

Group Briefing

December 2018

Securitisation Regulation Update: *Addressing Challenges*

Ireland Client Service Law Firm of the Year 2018
Chambers Europe Awards

Ireland Law Firm of the Year 2018
International Financial Law Review (IFLR)
Europe Awards

**Advised on Equity Deal of the Year 2018 –
Allied Irish Banks IPO**
International Financial Law Review (IFLR)
Europe Awards

Ireland Law Firm of the Year 2018
Who's Who Legal

Ireland Law Firm of the Year 2017
Chambers Europe Awards

Best Firm in Ireland 2018, 2017 & 2016
Europe Women in Business Law Awards

**Best National Firm for Women in Business Law
2018, 2017 & 2016**
Europe Women in Business Law Awards

**Best National Firm Mentoring Programme 2018,
2017 & 2016**
Europe Women in Business Law Awards

**Best National Firm for Minority Women
Lawyers 2018**
Europe Women in Business Law Awards

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

As mentioned in our recent briefings ([What you need to know about the new EU Securitisation Regulation and Simple, Transparent and Standardised \(STS\) Securitisations: What you need to know](#)), the new EU Securitisation Regulation comes into force on 1 January 2019.

Some recent implementation challenges have arisen, leading to last week's [joint statement by the European Supervisory Authorities \(ESAs\)](#).

NEW DISCLOSURE TEMPLATES UNLIKELY TO BE READY IN TIME – 'CRA3 TEMPLATES' WILL APPLY FOR A TRANSITIONAL PERIOD

Quarterly Disclosure Requirements under the new Regulation

The creation of new securitisation positions after 1 January 2019 will trigger the application of new transparency requirements. Originators, sponsors and securitisation special purpose entities will be required to disclose detailed information to holders of securitisation positions, competent authorities and (upon request) potential investors. They must, between themselves, designate which of them will comply with the disclosure requirements. The disclosure requirements are more onerous than those currently contained in the Capital Requirements Regulation (CRR), and are

more aligned with what was envisaged by Article 8b of the Credit Rating Agencies Regulation (CRA III).

The disclosure requirements in Article 7 of the new Regulation are wide-ranging – only two are specifically impacted by the joint statement. Those are:

- » the requirement to report information on underlying exposures on a quarterly basis; and
- » the requirement to provide quarterly investor reports.

The other disclosure and transparency obligations in Article 7 are unaffected by the joint statement.

Status of draft ESMA Templates

ESMA was required to draft technical standards containing disclosure templates for the above quarterly reports. ESMA's Final Report, containing its draft disclosure templates, is [here](#), and is with the European Commission for approval. In that Final Report, ESMA noted the time and effort that would

be involved for reporting entities in adopting the new disclosure templates, and suggested that they apply with “a *gradually-increasing degree of compliance*” over a 15-18 month period. The Commission has not yet confirmed whether it has comments on the draft templates, but a statement is expected from the Commission shortly.

It now seems very unlikely, as signposted in last week’s [joint statement by the ESAs](#), that agreement will be reached on those disclosure templates in time to have them ready for 1 January 2019.

Transitional Provisions will apply

In light of this, the transitional provisions contemplated by the new Regulation will apply. Those transitional provisions require that the templates developed under CRA III be used to meet the quarterly reporting obligations until the new templates are ready. The CRA III templates cover reporting for structured finance instruments backed by residential mortgages, commercial mortgages, loans to SMEs, auto-loans, loans to consumers, credit card debt, and leases. They also set out a list of what should be included in investor reports. However, to date those templates have not been widely used, and their fields do not precisely match what needs to be reported under the new Regulation. Importantly, there is no specific CRA3 template for CLO reporting.

The ESAs noted that “*severe operational challenges*” have been highlighted by reporting entities that will need to use the CRA III templates – in particular, as some have never needed to use them. A requirement to temporarily use those templates before moving to the new templates (once agreed) could necessitate expensive adjustments to reporting systems.

The new Regulation is directly applicable across EU Member States. As

such, the ESAs commented that neither they nor national competent authorities (NCAs) can decide to dis-apply its provisions. Changing the requirements of the new Regulation would require further EU legislative action.

So, to address the concerns of reporting entities, and while expressly not advocating a general forbearance approach, the ESAs have said that until such time as the ESMA draft disclosure templates are agreed, NCAs are expected to supervise and enforce the new disclosure rules “*in a proportionate and risk-based manner*.” For example, when checking whether a reporting entity is complying with the disclosure element of the new transparency requirements, the ESAs expect the NCAs to take account of the “*type and extent of information already being disclosed*” by them, on a case-by-case basis.

What this means in practice

In practice, this means that, for securitisations where there is a CRA3 template, the safest option is for that template to be used until such time as ESMA’s new templates are agreed with the Commission. However, as NCAs will have scope to assess reporting compliance on a case-by-case basis, NCAs may be prepared to allow securitisations to be reported in different formats, provided that the information that would otherwise be captured by the most relevant CRA3 template forms part of that reporting. It would be sensible for a reporting entity proposing to use a non-CRA3 template to confirm this with its NCA in advance. For securitisations for which there isn’t a CRA3 template at the moment (such as CLOs), it will be up to the NCA to decide what form of reporting should be used, having regard to the ESA requirement that they do so “*in a proportionate and risk-based manner*” – existing reporting undertaken in respect of such securitisations may be

the most appropriate starting point.

CHALLENGES FOR BANK SUBSIDIARIES

Separately, some amendments made to the CRR in parallel with the new Regulation have caused concern for subsidiaries of EU banks engaged in securitisation in third countries. Under Article 14 of the CRR (as it will be from 1 January 2019) the provisions of the new Regulation relating to due diligence, risk retention, transparency, re-securitisation and criteria for credit-granting will apply on a consolidated basis, bringing those subsidiaries (possibly unintentionally) into scope. The ESAs have received feedback that the new rules on risk retention and transparency will be particularly challenging for those entities.

Again, the ESAs have said that they expect the NCAs to apply their supervisory powers in enforcing this aspect of the new regime in a proportionate manner, assessing each situation on a case-by-case basis. NCAs are allowed take account of further proposed changes to the CRR (negotiations are ongoing at EU level), which are likely to see the scope of Article 14 of the CRR pared back somewhat to capture only the due diligence obligations under the new EU Securitisation Regulation. This should address the key concerns of those banking subsidiaries, but those changes will not become law for some time yet.

NEXT STEPS

Reporting entities should engage with their NCA regarding how best to manage compliance with the transitional quarterly reporting obligations. If you would like to discuss this, or any aspect of the new Securitisation Regulation, further, please contact any member of our team.

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