DUFAS

Dutch Fund and
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# DUFAS Position Paper on the Proposal for amendments to the Securitisation Regulation

DUFAS and its members welcome the European Commission's ('**EC**') proposal for the package of legislative measures to revive the securitisation market in Europe. A more competitive and efficient European securitisation market can significantly contribute to the goals of the Savings and Investment Union ('**SIU**') by increasing the supply of capital for SMEs and socially important themes such as the green transition. Additionally, it enables buy-side institutions to invest in a more diversified group of assets, and enables efficient risk sharing in financial markets.

In order to revive the European securitisation market and unlock the potential benefits it has to offer, constraints on investing in securitisations have to be addressed. Only when existing burdens for both the supply and demand side of the European market for securitisations are being addressed, the securitisation market in Europe will truly become more competitive and efficient.

The members of DUFAS are a key driver of demand in securitisation markets. We believe that there are certain parts of the current proposal which are not beneficial for buy-side parties. Therefore, we would like to address some concerns Dutch demand side actors have regarding the proposal, in order to accomplish a truly efficient and competitive European securitisation market.

## Due diligence requirements

We strongly support the EC's intention to simplify the due diligence requirements under Article 5 of the Securitisation Regulation ('**SECR**'). However, we believe that the current proposal does not create a level playing field for EU investors (UCITS, AIFs, pension funds, insurance companies) vis-à-vis other global investors and restricts their access to global securitisation markets.
The EC has proposed easing the SECR's due diligence process where the sell-side parties are based in the EU. However, the prescriptive verification process remains in place where the sell-side parties are based outside the EU. Non-EU issuers of securitisations are not subject to EU rules and as such are themselves not obliged to disclose information via EU-style templates. As a result, EU investors face substantial hurdles in complying with their verification duties, which may in practice prevent them from investing in non-EU securitisations.

This limitation effectively excludes non-EU securitisations from the EU investor market, as almost no sell-side parties are willing to voluntarily comply with the EU framework, which is seen as overly burdensome. Because of this, EU investors face a significant competitive disadvantage vis-à-vis investors in other jurisdictions as they have less or no access to a €2.5T non-EU securitisation market, which is more than double the size of the € 1.1T EU market.

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Besides creating a non-level playing field for EU investors, the restriction of the simplified due diligence process in this amendment has the effects of:

- limiting diversification, investor choice and returns;
- reducing capital efficiency;
- undermining the competitiveness of the EU's asset management industry; and
- discouraging inflows into EU funds.

We would like to emphasise that the EU's "special" investor due diligence regime for securitisations is uniquely challenging in the context of global markets. Whereas other jurisdictions ensure that regulation of sell-side issuers is robust and fit for purpose, the SECR instead seeks to control and constrain investors, placing disproportionate burdens on EU investors. We also note that the UCITSD and AIFMD already have detailed and granular due diligence- and risk management requirements in place which apply to *all* assets, including securitisation. Therefore, for asset managers, the SECR due diligence requirements are, in our view, excessive and duplicative. A more risk-based and non-prescriptive approach to due diligence requirements would avoid unnecessary overlap while enhancing efficiency and competitiveness of the EU securitisation market.

Removing barriers to investments in non-EU securitisations will not hinder the development of the EU securitisation market. On the contrary, expanding the accessible market for EU investors would strengthen demand, stimulate supply, and ultimately grow the EU securitisation market. Also, non-EU issuers of securitisations play an important role in providing financing to the (real) economy. Limiting the accessibility to the EU market for non-EU issuers by creating barriers will therefore impact the availability of capital in the EU negatively. Furthermore, from a global perspective, other jurisdictions are not contemplating reciprocal barriers to investment in the EU's securitisation markets, increasing the disproportionality of these measures and creating a competitive disadvantage.

In order to ensure that the EU market for securitisations will be revived in such a way that the goals of the SIU are met, and a level playing field is created, we would like to propose the following:

- Remove the prescriptive "tick-the-box" approach to investor due diligence in the SECR for both EU and non-EU transactions
- Defer to the detailed due diligence/ risk management frameworks in sectoral legislation (UCITSD / AIFMD) where these legislations apply.
- Amend Article 5 (1) (e) to clarify that for investors when investing in non-EU securitisations, requiring template-based reporting is optional if information materially comparable to the information as required under article 7 SR is provided.

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## Sanctions for non-compliance with due diligence requirements

Furthermore, in relation to the due diligence requirements under the SECR for especially fund managers, we are concerned by the proposed amendment to the sanctions laid down in Article 32 SECR. The addition of an administrative sanctions regime for non-compliance with the investor due diligence requirements to Article 32 is in our view unnecessary and may be very harmful to the development of a competitive and efficient European securitisation market. Sectoral legislation such as UCITSD and AIFMD already includes remedies for non-compliance with the SECR's due diligence requirements by fund managers and supervisors retain sanction powers in relation thereto. These requirements are appropriately tailored to the sector. It therefore seems clear that the proposed sanctions regime will work against the overall simplification agenda and discourages investors, especially new market participants, by creating legal uncertainty and the potential of large fines.

## Disclosure templates

We are enthusiastic about the fact that the current disclosure templates will be reviewed and reduced in scope. However, we believe that the timeline for these changes (up to 18 months after the changes become law) is too long. We are of the opinion that more condensed and fit-for-purpose templates are necessary as soon as possible in order to make European securitisation markets more efficient and competitive.

## The STS label

We would like to point out that banks are currently not able to obtain the beneficial capital treatment for STS transactions for project finance loans relating to projects in the pre-operational phase. We believe that this is an undesirable and unintended situation that should be remedied to facilitate capital provisioning to projects that are an essential part of the green and digital transitions. We also note that the EC proposes to limit the eligibility of certain income producing real estate (IPRE) for STS. We don't see why this type of financing would not be eligible for the STS label. One clear objective of the SIU is financing the EU's strategic objectives. IPRE lending can be instrumental to two of these objectives: the green transition and urban regeneration. IPRE lending can finance energy-efficient buildings and retrofitting projects, contributing to the green transition. Indeed, we note banks are acutely aware of the energy-efficiency of buildings they finance, becoming stricter in their minimum requirements.

With respect to collateral requirements, we are of the opinion that in all (funded) STS transactions, both the issuer and investor should have recourse to high-quality collateral. This is currently arranged through Article 26e(10) of the SECR. However, in its current form this rule allows for two exceptions, namely: (i) cash-on-deposit with the originator is allowed for originators with Credit Quality Check 2 (CQS2) or better, and (ii) the collateralisation requirement is deemed satisfied when a direct Credit Linked Note (CLN) structure is used. We are of the opinion that these exceptions should be removed. Allowing for the funded notional to be placed on deposit with the originator is undesirable for many reasons, including (i) complicating the risk profile of the transaction by adding counterparty risk to the bank; (ii) that the risk cannot be adequately mitigated through other means, as hedges are imperfect and rating downgrade triggers don't work well; (iii) causing a loss of funding when the bank's creditworthiness deteriorates and loss of credit protection when the bank defaults, exactly at the time when the credit protection is needed most; (iv) it runs contrary to the general regulatory trend of mitigating counterparty risk since the global financial crisis of 2008 and the events of March 2023 have confirmed that counterparty risk is still of key importance; and (v) it leads to a lower quality STS framework for on-balance-sheet securitisation compared to true sale securitisation (where the collateral, the loans, are held by the note-issuing SPV). To facilitate collateralisation, the options for collateral to mitigate counterparty credit risk under the STS designation should in our view be extended to include (reverse) repos and money-market funds.

## Definition of public securitisations

We are of the opinion that the proposed amendment to the definition of public securitisations will have negative effects on the EU securitisation markets. By extending the definition of a public securitisation in the proposed manner, many materially private transactions will become in scope of public securitisation disclosure requirements. The colleteralised loan obligations (CLOs) issued as part of these transactions are oftentimes listed on regulated exchanges because of tax considerations, restrictions imposed by investment policies or other reasons. These materially private transactions are currently already subject to burdensome disclosure requirements. Subjecting these transactions to the public securitisation disclosure requirements will force issuers to comply with even more burdensome disclosure regimes which will most likely lead to a shrinking EU securitisation market. This reduces the availability of credit in Europe and thus financing possibilities for SMEs and leads to a competitive disadvantage vis-à-vis other jurisdictions.

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**DUFAS: Dutch Fund and Asset Management Association**
Since 2003, DUFAS has been committed to a healthy asset management sector in the Netherlands. DUFAS has more than 50 members: from large asset managers who invest Dutch pension and insurance assets to smaller, specialist asset managers. DUFAS increases awareness of the social relevance of investing, helps to develop sector standards and represents the sector in the implementation of new laws and regulations. In addition, DUFAS is committed to a single European market with equal regulations.