

Legal Update

The EU Securitisation Regulation – Where are we now?

The EU Securitisation Regulation¹ (the **"Securitisation Regulation"**) has been applicable since 1 January 2019. The purpose of this Legal Update is to summarise the key aspects of the Securitisation Regulation and related developments up to this time.

Overview

The Securitisation Regulation covers two main areas. Firstly, it sets out provisions in relation to all securitisations which are within the scope of the regulation, consolidating and adding to the rules that previously applied to particular types of regulated entities. These provisions include requirements for securitisation special purpose entities (**"SPEs"**), due diligence, risk retention and transparency obligations, credit-granting standards and a ban on resecuritisation, together with the relevant definitions. Secondly, the regulation sets out the criteria and other rules for simple, transparent and standardised (**"STS"**) securitisations. In addition, the regulation includes provisions dealing with sanctions and penalties for non-compliance, supervision by regulatory authorities, when securitisations entered into before 1 January 2019 would fall within its scope and transitional arrangements.

Development of the Regulations

The Securitisation Regulation was published at the end of December 2017 after a long period of discussion and consultation. A separate regulation² (the **"CRR Amending Regulation"**, and together with the Securitisation Regulation, the **"EU Securitisation Regulations"**) amending certain securitisation-related provisions of the EU Capital Requirements Regulation (the **"CRR"**)³ was also published at the same time. The CRR Amending Regulation amends the CRR in order to implement a revised hierarchy of approaches for EU banks to use in calculating their regulatory capital requirements for credit exposures to securitisations and to provide lower capital requirements for STS securitisations than for non-STS securitisations. Together with the related secondary legislation, the EU Securitisation Regulations represent a comprehensive revision of the regulatory framework for securitisation in the EU.

Below is a summary of some of the key developments leading up to the EU Securitisation Regulations.

¹ Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R2402&from=EN> (hereinafter cited as **"SR"**).

² Regulation (EU) 2017/2401 of the European Parliament and of the Council of 12 December 2017 amending Regulation No 575/2013 on prudential requirements for credit institutions and investment firms, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R2401&from=EN>.

³ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0575&from=en>.

In May 2014, the Bank of England and the European Central Bank published a Discussion Paper entitled “The case for a better functioning securitisation market in the European Union”.⁴ In November 2014, the European Commission (the “**Commission**”), in a published communication to other EU authorities on an investment plan for Europe, indicated that it wanted to revive high quality securitisation markets, without repeating mistakes made before the financial crisis, in order to develop the secondary market, attract a wider investor base and improve the allocation of finance; to do so, it envisaged establishing criteria for simple, transparent and consistent securitisation.⁵ That Commission communication was followed, in February 2015, by a Green Paper on capital markets union,⁶ in which the Commission stated that it would develop proposals to encourage high-quality securitisation, as part of this project. At the same time, the Commission published a consultation document on establishing a framework for STS securitisation,⁷ in which it recognised that securitisation had an important role to play as a funding source and as a method of reallocating risk in the financial markets, and raised a number of questions, including with respect to criteria for identifying high quality securitisations, the harmonisation of the securitisation market and making capital requirements for securitisations more risk-sensitive.

At the international level, as part of Basel III, the Basel Committee on Banking Supervision (“**BCBS**”) published the revised Basel securitisation framework in December 2014, setting out a revised hierarchy of approaches for the regulatory capital treatment of securitisation transactions, and amended it in July 2016 to include alternative

capital treatment for “simple, transparent and comparable” (“**STC**”) securitisations (the “**Revised Basel Securitisation Framework**”).⁸ The Revised Basel Securitisation Framework includes preferential capital treatment for securitisations which meet the STC criteria, and was supplemented in May 2018 by papers setting out STC criteria and capital treatment for short-term securitisations (i.e. transactions funded via ABCP conduits).^{9,10}

On 30 September 2015, the Commission published its proposals for the EU Securitisation Regulations. These were followed on 30 November 2015 by revised proposals with amendments from the Council of the European Union (the “**Council**”). The revised proposals were considered in detail by the European Parliament (the “**Parliament**”) and, following draft reports from parliamentary rapporteurs, further proposed amendments from MEPs and detailed negotiations, the Parliament published reports on 19 December 2016 setting out its compromise amendments to the proposals.

In 2017, the Commission, the Council and the Parliament engaged in a “trilogue” process to agree a common position. Some of the proposed amendments which had caused particular concern for market participants¹¹ were removed or modified and revised draft texts of the EU Securitisation Regulations were agreed in May 2017. Further technical revisions were made during the “jurist-linguist process”, together with (unusually for this late stage in the process, and following concerns expressed by some market participants) some additional changes to the provisions on credit-granting with respect to self-certified residential

4 The case for a better functioning securitisation market in the European Union – A Discussion Paper, Bank of England and European Central Bank, May 2014, available at https://www.ecb.europa.eu/pub/pdf/other/ecb-boe_case_better_functioning_securitisation_market.en.pdf.

5 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank – An Investment Plan for Europe, 26 November 2014, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0903&from=EN>.

6 Green Paper – Building a Capital Markets Union, 18 February 2015, available at http://ec.europa.eu/finance/consultations/2015/capital-markets-union/docs/green-paper_en.pdf.

7 Consultation Document – An EU framework for simple, transparent and standardised securitisation, 18 February 2015, available at http://ec.europa.eu/finance/consultations/2015/securitisation/docs/consultation-document_en.pdf.

8 Basel III Document – Revisions to the securitisation framework – Amended to include the alternative capital treatment for “simple, transparent and comparable” securitisations, 11 December 2014 (rev. July 2016) (“BCBS 374”), available at <https://www.bis.org/bcbs/publ/d374.pdf>.

9 Criteria for identifying short-term “simple, transparent and comparable securitisations”, May 2018 (BCBS and IOSCO), available at <https://www.bis.org/bcbs/publ/d441.pdf>.

10 Standard – Capital treatment for short-term “simple, transparent and comparable” securitisations, May 2018 (BCBS), available at <https://www.bis.org/bcbs/publ/d442.pdf>.

11 These included increased risk retention requirements, a proposal that investors had to be “institutional investors”, i.e. certain kinds of regulated entities, a proposal that at least one of the originator, sponsor or original lender had to be a regulated entity as defined in Article 2(4) of Directive 2002/87/EC (i.e. a credit institution, insurance undertaking or investment firm), requirements for investors to disclose information about the size of their investment and to which tranche of the securitisation it related, and a provision allowing for investigation of improper selection of assets if losses on securitised assets were significantly higher than losses on retained assets, without taking into account of the intent of the originator.

mortgage loans, and revised texts were approved by the European Parliament on 26 October 2017 and by the Council on 20 November 2017. The EU Securitisation Regulations were published in the Official Journal on 28 December 2017. They came into force on 17 January and have been applicable since 1 January 2019, subject to certain transitional provisions in the Securitisation Regulation for legacy securitisations, as discussed further below.

Key terms

The Securitisation Regulation has adopted and revised the main securitisation-related definitions which were set out in the CRR and has added some new definitions. Key definitions include the following:

- **Securitisation:** The definition of “securitisation”¹² in the Securitisation Regulation is based on the broad definition in the CRR, which itself was based on the Basel II risk-based capital framework. It refers a transaction or scheme, whereby the credit risk associated with an exposure or pool of exposures is tranced, having certain specified characteristics. This means that the Securitisation Regulation has a very broad reach and covers many private and bilateral transactions even where no securities are issued. The Securitisation Regulation adds a new limb to the definition in order to exclude transactions which are used to finance or operate physical assets and classed as “specialised lending” under the CRR.

- **Tranche:** The Securitisation Regulation also carries over the CRR definition of “tranche”,¹³ as well as “first loss tranche”,¹⁴ without significant changes. The latter term is used in option (d) of the possible methods of risk retention.¹⁵
- **Originator:** The Securitisation Regulation adopts the definition of “originator” from the CRR without significant changes.¹⁶ The wording refers to any “entity” which meets the definition, without any reference to the jurisdictional scope.
- **Original lender:** a definition of “original lender” has been included, based on the definition in the European Banking Authority’s (the “EBA”) final draft regulatory technical standards on risk retention from December 2013¹⁷, with some amendments.¹⁸ It does not specify the jurisdictional scope.

¹² “securitisation” means a transaction or scheme, whereby the credit risk associated with an exposure or a pool of exposures is tranced, having all of the following characteristics:

- payments in the transaction or scheme are dependent upon the performance of the exposure or of the pool of exposures;
- the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme;
- the transaction or scheme does not create exposures which possess all of the characteristics listed in Article 147(8) of Regulation (EU) No 575/2013.

SR Article 2(1); cf. CRR Article 4(1)(61) (does not include point (c)).

¹³ “tranche” means a contractually established segment of the credit risk associated with an exposure or a pool of exposures, where a position in the segment entails a risk of credit loss greater than or less than a position of the same amount in another segment, without taking account of credit protection provided by third parties directly to the holders of positions in the segment or in other segments”.

SR Article 2(6); cf. CRR Article 4(1)(67) (the only differences are “number” rather than “pool” of exposures and “each other segment” rather than “another segment”).

¹⁴ “first loss tranche” means the most subordinated tranche in a securitisation that is the first tranche to bear losses incurred on the securitised exposures and thereby provides protection to the second loss and, where relevant, higher ranking tranches”.

SR Article 2(18); cf. CRR Article 244(15) (no change).

¹⁵ SR Article 6(3)(d).

¹⁶ “originator” means an entity which:

- itself or through related entities, directly or indirectly, was involved in the original agreement which created the obligations or potential obligations of the debtor or potential debtor giving rise to the exposures being securitised; or
- purchases a third party’s exposures on its own account and then securitises them”.

SR Article 2(6); cf. CRR Article 4(1)(67) (the only difference is “for its own account” rather than “on its own account”).

¹⁷ EBA Final - Draft Regulatory Technical Standards – On the retention of net economic interest and other requirements relating to exposures to transferred credit risk (Articles 405, 406, 408 and 409) of Regulation (EU) No 575/2013 and Draft Implementing Technical Standards - Relating to the convergence of supervisory practices with regard to the implementation of additional risk weights (Article 407) of Regulation (EU) No 575/2013, 17 December 2013, available at <https://www.eba.europa.eu/documents/10180/529248/EBA-RTS-2013-12+and+EBA-ITS-2013-08+%28Securitisation+Retention+Rules%29.pdf>.

¹⁸ “original lender” means an entity which, itself or through related entities, directly or indirectly, concluded the original agreement which created the obligations or potential obligations of the debtor or potential debtor giving rise to the exposures being securitised”.

SR Article 2(20). The EBA definition said “originally created” rather than “concluded the original agreement which created”, and added that the original lender “is not the originator”.

- **Sponsor:** the definition of “sponsor”¹⁹ has been amended (a) to confirm that any credit institution (as defined in the CRR) may be a “sponsor” whether or not it is established in the EU, (b) to provide that any investment firm,²⁰ as defined in MiFID²¹ (and not only an investment firm subject to regulation under the CRR) can be a “sponsor”, and (c) to expressly include an entity that otherwise qualifies as a sponsor and delegates day-to-day portfolio management activity to another entity authorised to perform that activity. Although certain provisions of the Securitisation Regulation use the term as if every securitisation had a “sponsor”, it is applicable only in the context of “an asset-backed commercial paper programme or other securitisation that purchases exposures from third-party entities”.
- **Institutional investor:** There is a new definition of “institutional investor” which encompasses credit institutions, investment firms, insurance and reinsurance undertakings, alternative investment fund managers (“AIFMs”), undertakings for collective investment in transferable securities (UCITS) and regulated pension funds and management companies.²² These entities are subject to the due diligence requirements in

Article 5 of the Securitisation Regulation. They include the types of entities which were subject to investor due diligence and “indirect” risk retention requirements under the CRR, the AIFM Regulation and Solvency II²³ as well as UCITS and pension fund investors which were not covered by the previous regulations.

19 “‘sponsor’ means a credit institution, whether located in the Union or not, as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013, or an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU other than an originator, that:

- (a) establishes and manages an asset-backed commercial paper programme or other securitisation that purchases exposures from third-party entities, or
- (b) establishes an asset-backed commercial paper programme or other securitisation that purchases exposures from third-party entities and delegates the day-to-day active portfolio management involved in that securitisation to an entity authorised to perform such activity in accordance with Directive 2009/65/EC, Directive 2011/61/EU or Directive 2014/65/EU”.

SR Article 2(5).

20 “investment firm” is defined by reference to point (1) of Article 4(1) of MiFID (as defined below), to mean “any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis”.

21 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (“MiFID”).

22 “‘institutional investor’ means an investor which is one of the following:

- (a) an insurance undertaking as defined in point (1) of Article 13 of Directive 2009/138/EC;
- (b) a reinsurance undertaking as defined in point (4) of Article 13 of Directive 2009/138/EC;

- (c) an institution for occupational retirement provision falling within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council in accordance with Article 2 thereof, unless a Member State has chosen not to apply that Directive in whole or in parts to that institution in accordance with Article 5 of that Directive; or an investment manager or an authorised entity appointed by an institution for occupational retirement provision pursuant to Article 32 of Directive (EU) 2016/2341;
- (d) an alternative investment fund manager (AIFM) as defined in point (b) of Article 4(1) of Directive 2011/61/EU that manages and/or markets alternative investment funds in the Union;
- (e) an undertaking for the collective investment in transferable securities (UCITS) management company, as defined in point (b) of Article 2(1) of Directive 2009/65/EC;
- (f) an internally managed UCITS, which is an investment company authorised in accordance with Directive 2009/65/EC and which has not designated a management company authorised under that Directive for its management;
- (g) a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 for the purposes of that Regulation or an investment firm as defined in point (2) of Article 4(1) of that Regulation”.

SR Article 2(12). Note that “investor” means a natural or legal person holding a securitisation position, and “securitisation position” means an exposure to a securitisation. The term “exposure”, which the Securitisation Regulation uses frequently but does not define, is defined in Article 5 of the CRR (only for purposes of CRR capital requirements for credit risk) as “an asset or an off-balance sheet item”. An “off-balance sheet item”, though not formally defined, includes lending commitments, guarantees, letters of credit and undrawn credit facilities (see CRR Annex 1). While the previous rules for banks and AIFMs referred to those investors becoming “exposed to the credit risk” of a securitisation, those for insurance companies referred to “investing” in securitisation and were understood not to apply, for example, to credit insurance policies covering securitisation positions or a credit risk tranche of an exposure or pool of exposures.

23 Part Five (Articles 404 through 410) of the CRR (applicable to credit institutions and certain investment firms), Chapter III, Section 5 (Articles 51 through 56) of the AIFM Regulation (as defined below) (applicable to AIFMs), and Articles 254 through 257 of the Solvency II Regulation (as defined below) (applicable to insurance and reinsurance undertakings). These provisions have been deleted or replaced pursuant to the EU Securitisation Regulations, subject to the transitional provisions set out in Article 43(5)-(7) of the Securitisation Regulation.

- **SSPE:** The definition of “SSPE” has been amended, among other things, to exclude “an originator or sponsor”.²⁴ Under Article 4 of the Securitisation Regulation, an SSPE may not be established in certain third countries which are listed as high risk and non-cooperative by the Financial Action Task Force²⁵ or which have not signed an agreement with a Member State with respect to compliance with certain tax matters.
- **Resecuritisation:** The Securitisation Regulation, like the CRR and Basel II.5, defines “resecuritisation” as “securitisation in which at least one of the underlying exposures is a securitisation exposure”.²⁶ It omits the previous wording requiring that “the risk associated with an underlying pool of exposures is tranching”.²⁷ This wording was redundant because the definition of “securitisation” already includes the notion of credit risk tranching. The Securitisation Regulation also omits recitals from Basel II.5 and the CRR²⁸ which discussed the application of the definition to ABCP programmes and have been helpful to market participants more generally in applying this very broad definition.

24 “‘securitisation special purpose entity’ or ‘SSPE’ means a corporation, trust or other entity, other than an originator or sponsor, established for the purpose of carrying out one or more securitisations, the activities of which are limited to those appropriate to accomplishing that objective, the structure of which is intended to isolate the obligations of the SSPE from those of the originator.”

SR Article 2(2); cf. CRR Article 4(1)(66). The CRR definition excludes “an institution” rather than “an originator or sponsor”, and includes an additional requirement that “the holders of the beneficial interests have the right to pledge or exchange those interests without restriction”. That requirement, which appears in the Basel II operational conditions for securitisation, echoes wording in a former US GAAP standard for accounting derecognition (FAS 140), and has been given little attention in practice.

25 The Financial Action Task Force (FATF) (or *Groupe d’Action financière* (GAFI)) is an inter-governmental body established in 1989 by member countries, and its objectives are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. Website: <http://www.fatf-gafi.org/about/>. The FATF currently identifies eleven countries as “high-risk and other monitored jurisdictions”. <http://www.fatf-gafi.org/countries/#high-risk>.

26 SR Article 2(4).

27 BCBS 157 page 2, adding Basel II paragraph 541(i); CRR Article 4(1) (63).

28 BCBS 157 page 2; CRR recital (64).

Scope

General

Article 1(2) of the Securitisation Regulation sets out the scope of the regulation, stating that it applies to institutional investors, originators, sponsors, original lenders and SSPEs. However, it does not set out the jurisdictional scope. The definitions of originator and original lender are not restricted to EU entities. While the definition of sponsor has been amended to clarify that it includes non-EU credit institutions, it does not state that it extends to non-EU investment firms and it is hoped that this will be clarified. Our view is that the Securitisation Regulation’s regulatory mandates in principle apply directly only to entities that are established in the EU, except in the circumstances described in the next paragraph.

Article 14 of the CRR

One particular issue which has arisen with respect to the jurisdictional scope of the Securitisation Regulation relates to Article 14 of the CRR, as amended by the CRR Amending Regulation. That article previously provided that obligations under Part Five of the CRR (which included the previous risk retention and due diligence rule for credit institutions and investment firms, together with related credit granting standards and transparency requirements for those institutions) were to be applied on a consolidated basis to entities that were subject to “consolidated supervision” with an EU institution subject to regulation under the CRR. Article 1(11) of the CRR Amending Regulation repealed Part Five and provides that references to Part Five of the CRR are to be read as references to Chapter 2 of the Securitisation Regulation, which is much broader, since Chapter 2 not only includes provisions corresponding to Part Five of the CRR, but also adds a “direct” risk retention requirement, additional provisions on credit granting and selection of assets, and much more detailed and prescriptive due diligence and transparency requirements as well as a ban on resecuritisation. Under the amended Article 14, all those provisions could in principle have applied to non-EU consolidated affiliates of CRR institutions, even if the relevant securitisation has no other connection with the EU.

The regulatory technical standards (“RTS”) under Part Five, set out in Regulation (EU) No 625/2014²⁹ (the “CRR Part Five RTS”), include a materiality provision which provides some flexibility with respect to risk retention in relation to trading book activities of non-EU affiliates of EU institutions. That wording has been carried across in the final draft RTS in relation to risk retention published by the EBA on 31 July 2018 (the “Draft Risk Retention RTS”) with respect to Article 5 of the Securitisation Regulation. Following concern from market participants, EU lawmakers have adopted an amendment to the CRR (as part of the “CRR II/CRD V” package) which limits the application of Article 14 of the CRR to Article 5 of the Securitisation Regulation, and this amendment will apply from 27 June 2019.³⁰ Pending this amendment, the EBA, together with the European Securities and Markets Authority (“ESMA”) and the European Insurance and Occupational Pensions Authority (“EIOPA”; together with ESMA and the EBA, the “ESAs”) also recognised the issue in a joint statement published on 30 November 2018 (the “ESAs Joint Statement”),³¹ in which they stated that they expected competent authorities to apply their risk-based supervisory powers in their enforcement of the legislation in a proportionate manner, taking into account the then proposed changes to the scope of Article 14.

STS EU only

Jurisdictional scope is specified with respect to STS securitisations. A transaction can only qualify as STS if the originator, sponsor and SSPE are established in the EU,³² meaning that any securitisation in which any of those parties is not established in the EU cannot be STS. In the case of

an STS ABCP programme, each of those parties to each of the transactions within that ABCP programme would have to be established in the EU. Following Brexit, a securitisation that meets all other STS criteria but has a UK originator or SSPE may not qualify as STS in the EU.

Due diligence

Under Article 5 of the Securitisation Regulation, an institutional investor (other than the originator, sponsor or original lender)³³ is required (a) prior to holding a securitisation position, to verify compliance with credit granting standards and the risk retention and transparency requirements,³⁴ (b) prior to holding a securitisation position, to carry out a due diligence assessment which enables it to assess the risks involved,³⁵ and (c) while holding a securitisation position, to establish and perform ongoing monitoring, stress tests and internal reporting and recording.³⁶

An institutional investor may delegate its due diligence obligations to an investment manager, who would become subject to the applicable sanctions and/or remedial measures which may be imposed by the relevant supervisory authority in the applicable Member State if it fails to fulfil such obligations, instead of the institutional investor.³⁷

Verification of compliance with credit granting standards and risk retention and transparency requirements

In relation to verifying compliance with credit granting standards, where either (a) the originator or original lender is established in the EU and is not a credit institution or an investment firm, or (b) the originator or original lender is established in a third country, the institutional investor must verify that “the originator or original lender has granted all the

29 Commission Delegated Regulation (EU) No 625/2014 of 13 March 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council by way of regulatory technical standards specifying the requirements for investor, sponsor, original lenders and originator institutions relating to exposures to transferred credit risk, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_174_R_0006&rid=1.

30 Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No. 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No. 648/2012, Articles 1(9) and 3(3)(d).

31 Disclosure requirements for EU securitisations and consolidated application of securitisation rules for EU credit institutions, available at https://esas-joint-committee.europa.eu/Publications/Statements/JC_Statement_Securitisation_CRA3_templates_plus_CRR2_final.pdf

32 SR Article 18.

33 This exclusion of the originator, sponsor or original lender from these provisions of Article 5 (as from corresponding provisions in the precedent regulations) can be used to support an argument that, for example, the sponsor of an ABCP programme (which, through liquidity facilities provided to the programme SSPE, is exposed to the credit risk of the underlying securitisation transactions funded by the programme) is not required to undertake certain due diligence (except as provided in paragraph 2 of Article 5) or to verify risk retention by the originators with respect to the underlying securitisation transactions. It may be questioned, however, whether this is the intended result and consistent with the purpose of the regulation.

34 SR Article 5(1).

35 SR Article 5(3).

36 SR Article 5(4).

37 SR Article 5(5).

credits giving rise to the underlying exposures on the basis of sound and well-defined criteria and clearly established processes for approving, amending, renewing and financing those credits and has effective systems in place to apply those criteria and processes".³⁸ Where the originator or original lender is established in the EU, the institutional investor must verify that credit granting standards are met "in accordance with Article 9(1) of the Securitisation Regulation" (as summarised further below), while in the case where the originator or original lender is established in a third country, the standard is "to ensure that credit-granting is based on a thorough assessment of the obligor's creditworthiness". In many cases, the information required by institutional investors will not be much different from the information provided under the previous regime, although some institutional investors may require more information from non-EU originators, sponsors and original lenders than such parties would otherwise expect to provide, as they are not directly subject to the same credit granting requirements. In the case of a fully-supported ABCP programme, the programme sponsor, rather than institutional investors holding ABCP, must verify compliance by originators and original lenders with credit-granting criteria in accordance with Article 9(1).³⁹ Where the originator or original lender is established in the EU and is a credit institution or investment firm, it will be subject to credit granting standards under Article 9(1) and, apparently, an institutional investor will not be required to verify compliance.⁴⁰

In relation to verifying compliance with the risk retention requirements, the due diligence requirement corresponds to the "indirect" risk retention requirements set out in the CRR and the AIFM Regulation⁴¹ (the "**AIFM Regulation**"). However, unlike the CRR and the AIFM Regulation, the Securitisation Regulation requires institutional investors not just to obtain disclosure from the

originator, sponsor or original lender that it retains a material net economic interest, but to verify that the relevant party retains such an economic interest and discloses that retention. As with the required verification of compliance with the credit granting standards, Article 5(1) of the Securitisation Regulation distinguishes between risk retention by entities established in the EU (where the net economic interest must be retained "in accordance with Article 6" and disclosed "in accordance with Article 7")⁴² and by entities established in a third country (where the net economic interest must be "determined in accordance with Article 6" and disclosed to institutional investors).⁴³

In relation to verifying compliance with the transparency requirements, the institutional investor must verify that "the originator, sponsor or SSPE has, where applicable, made available the information required by Article 7 in accordance with the frequency and modalities provided for in that Article".⁴⁴ Investors may find this requirement burdensome and difficult to comply with in practice.

While the jurisdictional scope of the due diligence requirements is not clear, the words "where applicable" could be read as implying that it is not necessary to verify compliance with the Article 7 transparency requirements in all cases, for example, in a situation where none of the originator, sponsor and SSPE is established in the EU and where the Article 7 transparency requirements are not directly applicable to them. However, we are aware of different views in the market on this point.

Due diligence assessment

In addition to verifying whether the credit granting standards, risk retention requirements and disclosure obligations have been complied with, the institutional investor must carry out a due diligence assessment in relation to the transaction, considering at least:

- (a) the risk characteristics of the securitisation position and the underlying exposures;
- (b) the structural features that can materially impact the performance of the securitisation position, including the priorities of payment, priority of payment-related triggers, credit enhancements, liquidity enhancements, market value triggers and the definitions of default; and

³⁸ SR Article 5(1)(a) and (b).

³⁹ See SR Article 5(2). This provision appears incomplete, as it refers only to the requirement in point (a) of Article 5(1), which covers credit granting by an entity established in the EU other than a credit institution or investment firm regulated under the CRR, and does not mention point (b) of Article 5(1), which covers credit granting by an originator or original lender not established in the EU.

⁴⁰ See SR Article 5(1)(a).

⁴¹ Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0231&from=EN>.

⁴² SR Article 5(1)(c).

⁴³ SR Article 5(1)(d).

⁴⁴ SR Article 5(1)(e).

- (c) with respect to an STS securitisation, the compliance of the securitisation with the applicable STS requirements. The institutional investor may rely “to an appropriate extent” on the STS notification and on the information disclosed by the originator, sponsor and SSPE, without solely or mechanically relying thereon.

The requirements set out in paragraphs (a) and (b) above will be familiar to many investors as they are based on the previous rules in the CRR and the AIFM Regulation. In the case of an institutional investor in commercial paper issued by a fully supported ABCP programme,⁴⁵ instead of the matters set out in (a) and (b), the investor is required to consider the features of the ABCP programme and the full liquidity support.⁴⁶

Ongoing requirements

Written procedures should be established for ongoing monitoring of compliance with the applicable requirements and where relevant, this should include monitoring of exposure type, percentage of loans more than 30, 60 and 90 days past due, default rates, prepayment rates, loans in foreclosure, recovery rates, repurchases, loan modifications, payment holidays, collateral type and occupancy, frequency distribution of credit scores, industry and geographic diversification and frequency distribution of loan to value ratios.

Stress tests are also required. For securitisations other than a fully supported ABCP programme, the stress tests need to be on the cash flows and collateral values supporting the underlying exposures, or in the absence of sufficient data, on the loss assumptions, having regard to the nature, scale and complexity of the risk of the relevant securitisation position. In the case of a fully

supported ABCP programme, the stress tests need to be carried out with respect to the solvency and liquidity of the sponsor.

Internal reporting to the institutional investor’s management body is required to ensure that it is aware of the material risks and that the risks are adequately managed.

The institutional investor must be able to demonstrate to its supervisors upon request that it has a comprehensive and thorough understanding of the securitisation position and the underlying exposures and has implemented written policies and procedures for risk management of the securitisation position and for maintaining records, or in the case of exposures to a fully supported ABCP programme, it must be able to demonstrate to its supervisors upon request that it has a comprehensive and thorough understanding of the credit quality of the sponsor and of the terms of the liquidity facility.

The ongoing requirements are based on those in Article 406 of the CRR and the corresponding provisions of the AIFM Regulation, and also have some similarities with the relevant provisions of the Delegated Regulation in relation to the Solvency II Directive⁴⁷ (the “**Solvency II Regulation**”).

Risk retention

Under Article 6 of the Securitisation Regulation, the originator, sponsor or original lender is required to retain on an ongoing basis a material net economic interest in a securitisation of not less than 5%.

Under the previous risk retention rules, the onus was on the applicable investor to obtain disclosure that the risk retention requirements had been met. The Securitisation Regulation imposes this new “direct” obligation on the originator, sponsor or original lender to retain the minimum net economic interest, while keeping the “indirect” risk retention obligations on institutional investors to verify risk retention as part of their due diligence requirements under Article 5.

The Securitisation Regulation states that there are to be no multiple applications of the retention requirements (as in the previous rules under the

45 “‘fully-supported ABCP programme’ means an ABCP programme that its sponsor directly and fully supports by providing to the SSPE(s) one or more liquidity facilities covering at least all of the following:

- (a) all liquidity and credit risks of the ABCP programme;
- (b) any material dilution risks of the exposures being securitised;
- (c) any other ABCP translation level and ABCP programme-level costs if necessary to guarantee to the investor the full payment of any amount under the ABCP”.

SR Article 2(21).

“‘asset-backed commercial paper programme’ or ‘ABCP programme’ means a programme of securitisations the securities issued by which predominantly take the form of asset-backed commercial paper with an original maturity of one year or less”.

SR Article 2(7).

46 SR Article 5(3) last sentence.

47 Commission Delegated Regulation (EU) No 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0035&from=EN>.

CRR and the AIFM Regulation). The material net economic interest may not be split between different types of retainers (as in the CRR Part Five RTS and the Solvency II Regulation) and may not be subject to any credit risk mitigation or hedging (as in the previous rules under the CRR, the AIFM Regulation and the Solvency II Regulation).

The sole purpose test

An entity will not be permitted to be an originator for purposes of the risk retention requirement if it has been established or operates for the sole purpose of securitising exposures.⁴⁸ This follows a recommendation by the EBA in its reports of December 2014 (relating to the CRR)⁴⁹ and April 2016 (which considered the Commission's draft of the Securitisation Regulation of 30 December 2015)⁵⁰ which identified a "loophole" in the definition of "originator", whereby an originator SSPE could be established solely for the purpose of meeting the risk retention requirements, and could purchase a third party's exposures and securitise them within one day, which while it met the legal definition of "originator" would not be within the spirit of the risk retention requirements. The Draft Risk Retention RTS contains further details of the principles that should be considered for the purpose of the sole purpose test.⁵¹

Methods of risk retention

The required material net economic interest may be held in any of the following ways:

- (a) not less than 5% of the nominal value of each of the tranches sold or transferred to investors (known as a "vertical slice");

- (b) in the case of revolving securitisations⁵² or securitisations of revolving exposures,⁵³ retention of the originator's interest of not less than 5% of the nominal value of each of the securitised exposures;
- (c) retention of randomly selected exposures, equivalent to not less than 5% of the nominal value of the securitised exposures, where the number of potentially securitised exposures is not less than 100 at origination;
- (d) retention of the first loss tranche⁵⁴, and if such retention does not amount to 5% of the nominal value of the securitised exposures, other tranches having the same or a more severe risk profile, and not having an earlier maturity, than those transferred or sold to investors, resulting in a retention of not less than 5% of the nominal value of the securitised exposures; or
- (e) retention of a first loss exposure of not less than 5% of every securitised exposure in the securitisation.

The methods of retention are the same as in Article 405 of the CRR, except that paragraph (b) has now been expanded to include revolving securitisations (which under Article 405(1) of the CRR were treated as covered by option (a) (vertical slice) pursuant to Article 5 of the CRR Part Five RTS). There is no "L-shaped" retention option as in the United States. Further details of how the methods of risk retention should be applied and the measurement of the retained interest are contained in the Draft Risk Retention RTS.

Market participants were relieved that the minimum risk retention percentage remains at 5%, since there had been proposals in the Parliament to increase the percentage to up to 10% with a possibility of adjusting it to a maximum of 20% in the future.

48 SR Article 6(1) last sentence.

49 EBA Report on securitisation risk retention, due diligence and disclosure, 22 December 2014, available at <https://www.eba.europa.eu/documents/10180/534414/Securitisation+Risk+Retention+Report.pdf>.

50 EBA Report on securitisation risk retention, due diligence and disclosure under Article 410(1) of the CRR, 12 April 2016, available at <https://www.eba.europa.eu/documents/10180/1359456/EBA-OP-2016-06+Report+on+Securitisation+Risk+Retention+Due+Diligence+and+Disclosure.pdf>.

51 The mandate for the risk retention RTS is narrower in some respects than it was previously under the CRR, as it does not cover due diligence, credit granting and ongoing transparency requirements in relation to materially relevant data, although, as discussed below, the Securitisation Regulation requires separate RTS to be put in place with respect to the new transparency requirements.

52 "revolving securitisation" means a securitisation where the securitisation structure itself revolves by exposures being added to or removed from the pool of exposures irrespective of whether the exposures revolve or not".

SR Article 2(16).

53 "revolving exposure" means an exposure whereby borrowers' outstanding balances are permitted to fluctuate based on their decisions to borrow and repay, up to an agreed limit".

SR Article 2(15).

54 "first loss tranche" means the most subordinated tranche in a securitisation that is the first tranche to bear losses incurred on the securitised exposures and thereby provides protection to the second loss and, where relevant, higher ranking tranches".

SR Article 2(18).

However, the Securitisation Regulation does provide for the European Systemic Risk Board (the “**ESRB**”) to publish reports, in collaboration with the EBA, when the ESRB considers necessary, or at least every 3 years, on the financial stability implications of the securitisation market, and these may include recommendations on whether the risk retention levels should be modified.⁵⁵

The retention may be satisfied on a consolidated basis (i.e. by any entity in the same consolidated group as the originator, sponsor or original lender) in the case of a mixed financial holding company, a parent institution or a financial holding company established in the EU, subject to meeting certain requirements. Otherwise, retention on a consolidated basis is not permitted.

The jurisdictional scope of the risk retention requirements in Article 6 is not specified. The introduction to the original draft of the Securitisation Regulation by the Commission indicated that where none of the originator, sponsor or original lender is established in the EU⁵⁶ the indirect approach would continue to apply, suggesting that the direct approach would not apply in this situation. Although this wording has not been carried across, we believe the logical interpretation, based on general principles and practical limitations, is that the direct risk retention requirements should not apply to non-EU originators, sponsors and original lenders. This interpretation is supported by the EBA’s analysis of responses to the previous consultation in the Draft Risk Retention RTS, where the EBA stated that although the jurisdictional scope of the “direct” retention obligation relates to a general interpretation issue in relation to the Securitisation Regulation and is outside the scope of the Draft Risk Retention RTS, they agreed that a “direct” obligation should apply only to originators, sponsors and original lenders established in the EU. However, because of the due diligence obligations that apply to EU institutional investors under Article 5 of the Securitisation Regulation, in practice non-EU originators, sponsors and original lenders will still need to ensure that there has been risk retention in accordance with the Securitisation

Regulation in order for those EU institutional investors to comply with their due diligence obligations.

At the time of writing, the Draft Risk Retention RTS have not yet been approved and this is now expected to take place later in 2019.

Selection of assets

Under Article 6(2) of the Securitisation Regulation, originators are not permitted to select assets for the securitisation with the aim of rendering losses on the assets, measured over the life of the transaction up to a maximum of 4 years, higher than the losses over the same period on comparable assets which remain on the originator’s balance sheet. If the performance of the transferred assets is found to be significantly lower than the retained assets, sanctions may be imposed in the event of intentional breach by the originator. This wording is less onerous than the original Parliament proposal, which would have measured losses on securitised assets against losses on retained assets over a one year period and did not take into account the intent of the originator.

The Draft Risk Retention RTS provide that assets may be selected for securitisation with a higher than average risk profile than retained assets as long as this is clearly communicated to investors and competent authorities in advance. In addition, the originator can show that it has not intentionally breached the restrictions on adverse selection of assets if it has established and applied appropriate policies and procedures to ensure that the securitised assets would not reasonably be expected to lead to higher losses than comparable retained assets. However, the restrictions on adverse selection may still raise concerns for originators who may have to prove that they had not deliberately cherry-picked assets with a higher risk of default for the securitisation.

Transparency

Disclosure obligations

The originator, sponsor and SSPE of a securitisation are required under Article 7 of the Securitisation Regulation to make the following information available to the holders of a securitisation position, the relevant competent authorities and, upon request, to potential investors:

⁵⁵ SR Article 31(2).

⁵⁶ The concept of whether an entity is “established in the EU” is generally considered to apply to a subsidiary, but not to a branch, of a non-EU entity.

- (a) information on the underlying exposures on a quarterly basis (or in the case of ABCP, on a monthly basis);
- (b) all underlying documentation that is essential for an understanding of the transaction, including the final offering document or prospectus and the main transaction documents.⁵⁷ A detailed description of the priority of payments must be included in the documentation;
- (c) if the transaction does not have a prospectus complying with the Prospectus Directive,⁵⁸ a summary of the transaction with the main features of the transaction, including the structure, cash flows, waterfall, credit enhancement, liquidity, voting rights and all material triggers and events;
- (d) in the case of an STS transaction, notification that the securitisation is an STS transaction;
- (e) investor reports containing (i) all materially relevant data on credit quality and performance of the underlying exposures, (ii) trigger events for changes in the priority of payments or replacement of counterparties, and for non-ABCP transactions, data on the cash flows of the underlying exposures and the liabilities of the securitisation, and (iii) information regarding the risk retention and the method used;
- (f) inside information which is required to be made public in accordance with the EU Regulation on insider dealing and market manipulation (the “**Market Abuse Regulation**”),⁵⁹ and
- (g) if paragraph (f) does not apply, any significant event such as a material breach of obligations, structural changes, a change in the risk characteristics, an STS securitisation ceasing to meet the STS requirements or any material amendment to the transaction documents.

In the case of ABCP, certain specified information is to be made available in aggregate form to holders of securitisation positions and, upon request, to potential investors. Loan level data is required to be made available to the sponsor, and upon request, to competent authorities.⁶⁰

In Annex 1 (*Transparency*) we set out further details on what kinds of information have to be provided when and in what manner.

Originators, sponsors and SSPEs are required to comply with national and EU law in relation to confidential information and processing of personal data as well as confidentiality obligations relating to information relating to the customer, original lender or debtor, unless such confidential information is anonymised or aggregated.⁶¹ This wording was included due to concerns from market participants about potential breaches of confidentiality obligations and data protection laws. However, despite that, the Securitisation Regulation states that competent authorities can request the applicable confidential information. It is also unclear whether commercial terms, e.g. fees and interest rates, can be excluded/redacted.

The originator, the sponsor and the SSPE of a securitisation are required to designate one entity among them to fulfil the disclosure requirements and such entity is required to make such information available by means of a securitisation repository,⁶² or if no securitisation repository has been registered, by means of a website that meets certain requirements.

In the case of private securitisations (i.e. those where no prospectus is required to be published in accordance with the Prospectus Directive), the requirement to disclose such information by way of a repository or a website is disappplied, but the relevant information must still be disclosed. Market participants had hoped for a more extensive carve-out from the disclosure requirements for private transactions, given that investors in such transactions typically have direct access to the originator and sponsor, if any, and can request whatever information they require, but private transactions remain in scope, including the obligation to report the relevant information in the form of the applicable templates.

57 Further details are provided in Annex 1 (*Transparency*).

58 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (the “**Prospectus Directive**”).

59 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

60 SR Article 7(1) fourth sub-paragraph.

61 SR Article 7(1) sixth sub-paragraph.

62 “‘securitisation repository’ means a legal person that centrally collects and maintains the records of securitisations”.
SR Article 2(23).

The jurisdictional scope of the transparency requirements is not stated but our view is that they should not be directly applicable to non-EU originators and sponsors. However, non-EU entities may in practice be asked by EU institutional investors to provide the relevant information if and to the extent that those investors determine that it is necessary in order to comply with their due diligence obligations under Article 5, as discussed above.

Technical standards and reporting templates

The Securitisation Regulation requires ESMA to develop RTS to specify the requirements for the information on the underlying exposures and the investor reports, and implementing technical standards (“**ITS**”) with respect to the format of the information to be provided, by way of standardised reporting templates. On 19 December 2017 ESMA published a Consultation Paper with respect to the draft RTS and ITS, and this was followed by draft RTS and ITS on 22 August 2018. Market participants had a number of questions and concerns on those draft RTS and ITS, particularly around the templates for ABCP securitisations, the limited availability of so-called “No Data” options, and the application of the templates to private securitisations. The Commission notified ESMA, in a letter dated 30 November 2018, that it would only endorse the draft RTS and ITS once certain amendments were made and requesting it to consider extending the use of the “No Data” options particularly with respect to the ABCP templates. Following this, ESMA published an Opinion on 31 January 2019,⁶³ including revised RTS (the “**Draft Transparency RTS**”) and ITS, and a Q&A document intended to provide guidance on the completion of the templates. An updated version of the Q&A document was published by ESMA on 27 May 2019.⁶⁴ While the “No Data” options have been extended, market participants still have a number of questions and concerns in connection with the draft templates. At the time of writing, the revised RTS and ITS have not yet been adopted by the Commission and they are expected to be finalised later in 2019.

63 Opinion – Amendments to ESMA’s draft technical standards on disclosure requirements under the Securitisation Regulation, available at https://www.esma.europa.eu/sites/default/files/library/esma33-128-600_securitisation_disclosure_technical_standards-esma_opinion.pdf.

64 Questions and Answers On the Securitisation Regulation, available at <https://www.esma.europa.eu/press-news/esma-news/esma-updates-its-questions-and-answers-securitisation-regulation>.

In the meantime, Article 43(8) of the Securitisation Regulation provides that until the new transparency RTS have been adopted and become applicable, the relevant entities will be required to provide information in line with the requirements under Annexes I to VIII of the relevant Delegated Regulation⁶⁵ relating to Article 8b of the Credit Rating Agencies Regulation⁶⁶ in order to meet their obligations under Article 5(1)(a) and (e) (which deal with information on underlying exposures and investor reports). However, the so-called “CRA3 templates” are different from the forms expected to be required under Article 7, and have been published only for certain types of transactions (excluding, for example, private ABCP transactions and trade receivables securitisations). Although the regulation setting out the CRA3 templates was adopted in 2014 and was to become applicable in 2017, these templates had not been used in line with CRA3, as the website to be established by ESMA had not yet been set up.⁶⁷ Some market participants find that using the CRA3 templates is not too difficult, since the templates are similar in form to those used for ECB and Bank of England liquidity purposes, but for some participants it would be onerous and costly to have to comply with the CRA3 templates and then amend their systems and reporting procedures again to apply with the new ESMA templates. In the ESAs Joint Statement, the ESAs recognised the “severe operational challenges” of complying with the CRA3 templates stated that they expected competent authorities to apply their supervisory powers in a proportionate and risk-based manner, taking into account the type and extent of information already being disclosed by reporting entities, considered on a case-by-case basis.

65 Commission Delegated Regulation (EU) 2015/3 of 30 September 2014 supplementing Regulation (EC) No 1060/2009 of the European Parliament and the Council with regard to regulatory technical standards on disclosure requirements for structured finance instruments, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0003&from=en>.

66 Regulation (EC) No 1060/2009 on credit rating agencies, as amended, including by Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0462&from=EN>.

67 ESMA update on reporting structured finance instruments information under the CRA Regulation (27 April 2016).

Ban on resecuritisation

Article 8 of the Securitisation Regulation contains a ban on resecuritisation, stating that “the underlying exposures used in a securitisation shall not include any securitisation positions”. Investments in or other credit exposures to resecuritisations are in any event subject to punitive bank capital requirements under the CRR⁶⁸ and following its amendment by the CRR Amending Regulation (the “**Amended CRR**”)⁶⁹. Resecuritisations are also excluded from favourable treatment under the CRR liquidity coverage ratio (the “**LCR**”) (Level 2B securitisations)⁷⁰ and the Solvency II insurance capital rules (Type 1 securitisations), they are subject to credit rating agency “rotation” requirements under the Credit Rating Agencies Regulation,⁷¹ and they are excluded from ABCP issued by ABCP programmes which is eligible for purchase by money market funds under the new EU Money Market Funds Regulation (the “**Money Market Funds Regulation**”).⁷² This provision, which was added by the Parliament, goes further by actually prohibiting such transactions.

There are exclusions from the ban on resecuritisation for certain specified purposes in relation to the winding up of a credit institution, investment firm or financial institution, ensuring the viability of any such entity to avoid its winding up, or the preservation of investors’ interests where underlying exposures are non-performing, and this list may be supplemented by certain RTS. Helpfully, the Securitisation Regulation also states that fully supported ABCP programmes will not be resecuritisations provided that the individual transactions are not resecuritisations and there is not a second level of tranching at the programme

level through the credit enhancement. This means that “partially supported” ABCP programmes generally will not be permitted. While it is unlikely that market participants will intentionally be structuring any transactions as resecuritisations, care should be taken to analyse complex structures to ensure that they would not be characterised as a resecuritisation, given the broad definition of “securitisation” in the Securitisation Regulation.

The ban on resecuritisation excludes any securitisation the securities of which were issued before 1 January 2019. We assume that this means that, for transactions where all securities have been issued before 1 January 2019, those transactions will be excluded from the ban on resecuritisation, so long as no further securities are issued on or after that date. If new securities are issued with respect to any legacy resecuritisation transactions after 1 January 2019, it is possible that both the new securities and any existing securities issued in the same programme and backed by the same pool of assets/transactions would be subject to the ban.

Article 8 does not state how or to whom the ban on resecuritisation applies or what consequences arise from violating the ban, and the jurisdictional scope is not specified. Other than the possibility of RTS to add to the list of exclusions from the ban on resecuritisation (which we do not expect to apply widely) there is no mandate for any RTS with respect to this Article. In the absence of clear legislation or guidelines, EU institutional investors would be advised to avoid investing in resecuritisation positions, even if the originator, sponsor and SSPE are established in third countries, and EU originators and sponsors should avoid creating resecuritisations.

Criteria for credit granting

Article 9 of the Securitisation Regulation sets out criteria for credit granting for originators, sponsors and original lenders. Under Article 9(1), such entities are required to apply to securitised exposures the same sound and well-defined criteria which they apply to securitised exposures, as well as the same clearly established processes for approving, amending, renewing and refinancing credits. Credit-granting needs to be based on a thorough assessment of creditworthiness.

68 CRR Article 251 (which deals with the calculation of risk weights under the Standardised Approach), Article 261 (which deals with the calculation of risk weights using the Ratings Based Method) or Article 262 (which deals with the calculation of risk weights using the Supervisory Formula Method). These are consistent with the 2009 amendments to the Basel II bank capital framework (Enhancements to the Basel II framework, July 2009 (BCBS 157)).

69 Amended CRR Article 269.

70 Article 13 (Level 2B securitisations) of Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0061&from=EN>.

71 Article 6b of the Credit Rating Agencies Regulation.

72 Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds, Article 11, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1131&from=EN>.

Under Article 9(2), with respect to residential loans made after the entry into force of the Mortgage Credit Directive⁷³ (which requires the verification of information as to the borrower's creditworthiness), the securitised pool may not include any loan that is marketed and underwritten on the basis that the borrower or any intermediary was made aware that the information provided by the borrower might not be verified by the lender. The prohibition of self-certified mortgage loans was originally included only in the STS criteria, but in the final compromise text it was applied to all securitisations of residential loans. This caused concern for some market participants since it would have affected existing securitisations which included self-certified mortgage loans in their securitised asset pools and which would otherwise be refinanced from time to time after the effective date of the Securitisation Regulation. As a result of this concern, the wording of the final text was amended to apply only to the applicable residential loans made after the date of entry into force of the Mortgage Credit Directive, i.e. after 20 March 2014. However, the Mortgage Credit Directive was not required to be incorporated into the national laws of the Member States until 21 March 2016. Consequently, it appears that any self-certified loans which were originated between those two dates may not be securitisable.

Under Article 9(3), originators who purchase exposures for their own account and then securitise them (under "limb (b)" of the originator definition) must check that the entity that was involved in the original agreement relating to the exposures has fulfilled the credit granting requirements. There is an exception to this, where the original agreement which created the obligations was entered into before the entry into force of the Mortgage Credit Directive and the originator that purchases and securitises the exposures meets the credit standard that applied to originator institutions under Article 21(2) of the CRR Part Five RTS. That standard requires an originator to apply the same sound and well-defined credit granting criteria as it applies to non-securitised exposures. However, the Article 9(3) requirement could prove difficult for "limb (b)" originators to comply with in practice.

73 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

STS securitisations

The Securitisation Regulation provides for securitisations to be designated as STS if they meet all the relevant requirements. If a securitisation is designated as STS and also meets several additional criteria under the Amended CRR, an EU regulated bank that invests in or otherwise takes credit exposure to that securitisation will have a lower capital charge for that exposure than would otherwise apply under the Amended CRR.⁷⁴ A transaction qualifying as STS (and for Solvency II and the LCR meeting other criteria) will also benefit from lower capital requirements for insurance and reinsurance undertakings subject to regulation under Solvency II,⁷⁵ will be eligible for inclusion in high quality liquid assets by banks for the purposes of the LCR,⁷⁶ will be eligible for investment by money market funds subject to the Money Market Funds Regulation⁷⁷ and may also benefit from other relatively favourable regulatory treatment. The STS regime is thus meant to encourage EU institutional investors to invest in securitisations and so to foster the growth of a healthy securitisation market.

The STS criteria

There are separate STS requirements for non-ABCP securitisations and for ABCP securitisations.

For non-ABCP securitisations, the Securitisation Regulation contains separate Articles setting out detailed criteria with respect to simplicity, standardisation and transparency.⁷⁸

For ABCP securitisations, there are separate requirements which must be met at transaction

74 Amended CRR Articles 260, 262, 264.

75 Commission Delegated Regulation (EU) 2018/1221 of 1 June 2018 amending Delegated Regulation (EU) 2015/35 as regards the calculation of regulatory capital requirements for securitisations and simple, transparent and standardised securitisations held by insurance and reinsurance undertakings.

76 Commission Delegated Regulation (EU) 2018/1620 of 13 July 2018 amending Delegated Regulation (EU) 2015/61 to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for credit institutions, Article 1(8) (amending Article 13 of Delegated Regulation 2015/61).

77 Commission Delegated Regulation (EU) 2018/990 of 10 April 2018 amending and supplementing Regulation (EU) 2017/1131 of the European Parliament and of the Council with regard to simple, transparent and standardised (STS) securitisations and asset-backed commercial papers (ABCPs), requirements for assets received as part of reverse repurchase agreements and credit quality assessment methodologies, Article 1 (amending Article 13(1)(c) of Regulation (EU) 2017/1131 on money market funds).

78 SR Articles 20, 21 and 22.

level, for the sponsor and at programme level.⁷⁹ Except for certain specified requirements,⁸⁰ in relation to which a maximum of 5% of the aggregate amount of the exposures may be “temporarily” non-compliant, all ABCP transactions within an ABCP programme must be STS in order for the programme to be considered STS.

The STS criteria and the additional CRR criteria for non-ABCP and ABCP securitisations are summarised and compared in Annex 2 (*STS criteria and additional CRR criteria*).

As mentioned previously, a securitisation can only be STS if the originator, sponsor and SSPE are established in the EU. This means that many multi-jurisdictional securitisations could not qualify as STS as they have originators outside the EU. In addition, transactions with UK entities will no longer be STS under the Securitisation Regulation after Brexit.⁸¹ It is possible that an equivalence regime will be introduced for third country originators, sponsors and SSPEs at some point in the future, but this is not certain and may not happen for some time.

The Securitisation Regulation requires the EBA to develop RTS specifying which underlying exposures shall be deemed to be homogeneous. The EBA published final draft RTS setting out the conditions for securitisations to be deemed to be homogeneous on 31 July 2018.⁸²

The EBA was also required to publish guidelines with respect to the STS criteria. The EBA published its final guidelines with respect to non-ABCP and ABCP securitisations on 12 December 2018 (the “**STS Guidelines**”)⁸³ and these are expected to be very useful in interpreting the STS criteria.

The complexity, number of requirements, restrictiveness and, in many cases, lack of clarity of the STS criteria, as well as the notification obligations (as discussed below) and the severity of the penalties for non-compliance, may limit the extent to which market participants will want or be able to make use of the STS criteria. This is particularly the case for multi-seller ABCP programmes, where the requirements are much more extensive than for investment in ABCP by money market funds under the Money Market Funds Regulation.⁸⁴ However, a number of STS transactions have been established and we understand that others are in progress.

STS notification

The originator and sponsor have a joint obligation to notify ESMA where a transaction meets the STS requirements. In the case of an ABCP programme, the obligation to notify, both with respect to the programme and the transactions within it, falls upon the sponsor. Notification will need to be made using the prescribed template and will need to include an explanation of how each of the applicable STS criteria have been complied with.

ESMA is required to maintain a list of all STS transactions on its official website.

The originator and sponsor are required to notify ESMA if a securitisation is no longer STS-compliant.

The Securitisation Regulation mandates ESMA to develop RTS setting out the information required in the STS notification and ITS setting out the templates.

⁷⁹ SR Articles 24, 25 and 26.

⁸⁰ SR Articles 24(9) (which provides that the transferred exposures must not be in default or to a credit-impaired debtor or guarantor), (10) (which requires at least one payment to have been made under the exposures at the time of transfer (excluding revolving securitisations payable in a single instalment or having a maturity of less than one year) and (11) (which requires that the repayment of the holders of the securitisation positions shall not have been structured to depend predominantly on the sale of assets securing the underlying exposures).

⁸¹ It is likely that there will be a parallel STS regime in the UK after Brexit, as indicated by The Securitisation (Amendment) (EU Exit) Regulations 2019, which are expected to apply in the event of a no-deal Brexit. These are available at https://www.legislation.gov.uk/uksi/2019/660/pdfs/uksi_20190660_en.pdf.

⁸² EBA Final Draft Regulatory Technical Standards on the homogeneity of the underlying exposures in securitisation under Articles 20(14) and 24(21) of Regulation (EU) No 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, available at <https://eba.europa.eu/documents/10180/2298183/Draft+RTS+on+homogeneity+of+underlying+exposures+in+securitisation+%28EBA-RTS-2018-02+%29.pdf>.

⁸³ Final Report on Guidelines on the STS criteria for non-ABCP securitisation, available at <https://eba.europa.eu/documents/10180/2519490/Guidelines+on+STS+criteria+for+non-ABCP+securitisation.pdf>, and Final Report on Guidelines on the STS criteria for ABCP securitisation, available at <https://eba.europa.eu/documents/10180/2519490/Guidelines+on+STS+criteria+for+ABCP+securitisation%29.pdf>.

⁸⁴ Article 11(1)(b) of the Money Market Funds Regulation allows investment by money market funds in ABCP from fully supported programmes subject to no resecuritisation or synthetic securitisations.

Third party verification agents

Authorised third parties may be used to verify STS compliance. While the use of a third party verification agent may be very helpful, this will not absolve the originator, sponsor and SSPE from liability with respect to their obligations under the Securitisation Regulation. Third party verification agents will need to be authorised by the applicable competent authority and will need to meet certain conditions set out in Article 28 of the Securitisation Regulation as supplemented by the applicable RTS.

Administrative sanctions and remedial measures

Article 32 of the Securitisation Regulation requires EU member states to put in place rules establishing administrative sanctions and remedial measures for failure to comply with certain breaches of the Securitisation Regulation. The administrative sanctions would only apply in the case of negligence or intentional infringement. The relevant administrative sanctions and measures would apply in the case of failure to comply with the risk retention, transparency and credit-granting criteria. In the case of securitisations designated as STS, they could also be imposed for failure to meet the STS requirements, making a misleading notification, failure to provide notification that a securitisation no longer meets the STS requirements or if an authorised third party has failed to provide notification of changes to the information it has provided in order to be authorised. The administrative sanctions and remedial measures are required to be effective, proportionate and dissuasive, and should as a minimum include the power to make public statements in relation to the infringement, orders to cease and desist from the applicable conduct, temporary bans on individuals carrying out management functions, temporary bans on making STS notifications for failure to meet the STS requirements or making a misleading notification as to STS compliance and maximum fines of at least €5 million (including for individuals) or up to 10% of total annual net turnover. Member states may also (but are not required to) impose criminal sanctions in addition to, or instead of, such administrative sanctions and remedial measures.

Article 32 does not include penalties for breach of Article 5 by institutional investors. However, the new Article 270a of the Amended CRR provides

that an additional risk weight will be imposed where the requirements of Chapter 2 of the Securitisation Regulation are not met in any material respect, which will result in an increase in the regulatory capital which would need to be held against the applicable securitisation position. The additional risk weight is required to be a proportionate additional risk weight of no less than 250% of the risk weight, capped at 1,250%, and such additional risk weight will progressively increase with each subsequent infringement of the due diligence and risk management provision.

Application date, secondary legislation, further measures and transitional provisions

Application date

The Securitisation Regulation is directly effective in EU Member States without the need for any implementing legislation and has been applicable to the relevant transactions from the application date of 1 January 2019.

It applies to securitisations the securities of which are (or have been) issued on or after 1 January 2019. In the case of securitisations which do not involve the issuance of securities, the Securitisation Regulation states that references to “securitisations the securities of which are been issued” shall be deemed to mean “securitisations the initial securitisation positions of which are created”, but adds a proviso that the Securitisation Regulation “applies to any securitisations that create new securitisation positions on or after 1 January 2019”. It remains unclear how this proviso should be interpreted, as well as what could constitute the creation of a new securitisation position,⁸⁵ and, in our experience, market participants appear to be taking a cautious approach, giving a narrow application to grandfathering and a wide interpretation to the events that cause the Securitisation Regulation to apply.

Consequently, while in many cases pre-2019 securitisation transactions will be grandfathered, in many situations they may end up falling within the scope of the Securitisation Regulation. For example, legacy transactions with new issuances will fall within scope even though such transactions

⁸⁵ The definition of “securitisation position” is very broad, and could include swaps, liquidity facilities, third party credit enhancement, etc. Even a securitisation with an issuance of securities will probably have additional “securitisation positions” that are not securities.

were established before the new rules came into effect. Master trust programmes, in which a single issuer issues different series of securities from time to time backed by the same revolving pool of underlying exposures, are understood to be subject to the Securitisation Regulation once they issue a new series after the SR application date. In the case of ABCP programmes, even though underlying transactions may be grandfathered, Securitisation Regulation requirements apply at the programme level from the date of the first issuance of ABCP following the application date.

Secondary legislation

As mentioned above, the Securitisation Regulation also provides for secondary EU legislation in the form of RTS, ITS, delegated acts or guidelines, and the fact that many of these are not yet in place makes compliance more challenging for the securitisation industry. We have set out in Annex 3 (*Technical standards, guidelines and delegated acts pursuant to the Securitisation Regulation*) a table setting out the various pieces of secondary legislation in relation to the Securitisation Regulation. This secondary legislation, once finalised and adopted, will provide some much-needed clarification on certain aspects of the new regulatory regime, but there will remain many questions which will need to be resolved, and it is likely that there will need to be further discussions with the regulators on these points. In the meantime, market practice is developing gradually. For UK entities, the application of the Securitisation Regulation after Brexit will need to be considered.

Transitional measures

As regards due diligence requirements, in the case of securitisations the securities of which were issued⁸⁶ on or after 1 January 2011 but before 1 January 2019, and in the case of securitisations where the securities were issued before 1 January 2011 where new exposures have been added or substituted after 31 December 2014, the due diligence requirements under the CRR, the AIFM Regulation or the Solvency II Regulation (as applicable), in the versions applicable on 31 December 2018, will apply.

For the risk retention requirements, in the case of securitisations the securities of which were issued before 1 January 2019, credit institutions, investment firms, insurance and reinsurance firms and AIFMs are required to comply with the risk retention requirements in the CRR, the AIFM Regulation or the Solvency II Regulation (as applicable) in the versions applicable on 31 December 2018. In the case of the direct risk retention requirements under Article 6 of the Securitisation Regulation, originators, sponsors and original lenders are required to apply the rules set out in the CRR Part Five RTS with respect to securitisations which fall within the scope of the Securitisation Regulation until the new risk retention RTS apply (even though the previous rules relate to the “indirect” approach).

With respect to the transparency requirements, Article 43(8) of the Securitisation Regulation provides that until the applicable RTS have been adopted, originators, sponsors and SSPEs will be required to provide the information referred to in Articles 7(1)(a) and (e) in line with the requirements under Article 8b of the Credit Rating Agencies Regulation and the relevant Delegated Regulation, as described above.

With respect to eligibility for STS treatment, Article 43(3) of the Securitisation Regulation provides transitional rules to allow non-ABCP legacy transactions to be considered STS provided that they met certain of the STS requirements at the time of issuance and certain other STS requirements at the time of notification. However, this does not extend to ABCP transactions or programmes.

Further measures

The Joint Committee of the ESAs is required to publish reports by 1 January 2021 and every three years after that on certain matters, including the implementation of the STS requirements, material risks that may have materialised, due diligence, transparency and risk retention.

In addition, the European Commission must publish a report by 1 January 2022 on matters such as the effects of the Securitisation Regulation, the securitisation market, the methods of risk retention, disclosure and the possibility of an equivalence regime with respect to STS securitisations for originators, sponsors and SSPEs in third countries.

⁸⁶ See above discussion of “Application date” and previous footnote.

Furthermore, the EBA, in cooperation with ESMA and EIOPA, is required to publish a report by 2 July 2019 on the feasibility of establishing a framework to allow balance sheet synthetic securitisations to be considered STS.⁸⁷

Conclusion

The Securitisation Regulation introduces some fundamental changes to the securitisation market. While the risk retention requirements are largely unchanged, there will be a large additional burden on securitisation transactions in other respects, particularly as regards the transparency requirements. In addition, the extent to which investors will make use of the STS regime remains to be seen. There are many outstanding questions to be resolved on the interpretation of the Securitisation Regulation, and many of the secondary regulations, even if in substantially final form and not likely to change, have not yet been adopted or become applicable. While these issues pose challenges for originators and sponsors as well as investors in the securitisation market, market participants are gradually working through these challenges and adjusting their practices to the new system.

If you have any questions or comments in relation to this Legal Update, please contact the authors or your usual Mayer Brown contact.

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⁸⁷ Work is underway to develop a set of STS criteria for balance sheet (but not arbitrage) synthetic securitisations. The EBA Report on Synthetic Securitisation, published in December 2015, available at <https://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-26+EBA+report+on+synthetic+securitisation.pdf> proposed some criteria for balance sheet synthetic securitisations. The Commission is required to submit a report to the European Parliament by 2 January 2020 based on the EBA report which was required to be prepared by 2 July 2019, together with a legislative proposal if appropriate.

Annex 1

Transparency

Information	Non-ABCP	ABCP	STS (Non-ABCP) ⁸⁸	Comments
Information on the underlying exposures	Quarterly no later than one month after interest payment date.	Monthly, at latest one month after the end of the period the report covers. Information to be made available in aggregate form to holders of securitisation positions and, upon request, to potential investors. Loan level data to be provided to the sponsor and, upon request, to competent authorities.	Information to be made available to potential investors before pricing upon request.	Information to be specified in RTS and to be provided using the applicable reporting template.
All underlying documentation that is essential to understand the transaction, including the final offering document or prospectus, the asset sale or transfer agreement and any declaration of trust, derivatives and guarantee agreements, servicing, back-up servicing, administration and cash management agreements, trust deed, security deed, agency agreement, account bank agreement, guaranteed investment contract, incorporated terms and definitions, intercreditor agreements, subordinated loan agreements and liquidity facility agreements. A detailed description of the priority of payments must be included in the documentation.	Before pricing.	Before pricing.	Before pricing in at least draft or initial form. Final documentation no later than 15 days after closing.	STS wording on timing of disclosure differs from non-STS wording. Not clear that documentation can be provided in draft or initial form, as opposed to final form, before pricing for non-STS.

⁸⁸ Article 22 SR. Additional information must be disclosed for STS securitisations – see Annex 2 (STS criteria and additional CRR criteria) for details.

Information	Non-ABCP	ABCP	STS (Non-ABCP) ⁸⁸	Comments
If there is not a prospectus (where required under the Prospectus Directive), a summary or overview of the transaction with the main features of the transaction, including the structure, exposure characteristics, cash flows, waterfall, credit enhancement, liquidity, voting rights and all material triggers and events.	Before pricing.	Before pricing. Details of exposure characteristics, cash flows, waterfall, credit enhancement and liquidity to be provided in aggregate form to holders of securitisation positions and, upon request, to potential investors.	Before pricing in at least draft or initial form.	STS wording on timing of disclosure differs from non-STS wording. Not clear that summary/overview can be provided in draft or initial form, as opposed to final form, before pricing for non-STS. This requirement applies to “private” securitisations (defined as those for which no prospectus is required to be published) as well as public securitisations, even where the investors are closely involved and may not require such information. This will be an additional cost and administrative burden for many private transactions.
Any notification that the securitisation is an STS transaction	Before pricing.	Before pricing.	Before pricing in at least draft or initial form	STS wording on timing of disclosure differs from non-STS wording. Not clear that STS notification can be provided in draft or initial form, as opposed to final form, before pricing for non-STS.
Investor reports containing: <ul style="list-style-type: none"> all materially relevant data on credit quality and performance of the underlying exposures; trigger events for changes in the priority of payments or replacement of counterparties; for non-ABCP transactions, data on the cash flows of the underlying exposures and the liabilities of the securitisation; information regarding the risk retention and the method used. 	Quarterly no later than one month after interest payment date.	Monthly, at latest one month after the end of the period the report covers. All materially relevant data on credit quality and performance of the underlying exposures to be provided in aggregate form to holders of securitisation positions and, upon request, to potential investors.		Information to be specified in RTS and to be provided using the applicable reporting template.

Information	Non-ABCP	ABCP	STS (Non-ABCP) ⁸⁸	Comments
Inside information which is required to be made public in accordance with the Market Abuse Regulation.	Without delay.	Without delay.		The Draft Transparency RTS provides that in the case of public deals, such information will need to be provided using the applicable reporting template.
If the previous item is not applicable, any significant event such as a material breach of obligations, structural changes, a change in the risk characteristics, ceasing to meet the STS requirements or any material amendment to the transaction documents.	Without delay.	Without delay.		The Draft Transparency RTS provides that in the case of public deals, such information will need to be provided using the applicable reporting template.

Annex 2

STS criteria and additional CRR criteria

STS criteria for non-ABCP and ABCP transactions

The second and third columns specify whether or not the relevant criteria apply with respect to non-ABCP or ABCP transactions and also set out any additional criteria for non-ABCP or ABCP transactions, as applicable. We have included some comments on certain of the criteria but these are not exhaustive and there are likely to be further issues to take into account as market participants consider how to interpret the relevant criteria, including by reference to the guidelines once they are finalised, with reference to the particular transaction.

Criteria	Non-ABCP securitisations	ABCP securitisation transactions	Comments
	Article 20 (Simplicity)	Article 24	
Legal true sale; no severe clawback risk	✓ ⁸⁹	✓ ⁹⁰	Legal opinion as to true sale will generally be required. Intermediate transfers will also need to meet the true sale requirements. Local insolvency laws will need to be considered. Synthetic securitisations will not be STS. ⁹¹
Specified perfection triggers including severe deterioration in seller's credit quality, seller insolvency and seller breaches.	✓ ⁹²	✓ ⁹³	
Seller to represent that assets not encumbered and no adverse effect on enforceability of the sale.	✓ ⁹⁴	✓ ⁹⁵	

89 SR Article 20(1)-(4).

90 SR Article 24(1)-(4).

91 However, it is anticipated that a separate STS framework may be developed for balance sheet synthetic securitisations as discussed above.

92 SR Article 20(5).

93 SR Article 24(5).

94 SR Article 20(6).

95 SR Article 24(6).

Criteria	Non-ABCP securitisations	ABCP securitisation transactions	Comments
<p>Clear eligibility criteria.</p> <p>No active portfolio management on discretionary basis.</p> <p>Later transferred assets must meet eligibility criteria that applied to the initial exposures.</p>	✓ ⁹⁶	✓ ⁹⁷	<p>This is one of a number of criteria that will involve a degree of subjective judgment as to whether the criteria are sufficiently "clear". Eligibility criteria in securitisation transactions can be very detailed and vary from deal to deal, and arguably many of those criteria should not be relevant in considering whether a transaction is STS, but it appears that they will all need to be "clear".</p> <p>The STS Guidelines state that the criteria will be "clear" where compliance with them is possible to be determined by a court or tribunal as a matter of law or fact or both. Substitution of exposures that are in breach of representations will not be "active portfolio management". However, so-called "managed CLOs", in which an investment manager manages a pool of securitised corporate loans acquired from third parties, cannot be STS. Amending the eligibility criteria in the future could be difficult if STS treatment is to be maintained.</p>
<p>Assets must be homogeneous as to asset type.</p> <p>Obligations must be contractually binding and enforceable.</p> <p>Defined periodic payments required.</p> <p>No transferable securities other than unlisted corporate bonds.</p>	<p>✓</p> <p>Full recourse to debtors and guarantors.</p> <p>Instalments for the assets may differ in amount.⁹⁸</p>	<p>✓</p> <p>Full recourse to debtors.</p> <p>Remaining weighted average life ("WAL") of pool must be ≤ 1 year , or ≤ 3½ years for auto loans, auto leases and equipment leases</p> <p>Residual maturity of all exposures must be ≤ 3, or ≤ 6 years for auto loans, auto leases and equipment leases.</p> <p>No residential or commercial mortgage loans.</p> <p>Exposures may generate proceeds from sale of financed/leased assets.⁹⁹</p>	<p>Final Draft RTS on homogeneity, published on 31 July 2018 and adopted by European Commission on 28 May 2019.</p>

96 SR Article 20(7).

97 SR Article 24(7).

98 SR Article 20(8).

99 SR Article 24(15).

Criteria	Non-ABCP securitisations	ABCP securitisation transactions	Comments
Assets cannot include securitisations.	✓ ¹⁰⁰	✓ ¹⁰¹	Even non-STS securitisations that include securitisations (except where grandfathered and other limited exceptions) will be prohibited by the Article 8 ban on resecuritisation.
Assets must have been originated in ordinary course. Credit underwriting criteria to be no less stringent than for retained assets and must be disclosed.	✓ No "self-certified" residential mortgage loans. Assessment of borrower's creditworthiness to meet regulatory requirements. ¹⁰²	✓ ¹⁰³	Even non-STS securitisations of "self-certified" residential loans (except in limited circumstances) will be prohibited by the credit-granting standards in Article 9(2).
No assets in default or exposures to credit-impaired obligors.	✓ ¹⁰⁴	✓ ¹⁰⁵	It was queried whether this requirement should apply with respect to defaulted receivables that may be sold (e.g. in a buy-all transaction) but which are not eligible for funding. The STS Guidelines with respect to ABCP securitisation clarify that transaction and programme level requirements that refer to the underlying exposures should be applied only with respect to those underlying exposures that comply with the eligibility criteria and are funded by commercial paper, a liquidity facility or otherwise. However, this does not apply with respect to non-ABCP securitisation transactions.
At least one payment made (except in the case of revolving securitisations with assets payable in one instalment or with a maturity of < 1 year).	✓ ¹⁰⁶	✓ ¹⁰⁷	The exception is particularly important for trade receivables securitisations, although it will not work for non-revolving trade receivables securitisations.

100 SR Article 20(9).

101 SR Article 24(8).

102 SR Article 20(10).

103 SR Article 24(18).

104 SR Article 20(11).

105 SR Article 24(9).

106 SR Article 20(12).

107 SR Article 24(10).

Criteria	Non-ABCP securitisations	ABCP securitisation transactions	Comments
Repayment not dependent predominantly on sale of assets, provided that assets may be rolled over, refinanced, or subject to a repurchase obligation.	✓ ¹⁰⁸	✓ ¹⁰⁹	Useful exception included for refinancing of assets such as auto and equipment leases, and more generally for repurchase of receivables, e.g. for breach of representations. However, typical CMBS transactions (in which the asset-backed debt instruments would mature much earlier than the underlying credits) cannot be STS.
	Article 21 (Standardisation)		
Risk retention per Article 6.	✓ ¹¹⁰	✓	Risk retention is required in any event. In the case of ABCP, the requirement is in the sponsor criteria. ¹¹¹
Interest rate and currency risks appropriately hedged per common standards; no other derivatives.	✓ ¹¹²	✓ ¹¹³	
Interest payments per market rates or "sectoral" cost of funds, no reference to complex formulae or derivatives.	✓ ¹¹⁴	✓ Interest payments may reflect ABCP programme's cost of funds. ¹¹⁵	
After enforcement or acceleration notice, no cash trapping, sequential payment and no automatic liquidation of assets at market value.	✓ Repayment of securitisation positions not to be reversed with regard to seniority. ¹¹⁶	✓ ¹¹⁷	
Non-sequential priority of payments must include triggers for sequential payments, including deterioration in credit quality of assets below specified threshold.	✓ ¹¹⁸	✓	

108 SR Article 20(13).

109 SR Article 24(11).

110 SR Article 21(1).

111 SR Article 25(5).

112 SR Article 21(2).

113 SR Article 24(12).

114 SR Article 21(3).

115 SR Article 24(16).

116 SR Article 21(4).

117 SR Article 24(17).

118 SR Article 21(5).

Criteria	Non-ABCP securitisations	ABCP securitisation transactions	Comments
For revolving securitisations, specified triggers for termination of revolving period: deterioration in credit quality of assets below specified threshold, or originator or servicer insolvency-related event.	✓ Same specified triggers to apply for early amortisation for revolving securitisations, plus the following additional triggers: value of assets falls below specified threshold (early amortisation event), or failure to generate sufficient new assets of the required credit quality (termination of revolving period). ¹¹⁹	✓ ¹²⁰	
Transaction documents to specify clearly: contractual obligations of servicer, trustee and other service providers, provisions for continuity of servicing on servicing default/ insolvency and for replacement of hedge counterparties, liquidity providers and account bank.	✓ ¹²¹	✓ Transaction documents must also specify how the sponsor meets solvency and liquidity test (see below). ¹²²	The first part of this criterion is imprecise. It could be difficult to determine whether the requirement to specify clearly the contractual obligations has been met.
Servicer expertise in servicing similar assets and well documented policies, procedures and controls.	✓ ¹²³	✓	
Transaction documents to set out in clear and consistent terms definitions, remedies and actions regarding delinquency, default etc. Priorities of payment and triggers for changes to priorities of payment to be specified. Material changes to the priority of payments to be reported to investors.	✓ ¹²⁴	✓ ¹²⁵	
Provisions for timely resolution of conflicts between classes of investors; clearly defined voting rights allocated to noteholders, clearly specified responsibilities of trustee.	✓ ¹²⁶	✓	

119 SR Article 21(6).

120 SR Article 24(19).

121 SR Article 21(7).

122 SR Article 24(20).

123 SR Article 21(8).

124 SR Article 21(9).

125 SR Article 24(13).

126 SR Article 21(10).

Criteria	Non-ABCP securitisations	ABCP securitisation transactions	Comments
	Article 22 (Transparency)		
Historical data on defaults and losses for similar exposures to be provided before pricing.	✓ ≥ 5 years of data. ¹²⁷	✓ ≥ 5 years of data, or ≥ 3 years of data for trade receivables and other short-term receivables ¹²⁸	The shorter data period for trade and other short-term receivables does not apply to non-ABCP transactions – it is not clear why this should be the case. The requirement to have such a long period of historical data could mean that some assets will not be capable of being securitised.
Third party verification of asset sample by “appropriate and independent party” before issuance.	✓ ¹²⁹	✓	This could result in an additional cost.
Provision of liability cash flow model to investors before pricing and on ongoing basis.	✓ ¹³⁰	✓	
For residential loans and auto loans or leases, disclosure of environmental performance by originator and sponsor per Article 7.	✓ ¹³¹	✓	
Loan level data before pricing. Transaction documents, prospectus or transaction summary and STS notification drafts before pricing. Final documents within 15 days after closing.	✓ ¹³²	✓	

127 SR Article 22(1).

128 SR Article 24(14).

129 SR Article 22(2).

130 SR Article 22(3).

131 SR Article 22(4).

132 SR Article 22(5).

STS criteria for ABCP programmes

Criteria	Comments
Sponsor	
Sponsor must be a credit institution supervised under Capital Requirements Directive (CRD) ¹³³¹³⁴	
Sponsor must be a full support liquidity provider. Transaction level support to be disclosed to investors. ¹³⁵	
Sponsor must demonstrate to competent authority that its role as full support liquidity provider not endanger its solvency and liquidity even in extreme stress situation. ¹³⁶	
Sponsor to perform due diligence per Articles 5(1) and (3) and verify the seller's servicing capabilities and processes per Article 265(2)(h)-(p) of the CRR (as amended by the CRR Amending Regulation). ¹³⁷	Article 265(2)(h)-(p) of the CRR is part of the provisions in relation to the conditions for the application of the Internal Assessment Approach ("IAA"). It is not at all clear what relevance this has to servicing or how this should be interpreted.
Seller (for transaction) or sponsor (for programme) to satisfy risk retention requirement in Article 6. ¹³⁸	
Sponsor shall comply with transparency obligations in Article 7 at programme level and make available the information to potential investors before pricing per Article 7(1)(a) (aggregate information), and (b)-(e) (at least in draft form). ¹³⁹	
Liquidity must be drawn before expiry if not renewed and maturing securities repaid. ¹⁴⁰	
Transactions in the programme	
All transactions must fulfil ABCP transaction criteria, except for the criteria with respect to no assets in default or exposures to credit-impaired obligors (Article 24(9)), at least one payment to have been made (Article 24(10)) and repayment not being dependent predominantly on sale of assets (Article 24(11)), where ≤ 5% of the aggregate amount of the underlying exposures may temporarily be non-compliant, provided that an appropriate and independent party needs to verify externally a sample with respect to such criteria. ¹⁴¹	The requirement that all transactions must fulfil the ABCP criteria for an ABCP programme to be STS, except for the limited exception for temporary non-compliance with Articles 24(9), (10) and (11) for ≤ 5% of aggregate exposures, presents a very high bar and is likely to mean that very few ABCP programmes will be capable of being STS.

133 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

134 SR Article 25(1).

135 SR Article 25(2).

136 SR Article 25(3).

137 SR Article 25(4).

138 SR Article 25(5).

139 SR Article 25(6).

140 SR Article 25(7).

141 SR Article 26(1).

Criteria	Comments
Programme	
Remaining WAL of underlying exposures must be \leq 2 years. ¹⁴²	
Programme must be fully supported by sponsor (per sponsor criteria). ¹⁴³	This is already covered in the sponsor requirements.
Programme must not contain any re-securitisation and no programme-level tranching credit protection. ¹⁴⁴	
Securities may not include call options, extension clauses or other clauses that affect final maturity and which may be exercised by seller, sponsor or SSPE. ¹⁴⁵	Many programmes include call options for early redemption by the issuer. It would have been preferable if it had been a prohibition only of extension at the option of the issuer, i.e. extendable commercial paper as seen before the financial crisis.
Interest rate and currency risks appropriately hedged per common standards; no other derivatives. ¹⁴⁶	
Documentation to specify clearly duties of trustee (if any), sponsor and service providers, processes to ensure continuity of servicing on default/insolvency of servicer, provisions for replacement of hedge counterparties and account bank, remedies on default/insolvency of sponsor, and drawing of liquidity if not renewed. ¹⁴⁷	
Servicer expertise in servicing similar assets and well documented policies, procedures and controls. ¹⁴⁸	It would have been preferable if this criterion had been included at the transaction level, instead of at the programme level, since servicing occurs at the transaction level.

142 SR Article 26(2).

143 SR Article 26(3).

144 SR Article 26(4).

145 SR Article 26(5).

146 SR Article 26(6).

147 SR Article 26(7).

148 SR Article 26(8).

Additional CRR criteria

Criteria	Non-ABCP transactions	ABCP transactions/ programmes	Comments
	Article 243(2) of Amended CRR	Article 243(1) of Amended CRR	
Exposures to single obligor (or aggregate exposure to group of connected clients) must be ≤ 2% of pool/ programme.	✓	<p>✓</p> <p>Exception for trade receivables fully covered by eligible credit protection provided by credit institution or insurance or reinsurance undertaking, after taking into account purchase price discount and overcollateralisation.</p> <p>Exception for securitised residual leasing values covered by enforceable repurchase or refinancing commitment from eligible guarantor (eligible provider of unfunded credit risk mitigation ("CRM") under the CRR – including rated corporate)</p>	<p>For ABCP transactions and programmes, the 2% concentration limit applies only at programme level. For non-ABCP transactions (which would include private transactions similar to ABCP transactions), it applies to each transaction. It is difficult to understand the rationale for this difference in treatment, and it is not clear why it is necessary to apply an obligor concentration limit at programme level when normally the underlying transactions are independent of each other, without any cross-collateralisation or cross-exposure to losses between transactions. It will be difficult for programme sponsors to apply the programme-wide concentration limit and it might have been less difficult if each transaction within the programme had such a limit. The concentration limit could also prevent securitisations with large obligor concentrations (e.g. trade receivables securitisations) being STS, notwithstanding the inclusion of obligor concentration limits in those transactions which would be aimed at addressing any lack of granularity.</p> <p>It is also not clear why the exception for concentrations covered by overcollateralisation or other credit enhancement applies only in the case of ABCP programmes – this appears to be an unwarranted difference in treatment between ABCP and non-ABCP private securitisations. Furthermore, it is not clear how the concentration limit, with its exceptions, would be calculated.</p>

Criteria	Non-ABCP transactions	ABCP transactions/ programmes	Comments
<p>Maximum risk weight of assets under Standardised Approach must be:</p> <ul style="list-style-type: none"> • 75% on individual exposure basis for retail exposures; • 100% on individual exposure basis for other exposures, taking into account any CRM. 	<p>✓</p> <p>Maximum risk weight of real estate loans under Standardised Approach must be:</p> <ul style="list-style-type: none"> • 40% on portfolio weighted average basis for residential mortgage loans or fully guaranteed residential loans; • 50% on individual exposure basis for commercial mortgage loans, taking into account any CRM. <p>For real estate loans, no loans secured by lower-ranking security unless also include prior-ranking loans. For residential mortgage loans/ fully guaranteed mortgage loans, no loan-to-value >100%.</p>	<p>✓</p> <p>For bank authorised to apply IAA, liquidity facility risk weight ≤ 100%</p>	<p>No maximum risk weights specified for ABCP programmes/ transactions for residential or commercial mortgage loans as these are not permitted to be STS for ABCP transactions.</p>

Annex 3

Technical standards, guidelines and delegated acts pursuant to the Securitisation Regulation

Article	Heading	Drafter	Type	Subject	Current status
6(7)	Risk retention	EBA	RTS	Risk retention details including modalities (Art 6(3)), measurement (Art 6(1)), no hedging/ selling Art 6(1)), consolidated basis (Art 6(4)), conditions for exemption based on index (correlation trading) (Art 6(6))	Draft RTS published 18 July 2018. Awaiting Commission approval and expected to be finalised later in 2019.
7(3)	Transparency requirements	ESMA	RTS	Information to be provided under Art 7(1) (a) and (e) (on underlying exposures and in periodic investor reports)	Revised draft RTS published by ESMA 31 January 2019. Awaiting Commission approval and expected to be finalised later in 2019.
7(4)	Transparency requirements	ESMA	ITS	Format of reports – standardised templates	Revised draft RTS published by ESMA 31 January 2019. Awaiting Commission approval and expected to be finalised later in 2019.
8(5)	Ban on resecuritisation	ESMA	RTS	(Permitted) supplement to list of legitimate purposes for permitted resecuritisation (Art 8(3))	No date specified.
10(7)	Registration of a securitisation repository	ESMA	RTS	Procedures to verify reported information; application for registration; extension of registration	Revised draft RTS published by ESMA 18 January 2019. Awaiting Commission approval and expected to be finalised later in 2019.
10(8)	Registration of a securitisation repository	ESMA	ITS	Format of applications for registration and extension	As for Article 10(7).
16(2)	Supervisory fees	Commission	Delegated Act	Fees payable by securitisation data repositories to ESMA	Date not specified. Consultation Paper issued 23 March 2018. Final RTS awaited.
17(2)	Availability of data held in repository	ESMA	RTS	Information to be provided under Art 7(1); templates; operational standards for collection, aggregation, comparison of data; information to which ESAs and the European Systemic Risk Board will have access; conditions of direct and immediate access	As for Article 7(3).
17(3)	Information to repository	ESMA	ITS	Standardised templates for information to be provided to repository.	As for Article 7(4).
19(2)	STS securitisation	EBA	Guidelines	Guidelines on harmonisation and application of STS requirements in Arts 20-22	STS Guidelines published 12 December 2018.

Article	Heading	Drafter	Type	Subject	Current status
20(14)	Requirements re. simplicity	EBA	RTS	Which underlying exposures deemed homogeneous (Art 20(8))	Final Draft RTS on homogeneity published on 31 July 2018. Adopted by Commission and expected to be finalised later in 2019.
23(3)	STS ABCP securitisation	EBA	Guidelines	Harmonised interpretation and application of STS requirements in Arts 24 and 26	STS Guidelines published 12 December 2018.
24(21)	STS transaction level requirements	EBA	RTS	Which underlying exposures deemed homogeneous (Art 24(15))	As for Article 20(14).
27(6)	STS notification requirements	ESMA	RTS	Information for originator/sponsor notification (Art 27(1))	Consultation Paper published 19 December 2017. Final RTS awaited.
27(7)	STS notification requirements	ESMA	ITS	Templates for originator/sponsor notification (Art 27(6))	As for Article 27(6).
28(4)	Third party verifying STS compliance	ESMA	RTS	Information to be provided in application for authorisation (Art 28(1))	RTS adopted February 2019 and published in Official Journal.
36(8)	Cooperation between competent authorities and ESAs	ESMA	RTS	Cooperation obligation and information exchange (Art 36(1)); notification obligations (Art 36(4), (5))	Final RTS awaited.
39(1)	Amendment to Directive 2009/138/EC	Commission	Delegated Act	Circumstances for imposition of proportional additional capital charge for breach of Arts 5 or 6	Not specified.
39(1)	Amendment to Directive 2009/138/EC	EIOPA	RTS	Methods for calculation of proportional additional capital charge	Not specified.
42(6)	Amendment to Regulation (EC) No 248/2012	ESAs	RTS	Which arrangements under covered bonds or securitisations adequately mitigate counterparty risk (amended EMIR Art 4(5))	Final RTS awaited.
42(3)	Amendment to Regulation (EC) No 248/2012	ESAs	RTS	Risk management procedures (amended EMIR Art 11(3)), procedures for competent authorities applying exemptions (amended EMIR Art 11(6)-(10)), criteria (amended EMIR Art 11(5)-(10))	As for Article 42(6).

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