might be difficult to find, which is why some are not proposing an alternative definition, but propose an open discussion process, after an impact assessment and consultation.

The Commission notes that the calls for a different delineation of what constitutes a private securitisation are almost all linked to the concern that transparency requirements for private deals are overly prescriptive and rather meaningless for investors and potential investors in practice. It is argued that these investors in private deals are in a position to request and continuously receive the tailor-made information they need from the sell-side of the transaction. Thus, it seems that stakeholders calling for a change to the definition are doing so only to ease the transparency requirements on private deals. The Commission believes that this issue can be tackled by scrutinising the existing rules and templates and assessing their usefulness (see previous Section).

7. STS equivalence

Background and findings

Equivalence is a mechanism whereby the EU can recognise non-EU regulatory standards in a defined area as equivalent to its own²⁴. Granting equivalence in a given sector to a third country requires that rules and supervision are equivalent to those in the EU. This can provide for regulatory relief by removing duplicative requirements on cross-border transactions and aligning the prudential treatment of cross-border exposures with the one applied to domestic exposures.

In the consultation, most market participants voiced support for allowing non-EU entities to issue STS securitisations. Conversely, public authorities were almost unanimous in opposing the establishment of an equivalence regime.

The Commission's assessment

The EU's STS securitisation framework is based on a demanding set of requirements, not least in terms of information disclosure. The Commission observes that to date no securitisation regime in a third-country jurisdiction could come close to being considered equivalent to the EU's STS framework. The UK is the only jurisdiction outside the EU that has an STS regime in place, following its adoption of the EU's own STS regime after it left the EU.

In light of this, the Commission considers it premature to introduce an STS equivalence regime at this time. The EU STS regime is still evolving, and the EU has recently established a regime for STS on-balance-sheet securitisations that does not exist in the UK. Moreover, it will only be feasible to review third-country supervisory practices once EU supervisory practice is further developed and becomes fully convergent among EU supervisors. In this context, the peer review of the implementation of STS requirements is crucial to gaining an overview of the supervision of the STS regime in the EU. This peer review, which was originally supposed to be completed by 1 January 2022²⁵, has been postponed to 2024.

²⁴ Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions - Equivalence in the area of financial services - COM(2019) 349 final.

²⁵ As mandated by Article 36, paragraph 7 of the Securitisation Regulation.

Notwithstanding this, the Commission will continue to monitor relevant regulatory developments in third-country jurisdictions that could lead to the adoption of similar securitisation regimes in line with the Simple, Transparent and Comparable standard developed by the Basel Committee on Banking Supervision and the International Organization of Securities Commissions, on which the EU STS regime is founded.

Should the current situation change, the Commission might re-consider the need and appropriateness to introduce an STS equivalence regime.

8. Sustainable securitisation

Background and findings

The Securitisation Regulation imposes only a limited obligation to make sustainability disclosures. For STS securitisations, the sell-side party has to publish the available information on the environmental performance of the assets financed by residential loans or auto loans or leases. The Capital Markets Recovery Package amendments added the option for originators to publish instead available information on the principal adverse impact on sustainability factors of the assets financed by underlying exposures.

In addition to the mandate under Article 46(e), Article 45a(e) asks the Commission to report on the creation of a specific sustainable securitisation framework, on the basis of a report by the EBA ('the EBA report')²⁶. The EBA published its report on 2 March 2022²⁷.

Extending the scope of the existing disclosure requirements on environmental sustainability

In the consultation, most respondents supported in principle the notion that extending the existing disclosure requirement to other asset classes²⁸ may add value for investors who would appreciate having such information to measure their own share of environmental, social and governance (ESG) investment, to assess ESG-related risks, and as a comparison tool. Investors regretted that it is not yet available, since this kind of information will be necessary in the future to comply with their own disclosure requirements.

Nonetheless, respondents said that the usefulness of such an extension of the disclosure requirements to other asset classes depends on whether there are sufficiently clear and pertinent parameters to assess the respective environmental performances. According to most respondents, this is not yet the case for all asset classes.²⁹

To improve the availability of data, the EBA report recommends extending the disclosures on principal adverse impact to securitisations other than STS, and that mandatory disclosures on principal adverse impact should be introduced in the medium term.

²⁶ https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Reports/2022/1027593/EBA%20report%20on%20sustainable%20securitisation.pdf

²⁷ [EBA recommends adjustments to the proposed EU Green Bond Standard as regards securitisation transactions | European Banking Authority \(europa.eu\)](https://www.eba.europa.eu/press/2022/03/02/eba-recommends-adjustments-to-the-proposed-eu-green-bond-standard-as-regards-securitisation-transactions)

²⁸ Beyond residential loans or auto loans or leases.

²⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0391>

Creating a specific sustainable securitisation framework

The current proposal for an EU Green Bond Standard (EuGBS), published in July 2021 and still being negotiated³⁰, aims to draw up a framework for green bonds, including those issued by a special purpose vehicle in the context of a securitisation transaction. In order to get the green bond label the issuer needs to commit to use the proceeds from the issuance to finance, refinance or acquire assets aligned with the EU taxonomy.

The EBA report does not recommend establishing a dedicated framework for green securitisation at the present time, considering the still rather low amount of green assets available to be securitised³¹ and, because the market for sustainable securitisation is still quite new. The report recommends considering a dedicated framework only once the EU economy has made greater progress in the green transition.

Instead, the EBA report recommends adjusting the EuGBS standard to make it more appropriate for securitisations in the transition phase (see box below). The EBA recommends leaving out synthetic securitisation of the scope of a label for green securitisation (be it the EuGBS label or a separate dedicated label) because there is as yet no generally acknowledged methodology to measure the re-deployment of the capital that is freed up as a result of the transaction for green purposes.

In the consultation, most respondents warned against having several different labels for classifying green securitisation and voiced a clear preference to use the EuGBS label for the foreseeable future, rather than creating a separate framework. The feedback shared EBA's concerns about requiring the pool of underlying assets to be taxonomy-aligned, since this would create an unequal treatment of securitisation with other comparable bank funding instruments, such as covered bonds. Securitisation might then not be able to contribute to financing the transition to a green economy, given the current scarcity of taxonomy-aligned assets. On the responsible entity for reporting, many respondents preferred originators rather than issuers as it would be impractical to mandate issuers who do not control the assets.

On the disclosures required to qualify as sustainable, it is argued that an overly descriptive regime would be counterproductive given the wide range of activities related to exposures underlying securitisation transactions.

The EBA report recommendation on adjusting the EU Green Bond Standard (EuGBS)

The EuGBS proposal establishes a voluntary standard for financing sustainable investment and allows the issuer of a bond to use the green bond label as long as the full proceeds from the bond issuance are used for purposes that are fully aligned with the taxonomy. This means that the underlying exposures of the securitisation held by the SSPE would need to be aligned with the taxonomy.

The EBA report warns that this approach puts securitisations (and other financial instruments issued by a special purpose vehicle) on a different footing from securities that are not issued by a special purpose vehicle. The EBA draws attention to the fact that the current approach would require EuGBS-compliant securitisations to be backed by taxonomy-aligned assets. However, it would not prevent the originator, as the ultimate beneficiary of the proceeds from the securitisation bond issuance, from using the proceeds for non-green purposes. The EBA considered this approach to be inconsistent with the policy intention to channel new funding into financing the transition towards a green and

³⁰https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/european-green-bond-standard_en

³¹According to EBA estimates of the amount of taxonomy-aligned assets in EU banks, the maximum annual pool of green securitisations, assuming they are fully backed by taxonomy-aligned assets, would be EUR 15.6 billion.

sustainable EU economy. Because of the current scarcity of taxonomy-aligned assets available for securitisation, the EBA's view was that this would also limit significantly the potential for an EuGBS securitisation market. Moreover, the EBA report points out that SSPEs are of limited economic substance and therefore an EuGBS securitisation market would be impractical even if SSPEs are the sole entities to bear legal responsibility.

The EBA report thus recommends that the EuGBS requirements should apply to the originator of a securitisation, not to the SSPE. The EBA acknowledges that applying requirements on the use of proceeds at the originator level, instead of at the SSPE level, does not appear to be an obvious path for securitisation given its asset-backed nature does not benefit from a dual recourse. This could also result in EuGBS securitisations with underlying assets that are 'non-green'. However, the EBA see this as being the most efficient and pragmatic approach during a transition phase and as a way to ensure an equal treatment of securitisation with other types of asset-backed securities. The EBA recommends that shifting the EuGBS requirements to the originator should be accompanied by additional transparency measures to inform investors to what extent the asset pool is taxonomy-aligned. This approach should be complemented by safeguards to avoid the selection of assets to be securitised by the originator in a way that could be seen as greenwashing.

Furthermore, on disclosure for sustainable securitisations, in accordance with Article 45(a) of the Securitisation Regulation, the EBA report investigated how to integrate sustainability-related disclosure into the Securitisation Regulation, drawing upon the Sustainable Finance Disclosure Regulation³² (SFDR). The SFDR lays down sustainability disclosure obligations for financial market participants and financial advisers vis-à-vis end-investors. The EBA report notes that while investors who are active in the securitisation market are covered by the SFDR regime, securitisation products fall outside the scope of the SFDR because they are not considered financial products within the meaning of Article 2 of the SFDR. As a result, investors may not be able to include securitisation exposures in their ESG investment strategies.

The Joint Committee of the ESAs is tasked with developing regulatory technical standards that specify the information to be provided on the principal adverse impacts of certain types of underlying assets in STS transactions³³. While this would address the information demands of investors focused on ESG-linked products, the EBA recommends that the scope of the principal adverse impact disclosure should be extended: (i) in the short term, to non-STS securitisations backed by the same asset types as those in the existing STS disclosure requirement; and (ii) in the medium term, to all securitisations.

The Commission's assessment

The Commission welcomes the extensive and well-founded EBA report as an important contribution to developing a framework for sustainable securitisation. The Commission agrees with the EBA that, at least in the short and medium term, there is no case for creating a dedicated sustainability label for securitisations, considering in particular the low amount of green assets available to be securitised. In light of this, the Commission invites the European Parliament and the Council to take into consideration the EBA recommendation in the context of the ongoing negotiations on the EuGBS, and stands ready to assist with the work on specifying the details of securitisation within the EuGBS framework.

³² Regulation EU 2019 /2088 of the European Parliament and Council on sustainability-related disclosures in the financial services sector.

³³ Article 22 (6) of the Securitisation Regulation.

On the disclosure of sustainability-related information, the Commission recognises the need to develop principal adverse impact disclosures and considers that the scope of the upcoming Regulatory Technical Standard from the Joint Committee should be as wide as possible.

9. Third-party verification of STS criteria

Background and findings

The Securitisation Regulation established a system of third-party verification entities to assist both issuers and investors, on a voluntary basis, in assessing the compliance of a transaction with the STS criteria. However, the involvement of such verifiers does not remove the legal responsibility from originators, sponsors and institutional investors to treat a securitisation transaction as STS. These third-party verification entities are authorised by ESMA and supervised by the respective national competent authority of the Member State in which they are incorporated. ESMA has authorised two third-party verifiers so far. To date, most STS transactions have used the services of one of the two third-party verifiers.

The Joint Committee report analysed the role of third-party verification entities in the STS market. It noted that the market finds these entities helpful, in particular for less experienced market participants, not least in providing reassurance in view of the financial sanctions imposed for erroneous information in an STS notification. The Joint Committee stated that the interactions between third-party verifiers and national competent authorities have so far been limited. Given the apparent importance of the verifiers for the STS market and concentration on very few entities, this might lead to potential divergence between supervisors and verifiers in their interpretation of the STS criteria. Moreover, the Joint Committee Report noted that there was no common approach so far to the supervision of the STS verifiers.

The Commission's assessment

The third-party verification regime appears to function as intended and the Commission sees no need to revise the provisions governing this regime. As flagged by the Joint Committee Report, dialogue should take place at an appropriate frequency between the national competent authorities and the third-party verification firms to avoid inconsistent interpretations of the STS criteria to the detriment of issuers and investors.

As regards competition, the Joint Committee report did not indicate that the small number of authorised third-party verifiers is the result of a regulatory barrier to entry into the market or of insufficient competition. Therefore, the Commission currently sees no need to intervene.

10. Securitisation special purpose entities (SSPEs)

Background and findings

As regards true-sale securitisations, SSPEs are a key tool to manage the transactions and to reap the desired effects, particularly capital relief for the originating banks: the SSPE segregates the assets from the originator and shields the originator from the risk of the assets. The activities of the SSPE are limited to attaining these objectives. The Securitisation Regulation contains a full set of requirements applicable to SSPEs.

In light of the mandate under Article 46(h), the Commission enquired in the consultation whether a system of limited-licensed banks to perform the functions of SSPEs would add value to the securitisation framework.

An overwhelming majority of respondents, both from industry and from public authorities, warned against the introduction of such a system and the impact it could have on the market. Many

highlighted that SSPEs are already subject to authorisation and supervision by the relevant competent authority, which allows for their adequate supervision and the proper monitoring of risks.

A system of limited-licence banks was seen as detrimental to the independence of SSPEs as such, with eventually more actors managing the securitisation funds in a separate entity that belongs to the same consolidated group. Instead, the priority should be to ensure independence in control, management and reporting of the securitisation transaction vis-à-vis initiators, sponsors and investors. In addition, respondents noted potential risks arising from a system of limited-licence banks. They cautioned that this would lead to a higher concentration of risks. These dynamics would go against the very logic of risk diversification and reduction that underpin the securitisation market.

The Commission's assessment

The Commission considers that the current framework is working in an adequate manner as no shortcomings or issues to address with regard to SSPEs have been identified. In light of this, there is no need to complement the framework by establishing a system of limited-licensed banks that would perform the functions of SSPEs and have the exclusive right to purchase exposures from originators and sell claims backed by the purchased exposures to investors.

11. Jurisdictional scope

The Securitisation Regulation is predominantly an activity-based regulation, not a pure product regulation. It mainly imposes obligations on the sell-side (originator, original lender, sponsor and SSPE) and the buy-side (institutional investor) involved in securitisation. The Securitisation Regulation does not distinguish EU securitisations from securitisations in which one of the parties is established in a third country. However, the fact that one or more parties to a transaction are established in a third - country can raise questions about how the requirements of the EU regime shall be fulfilled in practice by the EU parties to the transaction.

The Joint Committee opinion noted difficulties related to the jurisdictional scope of the Securitisation Regulation. A big majority of respondents to the consultation confirmed that finding.

The Commission takes note of the reported difficulties and will use the following subsections of this report to provide some interpretative guidance on this issue, as requested by the Joint Committee and stakeholders.

11.1 Sell-side obligations

Background and findings

Articles 6, 7 and 9 of the Securitisation Regulation create certain fundamental obligations that, as a lesson from the great financial crisis, all parties to securitisations must comply with. The provisions in question do not consider whether the obliged party is inside or outside the EU:

- Article 6 obliges the originator, sponsor or the original lender to retain part of the risk of the transaction (a net economic interest of not less than 5%);
- Article 7 obliges the originator, the sponsor and the SSPE to provide the listed information to the investor, the competent authorities and, upon request, to the potential investors;
- In order to render the problematic 'originate-to-distribute model' impossible in the future, Article 9 obliges originators, sponsors and original lenders to apply to securitised exposures the same sound credit-granting criteria that they apply to non-securitised exposures.

The Joint Committee opinion raised the concern that in a transaction involving sell-side parties located inside and outside the EU, sell-side entities might escape these fundamental obligations, since EU supervisors cannot hold parties located in third countries accountable in case of a breach of these

obligations. Therefore, the Joint Committee was of the view that the provisions should be interpreted in a way so that:

- only an EU-based entity should be able to retain risk;
- the parties should be obliged to choose the EU-based entity as the designated reporting entity;
- an EU-based entity should be responsible for ensuring that the same sound and well-defined criteria for credit-granting apply to both securitised and non-securitised exposures, and that the securitised exposures are subject to the same processes as non-securitised ones for approving and renewing credit.

The Joint Committee suggested that these provisions should be clarified accordingly.

Moreover, the Joint Committee identified an inconsistency between Article 5(1)(b) and Article 9 of the Securitisation Regulation, however without making a clear recommendation on how to solve it: Article 9 obliges also the sponsor to ensure sound credit-granting, while the corresponding due diligence obligation in Article 5(1)(b) does not mention the sponsor.

Respondents to the consultation reacted as follows to the Joint Committee suggestions:

- Market participants argued against restricting risk retention only to EU-based entities. Risk retainers should be the entities with actual and sufficient control over and interest in the securitised portfolio; jurisdiction should not play a role.
- Also on the transparency requirements of Article 7 of the Securitisation Regulation, a broad majority, mainly of industry representatives, objected to imposing on the EU-based entity the obligation to disclose, stressing that the most appropriate reporting entity may not be located in the EU. Most supervisors that responded were more in favour of the suggestion of the Joint Committee. However, it is noted that only a handful of supervisors responded.
- Views were also split on whether the verification of the credit-granting standards according to Article 9 of the Securitisation Regulation should mandatorily be performed by the EU-based entity. Three quarters of respondents (comprising most of the industry respondents) argued against removing these responsibilities from the appropriate entity to one that is located in the EU.

Lastly, the consultation suggested a broad consensus among respondents that the inconsistency identified between Article 5(1)(b) and Article 9 of the Securitisation Regulation should be resolved.

The Commission's assessment

The Commission notes that the interpretation of Articles 6, 7 and 9 of the Securitisation Regulation suggested by the Joint Committee is not supported by the legal text. The Commission deems such a narrow interpretation not imperative, either, in order to achieve the legislative intent of the provisions of Articles 6, 7 and 9, namely to ensure that all securitisations with participating EU parties comply with certain structural and quality requirements. While it is certainly most desirable to have these requirements enforced directly by EU supervisors, it should be recalled that this aim is also met effectively through the institutional investor's due diligence obligations imposed by Article 5 of the Securitisation Regulation. According to these obligations, institutional investors must verify that the sell-side parties of the transaction, irrespective of their location, comply with the respective obligations under this regulation before investing in this securitisation. EU institutional investors may not invest in securitisations if the sell-side entities are found to be not in compliance with these obligations. In more detail:

- The main purpose of the risk retention requirement of Article 6 of the Securitisation Regulation is the alignment of interests between the issuer and the investor of a securitisation. Hence, the provision is in the interest of the investor. The narrow interpretation of Article 6 suggested by the Joint Committee is therefore not deemed necessary, since the investor verification duty under Article 5 effectively ensures that risk retention is complied with for all securitisations that are bought by EU investors. If the purpose of risk retention provision can be achieved this way, the more intrusive interpretation of the Joint Committee, or an amendment of the Securitisation Regulation in this respect, seems unnecessary.
- The obligations of Article 7 of the Securitisation Regulation are joint obligations for which every entity, whether the originator, sponsor or SSPE of the securitisation is fully liable. Hence, if only one of those sell-side entities is located in the EU, it is under the legal obligation to disclose all the information requested by Article 7, even if it is not the entity designated to fulfil the disclosure requirements. This obligation can be enforced against the EU sell-side entities, even if the designated reporting entity is established outside the EU.
- The Commission considers that the obligation under Article 9 of the Securitisation Regulation can only be meaningfully met by the credit-granting entity in the process, regardless of whether or not it is located in the EU. The Commission agrees that the obligation should ideally be supervised and enforced against an EU entity and notes that EU investors must be made aware that this might not be the case in every possible configuration. The EU-based investor is only allowed to invest in transactions for which it can be verified that they comply with the obligations of Article 9.

Lastly, the Commission notes the inconsistency between Article 5(1)(b) and Article 9 and intends to resolve this matter in the next revision of the Securitisation Regulation. The Commission notes that this inconsistency does not have any harmful effect in practice. If it is true that the sponsor (as defined by the Securitisation Regulation) does not apply any credit-granting standards since it does not grant credit on its own account, Article 9(1) cannot in practice impose a valid direct obligation on the sponsor.

11.2 Buy-side obligations – availability of disclosures

Background and findings

According to Article 5(1)(e) of the Securitisation Regulation, before investing in a securitisation, institutional investors have to verify that the information required by Article 7 of the same regulation has been made available according to the frequency and modalities provided for. For investments in third-country securitisations where none of the sell-side parties is located in the EU, this raises the question as to whether these investments are only admissible if the information listed in Article 7 is provided through ESMA templates and, in the case of public securitisations, a securitisation repository. Furthermore, this raises the question as to whether it has to be verified that the information provided fully matches the requirements specified by the ESMA regulatory technical standard on disclosure³⁴ and, in particular, whether loan-by-loan data are made available for all exposures underlying the securitisation. This interpretation of Article 5(1)(e) would prevent EU institutional investors from investing in third-country securitisations that do not fulfil these conditions. The submissions of the Joint Committee and the feedback to the consultation clearly indicate that the requirements of Article 5(1)(e) are currently interpreted and applied differently by market participants.

³⁴ Commission Delegated Regulation (EU) 2020/1224 of 16 October 2019 supplementing Regulation (EU) 2017/2402 of the European Parliament and of the Council with regard to regulatory technical standards specifying the information and the details of a securitisation to be made available by the originator, sponsor and SSPE, OJ L 289, 3.9.2020, p. 1–216.

The Joint Committee opinion argued for more flexibility, so that the verification can be presumed to be completed in the case of a third-country securitisation, even if not all EU transparency requirements are fulfilled in every detail. To this end, the Joint Committee suggested setting up a ‘third-country equivalence regime for transparency requirements’ in relation to third-country securitisations. This would make it possible to verify the compliance of third-country securitisations with the transparency required by Article 7 if one of the third-country sell-side parties has provided information on the securitisation in accordance with their country’s requirements governing the securitisation, and if this country’s transparency regime has been declared equivalent to the EU transparency rules.

In the consultation, an overwhelming majority of industry stakeholders joined the call for more flexibility. They argued that a legal interpretation of Article 5(1)(e) that requires institutional investors in third-country securitisations to verify that they have received all the information in accordance with Article 7 creates a competitive disadvantage for EU institutional investors. Very few respondents supported the idea of setting up an equivalence regime as suggested by the Joint Committee opinion. Some other respondents outside the industry were against greater flexibility in the case of investments in third-country securitisations, but recommended simplifying the information requirements in general.

The Commission’s assessment

The Commission acknowledges that Article 5(1)(e) gives rise to questions of legal interpretation and takes note of the different interpretations of this matter. However, the Commission is of the view that the legislative intent of the verification obligation under Article 5(1)(e) of the Securitisation Regulation is key to the interpretation of this provision. With the experience gained from the great financial crisis, the EU legislators wanted to ensure that in the future EU institutional investors in securitisations will perform proper due diligence before any investment, and that they have all the information necessary at their disposal. The co-legislators specified the information that must be disclosed to investors in Article 7. Thus, differentiating the scope of information to be provided, depending on whether the securitisation is issued by EU entities or by entities based in third-countries, is not in line with the legislative intent, since it does not matter for the proper performance of the EU-based institutional investors’ due diligence whether a securitisation originated inside or outside the EU. Therefore, without an amendment of the legal provision, it is not appropriate to interpret Article 5(1)(e) in a way that would leave it to the discretion of the institutional investors to decide whether or not they have received materially comparable information.

Notwithstanding the above, the Commission is aware that the current text of Article 5(1)(e), in conjunction with the rules laid down by Article 7 (and, in turn, in conjunction with the respective technical standard) de facto excludes EU institutional investors from investing in certain third-country securitisations. This is not because these transactions would be unable to materially comply with the EU regulatory framework, but simply because the third-country sell-side parties might not be interested in providing the necessary information according to the procedures set out in Article 7. While the issue might deserve thorough consideration in the context of a future amendment of the Securitisation Regulation, the Commission believes that the envisaged measures to amend the technical standards that set out the transparency requirements of Article 7 (see Sections 5 and 6) might help reduce the competitive disadvantage for EU institutional investors. This is because this will make it easier also for sell-side parties from third-countries to provide the required information.

11.3 Buy-side obligations – AIFM investors

Background and findings

The Joint Committee opinion pointed to a need for certain legal clarifications on alternative investment fund managers (AIFMs) acting as institutional investors in securitisations. First, it was

unclear whether a non-EU AIFM that manages or markets alternative investment funds (AIFs) in the EU would be covered by the scope of the Securitisation Regulation's definition of an institutional investor, even if the marketing in the EU only takes place on a private placement basis. Second, it was unclear whether the definition of the institutional investor (who is subject to the extensive due diligence requirements) also encompasses 'sub-threshold' AIFMs³⁵.

The consultation indicated a clear majority in favour of clarifications, however with opposing views on how the clarifications should be drafted. Those in favour of including both sub-threshold AIFMs and third-country AIFMs that market and manage AIFs in the EU stress the need to have a level playing field for all AIFMs active in the securitisation market.

On the other hand, some respondents questioned whether the inclusion of sub-threshold AIFMs would be proportionate. Respondents who argued against the application of EU due diligence requirements to third-country AIFMs managing or marketing funds in the EU stressed that such interpretation would render the Securitisation Regulation extraterritorial. They also suggested that this would create an unjustified difference between funds and other products for which the due diligence requirements are regulated by the home regulator of the institutional investor. Lastly, it was noted by a number of respondents that the legal text as it stands was unclear whether a requirement for an AIFM in a non-EU country to apply the EU due diligence rules would be limited to the funds managed and marketed in the EU or, once the AIFM manages or markets one fund in the EU, this obligation extends to all the funds marketed or managed by this third-country AIFM.

The Commission's assessment

The Commission notes that Article 2(12), i.e. the provision that defines institutional investors for the purposes of the Securitisation Regulation, refers in paragraph (d) specifically to the provision in the Alternative Investment Fund Managers (AIFM) directive that defines an AIFM without differentiating between entities above or below the above-mentioned threshold. The legal wording therefore clearly requires that sub-threshold AIFMs also have to be considered institutional investors within the meaning of the Securitisation Regulation. This interpretation is also supported by the legislative intent of the due diligence requirements of Article 5, which is to protect EU investors from exposure in the future to securitisation investments without prior due diligence and a proper understanding of the acquired product.

The legislative intent also provides strong arguments for the Commission's interpretation that third country AIFMs that market and manage funds in the EU have to comply with the due diligence requirements of the Securitisation Regulation for all of their securitisation investments. If third-country AIFMs marketing funds in the EU were considered exempt from the due diligence rules, this could undermine the comprehensive investor protection that the legislators intended. This interpretation does not render these rules 'extraterritorial', since they regulate an activity – the managing or marketing of a fund in the EU – that takes place inside the EU. Considering the legislative intent, it furthermore becomes clear that the broad wording of Article 2(12)(d) of the Securitisation Regulation should apply only to the funds that the third-country AIFM markets and manages in the EU, but should not be construed as also covering the management and marketing activities of this same AIFM that has no link to the EU. The Commission will consider amending the wording of Article 2(12)(d) to specifically remove any kind of legal uncertainty in a future proposal to amend the Securitisation Regulation.

³⁵ Sub-threshold AIFM means a small AIFM benefitting from a de minimis exemption and which is therefore only required to comply with the AIFM directive (and its specific Member State's implementing law) in respect of the registration and reporting obligations, but does not benefit from the marketing passport.

12. Supervision of securitisation

Background and findings

The Joint Committee report focused on the supervision of due diligence, risk retention, transparency, private securitisations and STS requirements. While noting some possible issues in the supervision of the market, it did not call for legislative changes, but recommended providing further guidance and clarity to supervisory authorities to ensure the efficient and consistent implementation of the Securitisation Regulation. Additionally, the Joint Committee report made the case that it is difficult for supervisors to access the information on a private securitisation, since it is not made available via a securitisation repository.

In the consultation, market participants reported differences in the supervisory approaches of Member States and stressed that this could create uncertainty. Competent authorities were mentioned to have different interpretations of the Securitisation Regulation and varying degrees of involvement in the supervisory process.

Overall, stakeholders called for consistency, more coordination between supervisors (given that several competent authorities are often involved in the supervision of one transaction) and a proportionate approach to avoiding divergent practices. They stressed that no additional requirements are needed, not even via regulatory technical standards, favouring supervisory guidance from the ESAs Joint Committee instead.

Lastly, a few competent authorities made the case for having a lead supervisor, selected from among the competent authorities involved in a securitisation. In their view, the lead supervisor would coordinate the sharing of information between supervisors, particularly in a context where different supervisors are involved in checking compliance with the different requirements of the Securitisation Regulation.

The Commission's assessment

The Commission acknowledges that competent authorities might need more time to gain sufficient experience, due in part to the late adoption of some regulatory technical standards. That said, to date no major shortcomings in supervision have been reported, in particular no issues requiring changes in legislation. The Commission sees this as an indication of the overall appropriateness of the supervisory framework.

However, at this stage a few issues have been flagged where greater convergence and enhanced coordination between supervisors would be beneficial. The Commission considers that diverging supervisory practices and ensuing legal uncertainty have the potential to create an unlevel playing field and are harmful to the growth of the securitisation market. Guidance should be provided to prevent differences in the interpretation of the Securitisation Regulation and in the involvement of competent authorities in the supervisory process. In particular, a more harmonised approach between competent authorities to monitoring compliance of the STS requirements should be ensured. Such guidance could be provided by the Joint Committee to further develop a common understanding of the rules, best practices and the supervisory tools to ensure a common supervisory approach at EU level.

The Commission is aware that the securitisation market is not equally developed across the EU and that this has an impact on the degree of experience of the different supervisors. Hence, the Commission agrees with the recommendation in the Joint Committee report to develop a common EU guide on best practices for national supervisors.

Peer reviews are another important and effective tool to promote convergence and could provide meaningful insights on the different practices among competent authorities in the STS criteria reported by stakeholders. Therefore, the Commission regrets that no peer reviews on the

implementation of the STS criteria have been carried out or are planned in the near future despite the obligation in Article 36(7) of the Securitisation Regulation. The Q & A process proved an effective tool to ensure convergence and a swift treatment of the questions raised should be ensured.

As also pointed out by the Joint Committee Report on the STS requirements, fragmentation of supervisory responsibility to a certain degree creates challenges to building up supervisory expertise and experience. In this respect, in the long run, the Commission sees merit in thoroughly exploring the feasibility of having a lead supervisor. This assessment should also reflect on the most appropriate tool to take this forward, e.g. via guidelines to supervisors or via an amendment to the Securitisation Regulation.

Lastly, on the alleged difficulty for supervisors to access information on private securitisations, the Commission notes that the legal requirement for the sell-side to make the information available to the supervisor in accordance with Article 7 does not differentiate between private and public transactions. Furthermore, the Commission is of the opinion that the Securitisation Regulation provides for all the supervisory tools that might be needed to enforce this obligation.

13. Prudential treatment of securitisations

The Commission is required to submit a report to the co-legislators under Article 519(a) of the Capital Requirements Regulation (CRR) on the application of certain provisions in the securitisation part of that Regulation ‘in light of developments in securitisation markets, including from a macroprudential and economic perspective’. This should be accompanied by a legislative proposal, if appropriate. While preparing such a report, the Commission deemed it appropriate to conduct a broad assessment of the performance of the securitisation prudential framework as a whole, in light of the challenging market conditions in recent years.

Call for advice

Against this background, the consultation included various questions on the functioning of the EU securitisation prudential framework. In addition, on 17 October 2021 the Commission addressed a call for advice (CFA) to the Joint Committee of the ESAs, asking it to assess whether the securitisation prudential framework has met its intended objective of helping in the recovery of the EU securitisation market while maintaining an appropriate level of prudence. The Joint Committee has been asked to deliver its advice by 1 September 2022.

The Commission is also assessing the appropriateness of the calibration of capital requirements for investments in securitisation tranches by insurance and reinsurance firms. Those issues also formed part of the above consultation and call for advice to the Joint Committee of the ESAs.

The Commission will await the Joint Committee’s advice and recommendations. Taking into account the advice and feedback received in the consultation, the Commission will assess the appropriateness and convenience of potential amendments to the securitisation prudential framework.

Significant risk transfer (SRT)

One of the main objectives that underpins securitisations from an originator’s perspective is achieving capital relief in relation to the portfolio of securitised assets, compared to the amount of regulatory capital that the originator must hold in relation to the same portfolio before executing the securitisation.

Achieving capital relief is subject to the various quantitative and qualitative conditions referred to in Articles 244 and 245 of the CRR (the ‘SRT framework’), which ensure that the originator does not incur a material risk of undercapitalisation in relation to the portfolio of securitised assets.

Accordingly, competent authorities must assess whether securitisations for which originators seek to claim capital relief meet the conditions for SRT laid down in those articles.

The SRT framework is, therefore, essential to guarantee the safety and soundness of bank originators, as well as to promote overall market confidence.

In its report of 23 November 2020³⁶, the EBA made several recommendations to the Commission on the harmonisation of SRT assessment practices and processes. Lastly, the EBA also included recommendations to simplify and improve the SRT tests laid down in Articles 245 and 246 of the CRR.

The industry has pointed out that the SRT framework raises several obstacles to the smooth and effective functioning of the securitisation market and has advocated that the framework be applied in a more transparent, consistent, and efficient manner. The Commission gathered industry feedback on selected aspects of the EBA SRT report in the consultation.

In light of the EBA recommendations and industry feedback, the Commission is currently considering the merit and convenience of using the empowerment laid down in Articles 244(6) and 245(6) of the CRR to enhance the harmonisation of the SRT framework, with the aim of making it more efficient, transparent and consistent.

14. Conclusion

The new EU securitisation framework became applicable only in 2019 and some new elements were added as late as April 2021. The full implementation of the framework is still ongoing with a few regulatory technical standards still under preparation. Likewise, as the questions on the jurisdictional scope show, for example, both market participants and supervisors are still in the process of translating the legal provisions into practice.

Hence, the Commission believes that more time is needed to get a full picture of the impact of the new securitisation framework. This is all the more so as extraordinary external factors like the COVID-19 pandemic and the accommodative monetary policy of the central banks during that period might have played a significant role in how the EU securitisation market has or has not developed since the new framework entered into application.

Having said that, this legally mandated review is a good opportunity to take stock, on a preliminary basis, and to decide whether there are areas that warrant immediate action. Considering all the input received, the Commission believes that the Securitisation Regulation contributes significantly to achieving the 2017 legislation's core objective of establishing an EU securitisation market that helps finance the economy without creating risks to financial stability. The new STS label constitutes one building block to this end and helps to remove the stigma that the EU securitisation markets have suffered from since the great financial crisis. Overall, the market seems to work reasonably well, even though expectations for a highly dynamic market with increasing volumes and a growing number of participants do not yet seem to have been fulfilled.

However, this first official stocktake of the new securitisation framework also raised a number of issues with the new framework that are considered to play a role in why the EU securitisation market has so far not grown as much as the initiators of the new framework had hoped.

³⁶ Report on the harmonisation of the SRT practices and processes for the purposes of the Delegated Act referred to in Articles 244(6) and 245(6) of the CRR <https://www.eba.europa.eu/eba-calls-european-commission-harmonise-significant-risk-transfer-assessment-securitisation>

On the prudential treatment of securitisation, which many industry stakeholders consider to be more conservative than for comparable products with a similar risk profile, the Commission has launched a call for advice to the Joint Committee of the ESAs to analyse the situation in more depth. Once this input is received, the Commission will assess whether or not there is a case for adjustments.

Concerns with the other part of the new framework, the Securitisation Regulation, focus mainly on the claim of market participants that complying with current transparency obligations is resource-intensive, without producing much added value for the investor, particularly in the case of private transactions. On balance, the Commission acknowledges that there is room for improvement, but thinks that, for the shortcomings which the review identified, improvements could be implemented without the need to change the Securitisation Regulation. With this in mind, the Commission invites ESMA to revisit the regulatory and implementing technical standards that set out the details of the transparency regime.

On a green securitisation framework, the legal mandate puts, at the right time, an important spotlight on the question of how securitisation can be harnessed to support the financing of the transition towards a sustainable EU economy, while at the same time avoiding risks of greenwashing. The Commission agrees with the EBA report that there is no need for a separate green securitisation label in the short and medium term and invites the co-legislators instead to address the issue in an appropriate manner in the ongoing negotiations on the creation of an EuGBS. In the view of the Commission, providing the securitisation market with the opportunity to play a role in the green transition is not only essential to further increase the benefits of securitisation for society, but is also needed to support the future development of the EU securitisation market itself.

The Commission remains fully committed to the aim of creating the framework for a thriving and stable EU securitisation market. Such a market is an indispensable building block of a genuine Capital Markets Union and might become even more important for tackling the challenges of financing economic activity in the significantly more difficult market environment that seems to be evolving at the moment. The Commission will therefore continue to closely monitor the securitisation market and intervene, if and when deemed appropriate, to fully reap the benefits of a thriving securitisation market for the EU.