German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

Regulation laying down common rules on securitisation and creating a European framework for simple and transparent securitisation COM (2015) 472

Register of Interest Representatives
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The German Banking Industry Committee is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

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General remarks

We appreciate the opportunity to comment on the EU-Commissions legislative proposals (i) for a regulation of the European Parliament and of the Council laying down common rules on securitisation and creating a European framework for simple and transparent securitisations COM (2015) 472 and (ii) for a regulation amending regulation (EU) No 575/2013 COM (2015) 473.

Level Playing Field and legal certainty

The European Commission includes in its legislative proposal on securitisation criteria for simple, transparent and standardised (STS) securitisation (STS-R). We support the Commission's initiative to define such securitisation by means of certain criteria. As we see it, the proposed criteria are, however, still vague and require further explanation.

The current proposals for designing some criteria lead to great uncertainty among originators and investors as to whether the criteria for STS securitisation can be met in future. In view of the fact that originators and sponsors are to be held liable for losses resulting from possible misjudgement of compliance with the criteria and the sanctions are considerable (Article 17 par.2), we believe that the criteria need to be specified further. They should, however, be specified further in the legislative text itself. It must be possible for an originator or an investor conducting due diligence to tell from the legislative text whether the securitisation meets the STS criteria. This is the only way to ensure the required legal certainty in the assessment of STS securitisations and to create a level playing field in the European securitisation market.

In addition, legal certainty should be significantly increased by conferring the right to the originator to request its competent supervisory authority to obtain a binding confirmation of conformity. This confirmation should be legally binding for other competent authorities. Otherwise there is a risk that the national competent authority would not confirm the fulfilment of STS criteria, because another competent authority of supervised investors in Europe could have an adverse opinion upon it. In this case ESMA or in most cases the Joint Committee of the European Banking Supervisory Authorities are empowered to take the final decision (Article 21 (5) in conjunction with Article 19 or Article 20 of STS-R), which could differ from the opinion of the national competent authority. But without a legally binding confirmation and together with the planned sanctions the originators, sponsors and SSPE's will not designate one securitisation transaction as STS. Furthermore, the self-attestation, the potential liability (which include civil court procedure, administrative fines and criminal sanctions) and the costs associated with excessive disclosure requirements define a considerable hurdle. For the success of the initiative it is extremely important that the risk of potentially different opinions of the different supervisory authorities on the STS eligibility and thus the legal uncertainty for the originator is mitigated by a binding confirmation of conformity at the request of the originator. In this respect, we propose changes to Article 14, 16 and 21.

Proposed criteria for STS ABCP

We explicitly welcome that the EU Commission proposes to incorporate ABCP into the realm of STS securitisations. In this respect, we especially appreciate the development of a separate set of criteria for securitisations positions in an ABCP programme at the transaction (i.e. liquidity facilities provided by the sponsor) and programme level (i.e. investment in ABCP). However, we wish to underline that, in their current

version, these criteria are likely to be too onerous or inapplicable in practice to the vast majority of ABCP transactions and programmes.
Especially the requirement in Article 11 that ABCP securitisations (i.e. all securitisation positions at the transaction and at the programme level) can only be considered STS if the ABCP programme complies with the requirements in Article 13 and all transactions within the ABCP programme fulfil the requirements in Article 12 in combination with the requirement in Article 13 para. 1 STS-R would have the effect that one single non-compliant transaction would not only "infect" the programme but also all other compliant transactions.

Furthermore, the STS-R and CRR-R impose requirements on the securitised receivables that cannot be complied with in many, if not all, multi-seller ABCP programmes. In this context, especially the restriction on the maturity of the securitised exposures (Article 12 par. 2 STS-R) and the prohibition of exposures to corporates with a risk weight of more than 100 percent under the Standardised Approach for credit risk (Art. 243 para. 1(a) CRR-R) should be deleted. The requirement to apply the obligor concentration limit of 1% to groups of connected clients should also be removed as it cannot be fulfilled in a multi-seller ABCP programme.

Additionally, onerous requirements are imposed on real economy originators that will, from our point view, considerably reduce the willingness of these companies to participate in an ABCP transaction. In this context, the joint liability of originators, sponsors and SSPE implies that, specifically in multi-seller ABCP programmes with various originators (Article 13 par. 8 STS-R), these originators will be liable for information or circumstances that are beyond their control. On the one hand, it should be excluded in any case that originators or the sponsor are held liable if one originator did not meet the criteria. On the other hand, it should be ruled out that the originators are held liable if the programme sponsor provided misleading information.

Furthermore, real economy originators (e.g. corporates that securitise trade receivables) will become supervised by designated competent authorities (Article 15, par. 4 STS-R). These bodies may impose harsh sanction on such corporates (including a ban against members of the management bodies to exercise management function (Article 17 par. 2 (c)). From our point of view, it is highly unlikely that real economy originators will submit to such supervision.

Synthetic securitisation

Synthetic securitisations are currently not included in the scope of STS securitisations in the Commission's proposals like term securitisations and ABCP programmes. We therefore welcome the fact that the Commission intends to examine the issue further and to analyse to what extent synthetic securitisations might be able to be included in the STS framework. There is no reason, as we see it, to automatically exclude certain types of securitisation from the "STS" category. Synthetic securitisation enables real-economy exposures to be securitised in an efficient manner.

Earlier in the year, the German Banking Industry Committee (GBIC) suggested criteria for defining simple, transparent and standardised synthetic securitisations in its response to the Commission's consultation document of 18 February 2015 on an EU framework for STS securitisations and were also sent directly to the EBA (see also Annex 1). As our proposals demonstrate, synthetic securitisations are also

capable of being designed in a way which is neither complex nor opaque, which is fully suitable to the STS approaches for term securitisation and ABCP programmes.

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Specific comments

Definition of a securitisation (art. 2 par. 1 STS-R)

It should be clarified that long-term financing for infrastructure, industrial and real estate projects, as well as for aircraft, ships and other assets do not count as securitisations. In some cases these projects and assets are funded via structures that, if viewed in isolation, would meet the definition of securitisations given in Article 2 par. 1 STS-R. This is the case where the finance takes the form of multiple tranches with different seniority. If a borrower defaults and the subordinate creditor is unable to assert its claims (a situation known as a “non-cross default”), the junior creditor would have to bear the loss.

In contrast to “true” securitisations, though, no risk is transferred with these specialised lending exposures. However, this is a precondition for assigning the transaction to one of the two forms of securitisations mentioned in the STS-R. In a traditional securitisation (Article 2 par. 9 STS-R), the risk is transferred by selling the exposure to an SSPE (a process known as a “true sale”). In the case of a synthetic securitisation, the transfer is achieved using credit derivatives (Article 2 par. 10 STS-R). Neither of these situations exist in the case of the above-mentioned specialised lending exposures. In line with this, Recital 6 of the STS-R clarifies with respect to the definition of the term “securitisation” that an exposure that creates a direct payment obligation for a transaction or scheme used to finance or operate physical assets should not be considered an exposure to a securitisation, even if the transaction or scheme has payment obligations of different seniority.

In our opinion, to avoid misunderstandings, the definition of a securitisation in the “Securitisation Regulation” (Article 2 par.1 STS-R) should take up the wording of Recital 6.

Due Diligence of structural features (art. 3 par. 2 (b) STS-R)

For investors in ABCP issued by multi-seller conduits with transactions that are fully supported by a liquidity facility provided by the sponsor other features than the ones mentioned in this passage (triggers, credit enhancements, definition of default) materially impact the performance of his securitisation position. This should be clarified.

Due Diligence of STS criteria (art. 3 par. 2 (c) STS-R)

Investor may place appropriate reliance on STS notifications and information disclosed by the originator, sponsor and SSPE when verifying the compliance with the STS criteria. The full evaluation of compliance with the STS criteria would impose an onerous new burden on investors. Detailed information would need to be collected relating to a large number of criteria. The time and effort involved would be exacerbated by the subsequent analysis of whether or not the criteria are fulfilled. On top of that, there is no legal certainty at present concerning how the criteria are to be interpreted. All in all, the work associated with this additional task is likely to deter potential investors from investing in STS securitisations.

A recourse to the STS notification and disclosed information is permitted, but it is not clear which degree of certainty can be achieved from this information and which further analyses are necessary. As far as we

understand, the investor has to engage in further analysis irrespective of whether the STS notification is positive. The conclusion is that the legal uncertainty is not mitigated.

We would therefore recommend that investors should be able to base their analysis of whether or not STS requirements are met on publications by ESMA. This would eliminate legal uncertainty for the investor. What is more, investors would not be forced to choose between more onerous due diligence requirements for STS securitisations and the higher risks associated with non-STS securitisations.

Stress tests (art. 3 par. 3 (b) STS-R)

Investors have to regularly perform stress tests on the cash flows and collateral values supporting the underlying exposures that are commensurate with the nature, scale and complexity of the risk. As for the due diligence requirements there is neither a grandfathering clause nor a transitional provision nor an empowerment to develop a new regulatory technical standard, it is not clear whether the concretisation of the requirements in chapter IV of Commission Delegated Regulation (EU) No 625/2014 can be applied to securitisations issued after 1 January 2011 or revolving securitisations where new underlying exposures have been added or substituted after 31 December 2014. It should, therefore, be clarified, in accordance with Article 18 par. 3 of Commission Delegated Regulation (EU) No 625/2014, that, in the case of a fully supported ABCP programme, institutions can carry out stress tests on the creditworthiness of the liquidity facility provider rather than on the securitised exposures.

Risk Retention (art. 4 STS-R)

Direct approach to risk retention (art. 4 par. 1 STS-R)

Article 4 of the proposal deals with risk retention when a securitisation is issued. Risk retention has been covered so far by Article 405 CRR and requires the investor to check the compliance with the relevant requirements before investing in a securitisation position (so-called “indirect approach”). The Commission proposes shifting responsibility for compliance with the risk retention requirements to the originator, sponsor or original lender (so-called “direct approach”).

The change in approaches raises further questions that need to be settled to ensure the required legal certainty. It is unclear what the procedure is to be in the case of transactions where not all the entities in question are domiciled in the EU. To what extent, if any, is the direct approach to be applied if only one entity is domiciled in the EU? We would welcome, if the text of the proposal would include details of exactly when the direct or indirect approach applies.

Definition of sponsors (new)

In practice, a sponsor is not necessarily, as stated in Article 2 par. 5 STS-R, „a credit institution or investment firm as defined in Article 4 (1)(1) and (2) of Regulation 2013/575/EU“. We therefore consider it necessary to broaden the definition of a “sponsor” for the purpose of applying the risk retention rules.

Basically, sponsors should be able to retain a portion of the risk even if they are not subject to EU regulation, as long as they have to comply with comparable regulatory requirements instead.

Transparency requirements (art. 5 STS-R)

General remarks (art. 5 par. 2 STS-R)

The requirements of Article 5 STS-R do not comply completely with the disclosure requirements of Delegated Regulation (EU) 2015/3 for structured finance instruments that refer to article 4 (1) (61) of Regulation (EU) No. 575/2013. To reduce legal uncertainty and to restrict implementation cost we suggest to provide transparency and disclosure requirements for securitisations in STS-R, only.

Disclosure of information on the underlying receivables in an ABCP securitisation (art. 5 par. 5 (a) STS-R)

In the case of an ABCP securitisation it is required that information on the underlying receivables shall be disclosed on a monthly basis. From our point of view it should be clarified that the disclosure of this information is only required in an aggregate form and thus no loan level data is required.

Time of publication for ABCP (art. 5 par. 1 sentence 4 STS-R)

In an ABCP securitisation the information described in the subparagraphs (a) and (e) shall be made available at latest one month after the due date for the payment of interest. We would like to indicate that not all ABCP comprise fixed payment dates for interest because they are discounted or the interest is paid at the moment of expiry. Thus, this requirement should only apply where possible.

Confidentiality of publication (art. 5 par. 2 STS-R)

According to Art. 5 par. 2 the entity designated to fulfil the requirements set out in paragraph 1 shall make the information available by means of a website. From our point of view the information should be provided on a password protected website or by means of another medium in order to achieve confidentiality for private or bilateral transactions.

Furthermore, we feel that in a bilateral or private transaction the sponsor should be given the option to disclose the required information solely to investors in their securitisations and to the competent authorities.

Publication of confidential data (art 5 par. (new))

In contrast to the unofficial draft versions of the proposal there is no regulation that prevents originators, sponsors or SSPEs to make available information which publication would breach Union or national law

governing the protection of confidentiality of information sources and personal data. We think that such a provision should be reinserted.

Furthermore, there is not only Union or national law governing the protection of confidentiality of information sources or the processing of personal data but also the banking secret that has to be observed, for instance in Germany as a contractual accessory duty of the originators based on common case law. Any violation would entail liability of the originator towards the debtors of the underlying assets.

Last but not least, it should be clarified that for ABCP programmes only information at the programme level but no transaction information shall be disclosed to investors. The relevant transaction documentation should be disclosed to the liquidity facility provider who is exposed to the risk of the underlying exposures at transaction level.

Homogeneity of underlying assets (art. 8 par. 4 STS-R)

Article 8 par. 4 STS-R requires that the securitisation shall be backed by a pool of underlying exposures that are homogeneous in terms of asset typ. It is not clear what “homogenous in terms of asset type” means and is thus open to unforeseeable interpretation by supervisory authorities. Hence, it should be clarified that the pool of underlying exposures shall consist of one asset type which is the current market practice. Additional requirements by supervisory authorities based on later guidelines to achieve a maximum level of homogeneity would have the consequence that currently successfully securitised portfolios could no longer be securitised within one STS securitisation. Instead, it would be necessary to split these securitised portfolios into several portfolios. Each of these split portfolios would have to be securitised separately. It would mean that all regulatory and market driven requirements would have to be fulfilled for each transaction. For example, the assessments of rating agencies would be necessary for each transaction. Each transaction would need derivative counterparties to hedge interest rate risks. For each transaction a prospectus would have to be prepared and a cash flow model to be delivered etc. In addition, the portfolio size would shrink significantly, which would impede the marketability due to decreasing liquidity of small securitisations. In the end, if the criterion of homogeneity is interpreted too strict by supervisory authorities it will make the securitisation uneconomically.

Significant Risk (art. 8 par. 7 (c) STS-R)

Article 8 par. 7 (c) STS-R requires that, at time of transfer of the exposures to the SSPE, shall not include (…) exposures to a credit-impaired debtor or guarantor, who, to the best knowledge of the originator or original lender has a credit assessment or a credit score indicating that the risk of contractually agreed payments not be made is significantly higher than for the average debtor for this type of loans in the relevant jurisdiction.

It is not clear, in practice, what is meant by “that the risk of contractually agreed payments not be made is significantly higher than for the average debtor for this type of loans in the relevant jurisdiction”. There is much room for interpretation, which generates a high level of uncertainty for originators and investors. The required comparison with the average debtor for the same type of loan in the relevant jurisdiction exacerbates the uncertainty and complexity because, among other things, debtors might be deemed to

be of significant risk in one European country with high credit standards, but not in another country with less strict credit standards.

The established market practice is much more precise and objective. Effectively all loans that have been approved in the normal course of business and that have been selected randomly for securitisation are eligible provided that, first, at least one payment has been made and, second, the selected loans are performing loans, i.e. not delinquent and not in default at the time of selection for securitisation.
We think that the non-impairment requirement should be simple with regard to its interpretation, free of preconditions, easy to implement and robust with regard to its assessment. Its application across Europe would also be largely consistent. We would therefore propose excluding loans that show evidence of impairment under the applicable accounting framework requiring the allowance of specific provisions. Such data are already available for accounting purposes. Since each allowance of specific provisions is based on assessments that can differ between originators, we suggest as a back-stop the status of delinquency, which is a very objective and prudent measure that can be easily determined, that is already used in investor reports and is already a criterion considered in the context of high-quality securitisation.

In the case of retail exposure it must be allowed to apply the non-impairment requirement at the level of an individual credit facility rather than in relation to the total obligations of a borrower. This is important for credit institutions that apply a default definition according to article 178 (1) subparagraph 2 CRR at contract level. Historical information is in such cases often only available at the level of the contract but not or only partly at the level of the obligor. At a minimum, a transitional provision should be introduced for a transitional time if the backward looking requirements are not fulfilled. Without practical relieves in terms of the backward looking requirements it could take some years until the originating credit institution will be able to issue STS-retail securitisations.

In addition, it should be reconsidered to require checking whether the debtor has declared insolvency, agreed with his creditors to a debt dismissal or reschedule or had a court grant his creditors a right of enforcement or material damages as a result of a missed payment within three years prior to the date of origination. In practice, also seasoned exposures are securitised. The requirement would mean for contracts that were originated, for instance, five years ago that it would have to be looked backed 8 years even if the credit quality is out of question for years.

In addition, it should be noted that the impairment criteria according Art. 8 (7) can only be checked one time at the time of selection for inclusion in the securitisation. However, it takes some time that can't be avoided until the selected exposures can be legally transferred and assigned, respectively. During this short period, it cannot be avoided that exposures get into default or become credit-impaired. Thus, the exclusion of defaulted exposures according to Article 178 CRR and credit-impaired exposures according to this paragraph should refer to the time of selection if the underlying exposures will be transferred and assigned, respectively without undue delay. In practice, it is often required that the time between portfolio selection and the inclusion into securitisation does not need to exceed 3 months.

Residual value (art. 8 par. 9 STS-R)

Article 8 par. 9 STS-R requires that the repayment of the holders of the securitisation positions shall not depend, substantially, on the sale of assets securing the underlying exposures.

There were lengthy deliberations about this point during the preparation of the delegated act on the LCR. We would, therefore, strongly recommend using the wording of Article 13 (3) of the delegated act on the LCR should be adopted.

Furthermore, in many cases such residual values are backed by repurchase obligations or guarantees by the manufacturer or seller at a fixed price – and are, therefore, not exposed to residual value risk (market risk). We advocate that in case that the residual value risk is hedged by a repurchase obligation or a guarantee by the manufacturer or the seller it should be eligible as underlying assets, because the market risk is mitigated.

Termination of Servicing (art. 9 par. 6 (b) STS-R)

Article 9 par. 6 (b) STS-R requires to ensure that a default or insolvency of the servicer does not result in a termination of servicing.

It is current practice that a replacement clause is agreed which enables the replacement of the servicer in case of default or insolvency of the servicer. It should be abstained from further requirements because there are no comparable requirements for covered bonds. However, the impact of a default or insolvency of the administrator of the underlying exposures is the same irrespective of a securitisation or a covered bond because it makes no difference whether the administrator of the underlying exposures of a securitisation or a covered gets into default or insolvent. This applies a fortiori in those cases where the servicer is an institution subject to the resolution regime of the BRRD. Also, the current consultative document of the Basel Committee on Banking Supervison on the “Capital treatment for “simple, transparent and comparable” securitisations”, released on 10 November 2015, requires only provisions documented for the replacement of servicers.

To facilitate the assessment it should be said that a replacement clause enabling the replacement of the servicer in the event of default or insolvency will normally fulfil the requirement to ensure that a default or insolvency of the servicer does not result in a termination of the servicing.

Clear and consistent term definitions (art. 9 par. 7 STS-R)

Article 9 par. 7 STS-R requires definitions, remedies and actions to be provided in clear and consistent terms. It should be noted that processes and, especially, certain kinds of actions are not always predetermined. Decision-makers at the originator or servicer have a certain level of discretion when taking their decisions with regard to the underlying assets. Processes, definitions and actions might change during the lifetime of an ABS transaction without lowering the standards and this must be permitted. A clarification on this point would be helpful.

Historical default and loss performance data (art. 10 par. 1 STS-R)

Article 10 par. 1 STS-R requires that the originator, sponsor and SSPE provide the investor before investing access to data on static and dynamic historical default and loss performance, such as delinquency and default data.

In this context, we feel that five years is much too long a period for trade receivables. It should be reduced to three years.

External verification (art. 10 par. 2 STS-R)

According to art. 10 par. 2 STS-R a sample of the underlying exposures shall be subject to external verification prior to issuance of the securities resulting from the securitisation by an appropriate and independent party, including verification that the data disclosed in respect of the underlying exposures is accurate, with a confidence level of 95%. In our view for short term, revolving assets such as trade receivables it is neither possible nor appropriate to verify the accurateness with a confidence interval of 95%. Furthermore, in ABCP programmes with fully supported liquidity the CP investor is protected by the liquidity facility and hence, such verification is unnecessary and costly. Especially in ABCP programmes where ABCP is issued frequently it is impossible to make verification “prior to issuance”.

Therefore this requirement should only be applied to static pools and if the securitisation is not within an ABCP programme. This can be achieved by adding art. 10 par. 2 STS-R to the “exemption list” in art. 12 par. 1. STS-R.

Joint responsibility (art. 10 par. 4 STS-R)

Art. 10 par. 4 STS-R requires that the originator, sponsor and SSPE shall be jointly responsible for compliance with Article 5 of this Regulation and shall make all information required by Article 5(1) (a) available to potential *investors* before pricing. The originator, sponsor and SSPE shall make the information required by Article 5 (1) (b) to (e) available before pricing at least in draft or initial form, where permissible under Article 3 of Directive 2003/71/EC. The originator, sponsor and SSPE shall make the final documentation available to *investors* at the latest 15 days after closing of the transaction.

We would like to point out that in an ABCP programme not only the investor is exposed to the risks of the securitisation and thus in need of information. As already indicated the holder of a securitisation position can either be on a transaction level (e.g. the relevant liquidity bank) or on the programme level (e.g. the ABCP investor). Thus, we would like to propose to replace the term “investor” by “holder of a securitisation positon”).

As we will later argue in our comments on Article 13 par. 8 STS-R we strongly advocate to limit the responsibility of the originator to information on his portfolio of receivables.

Compliance with STS criteria (art. 11 STS-R)

According to Article 11 ABCP securitisations (i.e. all securitisation positions at the transaction and programme level) shall only be considered STS if the ABCP programme complies with the requirements in Article 13 and all transactions within that ABCP programme fulfil the requirements in Article 12. This would imply, from our point of view, that a securitisation position at transaction level (e.g. a liquidity line) cannot be considered STS if the ABCP programme in its entirety does not comply with the STS criteria. In

other words: one non-STS transaction within an ABCP programme would “infect” other transactions even if they fulfil with the STS criteria at the programme level.

The already strict provision in Article 13 par. 1 would have the effect that one non-STS transaction can “infect” the whole ABCP programme (see our comments below). But it would leave other STS-compliant transaction unaffected. Taken together these provisions would have the effect that one single non-compliant transaction would not only infect the programme but also every other compliant transaction.

We, therefore, strongly advocate deleting this provision. It should be sufficient that transactions comply with the requirements in Article 12 and programmes with those in Article 13.

Remaining maturity (art. 12 par. 2 STS-R)

Article 12 par. 2 STS-R requires for ABCP transactions a maximum remaining maturity of the underlying exposures of no longer than three years. At the same time the remaining weighted average life shall be of no longer more than two years.

Limiting the remaining maturity to three years would mean that many ABCP transactions in their current form could not be classified as STS. As things stand, ABCP programmes contain some transactions whose underlying exposures have longer maturities. These longer maturities are due to the types of underlying exposures involved, which normally include car loans and leases, operating equipment and consumer loans but also leases of machineries or other tangible assets. These have longer original maturities by their very nature (e.g. 6 years) and consequently also have longer residual maturities when they are securitised. With such underlying real-economy exposures an ABCP transaction would not qualify as simple, transparent and standardised. This flies in the face of the Commission’s declared objective of promoting the real economy.

The maturity cap would in particular affect the securitisation of auto loans and leases. These securitisations play an important role for the real economy, especially for SMEs. They are especially important for the sale of cars for European auto manufacturers. According to Moody’s, European multi-seller ABCP programmes securitised receivables of an amount of 65 billion EUR in 2014. More than one quarter of these assets (approximately 16.5 billion EUR) were auto loans and leases.
In our view, investors can be only exposed to a liquidity risk stemming from the need to refinance the longer term assets at expiry date if underlying assets cannot be refinanced by issuing new ABCP. Investors would then face a credit risk because the underlying exposures had to be sold to pay back the investors. This cannot happen, if the ABCP programme is fully supported. In this case the liquidity or credit risks mentioned above are covered by the liquidity facility provided by the sponsor. Therefore the fundamental question when assessing whether or not the CP issued by a programme can qualify as “STS” should be whether the sponsor is providing full liquidity and credit support, and whether the investor can expect this support to be reliable. When the sponsoring bank provides this full, robust support, the CP issued by an ABCP conduit is equivalent to a covered bond. Furthermore, the investors are protected against a default of the sponsor by the requirement in Article 13 par. 7(f) STS-R that the programme has to provide for a collateralization of the funding commitment or a replacement of the liquidity facility provider in case of a default.

For this reason, we would recommend removing the restriction of maturity of assets in the underlying pool - which becomes unnecessary when the programme-level criteria of full credit and liquidity support is fulfilled.

Seller default (art. 12 par. 4 STS-R)

If the seller defaults principal receipts from the underlying exposures shall be passed to the investors via sequential payments and no substantial amount of cash shall be trapped in the SSPE. We suggest deleting this requirement. In the case of a seller's default the liquidity line will be drawn and the underlying exposures are paid to the liquidity bank according to the priority of payments. In our view it is not relevant for STS criteria whether cash is trapped in the SSPE or not because this is an individual bilateral agreement between the liquidity bank and the SSPE.

Underwriting standards (art. 12 par. 5 STS-R)

Material changes in the underwriting standards shall be fully disclosed to potential investors. In fully supported ABCP transactions the investor is mainly exposed to the risk of the liquidity bank (sponsor). Changes in the underwriting standards are thus foremost interesting for the liquidity bank. Therefore, we suggest to change the addressee of this requirement to the "holder of the securitisation position". This would enable the liquidity bank (as holder of a securitisation position) to have access to information regarding underwriting standards and would protect the originator from disclosing sensitive details of the underwriting to third party investors of the ABCP programme.

This would also be in line with our general comment that transaction specific details or documentation should not be disclosed to investors because they are protected by the liquidity facility.

Termination of the transaction (art. 12 par. 6 (c) STS-R)

The revolving period shall be terminated if the programme is not able to generate sufficient new underlying exposures that meet the pre-determined credit quality criteria. We would like to point out that in ABCP trade receivables transactions it is quite common that the underlying exposure fluctuates and the maximum purchase limit is not reached. This is due to the nature of the business or asset class and, from our point of view, not relevant for STS criteria. We, therefore, suggest deleting this requirement.
At least, it should be clarified, in accordance with the rational of the EBA for the corresponding Criterion 11 (p. 80 of the EBA report), that it is not required to terminate the revolving period when the unavailability of appropriate exposures is only temporary and not caused by any changes with respect to the credit quality of the seller or the transferred assets, but by non-credit risk related issues like the actual funding needs of the seller or seasonal variations in the demand for certain products or services.

Review of seller's underwriting standards (art. 12 par. 7 (d) STS-R)

The sponsor shall verify that the seller's underwriting standards, servicing capabilities and collection processes meet standards as stringent as those defined in the requirements specified in points (i) to (m) of

Article 259(3) of the CRR-R. In line with the proposal by the EBA this requirement could be deleted *here* because the respective requirements relate to the ABCP programme (EBA Criterion A, p. 83) and are not compliable by servicing capabilities and collection processes of a single transaction. It might be included in Article 13.

ABCP programme criteria (art. 13 par. 1 STS-R)

In order for an ABCP programme to qualify as a STS securitisation all ABCP transactions shall fulfil the requirements for qualified transactions in Article 12.

This would mean that if, even due to a minor or temporary breach of one of the criteria, one transaction becomes ineligible, the whole ABCP programme would be “infected” by the ineligible transaction and thus the ABCP issued could not be counted for as qualifying. This very restrictive requirement would likely have the effect that not a single ABCP programme can comply with the STS criteria.

We, therefore, strongly advocate implementing an upper limit, of e. g. 30% of all financed receivables, for non-qualified transactions within an ABCP programme. This would give sponsors a certain amount of flexibility to allow for a small number of transactions that fall out of the STS scope. Such a ceiling would especially be beneficiary for corporates using non-compliant transactions (e.g. for leases) that otherwise would have to resort to (costlier) bank loans for their funding.

ABCP with call options (art. 13 par.5 STS-R)

The Commission wants to make sure that no instrument issued by an ABCP programme includes clauses which can have an effect on the final maturity of the instrument. We would propose to limit this prohibition to the structured ABCP issued only. There may be a co-existence of CPs that contain e.g. put options for the investor (structured CP) and ‘plain vanilla’ ABCP (without optionalities) within the same programme. In such a case the ‘plain vanilla’ ABCP may still be a STS securitisation where - at the same time – the structured CP is not. Otherwise one structured CP would “infect” all unstructured ABCP.

Responsibility of the trustee (art. 13 par. 7 (a) and (b) STS-R)

According to this provision the responsibility of the trustee and other entities with fiduciary duties towards investors shall be specified in the programme documentation. Furthermore the documentation shall contain clear provisions facilitating the timely resolution of conflicts of conflicts between the sponsor and the investor. From our point of view, we cannot think of any conflict between the sponsor and the investor that can occur in a fully supported ABCP programme. We rather think that there is a total alignment of interests be-tween those parties due to the full support. We would therefore propose to delete this provision.

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Replacement of counterparties (art. 13 par. 7 (e) STS-R)

Article 13 par. 7 (e) STS-R requires that the programme documentation specifies provisions for replacement of derivative counterparties, and the account bank at ABCP programme level upon their default, insolvency and other specified events, where applicable.

We are of the opinion that this criterion is not required, if the liquidity facility covers the default and the further specified events of the derivative counterparty and account bank.

Joint compliance with programme requirements (art. 13 par. 8 STS-R)

Here it is required that the sponsor and the SSPE shall jointly with the originator comply at the ABCP programme level with the requirements to provide information to the investors in Article 5. From our point of view, only the sponsor should be responsible to make information available to the investor of the ABCP programme. In a multi-seller programme receivables from several real economy originators are securitised. This is why, the individual originator can only be held reliable for information about their own portfolios and for the quality of their servicing. They should not be reliable for consolidated information provided by the sponsor or features of the programme structure or documentation. We think that only the sponsor should make available information to the investor at the programme level. The Originator and the SSPE are not in a position to do this.

STS notification (art. 14 par. 1 STS-R)

The EU Commission proposes that originators, sponsors and SSPEs shall “jointly notify” ESMA that the securitisation meets the requirements for STS securitisations. We are of the opinion that this would cause insurmountable difficulties for ABCP programmes. In an ABCP programme multiple sellers sell their receivables to one of the transactions. This is why they can only declare their compliance in relation to “their” transaction but not to the entire ABCP programme. We, therefore, propose that in such ABCP programmes each originator shall only be obliged to declare that the securitisation meets the requirements of Article 12 for its “own” transaction.

Furthermore, ESMA has to publish this confirmation on its website. We think that bilateral or private transactions should only be notified to ESMA but not published on the ESMA website.

Notification requirements for non-banks (art. 14 par. 2 STS-R)

This regulation seeks to impose notification obligations on originators that are not supervised credit institutions. They would apply, in particular, to unregulated real economy originators in multi-seller ABCP programmes. In our view these requirements will drive up costs for these originators and will increase their administrative burden. This would jeopardize the economic profitability of such transactions for these originators and would ultimately prejudice the financing of such real economy businesses through securitisation which may be their only access to the capital market.

Additionally, such originators would have to provide a confirmation that their credit granting has not been subject to supervision (art. 14 par. 2 (b)). Most likely, originators that are not credit institutions or investment firms (such as real economy enterprises) will not be subject to supervision. However, in its

due diligence any investor will be aware of this fact so that a separate declaration is in our view obsolete and can be deleted. In sum, the whole paragraph should, therefore, be deleted.

STS notification (art. 14 par. 2 (new) STS-R)

There exist many competent authorities in the European Union for credit institutions, insurance undertakings and funds that can have different opinions on the STS compliance of certain securitisations. In case of disagreement the matter would have to be referred to ESMA pursuant to Article 21 (5) STS-R and the Joint Committee of the European Supervisory Authorities that would have to take the final decision on the STS eligibility based on Article 20 of Regulation (EU) No 1095/2010. Thus, it is not to expect that the competent authority of the originator will grant the requested confirmation because it has to fear to be overruled by the Joint Committees of the European Supervisory Authorities. Against this backdrop, it is crucial that the competent authority of the originator or sponsor have the power to grant the requested confirmation of conformity to create the required legal certainty for originators given the envisaged extremely dissuasive sanctions (see also our explanation set out in the general remarks). Therefore, it should be possible that the originator or sponsor may file a letter of enquiry to their competent supervisory authority to obtain a binding confirmation of conformity based on a joint opinion of the originator, SSPE and sponsor complies with the requirements relating to certain criteria.

List of STS securitisations (art. 14 par. 4 STS-R)

ESMA shall maintain on its website a list of all STS securitisations. We propose to exempt bilateral or private transactions from this requirement.

Designation of competent authorities (art. 15 par. 4 STS-R)

For entities not covered by the Union legislative acts referred to in paragraph 3, Member States shall designate one or more competent authority to ensure compliance with Articles 4 to 14 of this Regulation. This would mean that unregulated entities like corporates (as originators orsellers of e.g. trade receivables) shall get a designated supervisor who can impose sanctions on the corporate according to Article 17 par. 2 STS-R. This would include a temporary ban against the management bodies to exercise management functions (c) as well as fines (e) to (g) etc. Given the comprehensive catalogue of STS-criteria with – to some extent – unclear definition and various parties involved we think this would pose an unpredictable legal risk for a single originator within an multi-seller ABCP programme.

We advocate deleting this paragraph or at least make it not applicable to real economy entities as originators within a multi-seller ABCP programme. SSPEs in Europe are already supervised.

Powers of the competent authorities (art. 16 par. 4 (new) STS-R)

Referring to our explanation set out in the general remarks and under Article 14 (2) (new) STS-R we propose that Article 16 STS-R should include the empowerment for the competent authority to confirm the joint opinion of the originator, SSPE and sponsor that the securitisation complies with the requirements

relating to certain criteria. Such confirmation shall be binding in the European Union to warrant the necessary level of legal certainty for all market participants.

Cooperation between competent authorities (art. 21 par. 5 STS-R)

Referring to our explanation set out in the general remarks we propose that Article 21 par. 5 STS-R should regulate in the case of disagreement between the competent authorities, when a binding confirmation by a competent authority exist, that this is an exception from the procedure of Article 19 or Article 20 STS-R.

Amendment to Regulation (EU) 648/2012 (art. 27 STS-R)

We have serious concerns regarding the proposed amendments of Regulation (EU) 648/2012 (EMIR) as these are likely to conflict and overlap with the numerous RTS currently under development or being in the process of being adopted. Specifically, as generally known ESMA has already presented its final report on the RTS on the clearing obligations under EMIR in respect of IRS and CDS (the former has already been accepted by the Commission) and EBA, ESMA and EIOPA are currently jointly in the process of finalizing their proposal for the RTS on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) EMIR. All of these RTS finalised or in the process of finalisation already contain provisions on the special treatment of OTC derivative contracts which are concluded with covered bond issuers or with cover pools for covered bonds as well as the provision on risk mitigation, segregation of collateral and practical/legal impediments for prompt transfer of assets. The proposed revision of the level 1 text regarding these issues may directly interfere with the framework already under development and may result in inconsistencies, conflict or unnecessary overlaps. This could jeopardize the solutions and approaches which have been developed and are already in the process of being implemented. While we of course fully support the proposed exemption from the clearing obligation for covered bond related transactions and likewise, transaction with securitisation special purpose entities we believe the proposed approach needs to be reviewed. In particular we believe it to be vital, that the details are coordinated as closely as possible with the already existing draft RTS as well as the RTS currently under development regarding these issues. We also strongly suggest to consider a close collaboration with the ESA experts in the development of an alternative approach. Against this background we believe that recital 29 should be deleted and article 27 STS-R need to be revised in his entirety. We propose to amend only recitals 16 and 24 of EMIR accordingly and set the rules for exemptions for derivatives relating to securitisations on level 2, i.e. follow the same approach that has led to successful results for derivatives relating to covered bonds.

Transitional provisions (art. 28 STS-R)

Transitional provisions on due diligence (art. 28 par. 3 STS-R)

In deviation from the general principle to apply the STS-R to securitisations issued after the entry into force of the regulation, Article 28 par. 3 STS-R requires that “[i]n respect of securitisations the securities of which were issued on or after 1 January 2011 and to securitisation issued before that date, where new

underlying exposures have been added or substituted after 31 December 2014, Article 3 of this Regulation are complied with".

We would like to point out that a retroactive change of a requirement is difficult to fulfil in the majority of cases. The requirement in Article 3 states that the investor shall verify different aspects before becoming exposed to a securitisation. In fact, an investor, who already owns these securities, is not able to verify the required information before. On the other hand, the originator or original lender would have some effort to make these information available. Therefore we propose to delete Article 28 par. 3 STS-R.

Furthermore, the application of the STS-R to new securitisations would mean that banks were not allowed to use the concretisations of the due diligence requirements in chapter IV of the Commission delegated regulation 625/2013 as these reference Article 406 CRR. We therefore advocate, first, to insert a respective empowerment clause in Article 3 and, second, a grandfathering clause for the due diligence requirements that allows banks to apply chapter IV of the Commission delegated regulation 625/2013 until the new RTS applies.

Transitional provisions on risk retention (art. 28 par. 4 STS-R)

Article 28 par. 4 STS-R requires that "in respect of securitisation positions outstanding as of [date of entry into force of this Regulation] credit institution (…) shall continue to apply Article 405 of Regulation (EU) No 575/2013 (…) in the version applicable on [day before date of entry into force of this Regulation]."

As far as we understand the current requirements on risk retention shall be continued for securitisation position that are outstanding before the date of entry into force of the Securitisation Regulation. We consider that this requirement conflicts with the current requirement in Art. 404 CRR-R. This Article states that the requirements on risk retention shall apply to new securitisations issued on or after 1 January 2011. Securitisation issued before that date don't need to fulfil this requirement. This transitional requirement of the current CRR should be taken into account for the new Securitisation Regulation.

Transitional provision for synthetic securitisations (art. 28 par. 7 (new) STS-R) and Review on STS criteria for synthetic securitisation (art. 30 par. 2 (new) STS-R)

As there are currently no STS criteria for synthetic securitisation defined to include them in the scope of the Regulation, we welcome the fact that the Commission intends to examine the issue further and to analyse to what extent synthetic securitisations might be able to be included in this Regulation (see also Recital 16 STS-R).

The EBA and the Commission have made clear that synthetic securitisations have, first and foremost, not been considered in their first draft of the proposal on simple, transparent and standardised securitisations as they have not identified an established market standard for synthetic securitisations. We also support their point of view to avoid opaque structures and transactions like ABS of ABS, as they appeared with the advent of the financial markets crisis 2007/2008. The Commission also made clear that she does not want to exclude fractions of credit financed SME from the option of benefiting from securitisation markets refinanced credit programs. We agree that by standardising synthetic transactions and ensuring that the

credit risk of the securitised portfolio is ultimately borne by the investors (no fallback at any point of time of the transaction), a suitable way can be found to include certain synthetic securitisations by defined STS criteria. These criteria should follow those STS criteria that have been positioned for term securitisations and ABCP programmes in this legislative proposal.

The EBA is currently doing a survey with several banks and other market participants after the German Banking Industry Committee (GBIC) has developed a proposal for criteria for simple, transparent and standardised synthetic securitisations (see also Annex 1). This has been part of the GBIC´s comments - on the Consultation Document of the Commission and was also sent directly to the EBA.

From our point of view it is of utmost importance that the Commission and the EBA is carrying on with its work on developing criteria, which can be adopted by the Commission to include certain synthetic securitisations into the new STS Regulation.

Review (art. 30 STS-R)

It is proposed that the commission shall present a report to the European Parliament and the Council on the functioning of this Regulation, accompanied, where appropriate, by a legislative proposal by four years after entry into force to take corrective measures if the experiences with the new rules indicate the need for changes. We recommend to change the timeline from four to one year.

Annex 1

Inclusion of certain synthetic securitisations in the regulation for STS securitisations (from GBIC Comments to the Commission's consultation document of 18 February 2015 on an EU framework for STS securitisations)

A. Preliminary comments

The underlying objective of the EU Commission in its endeavours to revitalise European securitisation markets is to stimulate broad-based economic growth, across all the countries of the euro zone. We support this objective, and welcome plans to introduce a European framework for simple, transparent and comparable securitisations. Likewise, we welcome the associated introduction of a market segment for high-quality securitisations. However, when considering the suitability of measures to achieve the desired growth targets – and to achieve them without undue delay, and in an efficient manner – we believe a differentiated view is required upon the European economy, as well as Europe's corporate (and hence, financing) structures.

Business environment characterised by family-owned SMEs and Midcaps

Besides numerous large corporations, the European business environment is characterised, in particular, by small and medium-sized enterprises as well as a large number of family-owned mid-cap companies – especially in Germany. Family-owned businesses continue to be predominant, regardless of the fact that, from a company law perspective, limited companies have increasingly gained in importance. This structure of businesses looking for financing is decisive for an understanding of European credit markets.

European credit markets are driven by demand from businesses

In Europe, financing demand from businesses – as opposed to supply – has been the determining factor over recent decades. Accordingly, the banking sector began developing and offering suitable financing instruments (prior to the introduction of Basel II/III) that permit them to provide financing even outside their balance sheets, which are restricted in terms of equity. The question whether a bank offers any given capital market instrument (or capital markets-related structure) as a financing solution is almost exclusively driven by the bank's client structure.

Bank loans are the financing option of choice for the majority of SMEs and Midcaps

For a variety of reasons, SMEs as well as Midcaps focus on working capital facilities – in contrast, investment loans are requested for defined financing needs, such as the purchase of machinery or the construction of production sites, for example. This reflects the fact that the framework specifications for an investment loan – specifically, fixed amounts, defined tenor and redemption – often are only set for such clearly-defined individual investment projects, given depreciation rules under tax law, the planned useful life, or underlying investment calculations, to name but a few. In fact, bullet repayments are not common at all, since they only rarely match SME cash flow structures. The focus of European SMEs is rather on variable-rate financings of current operations: working capital facilities.

Furthermore, there are additional aspects as to why a large portion of companies will be reluctant to approach more capital markets-oriented financings, regardless of the offers available. Key points in this context are the wish to maintain local GAAP (e.g. German commercial law – "HGB"); the desire to retain control of proprietary company and financial data, and the scope of persons to whom such data is disclosed; a fear of increased efforts and costs involved in converting financial reporting to a quarterly basis – for example – in order to comply with the requirements of certain forms of capital markets financing. In addition a bank loan, as opposed to standardised capital market products, gives the borrowing company significantly more flexibility to get a financing that matches the companies needs.

In summary, it is fair to say that large companies –which are familiar with capital markets practice – are using such forms of financing as part of their financing mix, whereas others (and SMEs and Midcaps in particular) prefer traditional bank loans.

Financing relief must be oriented upon demand to be effective

In our view, targeted growth would be achievable in a much faster and more efficient manner if the focus was not on removing perceived burdens on lending by the banking sector, to allow businesses to access capital market financing – but by strengthening banks' equity, and by facilitating credit risk management using capital market instruments.

New securitisation standards and easier capital market financing will only benefit a small part of enterprises: large corporations. SMEs and Midcaps will continue to predominantly finance via established credit products on a national level, determined by the respective legal framework.

Criteria for high-quality securitisations should not lose sight of the underlying target of facilitating the provision of finance to the real economy

Banks should not face unnecessary burdens when placing parts of their credit risk exposure to professional investors. Yet this is exactly what would happen if synthetic securitisations were generally excluded from the regulations for high-quality securitisations, as opposed to so-called "true sales". In fact, synthetic securitisations are particularly suitable for this purpose, since they only require comparatively straightforward contractual agreements – and no full transfer of title of the underlying loan receivables (regardless of whether these are not desired for reasons of business policy, or downright illegal). Moreover, this would negatively affect banks whose clients are preferring bank loans – leading to competitive distortions.
Furthermore a one-sided focus on true sale securitisation would discriminate between jurisdictions where true-sale securitisation is common practise and others like Germany where historically synthetic securitisation has proven to be more feasible and accepted by borrowers.

Instead, the focus should always be on the benefit of a form of a capital market instrument for the real economy: the issue as to whether a securitisation is simple, transparent and comparable securitisation should not be determined on the basis of the legal structure alone. We would like to support the development with the following proposals for suitable criteria.

Using the quality identified by the credit quality assessments carried out by the banking sector to promote the European securitisation market

Both the retention requirements for securitisations pursuant to the CRR and the new BCBS Securitisation Framework – including numerous new, quality-enhancing rules for originators, sponsors and investors, have created a market for securitisations of a higher quality. This market is currently experiencing a revitalisation and should not be obstructed (or destroyed) by new segmentation initiatives.

If ratings of external rating agencies and updated credit risk models are used as evidence for the quality of a securitisation at a portfolio level, it is banks' credit quality assessments at a single-loan level that evidence the quality of receivables included in the securitisation. We agree with the view that re-securitisations, as well as complex securitisation structures which do not serve the purpose of directly hedging existing credit risks, should not be included in a standard for high-quality securitisations.

Going foward, the securitisation market should remain an 'overflow' mechanism for the credit market with limited equity. This will enable the banking sector to satisfy the credit demand of businesses, in line with clients' needs – provided that lending standards for individual loans are harmonised with an EU securitisation framework, which adequately incorporate established forms of securitisation, instead of excluding them.

B. Appropriate modification of SST criteria regarding synthetic securitisations

Following this economic assessment, we should like to look at the supervisory aspects of synthetic securitisations. In our view, synthetic securitisations can be structured in such a way that they are also simple, transparent and standardised.

EBA criticisms

In the EBA consultation document on simple, standard and transparent securitisation (SST securitisation), synthetic securitisation is explicitly excluded. The EBA gives three reasons for this:

1. No access to securitised assets
   In the EBA's view, assets in an SST securitisation should be permanently transferred legally and economically to a special-purpose vehicle (SPV). As we understand it, the EBA in this way intends to ensure that the investor in such a securitisation can access the transferred assets should the SPV fail to meet the agreed payment obligations. The assets then serve as security for the investor's claims. This applies also in the event of default by the originator.

2. Increased complexity through counterparty risk
   In the EBA's view, "most" synthetic securitisations are complex with regard to counterparty risk. This would be understandable if the EBA already regards the transfer of credit risk from the originator to the investor or SPV by means of a financial guarantee or credit derivative (e.g. credit default swap (CDS)) as in itself complex. By using the term "most", the EBA also admits, however, that this supposed complexity does not apply to synthetic securitisation in every case.

3. Increased complexity of risk modelling
   The EBA's third criticism relates to the complexity of risk modelling. We understand this criticism to mean that the EBA suspects that due diligence in synthetic securitisation poses a greater challenge to the investor. We can appreciate that due diligence should be relatively simple for high-quality securitisation. In addition, we interpret the worry about unavailability of adequate portfolio reporting, particularly regular, detailed portfolio reporting, information on individual exposures, as well as cash flow information, as possible perceived complexity.

Our understanding is that the EBA's criticisms serve a common objective: designing STS securitisation in such a way that the investor is protected if possible against unforeseen events that impair the invested capital.

Basic principles

The EBA criticisms outlined above and their aim, as we see it, engender a fundamental idea that must be taken into account when structuring synthetic securitisations:

Protection of the investor

This creates three basic principles for synthetic securitisation:

1. **The investor bears only the credit risk of the securitised portfolio.**
2. **The investor recovers the capital he invested provided there is no credit default in the securitised portfolio.**
3. **The investor receives all the information he needs to model the risks adequately.**

If a synthetic securitisation takes due account of these basic principles and the aspects associated therewith, the requirements set for SST securitisations are, in our view, fulfilled. This means that synthetic securitisations can also meet the requirements in regard to simplicity, transparency and standardisation.

Linking the EBA criticisms to the basic principles for synthetic securitisation:

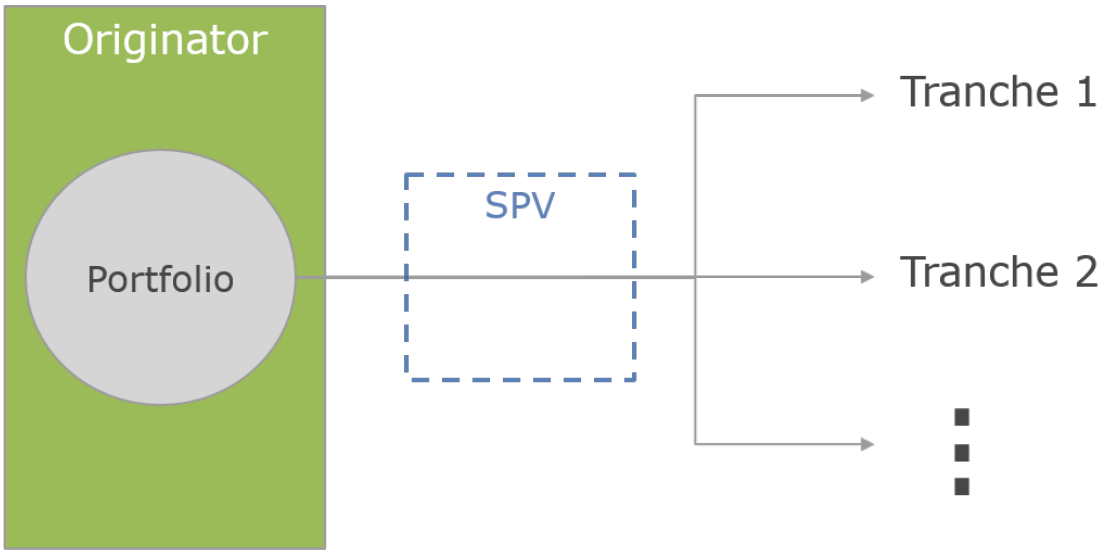
The complexity of a synthetic securitisation is low insofar as the underlying assets precisely do not have to be transferred. The risk of default of the underlying loan portfolio is transferred by way of bilateral agreements that can be based on standard master agreements. Legally effective title transfer that has to comply with comprehensive legal requirements is not necessary in this case. On the other hand, synthetic securitisation undeniably creates an additional counterparty risk. This counterparty risk can, however, be reduced through the hedging measures mentioned below to a level equivalent to that of a true sale transaction.

If a synthetic securitisation is financed in part by issuing securities, the proceeds of the issue are protected against insolvency – in relation to the originator and other transaction parties – by being separated and invested (cash collateral or equivalent securities). This means that the investor has no access to the underlying assets in the event of insolvency. However, the invested proceeds of the issue are available at short notice to repay the invested capital. As a result, the synthetic securitisation can also be regarded as collateralised. A loan portfolio does not need to be transferred to an SPV to secure the investment.

The investor requires detailed information to enable him to model risks. Our experience is that the investor receives all the information he needs to do so also when investing in synthetic securitisations.

Synthetic securitisation criteria

We should like in the following to translate the above remarks on the EBA's criticisms into explicit criteria for synthetic securitisations. We have a quite simple synthetic securitisation structure in mind, as shown in the diagram below:



Funded (e.g. CLN, bargedeckte (Finanz)Garantie) / Unfunded (e.g. CDS, (Finanz) Garantie) Credit Protection

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The originator of a synthetic securitisation is, as a rule, a supervised institution. The supervised institution securitises a loan portfolio created by its own business activity. The portfolio credit risk is transferred to an investor by way of a financial guarantee or a credit default swap (CDS). The credit risk of the securitised portfolio can be transferred directly or through the involvement of an SPV. Provision of security for the guarantee or CDS and SPV refinancing are usually ensured by issuing credit linked notes (CLNs).

In its consultation document, the EBA has already proposed numerous criteria for high-quality securitisation. We have taken the liberty of examining these to assess their suitability for synthetic securitisation. Our assessment is set out in the following overview (Tables A-D). In this assessment, we make proposals for amendment and provide further advice on how applicable or also questionable certain requirements for synthetic securitisation are. We do not take up our proposed amendments to criteria that also apply to true sale securitisation and refer in this connection to the German Banking Industry Committee (DK) comments on the EBA consultation document on SST securitisation.

In addition, we have developed further criteria to take due account of the basic principles for synthetic securitisation. We propose the following additional criteria for simple, transparent and standardised synthetic securitisation:

- The originator of a synthetic securitisation is a regulated institution that is required to comply with supervisory requirements for lending processes, recovery and resolution (BRRD), and risk management.
- If cash collateral or equivalent security is used in synthetic securitisation, it must be separated and transferred to the investor in the event that the securitisation is terminated. This can ensure that the investor recovers the invested capital.
- Any counterparty risk within a synthetic securitisation must be covered so that the investor merely bears the credit risk of the securitised assets.
- Loan defaults and resulting losses are verified by an eligible, independent third party (e.g. certified public accountant). Verification also covers examination of whether the loan concerned fulfilled all the agreed criteria when included in the transaction.

We believe that these criteria contribute to simple, transparent and standardised securitisation. Please see in this connection Table E.

Simple Securitisation (Table A):

No.	Criterion	Adjustments for synthetic securitisation / Comments
1	The securitisation should meet the following conditions: • It should be a securitisation as defined in the CRR (as per Article 4 (61)); • It should be a 'traditional securitisation' as defined in the CRR (as per Article 242(10)); • It should not be a 're-securitisation' as defined in the CRR (as per Article 4 (63)).	The second bullet should read: It should be a 'traditional securitisation' as defined in the CRR (as per Article 242(10)) or a `synthetic securitisation´ as defined in the CRR (as per Article 242 (11)). It should be added: Applying leverage to credit risks is not permitted.
2	The securitisation should not be characterised by an active portfolio management on a discretionary basis. Assets transferred to a securitisation should	No adjustments necessary.

	be whole portfolios of eligible exposures or should be randomly selected from those satisfying eligibility criteria and may not be actively selected or otherwise cherry-picked. Substitution of exposures that are in breach of representations and warranties should in principle not be considered as active portfolio management.	We ask for clarification that replenishment is not a case of active portfolio management (as EBA in EBA/DP/2014/02, Rational to Question 2).
3	The securitisation should be characterised by legal true sale of the securitised assets and should not include any severe insolvency clawback provisions. A legal opinion should confirm the true sale and the enforceability of the transfer of assets under the applicable law(s). Severe clawback provisions should include rules under which the sale of cash flow generating assets backing the securitisation can be invalidated by the liquidator solely on the basis that it was concluded within a certain period (suspect period) before the declaration of insolvency of the seller (originator/intermediary), or where such invalidation can only be prevented by the transferees if they can prove that they were not aware of the insolvency of the seller (originator/intermediary) at the time of the sale.	It should be added: In case of a synthetic securitisation, such securitisation should be characterised by an effective contractual transfer of the credit risk of the securitised assets and should effectively mitigate counterparty default risks. This means that the Investor takes just the credit risk of the underlying assets and in the case of the termination of the funded securitisation the investor receives the invested money back (if there is no default within the portfolio). All investor proceeds received by the originator or the SPV in case of a (partially) funded transaction have to be kept in a segregated account isolated from the insolvency of the originator and/or the SPV. Comment: The difference is that in a synthetic securitisation, the credit risk associated with a loan receivable is transferred by way of a bilateral agreement between the protection seller and the protection buyer, through a guarantee or a credit derivative contract – as opposed to transferring the loan receivable itself. This facilitates the transfer of risk from a legal perspective, since the originator does not need to take the manifold legal requirements for a legally effective full transfer of rights into account (and investors will not need to analyse whether such requirements are in fact fulfilled). It is possible to evidence the legal effectiveness of the guarantee (or the credit derivative) by way of a qualified legal opinion as defined by Article 194 of the CRR. The mechanism for the transfer of credit risk by way of a bilateral agreement (under the law of obligations) is relatively easy and robust. This would also allow for an easier introduction of uniform pan-European contractual (and thus product) standards
4	The securitisation should be backed by exposures that are homogeneous in terms of asset type, currency and legal system under which they are subject. In addition, the exposures should meet the following criteria: i. They arise from obligations with defined terms relating to rental, principal, interest or principal and interest payments, or are rights to receive income from assets specified to support such payments;	

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	ii. They are consistently originated in the ordinary course of the original lender's business pursuant to uniform and non-deteriorating underwriting standards; iii. They contain a legal, valid and binding obligation of the obligor, enforceable in accordance with its terms against any third party, to pay the sums of money specified in it (other than an obligation to pay interest on overdue amounts); iv. They are underwritten: a. with full recourse to an obligor that is an individual or a corporate and that is not a special purpose entity, and b. on the basis that the repayment necessary to repay the securitisations was not intended, in whole or in part, to be substantially reliant on the refinancing of the underlying exposures or re-sale value of the assets that are being financed by those underlying exposures.	Synthetic securitisations may only be used to hedge the originating bank's existing credit risks, based on exposures originated or actually purchased by that bank. No. iii part "enforceable in accordance with its terms against any third party" is not relevant for synthetic securitisation.
5	At the time of inclusion in the securitisation, the underlying exposures should not include: i. Any disputes between original lender and borrower on the underlying assets; ii. Any exposures which are in default. An exposure is considered to be in default if: a. it is more than 90 days past-due; b. the debtor is assessed as unlikely to pay its credit obligations in full without realisation of collateral, regardless of the existence of any past-due amount or of the number of days past due. iii. Any exposures to a credit-impaired borrower. For these purposes, a borrower should be deemed as credit-impaired where he has been the subject of an insolvency or debt restructuring process due to financial difficulties within three years prior to the date of origination or he is, to the knowledge of the institution at the time of inclusion of the exposure in the securitisation, recorded on a public credit registry of persons with adverse credit history, or other	No specific comments on synthetic securitisation (please refer to question 1 and attachment 2).

	credit registry where a public one is not available in the jurisdiction, or he has a credit assessment by an ECAI or a credit score indicating significant risk of default; iv. Any transferable securities, as defined in Directive 2004/39/EC (MIFID) or derivatives, except derivatives used to hedge currency and interest rate risk arising in the securitisation. In addition, the original lender should provide representations and warranties that assets being included in the securitisation are not subject to any condition or encumbrance that can be foreseen to adversely affect enforceability in respect of collections due.	
6	At the time of inclusion, the underlying exposures are such that at least one payment has been made by the borrower, except in the case of securitisations backed by personal overdraft facilities and credit card receivables	No adjustments necessary.

Standard Securitisation (Table B)

No.	Criterion	Adjustments for synthetic securitisation / Comments
7	The securitisation should fulfill the CRR retention rules (Article 405 of the CRR).	No adjustments necessary.
8	Interest rate and currency risks arising in the securitisation should be appropriately mitigated and any hedging should be documented according to standard industry master agreements. Only derivatives used for genuine hedging purposes should be allowed.	No adjustments necessary. It should be adjusted: For true sale securitisations the only derivatives used for genuine hedging purposes should be allowed.
9	Any referenced interest payments under the securitisation assets and liabilities should be based on commonly encountered market interest rates and may include terms for caps and floors, but should not reference complex formulae or derivatives.	No adjustments necessary.
10	The transaction documentation of those transactions featuring a revolving period should include provisions for appropriate early amortisation events and/or triggers of termination of the revolving period, which should include, at least, each of the following:	For clarification: the "revolving period" in the case of synthetic securitisation is replenishment. No further adjustments are necessary.

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	i A deterioration in the credit quality of the underlying exposures; ii A failure to generate sufficient new underlying exposures of at least similar credit quality; and iii The occurrence of an insolvency-related event with regards to the originator or the servicer.	
11	Following the occurrence of a performance-related trigger, an event of default or an acceleration event: i The securitisation positions are repaid in accordance with a sequential amortisation payment priority, whereby the seniority of the tranches determines the sequential order of payments. In particular, a repayment of noteholders in an order of priority that is 'reverse' with respect to their seniority should not be foreseen; ii There are no provisions requiring immediate liquidation of the underlying assets at market value.	Comment: In an event of default, the synthetic securitisation will be wound up and the loss upon such default will be allocated to a particular tranche in that securitisation in accordance with its contractual terms. It should be ensured that the investor has access to the cash collateral if no default in the underlying assets has occurred. Issue proceeds in (partially) funded structures may be invested in liquid and secure alternative assets which can be standardised (such as government bonds, Pfandbriefe, or bank deposits). It should be adjusted: In particular, a repayment of investors in an order of priority that is 'reverse' with respect to their seniority should not be foreseen; No adjustments necessary.
12	The transaction documentation should clearly specify the contractual obligations, duties and responsibilities of the trustee, servicer and other ancillary service providers as well as the processes and responsibilities necessary to ensure that: i the default or insolvency of the current servicer does not lead to a termination of the servicing of the underlying assets;	In case of synthetic securitisation the servicer is the originating bank. The default of the servicer leads to the transaction wound up. It should be amended: This requirement is not applicable for synthetic securitisation. Comment: The loan receivable (and hence, the entire contractual relationship that is relevant for ongoing maintenance and settlement of that receivable) remains with the originating bank (as protection buyer) without the need for any additional contractual arrangements related to the cash flow transfer to investor – making the contractual framework less complex and less costly. Moreover,

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		there is no third-party risk involved (or only to a very limited extent), since loan receivables will not have to be collected (or collateral realised, with extensive effort) in order to determine the actual loss incurred. In case of a servicer default the transaction will be terminated, losses of already reported credit events will be appraised and verified by independent, qualified third parties.
	ii upon default and specified events, the replacement of the derivative counterparty is provided for in all derivative contracts entered into for the benefit of the securitisation; and	No adjustment necessary.
	iii upon default and specified events, the replacement of the liquidity facility provider or account bank is provided for in any liquidity facilities or account bank agreements entered into for the benefit of the securitisation.	It should be adjusted: upon default and specified events, the replacement of the liquidity facility provider or account bank is provided if any liquidity facilities or account bank agreements entered into for the benefit of the securitisation. .
13	The transaction documentation contains provisions relating to an 'identified person' with fiduciary responsibilities, who acts on a timely basis and in the best interest of investors in the securitisation transaction to the extent permitted by applicable law and in accordance with the terms and conditions of the securitisation transaction. The terms and conditions of the notes and contractual transaction documentation should contain provisions facilitating the timely resolution of conflicts between different classes of noteholders by the 'identified person'. In order to facilitate the activities of the identified person, voting rights of the investors should be clearly defined and allocated to the most senior credit tranches in the securitisation.	It should be amended: In case of synthetic securitisation there is an "identified person" who is responsible for the verification (and notification) of default /losses in the underlying portfolio of securitised assets and who is independent, free from conflicts of interests and acts unbiased on a commercially reasonable basis, and, finally, that the loss verification of such "identified person" will bind all parties to the transaction. Comment: The Trustee in a synthetic securitisation will act in the best interest of the investors. In the context of a loss verification the trustee will also verify that the asset servicing has been conducted in accordance with the agreed servicing principles.
14	The management of the servicer of the securitisation should demonstrate expertise in servicing the underlying loans, supported by a management team with extensive industry experience. Policies, procedures and risk management controls should be well documented. There should be strong systems and reporting capabilities in place.	See above comment to no. 12 and 13, no adjustments necessary.

Transparent Securitisation (Table C)

No.	Criterion	Adjustments for synthetic securitisation / Comments

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15	The securitisation should meet the requirements of the Prospectus Directive.	It should be amended: The securitisation should meet the requirements of the Prospectus Directive or any other disclosure (offering) document that contains substantially the same economic information. Comment: A synthetic securitisation can be a public or private placement and can be funded or unfunded. In case of private placement or unfunded (no securities issued) securitisation the requirement cannot be fulfilled. For this reason the requirement should be extended.
16	The securitisation should meet the requirements of Article 409 of the CRR and Article 8b of the CRA (disclosure to investors).	No adjustment necessary.
17	Where legally possible, investors should have access to all underlying transaction documents.	No adjustment necessary.
18	The transaction documentation should provide in clear and consistent terms definitions, remedies and actions relating to delinquency and default of underlying debtors, debt restructuring, debt forgiveness, forbearance, payment holidays and other asset performance remedies. The transaction documents should clearly specify the priority of payments, triggers, changes in waterfall following trigger breaches as well as the obligation to report such breaches. Any change in the waterfall should be reported on a timely basis, at the time of its occurrence. The originator or sponsor should provide investors a liability cash flow.	As far as requirements are applicable, no adjustment necessary.
19	The transaction should be subject to mandatory external verification on a sample of underlying assets (confidence level of at least 95%) at issuance, by an appropriate and independent party or parties, other than a credit rating agency. Confirmation that this verification has occurred should be included in the transaction documentation.	For synthetic securitisation the external verification on a sample of underlying assets at issuance can be replaced by an ex-post verification. We propose: The losses allocated to the investor have to be verified by an independent, qualified third party, e.g. an auditing company. See comment to criterion no. 13. Comment: For the avoidance of doubt. A loss allocation is only possible, when the defaulted asset has complied with all eligibility criteria upon the inclusion into the transaction. This would be part of the loss verification process.
20	Investors and prospective investors should have readily available access to data on the historical default and loss performance, such as delinquency and default data, for substantially similar exposures to those being securitised, covering a historical period representing a significant stress or where such period is not available, at least 5 years of historical performance. The basis for	No adjustment necessary.

	claiming similarity to exposures being securitised should also be disclosed.	
21	Investors and prospective investors should have readily available access to data on the underlying individual assets on a loan-by-loan level, at inception, before the pricing of the securitisation, and on an ongoing basis. Cut-off dates of this disclosure should be aligned with those used for investor reporting purposes.	No adjustment necessary.
22	Investor reporting should occur at least on a quarterly basis. As part of investor reporting the following information should also be disclosed: • All materially relevant data on the credit quality and performance of underlying assets, including data allowing investors to clearly identify debt restructuring, debt forgiveness, forbearance, payment holidays, delinquencies and defaults in the pool; • Data on the cash flows generated by underlying assets and by the liabilities of the securitisation, including separate disclosure of the securitisation's income and disbursements, i.e. scheduled principal, scheduled interest, prepaid principal, past due interest and fees and charges; • The breach of any waterfall triggers and the changes in waterfall that this entails.	No adjustment necessary.

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Credit Risk Criteria (Table D):

No.	Criterion	Adjustments for synthetic securitisation / Comments
A	Underlying exposures should be originated in accordance with sound and prudent credit granting criteria. Such criteria should include at least an assessment of the borrower's creditworthiness in accordance with paragraphs 1 to 4, 5(a) and 6 of Article 18 of Directive 2014/17/EU or Article 8 of Directive 2008/48/EC, as applicable.	No adjustments necessary.
B	The pool of exposures to be securitised should be such that the largest aggregated exposure to a single obligor does not exceed 1% of the value of the aggregate outstanding balance. For the purposes of this calculation, loans or leases to a group of connected clients, as referred to in Article 4(39) of the CRR, should be considered as exposures to a single obligor.	No adjustments necessary.
C	The underlying exposures should fulfil each of the following criteria: i. They have to be exposures to individuals or undertakings that are resident, domiciled or established in an EEA jurisdiction, and ii. At the time of inclusion they have to meet the conditions for being assigned, under the Standardised Approach and taking into account any eligible credit risk mitigation, a risk weight equal to or smaller than: a. [40%] on a weighted average basis where the exposure is a loan secured by a residential mortgage or fully guaranteed residential loan, as referred to in paragraph 1(e) of Article 129 of the CRR; b. [50%] on an individual loan basis where the exposure is a loan secured by a commercial mortgage c. [75%] on an individual loan basis where the exposure is a retail exposure d. [100%] on an individual loan basis for any other exposures. iii. Under (a) and (b) loans secured by lower ranking security rights on a given asset should only be included in the securitisation if all loans secured by prior ranking security rights on that asset are also included in the securiti-	No specific comments on synthetic securitisation (please refer to question 1).

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	sation. Under (a) no loan in the securitised portfolio should be characterised by a loan-to-value ratio higher than 100%.	

New Criteria (Table E)

No	Criterion for synthetic securitisation	Si, T, St
1	The originator of a synthetic securitisation is a regulated institution that is required to comply with supervisory requirements for lending processes, recovery and resolution (BRRD), and risk management.	Si, St
2	If cash collateral or equivalent security is used in synthetic securitisation, it must be separated and transferred to the investor in the event that the securitisation is terminated. This can ensure that the investor recovers the invested capital.	St, T
3	Any counterparty risk within a synthetic securitisation must be covered so that the investor merely bears the credit risk of the securitised assets.	Si, St
4	Loan defaults and resulting losses are verified by an eligible, independent third party (e.g. certified public accountant). Verification also covers examination of whether the loan concerned fulfilled all the agreed criteria when included in the transaction.	St, T