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EUROPEAN CRE CLOs – SOME THOUGHTS ON A DEVELOPING ASSET CLASS

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For a long time, securitisation financing of commercial real estate (CRE) in Europe has been confined to commercial mortgage-backed securitisations (CMBS). However, CRE CLOs are an established asset class in the US and with the growing presence of non-bank lenders originating commercial real estate loans, the signs are that the CRE CLO will emerge as an alternative asset class in its own right. This article explores some its emerging features, and some of the key points of difference with European CMBS.

Key issues

- CRE CLOs expected to become attractive term funding option for non-bank lenders of commercial real estate loans
- Will enable originators to refinance out of warehouse or back leverage lines, but preserving many of the same features
- US market expected to be a good guide as to how the European one will develop
- Likely to be a significantly different product to European CMBS, giving more ongoing operational flexibility to the sponsor to manage individual loans and the portfolio as a whole
- Initial deals likely to be either static or lightly managed, with more dynamic features added as the market matures, as per US model
- Some possible challenges around disclosure and 10b-5 diligence

Introduction

It is easy to see why there has been so much noise around European CRE CLOs. There are many more alternative lenders in the European commercial real estate market now, and the securitisation market – as it does for other asset classes – opens up new sources of capital as these alternative lenders look to grow their businesses.

At the moment, as we cross our fingers and hope for the European CRE securitisation market to re-emerge with sufficient strength to absorb this new product that we hope will emerge during the course of the year, it is worth exploring some of its key features.

To an extent this involves some crystal ball-gazing, given there is only one closed European transaction at the time of writing[1]. However, we know that many of the likely participants in the European market, when it emerges, have successful CRE CLO programmes in the US. Given what we know of these US deals[2], it is possible to sketch out the bare bones of how some of the European deals are likely to work.

Certainly, we predict that CRE CLOs will emerge as a different and distinct asset class to CMBS, serving a different need and containing some decidedly different structural features. This article explores some of these.

Why are they needed?

CRE CLOs are likely to be a valuable alternative source of non-bank capital to debt fund and other alternative CRE lenders, and there are many more of these lenders around than there used to be[3]. Furthermore, they will appeal to different types of non-bank lenders.

1 Starz Mortgage Securities 2021-1 DAC.

2 Given major debt funds with existing US CRE CLO programmes are likely to want to replicate these as much as possible, these are likely to provide a helpful guide to some of the features that we can expect to see in European transactions to come.

3 By way of illustration, the most recent Bayes CRE Lending report suggests that debt funds have grown from nothing to approximately 20 per cent of the UK CRE lending market since 2012.

First, there are the non-bank lenders whose business model, unlike the traditional investment bank lender, would be to underwrite smaller loans against more transitional assets at higher margins, with the initial senior funding provided through bank warehouse lines. These assets would not be suitable for CMBS, so a CRE CLO represents the securitisation take-out global: loan-on-loan option for that warehouse line. The Starz deal appears to fall into this category.

Second, there are the debt fund arms of more established private equity real estate investment businesses, who would often look to write the same sort of loans and at the same size as the investment banks, but who would typically look to 'back leverage' their lending position through behind-the-scenes senior funding - usually by way of a repo, TRS or loan-on-loan. The CRE CLO is valuable to these sponsors too, as it would enable them to refinance into the capital markets and free up additional back leverage capacity. These are the sorts of large loans that could also go into CMBS transactions, but the sponsor might prefer the CRE CLO structure, which as we shall see allows it to remain in the driving seat, but also to effectively retain the back leverage on its lending position.

Investor perspective: investment in the sponsor too

CMBS deals are generally instigated and driven by banks looking to sell down and exit their real estate finance lending positions; and, subject to risk retention and profit extraction, they do typically exit them. For investors, CMBS represents direct, tranched, exposure to the CRE loans themselves: even for multi-loan deals, the cashflows in effect operate to preserve the day one credit enhancement levels for each individual loan[4]. In CMBS, the bank originator leaves the decision-making stage when the securitisation closes, with ongoing loan management thereafter carried out in the interests, and on behalf, of investors by the servicer and special servicer, or occasionally voted on by the investors themselves (sometimes together, sometimes through the controlling class). CMBS is all about the day one loan assets.

With CRE CLOs, the US model is for the sponsor[5] to remain much more in the management seat. This is achieved in a number of ways:

- the sponsor (or an affiliate) will typically act as the collateral manager for the CRE CLO;
- the sponsor will typically subscribe for the junior, subordinated tranches (in the US, these may amount to some 20% of the overall capital structure), which will typically be the controlling class in the CRE CLO for any major loan-level decisions that are required to be made by the CRE CLO issuer as lender;
- the sponsor may remain as lender of record for the piece of the loan not sold into the securitisation, which may well be the majority lender/controlling piece;

4 See e.g. Taurus 2021-4 and Cassia 2022-1 Srl, where the complex cashflows seek to preserve the day one credit enhancement in the face of future reverse sequential redemption.

5 Sponsor here, and for the rest of the article, means the debt fund or other alternative lender that originates the loans forming the collateral for the CRE CLO and in effect economically sponsors the CRE CLO (albeit it is likely to risk retain in its capacity as originator).

- the sponsor will likely have the ability to make certain major modifications to the loans in the portfolio which sit outside of the servicing standard regime (see further below); and
- the sponsor will likely have certain other portfolio management rights, including the ability to replenish the portfolio with additional loans and/or participation interests and the right to repurchase or exchange defaulted and credit impaired loans (see further below).

The vertical and horizontal holdings of the sponsor described in the second and third bullet points above gives rise to an “L-shaped” holding structure by the sponsor that is a feature of US CRE CLOs. It means that the sponsor controls decision-making both for the piece of the loan that sits within the CRE CLO, and the piece which sits outside it.

All in all, this means that the CRE CLO presents a slightly different investment proposition for the noteholders when compared with CMBS. While it is of course an investment in the day one assets as well, it is, far more than CMBS, an investment in the sponsor and its business. The comfort for investors unused to this is the inherent alignment of interest between sponsor and investor, which the L-shaped holding structure described above ought to give them.

Sponsor perspective: back leverage in another form

For the sponsor, the CRE CLO structure allows it to preserve the ability to manage its loans and, as noted above, this may be a reason why debt fund lenders might prefer the CRE CLO structure to CMBS as a source of alternative capital for their lending business. In much the same way that the original warehouse mechanic or back leverage structure - be it repo, Total Return Swap (TRS) or loan-on-loan - enables the non-bank lender to manage the relationship with the underlying borrower while leveraging their lending position, the L-shaped retention structure described above preserves this for the CRE CLO take out. The senior noteholders provide senior leverage in much the same way as, previously, a warehouse provider, loan-on-loan lender, repo counterparty or TRS counterparty might have done; the sponsor remains the fronting entity[6].

CRE CLOs also indirectly preserve a degree of financial recourse to the sponsor that is a requirement for most back leverage providers. Warehouse providers, along with repo and TRS counterparties, and loan-on-loan providers, typically require recourse to a ‘deep-pockets’ parent entity through a fund guarantee[7] or similar. In effect this recourse exists in a CRE CLO too, because the seller will typically be required to repurchase loans that materially breach the asset warranties or have defective documents, and an entity of substance in the seller group would typically stand behind that repurchase obligation.

6 There are of course limited control rights that the bank (whether as loan-on-loan lender, repo counterparty or TRS counterparty) would impose on the sponsor’s management of the underlying loan in most back leverage structures.

7 Whether this is full or partial recourse is negotiated on most back leverage transactions, and on some loan-on-loan transactions recourse may be much more limited.

For these reasons, it may not therefore be surprising to see a number of the banks that originally provided the back leverage to the fund through the repo, TRS or loan-on-loan structure, also be among the senior noteholders in a CRE CLO, because in many respects the CRE CLO structure replicates many of the key features of the original back leverage arrangement.

Rating agency approach

One key influence on the direction of travel for the CRE CLO market will be whether rating agencies are able to develop specific methodology for this asset class. Starz was rated by the rating agencies under their CMBS methodology, meaning that they modelled and analysed each individual day one loan for the purposes of their analysis. This may create issues for the development of the CRE CLO market for a number of reasons.

First, it creates a logistical and timing issue for sponsors looking to bring CRE CLOs to market. CRE CLO portfolios in the US have been known to contain up to around 30 different loan assets in the day one pool. Applying a CMBS modelling approach to each of these loans takes staffing and time, and there is no reason to suppose that the underlying loans will be any less complex that those that go into CMBS deals (in fact there is every reason to think they may be less straightforward).

Second, it doesn't give credit to one of the key distinctions between the CMBS and the CRE CLO structure described above: that an investment in CRE CLOs is much more an investment into the sponsor's business and management.

Third, it means that rating agencies are currently unable to rate features from the corporate CLO market such as ramp up and reinvestment, because these portfolio management features are based on eligibility criteria. Rating agencies employing CMBS methodology, involving the day one modelling of individual loans, cannot rate future, as yet unidentified loans, based on eligibility criteria. As noted below, this may be a point of difference between US and European deals at least in the early stages of the European market, as most recent US CRE CLOs have one or both of these features.

Portfolio management: how dynamic will CRE CLOs be?

One of the other questions about CRE CLOs is how dynamic the portfolios will be, and to what extent the typical portfolio management features that we see in corporate CLOs will find their way into CRE CLOs.

The main dynamic features typically found in corporate CLO deals are the following:

- **Ramp up:** where there is an over-issuance of notes day one for the purposes of acquiring new loans meeting certain eligibility criteria.
- **Reinvestment:** principal receipts from loans being refinanced are used to purchase new loans meeting the eligibility criteria.
- **Replenishment:** principal receipts are used to purchase companion-pieces (i.e. additional slices of loans already in the portfolio).
- **Delayed close:** notes are over-issued to acquire a known loan that has failed to close prior to the issuance date for the CLO.

These features are all now fairly common in the US CRE CLO market. However, the US market is relatively well-developed, and it should be noted that (as was the case pre-crisis) the initial deals in the US market started off largely static, with management features added as the market matured.

Chances are that the early stages of the European market will follow the early US deals, with not all of the above features being employed, at least not at the beginning. Partly this may be a function of limited availability of collateral. In the corporate CLO world, the collateral manager can source leveraged loans from all kinds of lender; in CRE CLOs, the sponsor has its own loan book only. Partly, as noted above, this is down to the rating agencies currently applying their CMBS methodology, which cannot yet assess eligibility criteria.

This means that of the typical CLO revolving mechanics listed above – ramp up, replenishment, reinvestment and delayed close – it is likely that replenishment and delayed close are likely to feature first. This is because, these being companion loans or loans that have signed but are yet to fund, the collateral already exists, is known and has already been included by the rating agencies in their analysis. We would therefore expect the initial European CRE CLOs to follow the US lead and, at most, include replenishment and delayed close features and thus fall into the “lightly managed” or “static” category. The replenishment feature is also likely to be accompanied by concentration limits (as clearly, the ability to purchase companion pieces only comes with concentration risk).

Loan modifications in CRE CLOs: more sponsor discretion

In terms of the ability to modify loans in the portfolio, the picture looks like being completely different in CRE CLOs than for CMBS.

As mentioned above, the CRE CLO portfolio sometimes consists largely of minority holdings of loans with the sponsor holding a majority lender position outside the securitisation. However, even where the controlling loan position is held in the CRE CLO itself, US CRE CLOs typically give the sponsor (usually as collateral manager but possibly as junior noteholder/equity investor) far more control over loan modifications than would be the case in CMBS, a position that was mirrored in Starz.

US CRE CLOs (and Starz) give the sponsor powers to direct the servicer to agree to modifications of performing loans subject to satisfaction of criteria, with any such modifications in effect taken outside the scope of the servicing standard. These modifications are typically split into so-called administrative modifications and more significant, so-called “criteria-based” modifications.

To investors whose experience is of European CMBS, the US CRE CLO concept of administrative modification is something of a misnomer. It goes some way beyond purely technical but commercially neutral modifications that the name might suggest, and can include modifications to such things as fees, default interest, cash trap and reserve levels.

More recent CRE CLO transactions in the US have enabled the sponsor to make a limited number of criteria-based modifications to the loan terms, including extensions of maturity, increases in proceeds, the incurrence of additional indebtedness and a reduction in spread. There will usually be limits on the numbers of these significant modifications that can be made, so as to preserve the overall credit quality of the collateral pool.

The extent and scope of some of the modifications will look very unfamiliar to investors used to CMBS practice, where the discretion afforded to the servicer under the contractual documentation would generally see these decisions made by servicers acting in the interests of the investors or, occasionally, actively voted on by the investors themselves.

Repurchase of defaulted and/or credit impaired loans

As per most securitisations, the sponsor will be required to repurchase assets out of the portfolio where there is a material breach of the asset-level representations or materially defective loan documents. This repurchase obligation would likely sit with, or be guaranteed by, a "deep-pockets" entity in the sponsor group. As noted above, this mechanism gives the senior CLO investors the same sort of comfort that a sponsor guarantee gives to a senior leverage provider in a private transaction - be it a repo or TRS counterparty, or loan-on-loan lender - whereby an entity of substance will, in effect, stand behind any defective assets.

However, CRE CLO structures in the US will also typically give the sponsor discretion to purchase defaulted or impaired loans out of the portfolio. This is yet another example of active portfolio management by the sponsor that CMBS investors may not be used to, but also where there should be alignment of interest between the sponsor and the investors: the investors are obviously incentivised to see defaulted loans either substituted or repurchased at par; the sponsor may be incentivised to repurchase or substitute a default or credit-impaired assets out of the pool, given that any principal recovered from any workout of the defaulted loan would then flow down to the sponsor as lender, whereas if the loan remained in the securitisation it would likely be absorbed by the senior CLO noteholders in the sequential cashflows.

Note protection tests: more protection for investors

One other key feature of US CRE CLO programmes (which were replicated in Starz) is the inclusion of ongoing note protection tests, namely a par value test and an interest coverage test. The par value test typically measures the aggregate portfolio balance against the aggregate principal amount of the offered notes (i.e the senior classes of notes not held by the sponsor). The interest coverage test measures scheduled interest on the loan assets against the offered notes.

These tests do not appear in CMBS, given the deals are completely static and given all cashflows are typically applied to redeem the offered notes in the ordinary course in any case. In CRE CLOs the tests are dynamic, partly because they may be lightly managed rather than static deals (and so the composition of the portfolio may change over time), but also because the aggregate portfolio balance for these purposes typically excludes loans where a payment default or other material default has occurred (which could be a moving picture from test date to test date) and because of the sponsor's ability to potentially modify the economic terms of the loans. These tests provide further comfort to investors as to the ongoing health of the portfolio in the light of the various operational discretions afforded to the sponsor.

Breaches of these tests would typically result in funds that would otherwise have been available to pay interest on the junior, sponsor-held notes being swept in prepayment of the offered notes until the relevant test that had been breached was satisfied. While a breach of either of these tests is continuing, this would also typically switch off some of the other sponsor discretions, for example its ability to apply principal receipts to replenish the portfolio, and the ability to make criteria-based modifications to the loans in the portfolio.

Asset level disclosure and 10b-5

This may be more one for the lawyers, but CRE CLOs do present certain challenges around disclosure. Unlike in most European CMBS transactions involving one or two loans, it clearly won't be possible to produce the detailed summary disclosure of the loan terms for these more granular portfolios, still less to append full form senior facility agreements to the offering document which some CMBS deals have done. As well as the legal difficulty/impossibility of aggregating disclosure across a number of differing loans, there is also the sponsor's and the underlying borrowers' desire to avoid the disclosure of the detailed terms of their loans to the market.

Set alongside this is the investor and tax requirement to have a listed instrument, bringing with it the disclosure standards of the relevant stock exchange. Arrangers are also likely to want to access the deeper, more familiar market of US CRE CLO investors, meaning that disclosure and the related due diligence will need to be done to enhanced 10b-5 standard required for Rule 144A offerings into the US.

Furthermore, it is not as if the underlying loan agreements suddenly became less complicated by virtue of being part of a larger and more granular pool. In fact, the granularity arguably gives scope for the inclusion of loans with more flexible features and complexity. There is a lot of complex material to get through, so making sure that the offering document contains all material information on the portfolio, and does not omit anything material, is a potentially challenging exercise.

On listing, it wouldn't therefore come as a surprise to find more private listing destinations chosen for CRE CLOs, where offering documents were not on public display, and where there are fewer hard and fast minimum disclosure rules to run up against.

Irrespective of the listing rules, securities laws will require all material features of the underlying loans to be disclosed, with no material features omitted, and the US 10b-5 due diligence process will need a defensible due diligence procedure to be followed in order to achieve this. In practice this is likely to require some input from sponsors and their loan origination counsel, but it is still potentially a far more laborious exercise than is the case for single or two-loan CMBS deals.

Borrower consent and cooperation

CMBS deals cannot really happen without the consent and cooperation of the underlying borrower. Indeed, the ability to CMBS the loan will typically be hard-wired into the facility agreement at the time the loan is negotiated. For example, the loan will typically permit transfer to a securitisation issuer; there will be other contractual terms that facilitate the securitisation of the loan, including a syndication and securitisation cooperation clause that requires the borrower to give the lender what they need to securitise the loan; there will be carve outs to the confidentiality clause to permit disclosure of relevant information in an offering circular; and the leader may well seek to negotiate margin, and potentially structural, flex rights with the borrower.

By contrast many of the loans to be included in a European CRE CLO portfolio (albeit this is not an issue in the US) may require the specific consent of the borrower to be transferred to the CRE CLO issuer and/or may not contain the helpful contractual flexibility described above. Furthermore, as mentioned above the borrower may be commercially unwilling to have public disclosure of the terms of their loan.

In fact, though, CRE CLOs should be an easier sell to borrowers. For a start, the borrowers will not generally find themselves having to interact with a professional loan servicer for every single consent request given the ongoing role of the sponsor in loan-level decisions. This has been a big problem for borrowers with loans in CMBS, where decision-making can sometimes seem to disappear down a black hole of servicer deliberation and noteholder voting mechanics. But it should be less of a concern in CRE CLOs as they will still be dealing with the sponsor, at least for the significant decisions. The disclosure concern should also be mitigated by listing on a more private exchange.

Overall, though, there is likely to be more of a process around borrower consent than there would be for a CMBS loan where the borrower is bought into the process from the outset.

UK and European regulatory position

While there could be some technical debate about whether single-asset CMBS deals, especially agented deals, properly fall within the definition of securitisation for EU and UK regulatory purposes, there is little doubt that CRE CLOs will. This means that they will be subject to the regulatory risk retention and transparency requirements imposed by applicable securitisation regulation.

Most recent European CMBS transactions have done their risk retention vertically through a *pari passu* loan that mirrors the economic effect of retaining 5 percent. of each class of notes in the capital structure (retention in *pari passu* loan format being generally preferable for the originator bank for capital or other internal compliance reasons). As noted above, CRE CLOs are typically set up for the sponsor/originator to retain the junior notes in any case, and so these structures would generally lend themselves to horizontal risk retention. Where CRE CLOs have a sponsor who is a US person under the US risk retention rules, where the notes are being marketed to US investors under Rule 144A or where more than 10% of the investor base are “US persons” for the purposes of the US risk retention rules, the transaction will also need to comply with US risk retention requirements, meaning that the 5% horizontal interest will need to be sized at 5% by fair value rather than nominal value, with related disclosures as to such fair value determination being required in the offering circular.

On the transparency requirements under the relevant Securitisation Regulation (EU or UK), for the time being transactions will need to complete the Annex 3 template for underlying exposures secured over commercial real estate, as well as the Annex 12 investor report template for non-ABCP securitisations. This is as per current CMBS norm. Of course, if and when the shorter-form templates for "private" securitisations that the European Commission has mandated ESMA to produce ever come into force, CRE CLOs should be able to report on these instead[8].

As is the case for CMBS and other publicly marketed securitisations, CRE CLO issuers are likely to want to market CRE CLO notes to both EU and UK investors, and hence to want to make CRE CLOs compliant with both the EU and the UK securitisation regimes to make sure that investors are able to satisfy their Article 5 due diligence requirements under each. Following recent announcements on both the EU and UK side, it is looking increasingly likely that the UK and the EU regimes will begin to diverge: on the EU side, following publication of the EU Commission's Article 46 review of the functioning of the EU Securitisation Regulation on 10 October 2022[9]; and on the UK side following the announcement of the so-called "Edinburgh Reforms" on 9 December 2022[10]. Any reforms to either regime that follow these announcements will likely mean increased divergence between the two regimes albeit, at the moment, it is difficult to predict exactly what the extent of the divergence will be, and which aspects of the regulation will be most affected.

Finally on the regulatory side, we note in passing that there ought to be no danger of CRE CLOs being "re-securitisations", which would be prohibited under the EU and the UK regimes. Clearly this would be the case where the underlying financings consisted of a single-tranche loan. However, this would also be the case where the underlying loan was one part of an "A/B" loan structure, as generally A/B loans, notwithstanding the tranching element, would not themselves constitute securitisations for regulatory purposes.

Conclusion

Alongside CMBS, the CRE CLO looks to have a big role to play in the financing of commercial real estate in the European market. Here's hoping that 2023 is the year when both asset classes appear side by side, so that we can make proper comparisons rather than simply predictions.

8 Note that, as things stand, these would only be available for securitisations regulated under the EU Securitisation Regulation; it remains to be seen whether the FCA will propose anything similar for the UK regime.

9 This includes the EU Commission's mandate to ESMA to produce a simplified template for private securitisation, as mentioned above. For more details, see Clifford Chance Client Briefing entitled "EU Securitisation Review: two months on" dated 19 December 2022.

10 For more details, see Clifford Chance Client Briefing entitled "UK Edinburgh Reforms: The New Securitisation Framework?" dated 13 December 2022.

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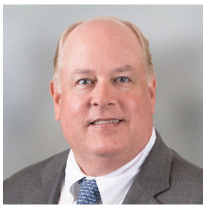

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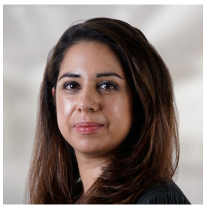

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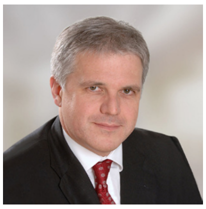

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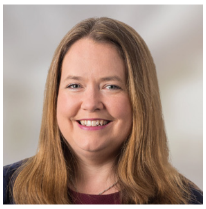

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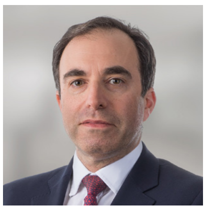

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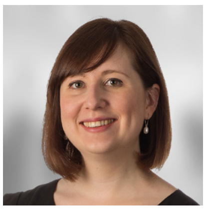

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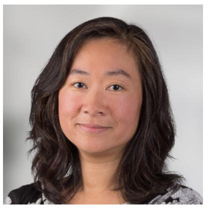

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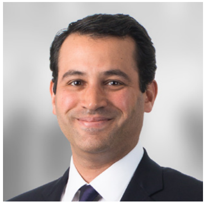

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2301-004379