Another Unwelcome Surprise on Risk Retention in Securitisations— EBA Q&As

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EBA's recent response to a Q&A question calls into question the commonly practiced use of conditional sale agreements to season assets by the parties acting as originators when setting up securitisations.

This will likely have an effect on market practice in the EU securitisation market and presents a second unwelcome surprise in short order after the EU Commission's statement on the "sole purpose test" described in our previous client update.

Background. Securitisations with sell-side parties in the EU are subject to the Securitisation Regulation (EU) 2017-2402 (the "SECR"). Securitisations outside the EU that wish to attract EU institutional investors will also have to comply with certain requirements of the SECR. Amongst such requirements is compliance with the risk retention rule: one or more of the sell-side parties, i.e., the sponsor, originators, or original lenders must retain at least 5% of the net economic interest in the securitisation. This obligation is often taken on by an originator. A sell-side party qualifies as originator if this party either (a) was itself directly or indirectly through a related party involved in the original loan agreement creating (some of) the securitised assets (the "Limb (a) Originator") or (b) purchases third-party loan assets on its own books and then securitises them (the "Limb (b) Originator"). While a Limb (a) Originator may act indirectly, this option is notably not available to Limb (b) Originators. Although not explicitly required by law, the market has developed a long-standing practice that Limb (b) Originators keep the assets on their books for 15 days (seasoning) before transferring them to the securitisation special purpose entity (the "SSPE").

Where the SSPE was supposed to acquire third-party receivables directly, a common market practice is using a conditional sale agreement to qualify the party of choice as Limb (b) Originator. The designated Limb (b) Originator would enter into an agreement with the SSPE and undertake to purchase portfolio receivables if they default within 15 days. Accordingly, the designated originator is exposed to the default risk for the same time as if the originator had purchased and held the receivables on the book.

EBA's Q&A Response. EBA has shut down this argumentation on 8 August 2025 in an answer to the SECR Q&As and stated that an entity that did not purchase the securitised assets but instead entered into a conditional sale agreement with the SSPE, whereby the entity is obliged to acquire relevant assets from the SSPE if they default, does not qualify as an originator and therefore cannot fulfil the risk retention requirement on this basis.

Technically, Q&A answers are not legally binding, but, as tools to ensure EU-wide uniform regulatory practice, competent regulators can be expected to follow EBA's guidance in most cases. This is no different here, especially since EBA had coordinated its answer with the EU Commission. It should be noted that Q&A answers are technically no changes in law but rather "clarifications" of the existing law and hence can be seen as guidance that could also apply retroactively.

Consequences. The first consequence of EBA's new guidance should be ceasing to qualify entities as originators on the basis of conditional sale agreements. An alternative to conditional sale agreements would be forward purchase agreements already in use in the market. Here the intended Limb (b) Originator acquires the assets on its own books and sells them on to the SSPE under the condition that they do not default during the seasoning period. Unlike with conditional sale agreements, the originator using a forward purchase agreement actually holds the assets on its books, instead of only being exposed to the default risk, which would comply not only with the spirit but also the wording of the SECR in line with EBA's new guidance.

Regarding existing securitisations, advisable next steps turn on the facts of the case. A closer analysis of the structure and the individual party's actual obligations under the SECR or contractual agreements would be required.

Securitisations so far relying on conditional sale agreements may review whether they can rely on other arguments. For instance, a securitisation of a mixed collateral pool containing assets acquired on the secondary market, as well as assets originated on the primary market could investigate if the assets originated on the primary market suffice to qualify the risk retainer as Limb (a) Originator. Limb (a) Originators can, contrary to Limb (b) Originators, originate assets indirectly without holding them on their own books. Where more than one originator exists, a single originator can act as risk retainer if the relevant originator has established the securitisation and originated more than 50% of the securitised assets. The 50% threshold is not relevant where the originator also manages the securitisation, although the market usually complies with an unwritten requirement pursuant to which this originator-manager must originate at least 5% to 10% of the assets. Securitisations with originator-managers using conditional sale agreements only as a backup should not have to worry about EBA's new guidance when the 5% to 10% threshold is reached. This may, for instance, be helpful for credit funds with a NAV facility qualifying as a securitisation with the fund's SPV subsidiary qualifying as SSPE.

Since Q&As are only guidance on existing legislation, grandfathering provisions are not available. It remains to be seen if competent regulators may consider applying EBA's guidance only to transactions after the publication of EBA's new guidance as a form of informal "grandfathering." However, contrary to the EU Commissions guidance on the "sole purpose test" earlier this year, no relief in that regard has been published by EBA.

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