107987

German Banking Industry Committee

Die Deutsche
Kreditwirtschaft

Comments

EBA Discussion Paper on simple standard and transparent securitisations (EBA / DP / 2014 / 02)

Register of Interest Representatives
Identification number in the register: 52646912360-95

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Berlin, 15-01-14

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,000 banks.

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General Comments

We welcome the EBA's initiative to develop simple, standard and transparent criteria. We by and large agree with the principles, but see a need for changes in the details so as not to exclude from recognition as "simple standard and transparent (SST) securitisations" those marketable securitisations which already meet from the investor perspective the demands on simple, standard and transparent securitisations. Otherwise, there could be negative effects for securitisations which have successfully established themselves in the securitisation market.

We welcome and expressly support not tying the qualification as "SST securitisation" to the seniority of the securitisation and would encourage the EBA to continue this approach. No doubt junior bonds of an ABS transaction would incur a higher capital requirement than senior bonds during the calibration of the capital requirement in order to reflect the risk. On the other hand, qualifying junior bonds as "SST securitisations" would pave the way to a more favourable, risk-adjusted, capital requirement than for non-SST securitisations. This could tackle the problem of cliff effects that could arise, were junior bonds from "SST securitisations" not to be recognised as "simple, standardised and transparent". This is an important step towards not jeopardising the ability to market an ABS transaction due to clearly excessive capital requirements for junior bonds. A distinction must be made for mezzanine tranches immediately above the first loss position, for which an equitable solution should be sought based on empirical findings on "SST securitisations".

Lastly, we welcome a holistic review of the policies and rules for securitisations and other investment products.

Uniform approach

We consider it to be important that the experience and lessons from previous regulation projects are taken on board during the compilation and description of the criteria for "SST securitisations". For example, securitisations for the LCR (delegated act) can be used to a certain extent as liquidity buffers. Here too, numerous criteria were defined which then have to be met before a securitisation can be used as such. There was a broad discussion on the definition of the criteria. The fruits of that discussion should also be applied when deciding the criteria for simple, standard and transparent securitisations. Differing or tougher criteria would impact the EBA's aim of restoring market acceptance for securitisation and also increase the complexity of securitisation transactions. We thus feel that the criteria should be developed against the background of previous regulation projects with the aim of producing a uniform "playing field".

ABCP transactions

We have noticed that the EBA’s discussion paper does not cover ABCP transactions, even where these meet the CRR securitisation definition. Against the background of the significant importance of ABCP programs for banks and corporate customers and the intended beneficial treatment of transactions meeting the EBA’s requirement we would like to ask the EBA to continue its work on "simple standard and transparent securitisation" in order to elaborate, together with the industry, tailor-made criteria for simple standard and transparent ABCPs. Since multi-seller conduits differ from the usual structure of a term securitisation there should be specific high-quality criteria for multi-seller conduits. In the attached position paper we would like to illustrate in what respect the criteria proposed by the EBA should be adjusted in order to better capture the special nature of multi-seller ABCP programs.

Synthetic securitisations

We very much support extending the scope of qualification to include synthetic securitisations with real-economy links. Only synthetic securitisations permit securitisation of credit claims that is independent of individual loans. This focus on the borrower rather than on the individual loan would in itself contribute greatly to the flexible financing of investments as demanded by the SMEs. Narrowing the scope of qualification to true sale securitisations would be counterproductive to the faster economic recovery tailored to the needs of the borrowing companies in the real economy which is being called for by economic policymakers. This restriction to real-economy claims could take into account the reservations against the possibilities of using synthetic securitisations to reduce capital requirements.

Principle-oriented definition of the criteria

Against the background of the need to improve the market acceptability of securitisations, we suggest that the criteria to be defined be formulated in the main independently of the type of securitisation (true sale or synthetic). Where there is a need for a clear distinction at the securitisation type level, this should be made via supplementary criteria. This would allow for the approach to be applied to enhanced transaction models in the future (principle orientation).

Questions

Question 1: Do you agree with identified impediments to the securitisation market?

Only a few investors can bear the considerable cost of the tougher demands introduced in the past few years on internal processes. Most important from our perspective are the regulatory impediments. For example, we fail to grasp why the securitisation market is to be supported whilst at the same time the regulatory demands on securitisations - seven years after the onset of the crisis in the subprime RMBS segment in the USA - are being significantly tightened:

- The capital requirements for securitisations with AAA ratings (e.g. Auto ABS) are to be more than doubled from 2018 according to the revised Securitisations Framework published in December 2014. The risk rating floor is to rise from 7% to 15%. The EBA discussion paper also proposes a 15% floor. Thus, no alleviation for the capital backing is apparent for "SST securitisations". Compared with covered bonds this would mean a 50% higher capital requirement.

- Unless adjusted to successfully established market standards, non-impairment demands on securitised assets will have significant negative effects on the further development of the securitisation market, albeit without any reasonable benefit in the form of the apparently expected greater security.

- Further impediments arise from the fact that the revised Securitisations Framework published in December 2014 could force IRB banks to use the external rating-based approach due to their lack of information about the underlying assets or rating procedures approved by the banking supervisory authorities. This could be the case especially if the development of internal IRB processes for securitisation positions is not worthwhile for those banks. In that case, the risk weights would well-nigh triple, namely from 7% to 20%. This could lead to a reduction in the investor base.

- Should the current Commission's bank recovery and resolution proposals come into force in this form, negative effects on the securitisation markets could not be ruled out. For example, Amortising Swaps—which are extremely important for the marketability of ABS—could probably only be offered by trading entities. This will lead to a further narrowing of the market. The number of possible counterparties is already extremely limited.

- Liquidity is the driving factor for the attractiveness of ABS. Market makers play an important role in this. The Bank Recovery and Resolution Directive envisages restrictions which will have a negative impact on the number of possible market makers.

- Significantly higher capital requirements for securitisations in the trading book are still being discussed. This could lead to a sharp drop in ABS trading volumes, with a corresponding negative impact on ABS and their liquidity.

- The relative capital requirements are too high even for high-quality securitisations under Solvency II compared with other assets, especially covered bonds. This could make it uninteresting for insurance companies to invest in securitisations in future.

- The large number of vague legal terms (e.g. relating to non-impairment requirements) has left wishes of investors for LCR- and Solvency II-compliant ABS paper largely unheeded.

- The Commission's current proposals would be tantamount to prohibiting money market funds from investing in ABS in future, even if they are recognized as highly liquid under the delegated act to the LCR. This is already leading investors to move towards the sidelines.

Against this background there is great uncertainty as to how these provisions, already adopted but yet to come into force, will impact the demand for securitisations in future. It is to be feared that the tighter regulations will shrink the investor base, with a corresponding negative impact on the depth and breadth of the securitisation market.

Question 2: Should synthetic securitisations be excluded from the framework for simple standard and transparent securitisations? If not, under which conditions/criteria could they be considered simple standard and transparent?

Synthetic transactions should not be excluded from the framework for simple standard and transparent securitisations. This holds true in particular when the only reason why a securitisation does not meet the EBA’s criteria for simple standard and transparent securitisations is because it has been structured as a synthetic securitisation. The essential benefit of synthetic transactions for many originating banks is the transfer of credit risk (e.g. SME loans) to third parties, when true sale transactions (traditional securitisations) cannot be employed because bank customers do not want the bank to sell their loans (transfer clause limitations). Furthermore, synthetic securitisations release risk-weighted assets which enable banks to extend new loans to the real economy. Moreover, synthetic transactions are often the only way to manage the risk arising from certain off-balance sheet exposures, e.g. letter of credits or guarantees provided to the bank’s customers. This also applies to certain on-balance sheet exposures like until-further notice overdraft facilities. In other words, synthetic transactions are a very efficient way of supporting real economy SME transactions in that they enable banks to transfer the risks of various lending products and accommodate the concerns of bank's clients such as data secrecy or the unfounded but widely spread worry about a sale of the relationship to third parties such as hedge funds. Synthetic transactions also support risk sharing in the financial system.

We do acknowledge that the originator as well as the investor might be exposed to an additional counterparty risk in comparison to true sale transactions. Nevertheless the counterparty risk in true sale transactions might also arise from interest or FX derivatives needed for transforming the cash flow of the underlying pool. However, the counterparty risk from the originator's perspective can be mitigated by the provision of equivalent cash collateral (SPV enters into guarantee or credit derivative with originating bank to ensure risk transfer and issues credit-linked notes to external investors). The cash collateral is either deposited with the originating bank or a third bank and pledged to the originator. On the other hand any counterparty risk from the investor's perspective can be mitigated by setting a rating trigger for the deposit bank. If the deposit bank is downgraded below a predefined threshold, the cash deposit (arising for the CLN) has to be transferred to another eligible bank. Thus the investor only faces a "jump to default" risk, if the bank becomes insolvent immediately without a preceding rating shift. It should also be borne in mind that synthetic transactions offer advantages over true sale transactions. Since the securitised assets will not be sold to the SPV there are no risks such as legal validity of the receivables, commingling risk, settlement risk and collection risk. This implies that the investor will not suffer any losses arising from such risks since they are not credit default risks. Moreover, if the originator bank defaults, the guarantee or credit default swap will be terminated and the investor gets back the provided cash (from purchased CLN) exceeding any occurred credit events in the underlying portfolio (in contrast to selling the securitised assets or awaiting any scheduled repayments in the portfolio). This is of particular interest for investors who want to buy a certain credit risk but not the actual underlyings (and potentially having to wait until all the assets are sold before getting their money back).

As mentioned above, synthetic transactions can be structured in a simple and transparent way. Often the transactions and associated documentation are less complex for both issuer and investor because no sale of assets is involved. By way of example there are after fewer parties involved in a synthetic transaction, and the complexity of criterion 12 (documentation specifying contractual obligations, duties and responsibilities of the trustee, servicer and other ancillary service providers) can be significantly reduced.

A synthetic transaction could be considered to be simple, standard and transparent under almost the same conditions/criteria proposed for a true sale securitisation. The following criteria need to be amended:

- criterion 1: it should be a "synthetic transaction" as defined in the CRR (as per Article 242(11));

- criterion 3: in the case of synthetic securitisation, the underlying assets have to be clearly defined and belong to one originator. A legal opinion should confirm that the credit protection arrangement is legally effective and enforceable in all relevant jurisdictions. The counterparty credit risk is mitigated by the way of collateralisation;

- criterion 12: in the case where servicer and originator are the same legal entity, the default or insolvency of the current servicer should lead to the termination of the transaction and fund repayment if the transaction is (partially) funded;

- criterion 15: the criterion should only apply to publicly offered or listed transactions with securities issuance. In the case of private transactions, the originator ensures that investors have access to all the information that is necessary for making an informed investment decision before the closing.

In summary, we believe that when synthetic securitisations of bank loans meet the spirit of the remaining EBA criteria, their being structured as a synthetic securitisation should not exclude their qualification as a "simple standard and transparent securitisation" and regulators should encourage the ability of banks to manage the risks associated with bank originated loans.

Question 3: Do you believe the default definition proposed under Criterion 5 (ii) above is appropriate? Would the default definition as per Article 178 of the CRR be more appropriate?

Criterion 5 proposes a default definition that does not correspond to the CRR's existing one. We are of the opinion that this definition cannot be implemented as it stands, because the criteria for default are very vague (e.g.: "credit score indicating significant risk of default") and thus give scope for interpretations. This is an extremely critical point in our opinion. In order to achieve a uniform approach throughout Europe, additional explanations or EBA guidelines would thus be necessary. For that reason, we would suggest that the common practice be applied and any claims which are overdue, in default as per Art. 178 CRR or for which an individual IFRS value adjustment has been made be excluded.

In this context we would like to point out that it is unclear when a credit assessment by an ECAI or a credit scoring indicates a significant risk. In addition, it is not clear whether external credit assessments and internal credit scorings can be used alternatively or whether they have to be used in combination. The latter would entail very high additional costs.

Furthermore, it is unclear which ECAIs and which credit scorings could be used under which conditions. Many originators of high quality ABS still use the credit standardized approach and thus have no IRB approval by the supervisory authorities although they have scoring procedures and models in place which are validated annually, are comparable to those of IRB credit institutions and have a significantly better discriminatory power than the scoring and rating procedures of ECAIs. Although the assessments of ECAIs are used in the credit process, they are in many cases not used for the credit standardized approach, and hence the requirements of the CRR to use the assessments of ECAIs have not yet been implemented because the costs would be too high due to the fact that the external ratings or scorings would have to be applied consistently worldwide. In addition, it has to be noted that the EU is looking to reduce the dependency on external ratings. However, the new requirement would actually increase this dependency on external ratings.
To ensure comparability of "significant risk" across Europe, a PD threshold would have to be determined. The use of scoring and PD models implies model risks. The same problems exist with respect to model risks for ECAI scores.

Currently, many high quality securitisations are not based on ECAI assessments or internal credit scoring but on the non-overdue status. Accordingly, all underlying exposures that are overdue at the time of the selection (pool-cut) or additionally in the case of replenishment after inclusion at any time after issuance are excluded from the selection. In future, these tried and tested processes which have ensured low losses of the underlying assets from securitisations even in times of crisis would have to be changed.

Furthermore, it is not clear under which conditions and for how long a credit history is deemed adverse or no longer adverse after a company has recovered or a private person is once again able to pay after a period of unemployment. Such a requirement would prevent in particular the recovery of SMEs after an economic downturn due to the increased financing costs even if the company has returned to a good credit standing in the meantime.

Moreover, companies, such as SMEs, which have recovered after an insolvency or debt rearrangement process, should not be excluded if they are no longer impaired under applicable accounting rules. Such accounting rules also require an assessment after a recovery as to whether the borrower is still credit-impaired. If this is the case, then such loans would have to be excluded from the securitisation of high quality ABS. According to the current proposal such borrowers would be excluded for three years regardless of their current creditworthiness, which would be detrimental to the recovery of such companies.

Finally, it will be difficult to implement the requirements because the required information is not stored in IT systems in a manner suitably structured for facilitating the exclusion of loans deemed credit-impaired under a new definition which deviates significantly from the credit-impairment definition under accounting rules. Thus, it is unclear how to exclude those borrowers and lessees which are no longer credit-impaired according to the accounting rules or in default and are serviced in the meantime in the normal course of business after their recovery. The information required for identifying such borrowers is often only available in an unstructured manner in credit agency reports. Highly granular ABS can comprise up to 90,000 contracts. It is virtually impossible to check all those contracts manually.

As a result, many existing high quality ABS structures are not catered for under the proposed non-impairment requirements, even though the existing eligibility criteria, which were mainly based on the non-overdue status, performed extremely well even under the stress conditions caused by the last crisis. Thus, we propose excluding all exposures which are in default as per Article 178 of Regulation (EU) 575/2013 ("CRR"), credit-impaired with objective evidence of impairment as per the relevant accounting standard or appendix A of IFRS 9, or are overdue.

To accommodate a forward-looking perspective and a prudent selection of the receivables to be securitised we propose the following:

In addition to the past-due status, originators should have to have an internal scoring or rating procedure subject to at least annual validation that comprises as a minimum a review of the discriminatory power and the calibration. An IRB approval should not be an obligatorily requirement. If such a procedure is not available, the ECAI should be allowed if the ECAI can demonstrate that the minimum validation criteria are fulfilled and if the originator obtains at least an annual validation report on the discriminatory power and calibration.

Furthermore, we propose a requirement to the effect that internal or external scores have to be used to support the credit-decision process based on an acceptance policy which has to be the same for the securitised and non-securitised portfolio. Loans with a credit-score that is worse than the policy's cut-off score would have to be excluded from the securitisation even if approved manually because it would be assumed that all exposures which are worse than the cut-off score have a significant risk.

To avoid any adverse selection, the loans should be selected randomly from a target portfolio. This applies especially for those selected on a past-due status during the life of the contract. By combining the past-due status and the use of scoring and rating models it would be possible to have in place both an objective procedure with a prudent backstop function and a forward-looking perspective based on the acceptance policy both for the securitised and non-securitised loans without having to rely on PDs with their inherent model risks.

Question 4: Do you believe that, for the purposes of standardisation, there should be limits imposed on the type of jurisdiction (such as EEA only, EEA and non-EEA G10 countries, etc.): i) the underlying assets are originated and / or ii) governing the acquisition process of the SSPE of the underlying assets is regulated and / or iii) where the originator or intermediary (if applicable) is established and / or iv) where the issuer / sponsor is established?

No, a restriction to Europe is not necessary if the calibration of capital requirements distinguishes between assets originating in Europe and beyond Europe. To simplify the due diligence, however, the securitisation of assets from different jurisdictions also within Europe should be avoided, because the lack of harmonised civil law and diverging case law in the individual jurisdictions would otherwise lead to excessive complexity.

Question 5: Does the distribution of voting rights to the most senior tranches in the securitisation conflict with any national provision? Would this distribution deter investors in non-senior tranches and obstacle the structuring of transactions?

We reject this, because this would disadvantage the owners of junior bonds. This could have extremely negative effects on the market attractiveness of junior bonds. Without the marketability of the junior bonds, the entire ABS transaction might be rendered unattractive to the market. This would stymie the goal of promoting an expansion of the securitisation market.

Furthermore, there are reservations on the part of the originators. It is widely perceived that there are reservations about borrowers and the securitisation of claims. These reservations are partly fuelled by the negative reporting on the detrimental treatment of customers whose claims have been securitised.

Currently, most ABS structures have been set up as "auto-pilots" with defined contractual clauses on how to respond to a default or insolvency event. The granting of voting rights to an "identified person" could be interpreted by the general public to mean that the "identified person" or the trustees might also have discretionary rights permitting them to interfere in the established customer-bank relationship. This will surely fuel the already existing reservations e.g. among consumer protection bodies and parts of the general public and could be detrimental to the fostering of the securitisation market.

Should these reservations not lead to dropping the idea of distributing voting rights to an identified person, it should be ensured that these voting rights are restricted to insolvency and default events. Furthermore, the owners of the junior bonds should be included in such cases, in so far as mezzanine tranches immediately above the first loss position are not involved, so as not to jeopardise the market attractiveness of these bonds of crucial importance for the market attractiveness of the entire ABS transaction. Any impression that the "identified person" would have any discretionary or intervention rights during the course of the normal execution or implementation of an ABS transaction which would impact the customer-bank relationship and the particular situation of mutual trust must be avoided at all costs.

Question 6: Do you believe that, for the purposes of transparency, a specific timing of the disclosure of underlying transaction documentation should be required? Should this documentation be disclosed prior to issuance?

Question 6 asks if any documentation should be disclosed prior to issuance. We would like to ask that the exact understanding of the term "prior to issuance" be clarified. It should not be overlooked that the originator relies on a certain degree of confidentiality before the deal announcement, and this might be endangered by a premature disclosure of significant deal information. Any extension of the period in which an ABS term transaction is public but not closed (i.e. closing of the books and the end of the book building) would burden the originator with more uncertainty regarding the placement of a transaction. Furthermore, we are of the opinion that the requirement is not relevant for bilateral private transactions.

Question 7: Do you agree that granularity is a relevant factor determining the credit risk of the underlying? Does the threshold value proposed under Criterion B pose an obstacle to the structuring of securitisation transactions in any specific asset class? Would another threshold value be more appropriate?

We believe that the threshold is appropriate for retail transactions. However, the requirements with respect to the group of connected clients should be softened somewhat in a way that includes "according to the best knowledge" of the originator. The reason is that there are in part thresholds in retail bulk business for identifying a group of connected clients in order to reduce the workload. Such a practice does not endanger the identification of single risks but could mean that small exposures might not be identified as belonging to a group of connected clients. Although it is very unlikely that the granularity threshold would be exceeded without the originator's knowledge, it cannot be fully ruled out that there might be a very few cases which exceed the granularity threshold. In order to avoid a securitisation not being eligible as "qualified" in such cases, the wording should be softened as proposed.

With respect to corporate customers the threshold could be too low. We propose a threshold of between 2% and 3%.

Question 8: Do you agree with the proposed criteria defining simple standard and transparent securitisations? Do you agree with the proposed credit risk criteria? Should any other criteria be considered?

We agree with the principles, but see some need for further adaption and specification in order to avoid those securitisations which are already well established in the market and already fulfil the basic principle requirement of simple, transparent and standard securitisation being excluded from recognition as a "SST securitisation". Otherwise, there might be negative repercussions for these already well-established securitisations. In addition, the wording should be adapted to the wording used in article 13 to the delegated act to the LCR determining the eligibility criteria for qualifying securitisations to benefit from extensive discussions during the deliberations on the development of the delegated act with stakeholders.

Criterion 4

Under Criterion 4, underlying assets should be "homogenous in terms of asset types". It should be clarified that the securitisation of corporate and retail exposures in one transaction is not excluded by this requirement.

Under Criterion 4, iv) the repayment of a securitisation position should not depend, i.e. either fully or in part, on the residual value of the collateral provided for the claim. This requirement could lead, especially for car securitisations, to these securitisations not qualifying as simple securitisations because the wording "in part" could have a detrimental impact on financing contracts with indirect residual value risks. When concluding contracts of this type, car dealers undertake to buy back the vehicle at a price determined in advance that reflects the final instalment and the estimated residual value and to pay the final instalment. Any shortfall is to be borne by the dealer. Hence the repayment depends in part on selling the vehicle. Therefore, it must be ensured for this criterion that only direct residual value risks are affected. The phrase "in part" should accordingly be dispensed with. The wording in the delegated act to the LCR constitutes, from our perspective, a suitable solution.

Criterion 9

Referring to "Commonly encountered market interest risks" in the automobile business loans and leases are subsidized by the car manufacturers or car dealers to promote the sale of the cars. It should be clarified that loans and leases subsidized, for instance, by the manufacturer and/or the car dealer are not excluded.

Criterion 13

Criterion 13 requires the involvement of an "identified person" who acts in the best interest of investors and facilitating timely resolution of conflicts. We kindly ask that it be clarified whether it is the EBA’s intention to establish a further party to act as arbitrator or if the trustee can play that role or if this is already covered by the capacity of trustee in traditional ABS term transactions.

See also our comments on question 5.

Criterion 17

"Access to all underlying transaction documents" should be limited to "all material and reasonable" underlying transaction documents.

Criterion 18

Processes and especially certain kinds of action are not always predetermined but characterised by a certain level of discretion that decision makers have when taking their decisions. Hence this could conflict with predetermined processes and actions. In addition, processes, definitions and actions can change during the lifetime of an ABS transaction. Thus, a description of the prescribed processes, definitions and actions could force the originator not to change the processes, an undesired outcome that should be avoided.

Thus, there should be a reference that these processes are governed and documented in internal process descriptions and instructions that will be provided for due diligence purposes at the request of interested potential investors. In addition, it should be indicated that whilst processes and definitions can change during the lifetime of the ABS transaction, the originator will undertake not to lower the existing standards. In addition, it is proposed that internal process descriptions and instructions will be provided on an ongoing basis upon request. Internal process instructions typically leave leeway for discretion, so that the discretion issue should be dealt with by reference to internal process instructions as well.

Referring to "provide investors with a liability cash flow model" before pricing and on an ongoing basis, investors should have their own cash flow model. However, originators should provide investors with all the relevant data necessary for building a cash flow model.

Criterion 20

Criterion 20 requires access to data on historical default and loss performance. We agree that such information is available for typical bank originated loans. These data might not be available, however, for corporate customer receivables (e.g. German trade receivables) since the customer's infrastructure does not usually provide such information. In addition, it should not be overlooked that the loss data for certain asset classes (e.g. German trade receivables) indicate that losses are very low (see also True Sale International 2010, 2014). Furthermore, silent assignment and transfer of the receivables is mandatory for almost all corporates (needless to say only if allowed under the applicable law). Although the data can be anonymised, the level of confidentiality a corporate client intends to maintain would be undermined and the relative value of a securitisation in comparison to loan lending would decline further.

Criterion B

Identifying the group of connected clients can be very challenging in the retail bulk business and can entail high operational costs with little benefit from a risk management perspective. In many cases there are thresholds in place in the retail bulk business to reduce the workload and so strike the right balance between operating costs and the need for identifying single risks in order to ensure proper risk identification and to comply with requirements. Thus, so as to ensure that the identification of the group of connected clients can be based on the existing processes of the originator who has to the identify group of connected clients, the words "to the best knowledge of the originator" should be added.

Criterion C

Criterion C of the credit risk criteria requires that the underlying exposures have to meet certain criteria in terms of their potential CRR credit risk framework risk weight. From our perspective this criterion contradicts the intention of the other EBA criteria on simple standard and transparent securitisation. Irrespective of the potential RWA consumption of the underlying assets, securitisation transactions can be set up as proper securitisation, where other risk than the pure credit risk related to the underlying exposures are properly mitigated. This applies in particular to underlying loans that meet criterion 4, which requires that the loans are consistently originated in the ordinary course of the original lender's business. Furthermore, we wonder whether the requirement demands that the securitised assets were on a bank's balance sheet. If so, corporate customer receivables included in a securitisation transaction in which the bank acts solely as a sponsor cannot meet the criterion. It should be clarified that the requirement is met, when the assets would potentially (assuming the Credit Risk Standardised Approach is applied to such assets) assigned to the listed risk weights.

Question 9: Do you envisage any potential adverse market consequences of introducing a qualifying securitisation framework for regulatory purposes?

No, in so far as the qualification as "SST securitisation" is not coupled with the seniority of the ABS tranche. For this approach can help to avoid sharply rising capital requirements (cliff effects) for junior bonds ranking immediately below senior bonds.

Question 10: How should capital requirements reflect the partition between qualifying and non-qualifying?

According to the EBA observations the qualifying securitisations had hardly any losses. Therefore there is no need to increase the capital requirements for qualifying securitisations. Based on the proposed minimum risk weight of 15% (see BCBS revision to the securitisation framework) and actual minimum risk weight of 7%, the partition between qualifying and non-qualifying would be 0.5. This partition is to be understood as a minimum and should be adjusted after the holistic review of the regulatory framework for securitisations and other investment products.

The capital requirements should be based on historical data for qualifying and non-qualifying securitisations. This should include segmentation by European and non-European securitisations. As the EBA's empirical findings show, the historical SST securitisation and non-SST securitisation losses differ significantly for the same external rating.

For the IRB approach, in the external rating-based approach and the standard approach as per the Securitisation Framework the parameterisation should be based on historical data such that the capital requirements for SST securitisations are reduced.

The hierarchy in the Securitisation Framework should be retained because—despite all the reservations—the external rating-based approach has the highest risk sensitivity compared with rating agencies under the IRB approach. Furthermore, rating agencies have learned from their past mistakes and significantly improved their rating methodology.

Concerning the standard approach, historical data should be used to determine conservative average parameters for SST and non-SST securitisations and used as the basis for capital requirements.

Question 11: What is a reasonable calibration across tranches and credit quality steps for qualifying securitisations? Would re-allocating across tranches the overall capital applicable to a given transaction by reducing the requirement for the more junior tranche and increasing it for the more senior tranches other than the most senior tranche be a feasible solution?

Re-allocation across tranches has already been proposed by the BCBS. The use of a partition on the non-qualifying securitisation risk weight seems to be a feasible and simple solution.

Question 12: Considering that rating ceilings affect securitisations from certain countries, how should the calibration of capital requirements on qualifying and non-qualifying securitisations be undertaken, while also addressing this issue?

We would propose, in the case of securitisations meeting the demands on SST securitisations, the capital requirements be determined before the sovereign-ratings cap for countries within the banking union, if this can be justified from the historical data.

Possible criteria for simple standard and transparent ABCP

Annex

We agree with the EBA's view that a one-size-fits-all regulatory approach to securitisations is no longer appropriate. In the consultative paper as well as in the discussion about revitalizing securitisation markets, however, one form of securitisation has not been taken properly into account: ABCP issued by multi-seller conduits.

Multi-seller conduits are platforms that purchase predominantly trade, consumer or leasing receivables from corporations or leasing companies or Auto-Asset Backed Securities (Auto-ABS). The purchase is funded by issuing short-term commercial paper (ABCP). The sponsor bank which is running the conduit provides liquidity lines that can be drawn if ABCP cannot be sold to the market or losses in the securitized receivables occur. Most of the ABCP issued in Germany are "fully supported". That means that any losses of the investors are borne by the provider of the liquidity facility.

ABCP conduits play an important role in the financing of businesses. They are advantageous for corporates as well as for banks. Corporates can use the sale of own receivables as a substitute for other forms of funding (especially bonds or bank loans). Banks can provide additional funding to corporates without expending credit lines. Furthermore providing a liquidity line is less risky from the banks perspective and – at present – has to be backed by less capital.

While the volume of the conduit business market shrunk significantly due to the exit of arbitrage conduits and structured investment vehicles (SIVs) after the financial crisis the share of multi-seller conduits in all conduit issuances has risen considerably. According to Moody's multi-seller conduits in Europe securitize trade, consumer or leasing receivables of an amount of 63.3 billion EUR in 2014 and thereby account for 82 Percent of the ABCP market.

Multi-seller ABCP show a strong performance. They have experienced a stable and sound development also through the financial and economic crises 2007/2008 and subsequent years. In Germany no ABCP investor in a multi-seller-conduit has ever suffered a loss.

We are afraid that ABCP will be negatively affected by the revision of the Basel Framework for Securitisations. In this context two roles have to be distinguished that banks can play in an ABCP multi-seller conduit: Investor and sponsor bank. As ABCP cannot be issued without a sponsor bank that provides the liquidity facility the treatment of these facilities in the capital requirements regime is of utmost importance.

According to our calculations the capital requirements for liquidity banks will multiply 3-4 times compared to the current framework and will exceed the risk weights for senior unsecured corporate loans. Thus ABCP financing will become unattractive for sponsors and very expensive for sellers.

From our point of view it is therefore of utmost importance that ABCP as well as the corresponding liquidity facilities are recognised as "simple standard and transparent securitisations" that should be rewarded by a special regulatory treatment.

As multi-seller conduits differ from the usual structure of a term securitisation there should be specific high quality criteria for multi-seller conduits. We would like to ask the EBA to continue its work on "simple standard and transparent securitisation" in order to elaborate, together with the industry, tailor-made criteria for simple standard and transparent ABCP. In the following we would like to illustrate in which respect the criteria proposed by the EBA should be adjusted in order to better capture the special nature of multi-seller ABCP programs.

Pillar I: Simple securitisations

Criterion 1

According to the EBA the securitisation shall not be a “re-securitisation” as defined in Article 4 (63) CRR. It should be clarified in this context that typical co-funding structures where a pool of trade or lease receivables is refinanced via one or more banks or ABCP programs or structures with separate purchasing and issuing vehicles (e.g. within ABCP-programs) where an SPV acquires the receivables and passes on the risk pari passu to the various banks or ABCP programs are not regarded as a re-securitisation provided that the inherent risk of the underlying portfolio is only tranched once (on the primary or the secondary level). The same should apply if the risks are passed on to the second SPV via the transfer of debt instruments used to back the Auto-ABCP’s.

Criterion 2

The EBA proposes that securitisation should not be characterised by an active portfolio management on a discretionary basis. For the avoidance of doubt it should be made clear here, that the revolving purchase of receivables (e.g. trade receivables) to replace maturing or ineligible assets is not to be regarded as active portfolio management in the sense of a discretionary decision by a manager.

Criterion 3

In the EBA’s view the securitisation should be characterised by legal true sale of the securitised assets. From our point of view this criterion shall be deemed to be fulfilled if the securitisation meets the requirements under Art. 13 (2) (c) and (d) of the Commission Delegated Regulation of 10.10.2014 to supplement Regulation (EU) 575/2013 with regard to liquidity coverage requirement for Credit Institution. This cross-reference shall help to harmonize regulations across various similar, but independent regulatory subjects and avoids unintended mismatches.

Criterion 4

Here the EBA is proposing that the securitisation should be backed by exposures that are homogeneous in terms of asset type, currency and legal system under which they are subject. From our point of view this criterion shall in the case of an ABCP programme not apply to the securitised assets but to the risk protection scheme or the risk taker. Therefore, as long as the credit risk of the securitised assets is fully covered by a third party (e.g. by a credit insurance or by a fully supported liquidity facility within an ABCP-program) it should be sufficient that the obligors of trade, consumer or lease receivable securitisations fulfil the criteria i. to iii.

This would enable fully supported ABCP-programs to fulfil the criterion even if the various pools of such multi-seller programs stem from different originators, asset classes, currencies and legal systems. By way of the full credit support the investor is exposed primarily to the risk of the sponsor bank. This adds enormous simplicity to the analyses of the investment. Similarly, the stress testing requirements according to the Commission Delegated Regulation 625/2014 only relate to the sponsor bank and not the portfolio.

From the perspective of the liquidity bank (which does not benefit from the full support) the homogeneity criterion for trade and leasing pools of real economy originators should be met if the asset type is uniform and if any material risks out of currency mismatches or different legal systems are covered by adequate measures (FX-hedging, credit insurance resp. legal opinions).

From our experience many SMEs are doing business internationally, i. e. they deliver goods or provide services not only in a single country. Furthermore, such SMEs are accepting the currency and governing law as proposed by their customers. Finally SMEs do not have sufficient receivables to securitise receivables separately in separate countries. The above mentioned amendments would ensure in our opinion that SMEs can use securitisation of their trade and lease receivables as a refinancing option.

Additionally the EBA requires that the securitised exposures are underwritten with full recourse to an obligor that is an individual or a corporate and that is not a special purpose entity (iv. a). For the avoidance of doubt it should be clarified that co-funding structures or structures with separate purchasing and issuing vehicles (e.g. within ABCP-programs) where an SPV is buying a pool of trade, consumer or lease receivables from an original lender and the risk is passed on to another SPVs which is issuing a securitisation position (which is not a re-securitisation position) do not harm criterion 4 iv (a). The same should apply if the risks are passed on to the second SPV via the transfer of debt instruments used to back the Auto-ABCP's.

Criterion 5

According to the EBA proposal at the time of inclusion in the securitisation, the underlying exposures should not include any exposures to a credit-impaired borrower. For these purpose, a borrower should be deemed as credit-impaired where he has been the subject of an insolvency or debt restructuring process due to financial difficulties within three years prior to the date of origination or he is, to the knowledge of the institution at the time of inclusion of the exposure in the securitisation, recorded on a public credit registry of persons with adverse credit history, or other credit registry where a public one is not available in the jurisdiction, or he has a credit assessment by an ECAI or a credit score indicating significant risk of default.

In the case of trade, consumer and lease receivable securitisations where the original lender is not a credit institution a borrower shall only be defined as credit-impaired if such original lender has positive knowledge of circumstances that make it highly unlikely that the borrower is able to pay its obligation in full. It should be noted that real economy originators, i.e. corporates, do not have systems and procedures in place to perform a bank-like underwriting and credit approval process. It should also be taken into account that trade receivables often are covered by a commercial credit insurance. In particular those originators will not be in a position to track whether an obligor has been the subject of an insolvency or debt restructuring process due to financial difficulties within three years prior to the date of origination.

In addition, the EBA requires that the original lender should provide representations and warranties that assets being included in the securitisation are not subject to any condition or encumbrance that can be foreseen to adversely affect enforceability in respect of collections due. From our point of view the representations and warranties of the original lender regarding enforceability of collections with regard to trade receivables should allow for exclusions of such circumstances that are ordinary in the original lender's business (e.g. dilutions, set-offs). If the ABCP programme is fully supported this requirement should be met automatically.

Criterion 6

Here the EBA requires that at the time of inclusion, the underlying exposures are such that at least one payment has been made by the borrower, except in the case of securitisations backed by personal overdraft facilities and credit card receivables. We feel that trade receivables and any other one-off payment obligations shall be added to the list of exemptions.

Pillar II: Standard securitisations

Criterion 9

The proposal requires that any referenced interest payments under the securitisation assets and liabilities should be based on commonly encountered market interest rates and may include terms for caps and floors, but should not reference complex formulae or derivatives. For the avoidance of doubt any lease receivables that contain interest rates at subsidized levels may be considered eligible if they are purchased with a discounted purchase price that adjusts the yield to the market rate level.

Criterion 10

The transaction documentation of those transactions featuring a revolving period should include provisions for appropriate early amortization events or triggers of termination of the revolving period if the originator/sponsor is not able to generate sufficient new underlying exposures of at least similar credit quality (ii). For the avoidance of doubt it should be clarified that this requirement does not apply to ABCP programs as these are designed to refinance fluctuating receivables pools (e. g. trade receivables).

Criterion 12

Criterion 12 requires that the transaction documentation should clearly specify the procedure regarding any replacement of the liquidity facility provider. In ABCP programs the replacement of the liquidity facility provider is not intended due to the paramount importance of the provided fully supporting liquidity facility (in contrast to liquidity facilities in term transactions, where the scope and function of a liquidity facility is rather limited) and the fact that the liquidity facility is a collateral in addition to the assets (means two layers of security for the benefit of the investors: assets and facility).

Further it should be clarified, that it is to ensure that the default or insolvency of the current servicer does not automatically lead to a termination of the servicing of the underlying assets without the replacement of the current servicer by a new servicer.

Criterion 13

According to the EBA proposal the documentation shall contain provisions relating to an “identified person” with fiduciary responsibilities, who acts in the best interest of the investors in the transaction. From our point of view does not apply to ABCP programs where there is only one key risk taker (e.g. in the case of a fully supported ABCP program, the sponsor bank acts as key liquidity bank). Only where there is a broad variety of investors which are exposed to the underlying risk of the securitised assets (in difference to ABCP programs where the underlying risk is fully covered by the sponsor/liquidity bank in relation to the investors), the problem that investors cannot act on their own behalf but need to rely on a third party with fiduciary responsibilities can occur.

Criterion 14

Here the EBA requires that the management of the servicer of the securitisation should demonstrate expertise in servicing the underlying loans. Regarding the servicing of the underlying receivables in the case of a multi-seller ABCP, the servicer (which is in the case of trade or lease receivables is no credit institution) demonstrates expertise when he is servicing the underlying receivables and confirms that he services the sold receivables as if such receivables have not been sold.

Pillar III: transparent securitisations

Criterion 15

The EBA is proposing that the securitisation shall meet the requirements of the Prospectus Directive. From our point of view this criterion should not apply if a securitisation in the form of an ABCP program (or in a similar form) is not publicly offered or listed. In this case an Information Memorandum (or similar document) shall be satisfactory if it contains materially similar information as it would be required under the Prospectus Directive. This should be insured by the Sponsor or Originator.

For bilateral or private deals (e. g. such as ABCP Programs for the securitisation of trade and lease receivables) a prospectus is not obligatory and hence structures typically do not fall under the Prospective Directive. However there is no reason why such transactions shall not be regarded as transparent only because there is no formal prospectus which complies with the requirements of the Prospectus Directive. Furthermore, the requirement to prepare a full prospectus would impact negatively in particular small securitisations (e.g. the securitisation of its trade receivables by a company) whereas large securitisations (as executed for example by international banks) are hardly effected. A market entry barrier for smaller, real economy originators would be the result.

Criterion 16

The securitisation should meet the requirements of Article 409 of the CRR and Article 8b of the CRA (disclosure to investors). We feel that the Criterion should also capture the relevant articles of the Commission Delegated Regulation 625/2014 and the RTS to the CRA3. For the securitisation of trade, consumer and lease receivables within ABCP-programs special requirements addressing the specialties of multi-seller conduits should apply.

Criterion 17

The EBA want to require that, where legally possible, investors should have access to all underlying transaction documents. We feel that access should be limited to *materially relevant* underlying documentation to assess the structure and the credit quality of the securitisation. For the securitisation of trade and lease receivables, the relevant real economy originator may define which information shall be protected as its business secret and whether there may be information published.

Even where a disclosure is legally possible, the disclosure could endanger business secrets of real economy companies whose trade, consumer and lease receivables are securitised. In such cases the originator is not a bank, but a real economy company. The securitisation transactions are, similar to factoring transactions, for many companies off-balance and, in some cases, even off-notes. In such cases even the mentioning of the name of the originator company could negatively impact the originating company. Furthermore, a disclosure of portfolio data in combination with the name of the originator, could allow competitors of such company to extract sensitive data (such as payment terms accepted by the company, distribution of the customer base, or general business development (e.g. turn-over etc.).

This applies even more if the securitisation is fully supported by a sponsor/liquidity bank or other means which cover all risks (e.g. credit insurance). Where investors rely on the support by a third part, they should only be entitled to request documentation that is materially relevant to understand their risk position to the extent that they may reasonably request such information without hurting business secrets of any of the counterparts involved.

Criterion 18

According to EBA's proposal the transaction documents should clearly specify the priority of payments, triggers, changes in waterfall following trigger breaches as well as the obligation to report such breaches. As pointed out in our remarks on criterion 17, reporting on breaches should only be done to the extent and in a way that is compatible with protectable rights of the originator or sponsor or original lender in terms of business secrets. Confidentiality issues must not be harmed. However, changes in the waterfall due to the occurrence of a termination event (or of other breaches) will be reported in the next monthly investor report.

Furthermore the originator or sponsor should provide investors a liability cash flow. We think that cash flow statements should not be mandatory, especially not within ABCP programs where assets and liabilities are constantly revolving. Any reporting of cash flow information should be made in a reasonable and sufficient manner to enable the investor to have a clear picture of all materially relevant aspects regarding his risk position in the respective investment. Especially in fully supported, multi-seller ABCP programs with trade, consumer or lease receivables from various real economy companies certain data may be kept confidential if information memorandum and investor reporting provide all materially relevant information for assessing the risk position of the investor. Therefore the originator and sponsor should only provide investors with a liability cash flow where applicable.

Criterion 19

Here it is proposed that the transaction should be subject to mandatory external verification on a sample of underlying assets (confidence level of at least 95%) at issuance, by an appropriate and independent party or parties, other than a credit rating agency. Confirmation that this verification has occurred should be included in the transaction documentation.

First of all, we would like to ask the EBA for a more detailed explanation of this requirement. In particular it is not clear what is meant by “external verification”. If it relates to the validity of the receivables pool at the initial issuance (or cut off date) this is understood and confirmed that an initial due diligence by the sponsor bank or an appropriate and independent party has to be made initially. However, with respect to pools of trade or lease receivables a confidence level of 95% may hardly be achieved in all cases. It should suffice to procure that a material sample which is representative for the pool has been verified. Investors can be informed upon request about the relevant size of the samples verified. If the term "external verification" is meant to include also historical loss, delinquency and dilution profiles, this would be overly burdensome and expensive for the originators (real economy companies). Investors can be informed upon request about the contents of the verified aspects.

In case of a revolving pool where assets are constantly replaced (e.g. trade or lease receivables), the verification of a sample of underlying assets should be repeated once per year by the sponsor bank or an appropriate and independent party. The size of each sample should be sufficient to adequately reflect the pool. In particular for short-term receivables (e.g. 3 months) such check is not appropriate against the background of the fast turn overturnover of the receivables. This holds in particular true, since on site audits of the seller are conducted by involved parties regularly (e.g. liquidity facility providers in ABCP programs) and external confirmations (e.g. by audit firms) are obtained.

Criterion 20

The EBA suggests that investors and prospective investors should have readily available access to data on the historical default and loss performance, such as delinquency and default data, for substantially similar exposures to those being securitised, covering a historical period representing a significant stress or where such period is not available, at least 5 years of historical performance. The basis for claiming similarity to exposures being securitised should also be disclosed.

From our point of view this requirement should not apply to multi-seller ABCP programs because of the specific structure of these programs. According to criterion 22 investors will have information about the materially relevant data on the credit quality and performance of underlying assets. Each ABCP-program reports on a pool-by-pool basis about the performance, compliance with triggers, credit enhancement and pool description. Furthermore each ABCP-program provides information on the full support by the sponsor bank as well as general information on the ABCP-program.

Because of the ongoing changes in ABCP programs (additions/removals of pools, permanent replenishment in each pool) and the coverage through (at least 100 %) liquidity support by the sponsor bank historical data of single pools is neither practically available from the companies nor relevant for investors.

Criterion 21

The EBA is proposing that investors and prospective investors should have readily available access to data on the underlying individual assets on a loan-by-loan level, at inception, before the pricing of the securitisation, and on an ongoing basis.

From our point of view this should not apply to multi-seller ABCP programs because of the specific structure of these programs. Through criterion 22 investors will have information about the materially relevant data of the underlying assets on an aggregated base (e.g. asset type, industry of sellers, currencies, geographical distribution etc.). Loan-by-loan-level data of trade receivables is practically not deliverable, already outdated and potentially not sensible to disclose. It may even be critical in terms of business secrets of the corporate sellers. Furthermore, investors do not benefit from such data as they rely primarily on the liquidity support of the sponsor/liquidity bank. Aggregated pool data has proven to be fully sufficient.

Credit risk criteria

Criterion A

Underlying exposures should be originated in accordance with sound and prudent credit granting criteria. Such criteria should include at least an assessment of the borrower's creditworthiness in accordance with paragraphs 1 to 4, 5(a) and 6 of Article 18 of Directive 2014/17/EU or Article 8 of Directive 2008/48/EC, as applicable. We think that the second sentence should only be relevant for such original lenders or originators which are covered by the respective directives. It should especially not be relevant for the securitisation of trade receivables. The requirements of a sound and prudent credit granting shall take into account the nature of the receivables (e.g. trade receivables). According to Article 2 of the Directive 2008/48/EC, such directive only applies to credit agreements but not to trade or (most) leasing receivables. Accordingly the originators (mainly corporates) - which are usually no finance institutions - do not comply with the directive. A carve out for such originators is necessary.

Criterion B

According to this suggestion the pool of exposures to be securitised should be such that the largest aggregated exposure to a single obligor does not exceed 1% of the value of the aggregate outstanding balance. For the purposes of this calculation, loans or leases to a group of connected clients, as referred to in Article 4(39) of the CRR, should be considered as exposures to a single obligor.

We think that this criterion shall not apply for the securitisation of trade, consumer or leasing receivables if the receivables pool is fully covered by a third party (e.g. by a credit insurance and other third warrentor) or by a fully supported liquidity facility within an ABCP-program. For the securitisation of leasing receivables any residual values shall not be counted as an obligor for the purpose of fulfilling this granularity criterion

Within the trade receivables pools of multi-seller ABCP-programs the exposure to a single debtor is subject to the business policy and customer base of the corporate originator (e.g. automotive suppliers with naturally only have few customers whereby trading companies may have thousands). It would not be appropriate to declare a whole ABCP-program is not eligible as a simple standard and transparent securitisation because of single transactions with higher concentrations. This counts even more if the portfolio (or the whole ABCP program) is covered by a commercial credit insurance or a fully supported liquidity line - see also criterion 4.

Furthermore, in case of leasing transaction with (predetermined) residual values, the manufacturer or an affiliate usually covers the credit risk of the residual value. This should not be regarded as an obligor but as a seller related risk.

Criterion C

The EBA requires that the underlying exposures of the securitisation have to be exposures to individuals or undertakings that are resident, domiciled or established in an EEA jurisdiction (i). For the securitisation of trade, consumer or leasing receivables this criterion shall not apply if the credit exposure is covered by a third party (e.g. by a credit insurance or by a fully supported liquidity facility within an ABCP-program) which is domiciled in an EEA jurisdiction. Especially for multi-seller ABCP conduits there should be a threshold level for exposures (e.g. 10 %) that may be domiciled outside an EEA jurisdiction.

According to (ii) at the time of inclusion the risk weights of the underlying exposures under the Standardized Approach shall not be higher than 40, 50, 75 or 100 percent depending on the exposure class. This criterion shall only apply if the original lender or the originator is an institution supervised under Directive 2013/36/EU (CRR). Corporates that have high export rates should not be excluded from ABCP-financing or forced to obtain credit insurance coverage. Furthermore such corporates cannot be obliged to generate or select only such trade receivables that have certain minimum risk weights (under the Standardized Approach of the CRR. Criterion ii shall therefore only apply to supervised institutions under the CRR.