



European Banking Authority.

17 July 2018

Re: EBA/CP/2018/04 Consultation Paper Draft Guidelines
on the STS criteria for ABCP securitisation.

This paper has been compiled by the Irish Debt Securities Association (IDSA), which is an industry organisation, established to promote and develop Ireland as the premier European location for activities to support the global structured finance, debt securities and the specialist securities industries. The membership of the IDSA includes corporate administrators, trustees, audit firms, legal advisors, listing agents, and other parties involved in the structuring and management of Securitisations and SPVs in the industry in Ireland. The IDSA promotes a responsible, sustainable and effective environment within which debt securities and other specialist securities can be used to facilitate transactions, to create investment products and to raise capital funding, similar to that of the European Commission's Capital Markets Union (EC CMU) initiative.

The IDSA welcomes the opportunity to reflect the views of the industry and to provide input into this consultation process into EBA/CP/2018/04 Consultation Paper Draft Guidelines on the STS criteria for ABCP securitisation.

Answers to the specific question are contained below.

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Requirements related to transaction-level criteria Q1 -Q25

True sale, assignment or transfer with the same legal effect (Article 24(1), 24(2), 24(3), 24(4) and 24(5))

Q1. 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.

The guidelines introduce the necessity to provide a legal opinion by a qualified legal counsel to confirm in the first instance that the transfer is achieved by means of an enforceable true sale, assignment or transfer with the same legal effect and to assess clawback, re-characterisation, commingling and set-off risks related to the transaction. In the event that the underlying exposures are not acquired by means of a true sale a legal opinion must be provided that the transfer has the same legal effect as a true sale and where an assignment is perfected at a later stage than at closing of the transaction a legal opinion must be provided that there are material obstacles preventing true sale or assignment at issuance and confirming the method of recourse to the obligors. The guidelines state that the legal opinion “*should be accessible and made available to third parties including third party certification agents and competent authorities.*” This indicates that the legal opinions could potentially be made available to different parties to the transaction.

There is a concern that the requirement to provide these legal opinions is in excess of what is required under Article 24 of the STS Regulation and could lead to practical difficulties as many external legal counsel will not agree to their legal opinions being accessible to third parties.

The ESMA consultation on *Draft technical standards on content and format of the STS notification under the Securitisation Regulation* (ESMA33-128-33), includes requirements for concise explanation to be included in the expected content of the STS notification in relation to true sale or assignment, no severe clawback provisions, clawback provisions in national insolvency laws and transfer performed by means of an assignment and perfected at a later stage.

Article 24 (1) Transfer of the underlying exposures by true sale or assignment:

The STS notification shall confirm and include a concise explanation on whether there is no circumstance in which a liquidator or creditor of the originator could seek to unwind the securitisation and claim that the receivables are available to the general creditors of the originator. The explanation shall specify whether the transfer of the underlying exposures is made by means of true sale assignment (legal or equitable), by declaration of trust or by way of novation.

Article 24 (2) No severe clawback provisions:

The STS notification shall include a concise explanation that none of the situations referred to in Article 20 (2) (a) and (b) or Article 24(2) are found in the securitisation, unless the requirements laid down in Article 20 (3) or 24 (3) apply.

Article 24 (3) Clawback provisions in national insolvency laws:

The STS notification shall include a concise explanation on which of the clawback provisions in national insolvency laws form an exception to the severe clawback provisions as provided for in Article 20(2) of the Securitisation Regulation.

Article 24 (5) Transfer performed by means of an assignment and perfected at a later stage:

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 securitisation, the STS notification shall include a concise explanation on whether the means by which the SSPE has acquired the underlying exposures has the same legal effect as an acquisition of underlying exposures by means of true sale. The STS notification

shall also provide a concise explanation on how and whether that perfection is effected at least through the required minimum pre-determined event triggers as listed in Article 20(5) of the Securitisation Regulation. Where alternative mechanisms of transfer are used, the STS notification shall confirm that an insolvency of the originator would not prejudice or prevent the SSPE from enforcing its rights.

The expansion of the scope of the required legal opinion to cover re-characterisation, commingling and set-off risks related to the transaction are in excess of what is required by the STS Regulation. This will involve additional significant work for the qualified legal counsels in relation to clawback, re-characterisation, commingling and set-off risks and a consequent increase in legal costs for the issuer.

Given the scope of the “concise explanations” due to be included in the proposed STS notification, it is felt that the EBA should reduce its emphasis on legal opinions.

In addition, the requirement that the legal opinion be accessible by third parties goes far beyond what is required by the STS Regulation. Article 7 of the STS Regulation specifically excludes legal opinions from the scope of the transaction documents which must be made available to investors. This recognises the fact that legal opinions are transaction specific carefully tailored documents and may contain confidential or proprietary information. In some jurisdictions, a legal opinion may be relied upon by anyone to whom it is disclosed even if non-reliance language is included in the legal opinion. If the guidelines require that a legal opinion be made publicly available, given the risks involved for law firms in doing so, it is likely that many law firms will simply refuse to give legal opinions in these transactions thereby restricting the ability of SSPEs to enter into ABCP transactions.

Q2. 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?

See 1 Above.

Q3. Do you believe that in addition to the guidance provided, additional guidance should be provided on the application of Article 24 (2)? If yes, please provide suggestions of such severe clawback provisions to be included in the guidance.

Q4. 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 or should not be considered as the trigger effecting perfection of transfer of underlying exposures to SSPE at a later stage?

Representations and warranties (Article 24(6))

Q5. 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.

There is a concern with regard to a situation where an original lender is no longer in existence and the subsequent buyer of the portfolio may not be in a position to provide the relevant representations and warranties. This could exclude a portfolio of assets from being securitised and attaining the STS designation.

A possible solution would be to include a “sunset provision” and for the existing seller to make a full disclosure. A sunset provision, in relation to the original origination, could come into effect after a reasonable period of time, such as 36 months, and be contingent on a positive credit performance of the underlying loans. Credit issues related to the original quality of underwriting of the loan should become apparent within a 36-months of the loan drawdown.

Eligibility criteria for the underlying exposures/active portfolio management (Article 24(7))

Q6. 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.

There is some concern with regard to guidelines in relation to *“the eligibility criteria to be applied to exposures transferred to the SSPE after the closing as part of substitution, repurchase, replenishment and ramp-up periods in accordance with paragraph 18, should be no less strict than the eligibility criteria applied to the initial underlying exposures. Eligibility criteria to be applied to such exposures should be specified in the transaction documentation. This criterion refers to eligibility criteria applied at exposure level.”* The concern here is that the eligibility criteria could refer to the original underwriting criteria as the guidelines state *“this criterion refers to eligibility criteria applied at exposure level.”* This would imply that the original underwriting would continue to apply to new assets added to the collateral pool after closing, under the conditions outlined above.

This provision makes sense for a short and limited period where assets are being ramped-up and there is a desire to ensure a homogeneity of the pool. However, underwriting criteria evolve with the market overtime and such a strict application of fixed eligibility criteria at the exposure level could prevent the addition of assets to the pool substitution, repurchase and replenishment reasons. One issue for ABCP is that once the Programme has been established then individual transactions can be issued at any time and therefore although the transaction may be an issue, the Programme has most likely been in existence for a considerably longer time. In such an instance the original underwriting criterion could be seen as the relevant eligibility criteria and thus prevent the issuance of a newer deal based on revised underwriting criteria.

Traditionally the addition of new assets to a collateral pool, for these reasons, have been governed by the maintenance of certain collateral pool level criteria, for example, a cap on the maximum weighted average LTV rate, a maximum exposure size or a maximum maturity profile. Changing the criteria from exposure level to pool level would be in keeping with market practice.

Q7. 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?

See 6 Above.

No exposures in default and to credit-impaired debtors/guarantors (Article 24(9))

Q8. 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 use of the phrase “material damages” is open to interpretation and could result in some parties taking contrary vires on the same credit exposure. A tighter definition would ensure consistency in the interpretation of this element.

Q9. Do you agree with the interpretation of the criterion with respect to exposures to a credit impaired debtor or guarantor?

The guidelines interpretation of excluding exposures *“to a credit-impaired debtor or guarantor” as “neither the debtor, nor the guarantor, should be credit-impaired”*. It is unclear what the aim of this restriction is, traditionally there has been a role for guarantors to provide guarantees to weaker debtors or even credit impaired debtors. This provision goes against standard market practice where by guarantees are provided for credit-impaired debtors. Indeed for exposure to suffer a loss there needs to be a double default whereby the debtor needs to default and the guarantee enforced and then the guarantor needs to default.

It is suggested that this is adjusted to allow a credit-impaired debtor to be guaranteed by a non-credit impaired guarantor which appears to be in the spirit of Article 24 (9).

Q10. 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?

We agree with this interpretation.

At least one payment made (Article 24(10))

Q11. 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 agree with this interpretation.

No predominant dependence on the sale of assets (Article 24(11))

Q12. 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 agree with this interpretation.

Q13. 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?

Appropriate mitigation of interest-rate and currency risks (Article 24(12))

Q14. 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 stipulation that interest rate and currency risks need not be perfectly hedged to be considered *“appropriately mitigated”* but can be mitigated through the use of reserve funds or other measures with the mitigation considered from an economic rather than accounting point of view.

However, the conditions attached to the use of traditional interest rate and foreign exchange rate derivatives is significantly more onerous than those for non-derivative based mitigants. For derivatives the guidelines state that *“the appropriateness of the mitigation of interest rate and currency risks through the life of the transaction must be demonstrated through quantitative*

information including the fraction of notional amounts that are hedged, as well as a concise sensitivity analysis that illustrates the effectiveness of the hedge under extreme but plausible scenarios". However, for risk mitigation not carried out through derivatives, there is no requirement to provide quantitative information and sensitivity analysis. But there is a requirement that these measures should be fully funded and available at all times. From an information disclosure and transparency perspective, it would be appropriate for similar quantitative information and sensitivity analysis to be carried out and disclosed to facilitate investors, in particular, to fully understand the risks and the mechanisms used to mitigate these risks.

Remedies and actions related to delinquency and default of debtor (Article 24(13))

Q15. 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 agree with this interpretation.

Data on historical default and loss performance (Article 24(14))

Q16. 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 agree with this interpretation.

Homogeneity, obligations of the underlying exposures, periodic payment streams, no transferable securities (Article 24(15))

Q17. 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 agree with this interpretation.

Q18. 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?

Referenced interest payments (Article 24(16))

Q19. 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 guidelines are considerably more restrictive than the STS Regulation in relation to the use of sectoral rates reflective of the cost of funds allowable reference rates. The guidelines require institutions to provide sufficient data to allow investors to assess their relation to other market rates. While some institutions disclose the factors which they use in setting their variable rates, the actual data and formula are not actually published.

Indeed, there is an additional issue in relation to the proposed definition of a *"complex formulae"* which is determined by meeting the definition of an exotic instrument by the Global Association of Risk Professionals (GARP). It defines a financial asset or instrument as one with features making it

more complex than simpler, plain vanilla, products. But this is a definition by exception and relies on the concept of a plain vanilla product, which is not defined! It is likely that the formula used in setting bank variable rates would be defined as complex formulas!

The more restrictive approach adopted by the guidelines relative to the STS Regulation means that deals back by loans linked to bank variable rates would be precluded these deals from achieving an STS certification, which would seem contrary to the aims of the STS Regulation.

Following enforcement or delivery of an acceleration notice (Article 24(17))

Q20. 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 agree with this interpretation.

Underwriting standards, seller's expertise (Article 24(18))

Q21. 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 agree with this interpretation.

Q22. Do you agree with this balanced approach to the determination of the expertise of the seller? 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 agree with this approach.

Q23. Should alternative interpretation of the "similar exposures" be provided, such as, for example, referencing the eligibility criteria (per Article 24(7)) that are applied to select the underlying exposures? Similar exposure under Article 24(18) 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 24(18), and "substantially similar exposures" under Article 24(14). 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.

Triggers for termination of the revolving period in case of revolving securitisation (Article 24(19))

Q24. 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 agree with this interpretation.

Transaction documentation (Article 24(20))

Q25. 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 agree with this interpretation.

Requirements related to programme-level criteria Q26-Q37

Temporary non-compliance (Article 26(1))

Q26. 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 agree with this interpretation.

Q27. Do you agree that the external verification should only cover the criteria referenced in paragraphs (9), (10) and (11) of Article 24, or should it cover all criteria mentioned in Article 24? Do you agree with the approach on determining the frequency of the external verification?

We agree with this interpretation.

Q28. Concerning the sample, should a minimum sample size be prescribed (in absolute or relative terms)? Should a statistical method for evaluating the outcome of the external verification of the sample be specified? Do you agree that it should be representative covering all underlying exposures of all transactions? Do you see merit in further specifying that the sample should be representative by properly representing the various asset categories of the transactions; or that representativeness may be assumed when the sample is gathered via a random selection?

Remaining weighted average life (Article 26(2))

Q29. Do you agree with the interpretation of this requirement, and the aspects that the interpretation is focused on? Should other aspects be covered? Please substantiate your reasoning.

We agree with this interpretation.

Q30. Should the calculation of the weighted average life follow the concept of weighted cash flows or of weighted (residual) maturities? Should there be a facilitation for a simplified calculation of the WAL (e.g. to use the longest contractually possible remaining maturity of the exposures in a transaction as an upper bound)?

No resecuritisation (Article 26(4))

Q31. 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 agree with this interpretation.

Q32. Are there any other market practices – apart from the ones being covered by the clarification provided in the guidance - which would also fall within the conditions of Article 26(4), while from an

economical point of view those should not be treated as resecuritisations? Do you agree with the clarification which credit enhancement is to be considered as “establishing a second layer of tranching”?

No call options and other clauses (Article 26(5))

Q33. 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 agree with this interpretation.

Appropriate mitigation of interest-rate and currency risks (Article 26(6))

Q34. 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.

See Q14 Above.

Documentation of the ABCP programme (Article 26(7))

Q35. 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. Should the “specified events” referred to in Article 26(7)(e) be specified in more detail e.g. as including triggers with regard to the creditworthiness of the sponsor?

We agree with this interpretation.

Expertise of the servicer (Article 26(8))

Q36. 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 agree with this interpretation.

STS criteria non-specified above (i.e. no resecuritisation requirement (Art. 24(8)) and full support by sponsor (26(3))

Q37. 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.

We agree with this interpretation.