Comments

On the EBA's Consultation Paper "Draft on the RTS and ITS on the securitisation retention rules"
EBA/CP/2013/14

Contact: Olaf Instinsky
Telephone: +49 30 20225- 5439
Fax: +49 30 20225-5405
Email: olaf.instinsky@dsgv.de

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Federführer:
Deutscher Sparkassen- und Giroverband e. V.
Charlottenstraße 47 | 10117 Berlin
Telefon: +49 30 20225-0
Telefax: +49 30 20225-250
www.die-deutsche-kreditwirtschaft.de

Dear Sir or Madam,

We appreciate the present opportunity to comment on the Consultation Paper "Draft on the Regulatory Technical Standards and Implementing Technical Standards on the securitisation retention rules (EBA/CP/2013/14)” published on 22 May 2013. We gladly seize this opportunity. Please find our comments below.

General Comments

First, we would like to share a general comment on Art. 16 RTS. We hold the view that the required review of compliance with former Art. 406 (former 395) CRR “at least annually" constitutes an increase in the CRR’s stringency which is not in line with the principle of proportionality. Lest the review deadline will see a constant shift, in this regard, the EBA should clarify that the requirement under Article 16 does not refer to a binding interval of 365 days. We therefore hold the view that "at least annually” should be understood as “at least once a year”.

One of the basic notions behind Art. 404 (former 393) ff is that banks have to meet the respectively applicable requirements regarding each of the roles they have assumed (cf. Draft RTS, Recital No. 2. We would appreciate a clarification that this shall not apply if and when a bank acts as a sponsor (cf. also RTS language) thus fulfilling the retention by means of a credit risk mitigating liquidity facility. If this basic rationale were also to be applied to ABCP programmes, this would mean that – in their capacity as investors - the liquidity provider (who, after all, provides the retainer themselves) would still have to obtain proof of the risk retention from the originator. However, reconciling the conflict of interests between the sponsor and the originator is not in keeping with the retention rules’ notion (cf. also CRR, Recital 57 and Article 4(1) RTS) pursuant to which the retention shall have to be fulfilled either by the sponsor, the originator or the original lender). However, the retention will already have been fulfilled completely by virtue of the liquidity facility provided by the sponsor. A clarification of this aspect would be very helpful.

Furthermore, concerning Art. 404 (former 393) CRR we would like to propose clarifying that the ABCP programmes shall be seen as a “securitisation” in their entirety and that not every individual exposure pool constitutes a securitisation in its own right. This way, it would be guaranteed that Title II and III will be applied in a uniform manner across all portfolios of a programme and that there will be no divergent treatment within one and the same ABCP programme.

In addition, will be of utmost importance to continue the exemption provided for under paragraph 9 and 85 of the CEBS Guidelines 40. This exemption allows credit institutions to continue market-making in securitisation positions even if it is not possible to ensure compliance with Article 405 and 406 of CRR on specific positions. The exemption has been used in markets where retention requirements have not yet been imposed by regulator’s and will not be applied in the future or only for certain asset classes. Discontinuation of the exemption will result in a discrimination of European institutions that trade in those markets.

Comments on the draft RTS

Article 4

Q2: ***The EBA would also like to understand if, for new securitisations there are transactions that are likely not to be able to meet the retention requirements following the CRR and associated draft RTS.***

Essentially, meeting the retention requirements will be possible, provided the ABCP programme shall be deemed (in line with the English version of the CRR) a "program of securitisations" and thus, a bank or other corporations shall be regarded as original lender, originator, sponsor or investor for every individual transaction within the program. Notwithstanding the foregoing, the following clarification should still be made:

- The retention is often fulfilled by another, closely associated company from the same group (generally in the form of a subordinated loan); whilst not limited to, this especially applies to securitisation of exposures by SMEs. In the event of a restrictive interpretation of the requirements under Art. 4 RTS, such transactions would fail to meet the requirements that the retention shall be fulfilled by the originator. Hence, we hold the view that said entities within a corporate group which are closely associated with the originator shall equally be regarded as an originator for the purposes of Art. 4 RTS and shall thus be capable of fulfilling the retention.

Article 6

General comment on Art. 6(1)(a)

It should be made clear that the two options for complying with the retention option in Art. 405 (1) (a) that are mentioned in Art. 6 (1) (a) and (b) of the draft RTS are to be understood as *additional* options to the retention of at least 5 % of the nominal value of each of the tranches sold or transferred. Otherwise the provision would restrain the possibilities for complying with the retention requirements given in the CRR. We therefore advise to formulate the first subclause of Art. 6 (1) as follows:

“A retention of no less than 5 % of the nominal value of each of the tranches sold or transferred as referred in option (a) of Article 405 (1) of the Regulation (EU) No. […] may *also* be achieved by the following: […]”

This would also be in line with the provision of Paragraph 46 of the CEBS Guidelines on Article 122a of Directive 2006/48/EC.

Q3: To the extent securitisations have relied on Paragraph 48 in the CEBS Guidelines on Article 122a of Directive 2006/48/EC to meet the retention requirements, would there be any material impact (be it economic, operational, etc.) to now complying with retention option (a) of Article 394(1) of the Regulation (EU) No xxxx/2013 rather than relying on the provisions of Paragraph 48 in the CEBS Guidelines on Article 122a of Directive 2006/48/EC in order to meet the retention requirements?

Paragraph 48 of CEBS guidance allows for the use of option b) not only for securitisations of revolving exposures, but also for revolving securitisations of non-revolving exposures. In our view there would be a material impact if the retention option b) would only be applicable for securitisations of revolving exposures. The flexibility to use the retention option b) is important for revolving securitisations and should be continued as there is no economic difference between the retention requirement option (a), (b) and (c).

Q4: Do you consider that this way to comply with the retention requirement under option (a) should be explicitly mentioned in the RTS?

Basically, we hold the view that Art. 405(1)(a) CRR constitutes a sufficient regulation of the option of fulfilling the retention by a liquidity facility with "full support". Especially for the original lender, this possibility presents an option for compliance with the minimum retention period. In Germany, meeting the retention requirements by means of providing a liquidity facility which fully covers the credit risk of the securitised exposures plays a major role in ABCP programmes. Hence, we deliberately welcome an explicit specification of this option.

However, due to the fact that ABCP programmes do not cover each and any securitisation programme in which liquidity facilities are being provided, fulfilling the retention in the aforementioned manner should be an option for all “securitisation programmes”.

Q5: ***Do you consider that the conditions enumerated in Article 6.1(b) are correct and sufficient? If not, which conditions would you add/change/remove? Why?***

The conditions enumerated are basically a useful guidance for implementing the requirements under ex. Art. 405(1) CRR / Art. 6(1)(a) RTS. However, given the fact that under the provisions of Art. 410(2) CRR, in *lieu* of a tightening of CRR, the RTS should merely constitute a more detailed specification, we would like to suggest the following clarification:

- Also for ABCP programmes, the conditions enumerated in Art. 6(1)(b) RTs are but one of several options for fulfilling the retention requirements.
- Art 6(1)(b)(i) refers to “the credit risk … of the underlying exposure“. There should be a clarification that this shall not cover any credit enhancements (potentially provided for instance in the form of purchase price discounts, over-collateralisation, subordinate loans, junior notes and / or cash reserves). This is due to the fact that they are typically not being funded by means of the ABCP conduit i.e. by means of issuing commercial paper (e.g. nom. exposure EUR110, purchase price/ABCP EUR100, liquidity facility EUR102 -> The liquidity facility thus fully covers the “*credit risk* of the underlying exposure” (=EUR100) even if the underlying exposure itself nominally amounts to EUR110). Especially if the originator provides the credit enhancement, any different understanding would lead to a situation where the sponsor supports the originator – this is inconsistent with the rationale underlying the retainer rules. But also regardless of who provides the credit enhancement and in which form it is being provided, in ABCP programmes this does not (primarily) serve funding purposes; instead its prime task consists in providing the necessary over-collateralisation. If and when the credit enhancement is provided from the originator’s sphere of influence (e.g. credit insurance or an associated company), for the purposes of the retention, these parties should not be regarded as investors lest this would result in a circular logic. In our view, a predication on the nominal value of the securitised exposures would constitute an inacceptable tightening of Art. 405(1)(a) CRR. In the CEBS Guidelines on Article 122(a), item 46 labels reference to securitised exposures as an additional option ("may also"); this should also be clarified under Art 6(1)(a) RTS.
- Art. 6(1)(b)(iii) sets out that, in order to be able to meet the risk retention by means of the liquidity facility, the retainer at the same time has to be the liquidity provider. Due to the fact that the retainer will usually be the sponsor [in rare

cases also the original lender and thus the exposure seller (cf. Art. (4)(1)], this would translate into a *de facto* syndication ban on liquidity facilities. At this point, it should be clarified that no less than 5% will have to be retained by the sponsor (provided that credit risk is fully assumed), which should give sufficient room for syndication. We believe this holds true against the background that option (a) sets out that 5% of the tranches transferred or sold to investors shall be covered by the retainer.

- Besides, the additional requirement under Art. 6(1)(b)(iv) RTS, concerning information access could be deleted at this juncture. This is due to the fact that this matter is already being covered under Art. 406 CRR and, as a consequence, in Chapter IV of the present RTS.

Article 9

Q8: *Are there other ways to comply with the retention options set out in Art 394 of the CRR which should be included in this RTS? Please be specific in your description of any additional ways to comply.*

We would like to reiterate our point made under Q2, i.e. for the purposes of the retention requirements, closely associated companies of a group should be treated as one single company. Additionally, the following retention options should be permitted:

Reserve accounts (if and when the latter have already been filled during the time period under observation): These reserve accounts are generally meant to cover potential interest losses or other defaults. More often than not, they will be returned to the originator as soon as the transaction is paid out. This approach is being implemented regardless of the way in which the reserve account was being funded (e.g. by the originator upon closing or over time from the assets' cash flows).

Excess spread (if and when the latter has already been realised or saved up): The latter presents the delta between the assets’ purchase price and the costs of the securitisation transaction after losses. Unless it was already reflected in the transaction’s purchase price, it should be eligible for recognition. In this regard, the excess spread is fit for purpose. This is due to the fact that, should a credit event materialise, it could be paid back to the investor. In the absence of a credit event, it could be paid back to the originator.

We are of the view that retention option (b) should be applicable to all securitisations irrespective whether the securitisation is revolving or non-revolving and whether the securitised portfolio is revolving or non-revolving. Furthermore, the retention option (b) should not only be applicable to the originator’s interest, but also to the original lender’s interest.

Article 14

Q 9: *Is the qualification “securitisation positions in the correlation trading portfolio containing only reference instruments satisfying the criterion in Article 327(1b)(ii) of Regulation (EU) No xxxx/201y” introduced in Article 13(1) correct/necessary? Should this qualification be removed? If not, why?*

Article 327(1b)(ii) of the previous CRR-D defines a reference title in a correlation trading portfolio as “commonly-traded indices based on those reference entities“. Based on this clarification, we see no need to remove this reference. However, we feel that also the reference to Article 327(1b)(i) previous CRR-D is missing which defines the reference title as “single-name instruments, including single-name credit derivatives, for which a liquid two-way market exists”.

Article 18

Q11: ***Should the broad stress testing requirement that institutions have to undertake be part of the Internal Capital Adequacy Process, in accordance with Article 72 of CRD IV, or should it, where applicable, be in accordance with Article 173 of the CRR and follow the credit stress testing requirements for IRB banks?***

The stress testing requirements should address the idiosyncrasies of ABCP programmes in which the credit risk of the securitised exposures is fully supported by a liquidity facility of the sponsor.

Article 23

Q14: ***For which type of underlying assets do you think that the information on a loan level basis is not necessary for complying with the due diligence requirements under Article 395 of the Regulation (EU) No xxxx/201y? What kind of information is required in those cases? Please specify by type of underlying asset.***

As regards highly granular transactions or in the event of very fast changing exposure pools (such as the ones which commonly exist in ABCP programmes and other securitisation programmes), the requirement of data on an individual level is neither common market practice nor does it yield any meaningful information. Instead, it is now a common market practice to provide aggregated information in the form of monthly investor reporting for each - even granular - transaction in a programme. By way of analogy, the same applies to highly granular Auto-ABS, RMBS and SME securitisations. Hence, we object to the reporting requirement on the level of individual exposures. Whilst not limited to, this caveat applies especially in cases where the liquidity facilities of the sponsors in an ABCP programme completely protect the investors form the credit risks of the securitised portfolio. What is more, in the event of extremely granular or fast changing exposure pools, investors do not demand a reporting requirement at the level of the individual exposure.

Notwithstanding the foregoing, it needs to be ensured that the disclosure of the loan level information does not create a conflict of interests with statutory or contractual requirements in terms of data protection, banking secrecy or other (common market practice) operational or business secrets. At this juncture, we hold the view that a corresponding clarification would be helpful.

Q15: Do you consider that the information in existing templates (e.g. ECB ABS loan-level data template or Bank of England ABS transparency requirements) meet the relevant due diligence and disclosure requirements under Article 395 and Article 398 of the Regulation (EU) No xxxx/201y, respectively? Please differentiate in your response in terms of the types of underlying assets, if applicable.

The templates mentioned were specifically developed with a view to true sale transactions; hence, they are not always fit for purpose when it comes to synthetic transactions. As a result, for instance the analysis of cashflows at the individual asset level are of less importance for synthetic transactions. This is due to the fact that the latter only transfer default events. Yet, to name but one example: When it comes to interest payments that are due, they are not subject to delayed payment inflow risks. Making such data available for synthetic transactions would thus provide investors with no additional decision-relevant information for the purposes of enhanced risk assessment whilst, at the level of banks, it would generate unnecessary costs.

If EBA considered separate templates for synthetic transactions then it should be ensured that the definitions are consistent to the definitions used for the loan-level data template of the ECB. Otherwise, this would reduce transparency for investors.