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Securitisation Regulation and CRR Amendment – recent developments

24 October 2017

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In preparation of the joint debate on the Securitisation Regulation (the "**Sec. Reg.**") and the amendment to the Capital Requirement Regulation (the "**CRR Amendment**") in the plenary session of the European Parliament scheduled for Wednesday 25 October 2017, updated drafts of the two regulations were circulated last week. This prompts the question which, if any, changes were made compared to the drafts published on 26 June 2017 and whether consensus on the two drafts is likely to be found in the first hearing scheduled for 25 October 2017 and vote in the plenary scheduled for the following day.

Latest changes

Considering the drafts published in late June 2017 were the result of negotiations between the different institutions as well as the industry ongoing for almost two years and constituted an acceptable compromise for the players involved in many ways, most amendments made compared to the June proposals solely clarify the text of the regulations or constitute editorial improvements.

There are, however, some aspects and last minute changes both in the revised draft of the Sec. Reg. as well as in the latest draft of the CRR Amendment worth pointing out.

Changes in the revised draft of the Sec. Reg.

Introduction of limitations to the ban on self-certified mortgages

Whereas Article 17 of the June proposal would have effectively banned securitisation of mortgages where borrowers self-certified their income, i.e. in all cases in which the borrower might have been aware that certain information had not been checked by the lender, Article 9 of the October draft provides for an exemption with regard to legacy portfolios by only applying the ban on self-certified loans to mortgages underwritten after the entry into force of the Mortgage Credit Directive (Directive 2014/17/EU) in March 2016.

Further limitation of transparency requirements with regard to securitisations outside the scope of the Prospectus Directive (Directive 2003/71/EU)

In the June proposals, Article 7, laying down transparency requirements for originators, sponsors and securitisation special purpose entities (SSPE's), already provided for an exception for securitisations where no prospectus had to be drawn up in compliance with the Prospectus Directive. With regard to such securitisations, the newly created obligation to make information for such securitisation transaction available by means of a securitisation repository did not apply. The October proposal further provides that with regard to

such securitisation transactions, the obligation to make the respective information available by means of a website does not equally apply.

Extension of powers of the ESMA with regard to transparency requirements

In addition to authorising ESMA to submit draft regulatory standards (RTS) to the Commission to specify the information originator, sponsor and SSPE have to provide to fulfil the transparency requirements provided for in Article 7, the October draft further contains an authorisation to develop implementing standards (ITS) specifying the format in which the required information shall be given by establishing standardised templates (instead of establishing such templates on the basis of RTS, as provided for in the June draft). The shift from RTS/delegated regulations (according to Article 290 of the Treaty of the Functioning of the European Union – "**TFEU**") to ITS/ implementing acts (as provided for in Article 291 TFEU) entails a loss of control by the Council and the European Parliament, as the two institutions only have the right to raise objections with regard to the former.

Changes in the revised draft of the CRR Amendment

New recitals (10) – (12), in particular extension of EBA mandate to review aspects related to significant risk transfer ("**SRT**")

The October proposal contains three new recitals, in particular specifying the Commission's powers to adopt delegated acts. Similarly to *the EBA discussion paper on the Significant Risk Transfer in Securitisation of 19 September 2017* (EBA-DP-2017-03), the new recital (10) refers to the extended mandate of EBA to provide technical advice on the conditions determining SRT, the concept of commensurate risk transfer and the requirements for competent authorities when assessing the transfer of credit risk. It should be noted that recital (10) points out the importance of expert consultations led by the Commission during its preparatory work as well as the significance of an equal participation of the European Parliament, the Council and Member States' experts.

Changes to recital (11) clarifying grandfathering provisions

With regard to the transitional provisions concerning outstanding securitisation positions (Article 2) and the provisions regarding the entry into force and date of application (Article 3), only editorial changes were made, in particular by inserting 1 January 2019 as the date of application (as expected). Although no changes as to the content were made, it should be noted that some editorial changes were made to recital (11) of the June proposal (recital (14) of the October proposal), clarifying the rationale of the transitional provisions. Accordingly, the CRR Amendment applies to "*all securitisation positions held by an institution*", whereby – to allow for a smooth migration to the new framework – "*institutions should continue to apply, until 31 December 2019, the previous framework to all outstanding securitisation positions*".

Replacement of the CRR rules on risk retention, due diligence and disclosure to investors by new provisions for the respective areas contained in the Sec. Reg.

Although no changes were made in this regard since the June proposal, the intended replacement of the CRR provisions on risk retention, due diligence and disclosure by newly created Sec. Reg. provisions are worth mentioning. The CRR Amendment not only prescribes the deletion of Articles 405 et seq., it further proposes to delete a provision of the current framework allowing for an exception of the application of the rules on risk retention etc. on a consolidated basis, currently resulting in the limitation of such rules to European banking groups. The deletion of this exception is likely to lead to an extra-territorial reach of risk retention, due diligence and transparency provisions of the Sec. Reg., also including third country entities (e.g. US subsidiaries of a European bank) within the scope of such requirements.

Next steps

Once consensus is found on the new drafts in the European Parliament, they will be published in the Official Journal of the European Union and enter into force on the twentieth day following such publication – both events expected to take place in late 2017 or early 2018. Following such entry into force, EBA, ESMA and EIOPA will be able to start negotiating and drafting the respective implementing acts. Considering the narrow timeframe until the application date of both regulations on 1 January 2019 and the number of authorisations given to the competent authorities to develop ITS and RTS, it remains to be seen if such ambitious goal can be achieved and whether the new framework will be functioning as of 1 January 2019.

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