BDA | BANKEN DER AUTOMOBILWIRTSCHAFT

Comité des Constructeurs Français d'Automobiles

VDA | Verband der Automobilindustrie

Comments
on EBA Consultation Paper 2018/05 on
Draft Guidelines on the STS criteria for non-ABCP securitisation

General Comments

The Banken der Automobilwirtschaft (BDA), the Comité des Constructeurs Français d'Automobiles (CCFA) and the Verband der Automobilindustrie e.V. (VDA) represent the companies of the automotive industry including their financial services companies – the so called Captives. The Captives are the link between the car manufacturers, the car dealers and the consumers. They offer wholesale financing and working capital to dealers as well as retail financing and leasing to consumers.

The Captives have continuously followed and supported the initiatives of the European institutions to promote the European securitisations market. However, the Captives are particularly concerned about the interpretation of Article 20 (13) which still stipulates that repurchase obligations are not dependent on the sale of assets securing the underlying exposures.

Responds to the questions

Requirements related to simplicity

True sale, assignment or transfer with the same legal effect (Article 20 (1), 20 (2), 20 (3), 20 (4) and 20 (5)

Article 20 (1): The title to the underlying exposures shall be acquired by the SSPE by means of a true sale or assignment or transfer with the same legal effect in a manner that is enforceable against the seller or any other third party. The transfer of the title to the SSPE shall not be subject to severe clawback provisions in the event of the seller´s insolvency.

Article 20 (2): For the purpose of paragraph 1, any of the following shall constitute severe clawback provisions:

(a) provisions which allow the liquidator of the seller to invalidate the sale of the underlying exposures solely on the basis that it was concluded within a certain period before the declaration of the seller´s insolvency;

(b) Provisions where the SSPE can only prevent the invalidation referred to the point (a) if it can prove that it was not aware of the insolvency of the seller at the time of sale.

Article 20 (3): For the purpose of paragraph 1, clawback provisions in national insolvency laws that allow the liquidator or a court to invalidate the sale of underlying exposures in the case of fraudulent transfers, unfair prejudice to creditors or transfers intended to improperly favour particular creditors over others shall not constitute severe clawback provisions.

Article 20 (4): Where the seller is not the original lender, the true sale or assignment or transfer with the same legal effect of the underlying exposures to that seller, whether that true sale or assignment or transfer with the same legal effect is direct or through one or more intermediate steps, shall meet the requirements set out in paragraphs 1 to 3.

Article 20 (5): Where the transfer of the underlying exposures is performed by means of an assignment and perfected at a later stage than at the closing of the transaction, the triggers to effect such perfection shall include at least the following events:

(a) severe deterioration in the seller credit quality standing;

(b) insolvency of the seller; and

(c) Unremedied breaches of contractual obligations by the seller, including the seller´s default.

Question 1
Do you agree with the interpretation of these criteria, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered?
Please substantiate your reasoning.

In general, we agree with the overall interpretation of the criteria. They provide a sufficient level of clarification.

Nevertheless, we would like to express our concern regarding the disclosure of the legal opinion. According to paragraph 13 of the draft guidelines, the legal opinion should be accessible and made available to *third parties*. This is particularly problematic for law firms issuing such legal opinions since they would be obliged to distribute the opinion to any third party independent of the fact whether the party has a legitimate interest in the legal opinion or not. As such an obligation may result in unforeseeable liability risks for which no insurance cover would be available law firms could be forced to abstain from supporting the securitisation processes.

However, legal counsel is of vital importance for a smooth and successful handling of securitisation transactions. A shortage of legal counsel because of the proposed distribution requirement would be an additional burden for the market participants of the European securitisation market.

That is why we propose to restrict the scope of legitimate recipients and to limit the access to the legal opinion on a non-reliance basis to third party certification agents and competent authorities supervising STS certifications.

Question 2
Do you agree with the clarification of the conditions to be applicable in case of use of methods of transfer of the underlying exposures to the SSPE other than the true sale or assignment? Should examples of such methods of such transfer be specified further?

Not relevant.

Question 3
Do you believe that in addition to the guidance provided, additional guidance should be provided on the application of Article 20 (2)? If yes, please provide suggestions of such severe clawback provisions to be included in the guidance.

Not relevant.

Question 4
With respect to the interpretation of the criterion in Article 20 (5), should the severe deterioration in the seller credit quality standing and the measures identifying such severe deterioration, be further specified in the guidelines? Do you believe that the interpretation should refer to the state of technical insolvency (i.e. state where based on the balance sheet considerations the seller reaches negative net asset value with its the liabilities being greater than its assets, without taking into account cash flows or events of legal insolvency), and if yes, should it be specified whether it should not be considered as the trigger effecting perfection of transfer of underlying exposures to SSPE at a later stage?

Not relevant.

Represantations and warranties (Article 20 (6))

Article 20 (6)
The seller shall provide representations and warranties that, to the best of its knowledge, the underlying exposures included in the securitisation are not encumbered or otherwise in a condition that can be foreseen to adversely affect the enforceability of the true sale or assignment or transfer with the same legal effect.

Question 5
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered?
Please substantiate your reasoning.

Not relevant.

Eligibility criteria for the underlying exposures/active portfolio management (Article 20 (7))

Article 20 (7)
The underlying exposures transferred from, or assigned by, the seller to the SSPE shall meet predetermined, clear and documented eligibility criteria which do not allow for active portfolio substitution of exposures that are in breach of representations and warranties shall not be considered active portfolio management. Exposures transferred to the SSPE after the closing of the transaction shall meet the eligibility criteria applied to the initial underlying exposures.

Question 6
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered?
Please substantiate your reasoning.

Not relevant.

Question 7
Do you agree with the techniques of portfolio management that are allowed and disallowed, under the criterion of the active portfolio management? Should other techniques be included or excluded?

From the Captives' perspective, the interpretation which techniques of portfolio management are allowed should be further extended in order to maintain current practices. Paragraph 18.c. of the draft guidelines only allows investing the proceeds from the underlying exposures into additional exposures during a "ramp-up" period.

However, almost all Captives have warehouse programs in which exposures are sold several times per year. The volume of such warehouse programs can be increased or decreased on an ongoing basis. Additionally the collection proceeds of such underlying exposures are used to refinance the purchase of further exposures during the revolving period in order to keep the transaction volume stable ("top-ups") or increasing ("tap-ups"). It is furthermore market standard to transfer such exposures into public term transactions. Such market practice which has proven to be stable and successful in the past would not be covered by paragraph 18.c. This is however of utmost importance, especially for German Captives and leasing companies, given the legal interpretation of the German insolvency regulation (Insolvenzverordnung), which only allows the sale on a without-recourse basis of leasing exposures in a very limited period of time after origination of such exposures.

Against this background we propose to amend lit. c. as follows:

c. use of "ramp up" periods in SSPE built as a warehouse program
- following the initial transfer of the underlying assets to the SSPE during which the proceeds from the underlying asstes are reinvested into additional assets,

- or to replace underlying assets of which the SSPE has sold or terminated in accordance with the terms and conditions of ther governing contractual framework by additional assets that meets the same predefined eligibility criteria,
to line up the value of the underlying exposures with the value of the securitization obligations, that may be increased or decreasd, depending the funding intended to be raised through such SSPE;

Additionally, for consistency with criteria 20(13) where repurchase of residual values is contemplated to protect the SPV against any residual value risk, there is a need to complete the definition by an additional lit. e.:

e. repurchase of residual value, in a view to mitigate residual value risk, as contemplated in Article 20(13);

Additionally, for enabling the servicer to carry over its regular business activities , it will be necessary to let him treat its clients on an equivalent basis – shoul the related receivables be securitized or not – notably letting him renegotiate some terms of the contracts in line with its usual credit and collection policy. In some ABS transactions, these renegotiations are permitted as long as they do not have a material impact for the SSPE when in other ABS transactions, this leads to a repurchase obligation by the seller. Against this background we propose to insert an additional lit. f into paragraph 18. as follows:

f. renegotiating of the terms and conditions of underlying receivables by the servicer in line with its credit and collection policies should not be seen as active management portfolio, with or without the repurchase of such receivables from the SSPE, as long as this does not have a material negative impact on the credit profile of the securitized portfolio of the SSPE;

Additionally, any prohibition of the current practice would also be problematic at the individual transaction level since this would make a clean-up call impossible. To clarify that a sale of exposures in exercise of a clean-up call option is not portfolio management, although such sale is not described in paragraph 18 we propose to supplement paragraph 19 as follows:

a. sale of underlying exposure(s) for reason other than those described in the paragraph 18 *or in exercise of a clean-up call option as contemplated in Article 244 (3) (g) of Regulation (EU) No 575/2013;*

Homogeneity, obligations of the underlying exposures, periodic payment streams, no transferable securities (Article 20 (8))

Article 20 (8)
The securitisation shall be backed by a pool of underlying exposures that are homogeneous in terms of asset type, taking into account the specific characteristics relating to the cash flows of the asset type including their contractual, credit-risk and prepayment characteristics. A pool of underlying exposures shall comprise only one asset type. The underlying exposures shall contain obligations that are contractually binding and enforceable, with full recourse to debtors and, where applicable, guarantors.

The underlying exposures shall have defined periodic payment streams, the instalments of which may differ in their amounts, relating to rental, principal, or interest payments, or to any other right to receive income from assets supporting such payments. The underlying exposures may also generate proceeds from the sale of any financed or leased assets.

The underlying exposures shall not include transferable securities, as defined in point (44) of Article 4(1) of Directive 2014/65/EU, other than corporate bonds that are not listed on a trading venue.

Question 8
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Exposures with higher final instalments (so-called balloon loans) as well as residual values both have defined payment streams and should therefore be included in paragraph 24 for clarification purposes as follows:
For the purposes of Article 20(8) of Regulation (EU) 2017/2402, exposures payable in a single instalment in the case of revolving securitisation, as referred to in Article 20(12) of Regulation (EU) 2017/2402, exposures related to credit cards facilities***, exposures with higher final instalments ("balloon-payments"), residual values*** and exposures with instalments consisting of interests only (including interest only mortgages) should also be considered to have defined payment streams relating to rental, principal, interest, or related to any other right to receive income from assets warranting such payments.

Question 9
Do you believe that additional guidance should be provided in these guidelines with respect to the homogeneity requirement, in addition to the requirements specified in the Delegated Regulation (EU) 2018/.... further specifying which underlying exposures are deemed homogeneous?

Not relevant.

Underwriting standards, originator's expertise (Article 20 (10))

Article 20(10)
The underlying exposures shall be originated in the ordinary course of the originator's or original lender's business pursuant to underwriting standards that are no less stringent than those that the originator or original lender applied at the time of origination to similar exposures that are not securitised. The underwriting standards pursuant to which the underlying exposures are originated and any material changes from prior underwriting standards shall be fully disclosed to potential investors without undue delay.

In the case of securitisations where the underlying exposures are residential loans, the pool of loans shall not include any loan that was marketed and underwritten on the premise that the loan applicant or, where applicable, intermediaries were made aware that the information provided might not be verified by the lender.

The assessment of the borrower's creditworthiness shall meet the requirements set out in Article 8 of Directive 2008/48/EC or paragraphs 1 to 4, point (a) of paragraph 5, and paragraph 6 of Article 18 of Directive 2014/17/EU or, where applicable, equivalent requirements in third countries.

The originator or original lender shall have expertise in originating exposures of a similar nature to those securitised.

Question 10
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

We would like to comment on paragraphs 28. and 29. of the draft guidelines which require the disclosure of changes in the underwriting standards. From our perspective, such a disclosure is not compatible with competition and anti-trust laws as the required information are confidential. Furthermore, it also breaches the provisions of the General Data Protection Regulation (GDPR) (EU) 2016/679 since it requires disclosing personal data. Also, the benefit for investors is questionable.

Question 11
Do you agree with this balanced approach to the determination of the expertise of the originator or original lender? Do you believe that more rule-based set of requirements should be specified, or, instead, more principles-based criteria should be provided? Is the requirement of minimum of 5 years of professional experience appropriate and exercisable in practice?

In general, we agree with the interpretation of this criterion. Nonetheless, we would like to point out that paragraph 39. leads to conflicts with the General Data Protection Regulation (GDPR) (EU) 2016/679 since it requires the disclosure of personal data. Also, the benefit for investors is questionable.

Question 12

Should alternative interpretation of the "similar exposures" be provided, such as, for example, referencing the eligibility criteria (per Article 20(7)) that are applied to select the underlying exposures? Similar exposure under Article 20(10) could thus be defined as an exposure that would qualify for the portfolio, based on the exposure level eligibility criteria (not portfolio level criteria) which has not been selected for the pool and which was originated at the time of the securitised exposure (e.g. an exposure that has repaid / prepaid by the time of securitisation). Similar interpretation could be used for the term "exposures of a similar nature" under Article 20(10), and "substantially similar exposures" under Article 22(1). The eligibility criteria considered should take into account the timing of the comparison. Please provide explanations which approach would be more appropriate in providing clear and objectively determined interpretation of the "similarity" of exposures.

For reasons of legal certainty it might be useful to further define the term "similar exposures". However, we do not consider it helpful to provide an alternative interpretation by referencing the *eligibility criteria*. Such interpretation would unnecessarily restrict the scope and go beyond the intent and purpose of Article 20 (10).

The purpose of Article 20 (10) is to ensure that the *underwriting standards* for the securitised portfolio at the time of origination are no less stringent than those for similar exposures which will not be securitised. On the other hand, the eligibility criteria are tailored for selecting the portfolio to be securitised and are not applied at the time of origination, though. Hence, both standards could differ. Taking into account that the similar exposures will not at all be securitised there is simply no need to extend the benchmark for assessing them to the eligibility criteria.

We rather propose to interpret the "similar exposures" in a way that the assets have been originated due to comparable, but not identical criteria. This could for instance be fulfilled if the assets fall under the same classification of the "risk factors" for homogeneity as proposed and discussed under EBA´s respective consultation paper.

No exposures in default and to credit-impaired debtors / guarantors (Article 20 (11))

Article 20(11)
The underlying exposures shall be transferred to the SSPE after selection without undue delay and shall not include, at the time of selection, exposures in default within the meaning of Article 178(1) of Regulation (EU) No 575/2013 or exposures to a credit-impaired debtor or guarantor, who, to the best of the originator's or original lender's knowledge:

(a) has been declared insolvent or had a court grant his creditors a final non-appealable right of enforcement or material damages as a result of a missed payment within three years prior to the date of origination or has undergone a debt-restructuring process with regard to his non-performing exposures within three years prior to the date of transfer or assignment of the underlying exposures to the SSPE, except if:

(i) a restructured underlying exposure has not presented new arrears since the date of the restructuring, which must have taken place at least one year prior to the date of transfer or assignment of the underlying exposures to the SSPE; and

(ii) the information provided by the originator, sponsor and SSPE in accordance with points (a) and (e)(i) of the first subparagraph of Article 7(1) explicitly sets out the proportion of restructured underlying exposures, the time and details of the restructuring as well as their performance since the date of the restructuring;

(b) was, at the time of origination, where applicable, on a public credit registry of persons with adverse credit history or, where there is no such public credit registry, another credit registry that is available to the originator or original lender; or

(c) has a credit assessment or a credit score indicating that the risk of contractually agreed payments not being made is significantly higher than for comparable exposures held by the originator which are not securitised.

Question 13
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

Question 14
Do you agree with the interpretation of the criterion with respect to exposures to a credit impaired debtor or guarantor?

Not relevant.

Question 15
Do you agree with the interpretation of the criterion with respect to the exposures to credit-impaired debtors or guarantors that have undergone a debt-restructuring process?

Not relevant.

At least one payment made (Article 20 (12))

Article 20(12)
The debtors shall, at the time of transfer of the exposures, have made at least one payment, except in the case of revolving securitisations backed by exposures payable in a single instalment or having a maturity of less than one year, including without limitation monthly payments on revolving credits.

Question 16
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

No predominant dependence on the sale of assets (Article 20 (13))

Question 17
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

Question 18
Do you agree with the interpretation of the predominant dependence with reference to 30% of total initial exposure value of securitisation positions? Should different percentage be set dependent on different asset category securitised?

We strongly oppose the interpretation of dependence in paragraph 53.a. During the legislative process, there has been a comprehensive discussion on this issue. Eventually, the previously envisaged term "substantially" was replaced by the term "predominantly" in order to clearly indicate that a majority is meant. Normally, a majority is more than 50 %, but not 30 %.

We would also like to comment on paragraph 55: In automotive finance it is most common that the customer pays affordable monthly instalments but does not repay the full credit amount, thus leaving a balance due at maturity. At the end of the term the customer has a choice between refinancing, paying the outstanding amount or returning the car to the lender. A third option would be to return the vehicle to the lender and being released from the final payment, provided they have paid at least half the total price. If the actual value of the returned vehicle is lower than the final payment there is a shortfall. The risk of this shortfall is the so called "residual value risk".

Residual values can be backed by repurchase obligations by either the *originator,* the *car dealer* or the *car manufacturer*. In such cases the risk that the sales price of the asset is less than the calculated value of the asset, the so-called residual value risk, will be fully borne by the party that has assumed the repurchase obligation or residual guarantee. The repurchase obligation can either be on the cars securing the underlying exposures or the receivables. In order to clarify this point, we propose to begin paragraph 55 by an additional sentence such as:

> *The exemption referred to in the second subparagraph of Article 20(13) of Regulation (EU) 2017/2402 is provided in case of a repurchase obligation of either the assets securing the underlying exposure or the underlying exposures themselves.*

It was the explicit political consensus that such Auto-ABS with residual values and repurchase agreements should be STS-eligible. Therefore, a second paragraph was introduced in Art. 20 (13), clearly stipulating that such repurchase obligations are not dependent on the sale of assets securing the underlying exposures.

However, paragraph 55 of the draft guidelines stipulates that the exemption of a repurchase obligation is only valid if the third party repurchasing the cars or the receivables or guaranteeing the residual values has a credit quality equivalent to A-level at inception of the transaction, and

to BBB-level during the life of the transaction, threatening the STS status in case of a downgrade of such transaction. This would have the consequence that a securitisation could cease to be STS if the guarantor is downgraded. If this happened, it would have to be de-notified as STS, and investors who had relied upon STS for capital benefits would lose them prospectively. This is also be noted that some dealers, some car manufacturers or Captives have not such required credit quality at inception and the transaction, and such criteria will restrict them to securitize residual values when their proper securitisation have correctly performed during the crisis.

We therefore strongly argue that paragraph 55 should be deleted. There is no need to further clarify – or indeed restrict – the exemption of provided in the second subparagraph of Article 20 (13).

Requirements related to standardization

Appropriate mitigation of interest-rate and currency risks (Article 21 (2))

Article 21(2)
The interest rate and currency risks arising from the securitisation shall be appropriately mitigated and any measures taken to that effect shall be disclosed. Except for the purpose of hedging interest-rate or currency risk, the SSPE shall not enter into derivative contracts and shall ensure that the pool of underlying exposures does not include derivatives. Those derivatives shall be underwritten and documented according to common standards in international finance.

Question 19
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

Referenced interest payments (Article 21 (3))

Article 21(3)
Any referenced interest payments under the securitisation assets and liabilities shall be based on generally used market interest rates, or generally used sectoral rates reflective of the cost of funds, and shall not reference complex formulae or derivatives.

Question 20
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

We propose to supplement paragraph 62 in a way that takes into account that LIBOR and EURIBOR are expiring benchmarks and that the reference interests, which will replace them in future, are not to be considered as *complex formulae*.

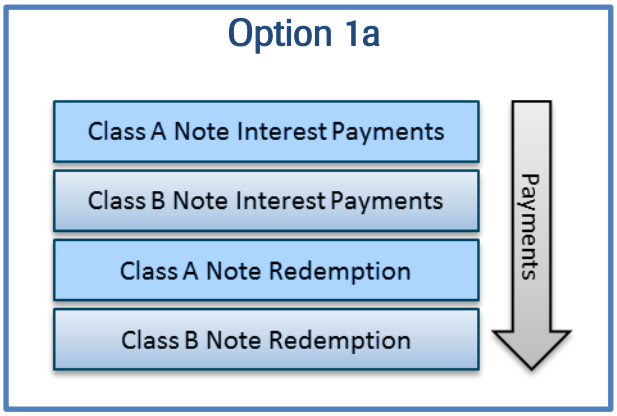
Requirements in case of enforcement or delivery of an accleration notice (Article 21 (4))

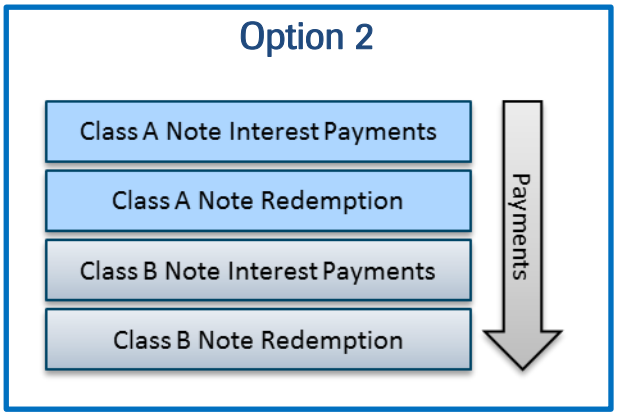
Article 21(4)
Where an enforcement or an acceleration notice has been delivered:
(a) no amount of cash shall be trapped in the SSPE beyond what is necessary to ensure the operational functioning of the SSPE or the orderly repayment of investors in accordance with the contractual terms of the securitisation, unless exceptional circumstances require that an amount be trapped to be used, in the best interests of investors, for expenses in order to avoid the deterioration in the credit quality of the underlying exposures;
(b) principal receipts from the underlying exposures shall be passed to investors via sequential amortization of the securitisation positions, as determined by the seniority of the securitisation position;
(c) repayment of the securitisation positions shall not be reversed with regard to their seniority; and
(d) no provisions shall require automatic liquidation of the underlying exposures at market value.

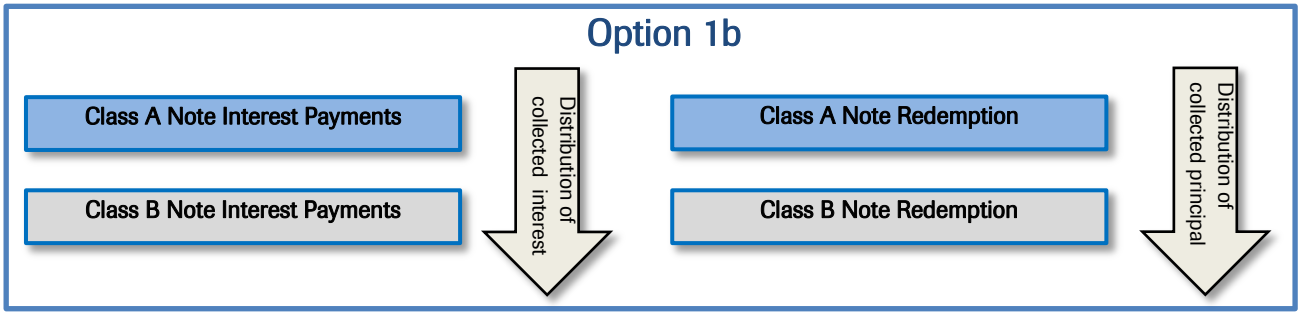
Question 21
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

The introduction of a mandatory sequential redemption in Article 21(4) of Regulation (EU) 2017/2402 has led to some uncertainty about what the requirements of such sequential redemption would be. In practice transactions often provide for different waterfalls for going concern scenarios compared to enforcement scenarios. The main difference usually is the ranking of interest coupons on junior notes as shown in the below picture. Whilst, as shown in option 1, in a going concern scenario a non-sequential payment waterfall applies with interest on junior notes ranks ahead of principal on senior notes, in enforcement scenario option 2 would apply in which there would be a sequential payment waterfall in which interest payments on junior notes are subordinated to principal on senior notes. This is mainly to comply with the requirement of Article 77 (2) of Guideline (EU) 2015/510 of the European Central Bank. Against such background market participants are uncertain whether a sequential redemption as required by Article 21(4) of Regulation (EU) 2017/2402 would also require a certain order of priority. Therefore, it would be helpful if EBA in its Guidelines could elaborate on its understanding of the requirements for a sequential redemption also.

See graphics on next page.


Option 1a
Class A Note Interest Payments
Class B Note Interest Payments
Class A Note Redemption
Class B Note Redemption
Payments


Option 2
Class A Note Interest Payments
Class A Note Redemption
Class B Note Interest Payments
Class B Note Redemption
Payments


Option 1b
Class A Note Interest Payments
Class B Note Interest Payments
Distribution of collected interest
Class A Note Redemption
Class B Note Redemption
Distribution of collected principal

Non-sequential priority of payments (Article 21 (5))

Article 21(5)
Transactions which feature non-sequential priority of payments shall include triggers relating to the performance of the underlying exposures resulting in the priority of payments reverting to sequential payments in order of seniority. Such performance-related triggers shall include at least the deterioration in the credit quality of the underlying exposures below a predetermined threshold.

Question 22
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

Early amortisation provisions/triggers for termination of revolving period (Article 21 (6))

Article 21(6)
The transaction documentation shall include appropriate early amortization provisions or triggers for termination of the revolving period where the securitisation is a revolving securitisation, including at least the following:
(a) a deterioration in the credit quality of the underlying exposures to or below a pre-determined threshold;
(b) the occurrence of an insolvency-related event with regard to the originator or the servicer;
(c) the value of the underlying exposures held by the SSPE falls below a pre-determined threshold (early amortization event);
(d) a failure to generate sufficient new underlying exposures that meet the pre-determined credit quality (trigger for termination of the revolving period).

Question 23
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

Transaction documentation (Article 21 (7))

Article 21(7)
The transaction documentation shall clearly specify:
(a) the contractual obligations, duties and responsibilities of the servicer and the trustee, if any, and other ancillary service providers;
(b) the processes and responsibilities necessary to ensure that a default by or an insolvency of the servicer does not result in a termination of servicing, such as a contractual provision which enables the replacement of the servicer in such cases; and
(c) provisions that ensure the replacement of derivative counterparties, liquidity providers and the account bank in the case of their default, insolvency, and other specified events, where applicable.

Question 24
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

Expertise of the servicer (Article 21 (8))

Article 21(8)
The servicer shall have expertise in servicing exposures of a similar nature to those securitised and shall have well-documented and adequate policies, procedures and risk-management controls relating to the servicing of exposures.

Question 25
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Is the requirement of minimum of 5 years of professional experience appropriate and workable in practice? Please substantiate your reasoning.

In general, we agree with the interpretation of this criterion. Nonetheless, we would like to point out that paragraph 76. leads to conflicts with the General Data Protection Regulation (GDPR) (EU) 2016/679 since it requires to disclose personal data. Also, the benefit for investors is questionable.

Question 26
Do you agree with this balanced approach to the determination of the expertise of the servicer? Do you believe that more rule-based set of requirements should be specified, or, instead, more principles-based criteria should be provided? Is the requirement of minimum of 5 years of professional experience appropriate and exercisable in practice?

We largely agree with the proposed approach. However, we fear that paragraph 78.b. would entail an additional requirement for specifically leasing companies which conduct the servicing within the transactions. Paragraph 78.b. defines that the proof of „well documented and adequate policies and risk management controls" as well as the other requirements mentioned in this paragraph should be substantiated by a third-party review.

Such proof would require the third party to have an insight view into the leasing companies' processes. This, however, is strictly confidential. Furthermore, such a disclosure is would breach the provisions of data protection within the European Union. Whilst we do not consider this approach to be unreasonably as such, we would, for the sake of legal certainty, ask EBA to precisely determine the circle of possible third parties as well as the format of substantiation for conducting the required proof. Otherwise the leasing companies would have no clarity on who and how their expertise is being checked.

Remedies and actions related to delinquency and default of debtor (Article 21 (9))

Article 21(9)
The transaction documentation shall set out in clear and consistent terms definitions, remedies and actions relating to delinquency and default of debtors, debt restructuring, debt forgiveness, forbearance, payment holidays, losses, charge offs, recoveries and other asset performance remedies.
The transaction documentation shall clearly specify the priorities of payment, events which trigger changes in such priorities of payment as well as the obligation to report such events. Any change in the priorities of payments which will materially adversely affect the repayment of the securitisation position shall be reported to investors without undue delay.

Question 27
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

Resolution of conflicts between different classes of investors (Article 21 (10))

Article 21(10)
The transaction documentation shall include clear provisions that facilitate the timely resolution of conflicts between different classes of investors, voting rights shall be clearly defined and allocated to noteholders and the responsibilities of the trustee and other entities with fiduciary duties to investors shall be clearly identified.

Question 28
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Yes, we largely agree with the interpretation of this criterion. However, in a number of European civil law jurisdictions there are already specific statutory concepts for creditor resolutions which should prevail and would be expected by investors to apply and which should not be confused with discretionary contractual arrangements investors may not expect.

Hence we would like to ask EBA for supplementing paragraph 80 as follows:

For the purposes of Article 21(10) of Regulation (EU) 2017/2402 provisions of the transaction documentation that "facilitate the timely resolution of conflicts between different classes of investors", should include provisions with respect to all of the following:

a. the method for calling meetings or arranging conference calls;
b. the required quorum
c. the minimum threshold of votes to validate such a decision, with clear differentiation between the minimum thresholds for each type of decision,
d. where applicable, a location for the meetings which should be in the Union;
e. the maximum period from the time where conflicts between different classes of investors occur and the resolution of such conflicts by means of holding a meeting or conference call,

unless the statutory law governing the transaction documents already provides for rules and procedures for creditor resolutions.

Requirements related to transparency

Data on historical default and loss performance (Article 22 (1))

Article 22(1)
The originator and the sponsor shall make available data on static and dynamic historical default and loss performance, such as delinquency and default data, for substantially similar exposures to those being securitised, and the sources of those data and the basis for claiming similarity, to potential investors before pricing. Those data shall cover a period of at least five years.

Question 29
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

Verification of a sample of the underlying exposures (Article 22 (2))

Article 22(2)
A sample of the underlying exposures shall be subject to external verification prior to issuance of the securities resulting from the securitisation by an appropriate and independent party, including verification that the data disclosed in respect of the underlying exposures is accurate.

Question 30
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

We do not oppose the verification as such. However, we are concerned about the present interpretation as included in paragraph 85 and 86.

According to paragraph 85b. the representative sample should include the verification, applying a confidence level of at least 95 %, that the data disclosed to investors in any formal offering document in respect of the underlying exposures is accurate. We fear that a confidence level of at least 95 % cannot be guaranteed in case of large volume securitization transactions. There is an incalculable risk of increase in time and costs.

In addition, we fear that the present interpretation as included in paragraph 86 would lead to severe difficulties with regard to the process of verification.

Paragraph 86 would extend the scope of Article 22 (2) by an obligation that the offering circular

should include a confirmation of the external verification of the underlying exposures. This verification will be conducted by an auditor. Hence, the obligation would entail that the originator would have to disclose the Agreed-Upon-Procedures (AUP) of the auditor in the offering circular to third parties.

The AUP´s are the core of the relationship between originator and auditor, though. As such they are confidential and any disclosure is subject to data protection provisions. As a result we are of the view that it will become very difficult – if not impossible – to obtain the necessary consent for disclosure from the responsible auditor and suggest to delete the proposed interpretation from the Guidelines.

Liability cash flow model (Article 22 (3))

Article 22(3)
The originator or the sponsor shall, before the pricing of the securitisation, make available to potential investors a liability cash flow model which precisely represents the contractual relationship between the underlying exposures and the payments flowing between the originator, sponsor, investors, other third parties and the SSPE, and shall, after pricing, make that model available to investors on an ongoing basis and to potential investors upon request.

Question 31
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Pursuant to paragraph 88. the originator should be deemed to bear the full responsibility for the submission of the information deriving from a cash flow model which is developed by third parties.

Indeed, it is common practice that the originator buys a cash flow model from the arranger or uses other service providers to develop and provide a cash flow model. However, the arranger/other service provider in its own responsibility and without any participation of the originator (other than providing required data/assumptions) develops, calculates and prepares the cash flow model. Whilst we do not oppose to bear responsibility for the transaction itself (including the provided data/assumptions) we are of the view that the responsibility for a service which is being conducted by a third party and which is clearly communicated to the investor should stay with the third party.

Additionally, we would like to express that we do not consider the wording of Article 22 (3) to cover the present interpretation as it only speaks of the obligation for the originator to "make available" the cash flow model, but does not touch upon any distribution of responsibilities.
As a result we propose to amend paragraph 88 in a way that the responsibility for the cash flow model stays with the arranger/other service provider who developed the same.

Environmental performance of assets (Article 22 (4))

Article 22(4)
In case of a securitisation where the underlying exposures are residential loans or auto loans or leases, the originator, sponsor and SSPE shall publish the available information related to the environmental performance of the assets financed by such residential loans or auto loans or leases, as part of the information disclosed pursuant to point (a) of the first subparagraph of Article 7(1).

Question 32
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

Question 33
Please provide further details and suggestions what type of information is available for residential loans and auto loans and leases that could be provided under this requirement.

Not relevant.

Compliance with transparency requirements (Article 22 (5))

Article 22(5)
The originator and the sponsor shall be responsible for compliance with Article 7. The information required by point (a) of the first subparagraph of Article 7(1) shall be made available to potential investors before pricing upon request. The information required by points (b) to (d) of the first subparagraph of Article 7(1) shall be made available before pricing at least in draft or initial form. The final documentation shall be made available to investors at the latest 15 days after closing of the transaction.

Question 34
Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Not relevant.

Non-specified Articles of the Regulation (EU) 2017/2402

Question 35
Do you agree that no other requirements are necessary to be specified further? If not, please provide reference to the relevant provisions of the STS Regulation and their aspects that require such further specification.

Not relevant.

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