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Provisions applicable to all securitisations

Article
9

Paragraph
3

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Originator obligations

Question

What are the obligations of an originator who purchases third party's exposures and subsequently securitises them, in order to meet the requirements set out in Article 9 of the Securitisation Regulation?

Background on the question

Article 9(3) of Regulation 2017/2402 requires limb (b) originators (that is, originators who purchase a third party's exposures for their own account and then securitise them) to "verify" that the entity which was directly or indirectly involved in the original agreement which created the obligations or potential obligations to be securitised (the "asset creator") complied with Article 9(1) relating to credit granting standards.

Such verification will frequently be extremely practically challenging for some types of securitisations because of the wide range of circumstances in which securitisation can be used. It may be challenging because the asset creator will not be involved in the securitisation transaction and will have no incentive to cooperate in the completion of this verification (in particular in the case of managed CLOs or securitisations of portfolios acquired from lenders no longer in the relevant business line).

There are also a number of cases where the asset creator no longer exists, or where the assets proposed to be securitised have been transferred multiple times since their creation or where the assets are old enough that the relevant information for the comparison required under Article 9(1) has not been preserved for legitimate reasons (because of data privacy legislation or because securitisation of assets was never contemplated, for example).

In all of these cases, it may not be possible to gain certainty around the circumstances in which the assets were created, but it is nonetheless possible to diligence the quality and performance of the assets in order to make a sensible, well-informed investment decision. This is especially true for older portfolios where the limb (b) originator should have access to seasoning data which substantially mitigates the risk of any limitations on how much due diligence can practically be achieved on the original lending.

In addition in many non-performing loan (NPL) sale transactions, buyers purchasing NPLs from banks borrow to fund their purchase and this borrowing may sometimes be done in the form of a securitisation. In some cases, even if it were possible to verify the credit granting standards in relation to NPLs (and this will frequently present significant practical difficulties) it could be difficult to objectively say they were "sound and well defined" if interpreted in very strict legal sense without taking into account the circumstances of securitisation.

Article 9 was introduced in the Securitisation Regulation as a further safeguard (in addition to, notably, the risk retention and disclosure requirements) against the "originate to distribute" model from before the 2008 financial crisis. Designed to prevent originators, original lenders and sponsors from creating and selecting assets they know to be of lesser quality for securitisation and transferring the associated risks to investors who are less knowledgeable about those assets a more nuanced and contextualised interpretation of Article 9(3) taking into account the type and circumstances of the securitisation should be considered.

EBA answer

In accordance with paragraph (3) of Article 9 of Regulation 2017/2402, the originator that purchases exposures from a third party has the obligation to verify that the entity, which was involved in the original agreement which created the obligations to be securitised, applied the same sound and well-defined criteria for credit granting which they apply to non-securitised exposures. One purpose of paragraph (1) is to prevent that exposures of lower credit quality are created with the sole purpose of being securitised.

The obligation to verify referred to in paragraph (3) should be interpreted consistently with the purpose referred to above in relation to paragraph (1) and appropriately to the class of assets being purchased and the nature and type of securitisation. More specifically, verification should mean to ascertain through any appropriate means that the original lender fulfilled the requirement referred to in paragraph (1) and therefore did not apply different criteria of credit granting to the assets to be securitised than they apply to non-securitised exposures. To that end, the originator should use adequate resources and make reasonable efforts to obtain as much information as is available and appropriate for such verification in accordance with sound market standards of due diligence for the class of assets and the nature and type of securitisation.

In this context it should also be noted that the strict verification requirement in Article 9(3) does not apply to those exposures where the original agreement was created before the date referred to in point (a) of Article 9(4) and where the condition of point (b) of Article 9(4) is met. That condition requires instead - by reference to Article 21(2) of Delegated Regulation (EU) No 625/2014 - an assessment of whether the credit granting criteria were as sound as those for non-securitised exposures.

This verification requirement should be interpreted without prejudice to the disclosure requirements to investors.

Link
EBA website link