RCCD
STUDIO LEGALE

Thank you for the opportunity to comment on the Draft Report on STS Framework for Synthetic Securitisation Under Art. 45 of Regulation (EU) 2017/2402 (the "**Draft Report**").

Please find below Studio Legale RCCD's answers to the questions in relation to which our firm believes may make a contribution.

Question 4: Do you agree with the analysis of the rationale for the creation of the STS synthetic instrument? How useful and necessary is synthetic securitisation for the originator and the investor? What are the possible hurdles for further development of the market? - Question 5: Do you agree with the assessment of the reasons that could eventually support a preferential capital treatment?

We do not see some of the "cons" outlined in the analysis carried out under Section 5.3 as relevant.

"Cons" under paragraph 86 highlights the possibility that an STS framework for synthetic securitisations could lead to a super-equivalent regime with additional operational issues for originators and investors. If an STS regime applicable to synthetic securitisations would be implemented, the choice on whether or not to benefit of it would be ultimately left to the relevant originator/investor on the basis of their economic considerations, exactly as it occurs with traditional securitisations. The fact that an STS transaction may result more burdensome to implement does not *per se* seems an element preclusive to the implementation of a STS regime applicable to synthetic securitisations, as it was not an element preclusive to the implementation of an STS regime for traditional securitisations.

"Cons" expressed under paragraph 87 does not seem to take in consideration the features typical of investors in synthetic securitisations; such investors usually focus on equity-like investments and are, as such, sophisticated. Assuming that less sophisticated investors would be interested in investing in mezzanine tranches of STS synthetic transactions, such players would be in any case protected by the collateralisation offered by the junior tranche (which is subject to minimum thickness requirements) and by the structural and transparency requirements introduced by the STS framework itself. We see as highly improbable that an STS framework applicable to synthetic securitisations would enhance a market of senior positions arising from synthetic deals, which in theory may be the most suitable investment for less sophisticated investors.

Moreover, the argument that the implementation of an STS regime for synthetic transaction could lead to less issuance of traditional STS securitisations does not seem to be *per se* a downside (as such fewer issuance would be compensated by the execution of STS synthetic securitisations); finally, the argument that an STS regime for synthetic transaction could lead to further STS developments later on, such as developments of STS NPL securitisations, seems to be groundless, due to the fact that in light of the current framework, NPL exposures cannot be included in STS transactions. Any modification to this latter criterion can always be rejected, independently from the implementation of an STS regime applicable to synthetic transactions.

"Cons" expressed under paragraph 94 seems also to be unjustified, as recognition of SRT by competent regulatory authorities should avoid, *per se*, that the execution of risk transfer transactions produces any negative impact on the stability of the originators.

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Question 7: Do you agree with the criteria on simplicity? Please provide comments on their technical applicability and relevance for synthetic securitisation.

Criterion 1: Due to the cross reference under art. 245 para 4 b) of the CRR, the conditions set by art. 249 shall be met by all synthetic securitisations, whether or not they qualify as STS. The general applicability of this criterion should be clarified by the Draft Report, as the same clarifies that criterion 14 applies to all securitisations.

Criterion 2: It is unclear the exact purpose of the suggested representations and warranties, and how they should differ from standard eligibility criteria (in particular, representations under third and fourth bullets seem to be identical to eligibility criteria).

Moreover, it is not clear to what consequences would lead the breach of the suggested representations and warranties. On the one side, termination of the transaction due to misrepresentation with respect to a single or a limited number of securitised exposures would seem a too extreme consequence and would render the credit protection maximally instable. On the other side, exclusion of the loans affected by the misrepresentation would render the suggested representations and warranties equivalent to eligibility criteria (thus rendering the differentiation useless).

On the content of the suggested representations and warranties we highlight the following:

- representation under bullet 1 does not seem to grant any particular protection nor to investors nor to originators. Whilst in the context of a synthetic securitisation it is material that the securitised exposures are registered on the balance of the originator, the legal ownership/full legal title by the latter of the same does not seem to be a necessary requirement (as an assignment of the securitised exposures from the originator to a SSPE is missing). Whilst required legal ownership by the originator of the securitised exposures grants no immediate and evident advantage to the transaction parties, it restricts the possibility for the originator to utilise the relevant exposures in the context of retained securitisations/liquidity transactions with the ECB; such double use does not seem per se to hinder the investors in synthetic securitisations, whilst permits to the originator to maximise efficiency in the management of its assets.

- Representation under bullet 2 is not immediately understandable: the breach by a securitised exposure of an eligibility criteria should lead to the exclusion of the relevant exposure from the portfolio. It is not clear to what further consequences a misrepresentation on the compliance by the reference exposures with the eligibility criteria should lead.

- Representation under bullet 3 should be an eligibility criterion.

- Representation under bullet 4 is vague and difficult to verify by any loss verification agent, due to the suggested knowledge qualifier (whose insertion we find necessary). This representation should be substituted with a criterion excluding exposures overdue for more than [__] days as at the date of selection of the portfolio, which is much more objective and easy to verify.

In case the proposed representations and warranties are maintained, we suggest that the consequences of a breach of the same are clarified, such as by requiring that the transaction documents specify that a misrepresentation should lead to repayment by the originator of the proceeds deriving from any occurred enforcement of the collateral with respect to loans affected by the misrepresentation, and repayment of loss on interest which derived from such enforcement.

Question 8: Do you agree with the criteria on standardisation? Please provide comments on their technical applicability and relevance for synthetic securitisation.

Criterion 18: we would suggest to make clear reference to the triggers set under paragraph 92 of the "*Discussion paper of significant risk transfer in securitisations*", which seem to be stricter than those proposed in this discussion paper.

Criterion 19: We assume that reference to "*early amortisation of the notes where SSPEs are used within a synthetic securitisation*" made by the proposed criterion entails the early termination of the transaction (as the notes would become due and payable) in case a breach of the suggested triggers occurs. If the above is true, we highlight that the envisaged early termination would be triggered by circumstances related to the performance of the portfolio and which are not under the control of the originator. Early amortisation of the notes seems thus a too extreme remedy following the occurrence of the proposed triggers (and not aligned with the principles set by the CRR). In our view, whether or not a SSPE is involved in the transaction, the only consequence of the occurrence of the proposed triggers should be termination of the revolving period (and the switch to linear amortisation, if applicable).

Criterion 20: More than detailing the standards that the servicer should adhere to in the context of the securitisation transaction (as such standards would already be known by the investors, having they performed a due diligence), it would be materially important that an STS transaction would be viable only if the originator ensures that the securitised exposures are managed as a blind pool.

Moreover, substitution of the servicer should not be limited to cases in which the appointed servicer is an entity different from the originator, but should also occur in case of insolvency of the originator acting as servicer. In this respect, please see our answers to question 12 below.

Criterion 21: this criterion does not seem to be sufficient in order to properly protect investors' interests. Please refer to our answer to criterion 20 on management as a blind pool of the securitised exposures, which is relevant also to this criterion.

Criterion 22: it should be clarified what the reference register consists of in practical terms and the periodicity of adjustment thereof. The reference register could be an annex to the agreement regulating CRM instrument at inception, and adjustments to the same during the life of the transaction may be notified to investors together with the ESMA Reports.

Question 10: Do you agree with the specific criteria for synthetic securitisation?

We agree with the proposed specific criteria for synthetic securitisations (except for criterion 36, as per the below answer).

Question 11: Do you agree with the criterion 36 on eligible credit protection agreement, counterparties and collateral? Please provide any relevant information on the type of credit protection and different collateral arrangements used in market practice and their pros and cons for the protection of the originator and investor.

A requirement for the collateral to be deposited with a third party entity hinders the capital relief provided by the transaction and renders the same inefficient from the originator's prospective. In case the collateral consists of securities deposited with the originator and pledged in its favour, the collateral should be permitted to be held with the originator if the provisions applicable to the latter in an insolvency scenario allow segregation of the collateral from the originators' assets (such legal feature to be confirmed by a legal opinion provided to the originator). If the collateral is constituted by cash, or if no segregation pursuant to the above terms is provided by insolvency provisions applicable to the originator, rating triggers requiring the originator to move the collateral may be sufficient to protect the investors from the originator's insolvency.

Question 12: Please provide suggestions for any other specific criteria that should be introduced as part of the STS framework for simple, transparent and standardised securitisation.

- To further protect investors from insolvency of the originator, the transaction documents should provide for the substitution of the originator in its capacity as servicer, in case of insolvency of the latter. The transaction documents should contain clauses ensuring that the servicing agreement concluded with the substitute servicer provides mechanisms through which the latter reports all the data necessary for the originator to properly manage the synthetic securitisation (e.g. data on losses, amortisation, etc).

- The transaction documents should be regulated by the law of incorporation of the originator, which is the most familiar to the originator and would facilitate the latter to comply with its management process duties with respect to credit risk mitigation practices carried out by the same (see article 194 para 8 of the CRR). As an alternative, the transaction documents should be governed by a law of a EU member state, in order to allow the transaction parties to benefit from the mutual recognition of laws and judicial sentences ensured by the EU legal framework.

Question 13: Do you see a justification for possible introduction of a differentiated regulatory treatment of STS synthetic securitisation? If yes, what should be the scope of such treatment and how should it be structured - for example only for senior tranche retained by the originator bank, or more limited/wider?

STS synthetic transactions should be deemed to be structurally simple (as they would comply with the requirements set by the Draft Report and with any further requirement deemed applicable); thus, they

should benefit of a preferential treatment, as risks arising for investors (in terms of structural features affecting the pure economic risk undertaken, including counterparty credit risk) and originators (in terms of solidity of the credit risk protection obtained) would be properly mitigated by the compliance of the transaction with the STS criteria. In view of the peculiarity of synthetic securitisations, STS transactions should be aimed at lowering the capital requirements with respect to senior tranches retained by the originators. For consistency purposes, we would suggest an alignment, to the extent possible, with the regulatory treatment applicable to traditional STS securitisations.

Question 14: What would be the impact if no differentiated regulatory treatment is introduced? In that case, is the introduction of the STS product without preferential treatment relevant for the market?

As an STS securitisation would entail higher costs to be borne by the originator and less flexibility for both the originator and investors, we do not believe that an STS product without preferential treatment would have any impact on the market. In particular, as investors in synthetic securitisations are and will be mainly players focused on equity-like investments, we do not believe that an STS label itself would contribute to enlarge the target market for synthetic transactions.

Question 16: Should a separate explicit recommendation be included in the Recommendations section on whether or not such treatment should be introduced?

In light of the considerations carried out with respect to questions 13 and 14, we believe that a separate explicit recommendation on the introduction of a preferential regulatory treatment for STS synthetic transactions should be included in the Recommendations section.

Further comments

We excuse to produce comments not directly linked to any question posed by the discussion paper; though, we deem convenient and take the opportunity highlight the following:

- many of the criteria set by the Draft Report (e.g. criterion 3, criterion 30, criterion 31, criterion 32 etc.) have already been referred to in prior EBA papers, and in particular in the 2017 discussion paper on the significant risk transfer in securitisation and in 2016 report on synthetic securitisations. We would suggest to explicit, with respect to the criteria replicated in prior documents, that breach of the same:

    1) may or may not (depending on the overall assessment of the transaction) impair the SRT with respect to any transaction not qualifying as STS (as set by the relevant prior EBA paper);

    2) without prejudice of the above, would preclude the qualificacation of the relevant synthetic transaction as STS.

- we would deem necessary that is clarified whether or not insolvency of the protection buyer would be an admissible termination event also with respect to transactions that do not qualify as STS.