

September 29, 2021

EBA's Consultation Paper specifying the requirements for originators, sponsors, original lenders and servicers relating to risk retention

FBF's answer to the EBA's consultation

Question 1: Do you agree with the provisions in this article with respect to the application of the retention options on the NPE securitisations, and the “net value” regime of the NPE securitisations? Are the retention options specified under articles 4 to 8 sufficiently clear using the net value regime? Are there any other aspects of NPE securitisation and the net value regime that should be clarified in the RTS?

The French financial industry agrees with the provisions proposed by the EBA with respect to the application of the retention options on the NPE securitisations, and the “net value” regime of the NPE securitisations.

Indeed, we consider as legitimate and logical, from both regulatory and operational perspectives, to make a link between the risk retention and the net value of non-performing exposures in the pool of underlying exposures of a securitisation.

The French financial industry wishes to point out a concern raised by Article 2 point 6 (b). Indeed, in case where multiple servicers fulfil the retention requirement, the latter shall be fulfilled by each servicer proportionately to the assets purchased by them (unless otherwise agreed upon by the parties).

Indeed, referring in this matter to an allocation proportionately to the number of servicers seems to be inappropriate to determine the exact role played and risk shared by each servicer in the securitisation.

Question 3: Do you agree with the provisions set out in this article on fees payable to the retainer?

The French financial industry agrees with the rationale of the provisions proposed by the EBA (i.e. to ensure an effective retention of a net economic interest by the retainer until the end of the transaction) and with the main content of such provisions.

Nevertheless, the French financial industry is concerned by the four following issues:

- the proposed provisions include a reference to both objective (“arm’s length”, in paragraph 2a) and subjective (“genuine” in paragraph 2b) criteria, whereas we consider that the contemplated regulation should be based solely on objective criteria. Indeed, the notion of “genuine” is very problematic to demonstrate and leads to a legal, regulatory and operational uncertainty for both the financial industry and the supervisor, which is not satisfactory and even risky.

- the proposed provisions include a reference to another very subjective notion, which is the “undue preferential claim” (paragraph 2b). The scope of this notion is not clearly defined in the text. In our opinion, servicing fees should not be perceived as an “undue preferential claim”. Even more, we consider as legitimate that those fees are preferential. Indeed, they are necessary to preserve the good functioning of the securitization structure and the interest of noteholders. As a consequence thereof, their senior positioning in the waterfall cannot in itself constitute a presumption of "undue preferential claim".

Based on the two issues mentioned here above, we propose to base primarily the EBA's proposal on the objective criteria referred to in paragraph 2a - and ideally to remove paragraph 2b ;

- according to the proposed provisions (ref. last paragraph of point 2), the EBA considers that an up-front payment granted to the retainer does not meet the requirement imposed by this article. The French financial industry considers conversely that this type of payment structure should not be considered negatively (i.e. as an artificial way to prioritise the retained interest in the allocation of cash flows) if the retainer fulfils efficiently its mandate. Indeed, the compensation owed by the retainer is linked to a service provided by the latter, which implies that the regulation should only focus on the monitoring that such compensation does not reward a credit risk;
- the French financial industry is rather puzzled by the operational application of the “fluctuation over time” of the fees payable to the retainer (ref. point 3). We would be pleased to obtain a clarification on this issue.

Question 4 : Do you agree with the provisions with respect to securitisation of own issued debt instruments?

The French financial industry fully supports the provisions proposed by the EBA concerning securitisation of own issued debt instruments.

Indeed, we share EBA's view that, in case of securitisation of own liabilities:

- the alignment of interests between all parties (namely, between the issuer and the investors) is by nature fulfilled as the credit risk remains with the issuer; and
- as a consequence thereof, the risk retention requirements should be considered as complied with.

Question 5: Do you agree with the provisions with respect with to re-securitisations?

The French financial industry supports the provisions proposed by the EBA concerning re-securitisations.

Indeed, if we acknowledge that the risk retention requirement logically applies to any transaction levels (and therefore, to any re-securitisation transactions), we also consider that the exemptions to this requirement specified in the text are fully legitimate in order to avoid any undue constraints on originators and retainers. Besides, these exemptions do not challenge the rights nor the protections granted to investors.

Question 6: Do you agree with the provisions in this article with respect to assets transferred to SSPE? Are there any additional aspects that should be further specified in these RTS, taking into account that no clarification is provided with respect to Recital 11 of the Securitisation Regulation (for example, do you see any specific implications for the securitisations of NPE securitisations and how these should be tackled)?

The French financial industry agrees with the provisions proposed by the EBA concerning assets transferred to SSPE.

Indeed, originators are legitimately required not to proceed to any “cherry picking” in the assets to be transferred depending on their respective credit quality and to ensure that portfolios securitised are comparable (in terms of performance) to those to be held on their balance sheet. These rules ensure the effectiveness of the alignment of interests between originators and investors.

In our opinion, no further clarification is needed in the EBA’s text with respect to this issue.

Question 7: Do you agree with the provisions set out in this article with respect to expertise of the servicer of a traditional NPE securitisation?

The French financial industry agrees with the provisions proposed by the EBA concerning the expertise of the servicer of a traditional NPE securitisation.

Indeed, the criteria specified to enable servicers to demonstrate that they have the required expertise in the servicing of NPE are linked indirectly to the criteria contained in the Securitisation Regulation concerning the expertise requirement imposed on a servicer of a STS transaction.

Question 8: Do you have any comments on the remaining Articles of these draft RTS?

The French financial industry wishes to raise the two following issues:

- we would like to obtain the clarification that the ability to fulfil the retention requirement on a consolidated basis should also apply to originators or original lenders other than credit institutions (as it was explicitly stated in CEBS Guidelines to 122a, paragraph 71).
- we would like to obtain clarification that in the context of limb(b) definition of originator, when the securitized assets are not registered on the balance sheet of the originator during a minimum period of time (Reco 6 of EBA report dated 22 dec 2014) before being transferred to SSPE, but (i) directly sold to an SSPE by the original lenders, (ii) with an exposure to the credit risk of the securitized assets by the originator in the form of guarantee, put option, contingent repurchase agreement... during a minimum period of time, and (ii) with first losses subscribed by the originator, this is an acceptable structure of origination / retention.