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From:	Presidency
To:	Delegations
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Subject:	Presidency non-paper on the changes in the compromise proposal for the STSS Regulation

Meeting of the Council Working Party on Financial Services (Securitisation)
12th November 2015 (10:00)

RATIONALE FOR CHANGES

Art. 1 (1)	Editorial change in line with Art. 2 (2).
Art. 1 (2)	Editorial change for the sake of coherence throughout the text.
Art. 2 (1) (a)	Alignment with CRR.
Art. 2 (1) new subpara.	Text added for clarification. The wording has been taken from recital (6).
Art. 2 (2)	Text added to clarify that the SSPE is established for the 'sole' purpose for carrying out a securitization; alignment to CRR.
Art. 2 (3) (b)	Text added for clarification.
Art. 2 (5)	1) Term 'transaction' is deleted to align the definition to CRR definition of 'sponsor'; 2) The wording is amended for the sake of legal certainty. Even in the case of a delegation, the responsibility will remain with the sponsor.
Art. 2 (7)	The amendment is in line with the Basel revised framework.
Art. 2 (9)	1) Reference to 'institution' is deleted as the scope is broader here than in the CRR; 2) Text changed for clarification.
Art. 2 (11)	In line with Art. 2 (19) (definition of 'securitisation position').
Art. 2 (12)	Editorial change.
Art. 2 (13)	Editorial change.
Art. 2 (15)	Text changed for clarification.
Art. 2 (17)	In line with Art. 2 (11) and Art. 2 (19).



Art. 2 (19)	As requested by certain MS, insertion of the definition of 'securitisation position'. The wording is taken from Art. 4 (62) CRR.
Art. 2 (20)	As requested by certain MS, the definition of 'original lender' has been added.
Art. 3 (1) (a)	Text added to clarify that point (a) applies only if the originator or original lender is established in the Union. The institutional investor shall verify that the criteria for credit granting pursuant to Art. 5a are applied.
Art. 3 (1) (aa) new	Point (aa) added in order to ensure via an indirect approach that the criteria for credit granting are applied by the originator or original lender in a third country.
Art. 3 (1) (b)	Text added to clarify that point (b) applies only if the originator or original lender is established in the Union. The retention requirement should be fulfilled on an ongoing basis.
Art. 3 (1) (ba)	Point (ba) added in order to ensure via an indirect approach that the retention requirement is fulfilled.
Art. 3 (1a)	Insertion of a new paragraph to specify that with respect to fully supported ABCP transactions, the sponsor (and not the institutional investor) shall verify the credit granting criteria.
Art. 3 (2)	For clarity purposes, the drafting suggestion replaces the terms 'commensurate with the risk' without changing the substance.
Art. 3 (2) (a)	Text changed for clarification.
Art. 3 (2) (c)	1) In line with Art. 6. 2) The amendment aims at further clarifying the meaning of appropriate reliance on the STS notification by stating that the institutional investor shall not mechanistically rely on the notification and information disclosed by the originator, sponsor and SSPE.
Art. 3 (3) (a)	1) The amendment clarifies that the written procedures include all features relevant for the transaction and the type of underlying exposure; 2) The term 'commensurate' is deleted and replaced by alternative wording to enhance legal certainty.
Art. 3 (3) (b)	1) The amendment takes into account that the current provision is not relevant for ABCP transactions;



	2) Text added to take into account stress tests for synthetic transactions;
	3) The term 'commensurate with' is deleted and replaced by alternative wording to enhance legal certainty.
Art. 3 (3) (c)	Text deleted to enhance clarity and legal certainty.
Art. 3 (3) (d)	The amendment clarifies that the record keeping requirement includes a documentation of each verification process and due diligence as well as of any other relevant information.
Art. 3 (3) (e)	Insertion of point (e) to ensure that institutional investors have a good understanding of the liquidity facility provided and the credit quality of the sponsor in case of a fully-supported ABCP transaction.
Art. 4 (1)	Text re-organized for clarification.
Art. 4 (2)	Editorial change for consistency purposes.
Art. 4 (3)	Text changed to include investment firms.
Art. 4 (4)	Editorial change.
Art. 4 (5)	As requested by several MS, this paragraph for which there was no clear rationale is deleted.
Art. 4 (6) (e)	In line with deletion of Art. 4 (5).
Art. 5 (1) (a)	The amendment takes into account that a monthly requirement to provide information on the underlying receivables or credit claims in the case of an ABCP program might not be workable.
Art. 5 (1) (b)	Text re-organised to enhance clarity.
Art. 5 (1) (c) (i)	Text transferred from Art. 5 (1) (c) (v)
Art. 5 (1) (c) (iii)	Editorial change.
Art. 5 (1) (c) (iv)	In line with Art. 2 (19) (definition of 'securitisation position').
Art. 5 (1) (c) (v)	Text transferred to Art 5 (1) (c) (i).
Art. 5 (1) (d)	Editorial change.
Art. 5 (1) (e)	In line with Art. 5 (1) (a).
Art. 5 (1) (e) (ii)	For clarification purposes.
Art. 5 (1) (e) (iii)	Text deleted in order to avoid a circular reference; the requirement is already covered by the relevant Article.
Art. 5 (1) (f)	Text added for the sake of clarity.
Art. 5 (1) (g) (i)	Editorial change.
Art. 5 (1) (g) (iii)	Text added to clarify the meaning of significant change.
Art. 5 (1) subpara 2	Cross-reference has been corrected.



Art. 5 (1) subpara 3	The text is amended for the sake of consistency.
Art. 5 (1) subpara 4	Text added to ensure consistency with Regulation (EU) No 596/2014 (MAR)
Art. 5 (1) subpara 5	To accommodate confidentiality concerns expressed by certain MS, wording is added to clarify that the originator, sponsor and SSPE of a securitisation shall comply with national and Union legislation governing the protection of confidentiality of information sources or the processing of personal data.
Art. 5 (2)	1) The amendment clarifies that the criteria are applicable to the entity (and not the website). 2) Text added to clarify that the website might be password protected.
Art. 5 (2) subpara. 2:	In line with subparagraph 1.
Art. 5 (3) (a)	Cross-reference is corrected. The amendment clarifies that ESMA shall adopt a proportionate approach when developing the draft regulatory technical standards.
Art. 5 (3) (b)	In line with Art. 5 (2).
Art. 5a	As article 408 of CRR is deleted by the regulation amending CRR, a new Art. 5a that introduces criteria on credit granting applicable to originators, sponsors and original lenders has been inserted. The wording closely follows the requirements of Art. 408 CRR.
Chapter 3 (Title)	Editorial change.
Art. 6	1) Editorial change; 2) Text added to enhance legal certainty.
Art. 7	The drafting suggestion clarifies that the originator, sponsor and SSPE involved in a STS securitisation shall be established in the Union. (Erratum: this requirement shall also apply to ABCPs, the new subparagraph will hence have to be either transferred to Art. 6 or duplicated in Art. 11)
Art. 8 (Title)	Editorial change.
Art 8(1)	1) insertion of a wording to clarify that when the assets are transferred to the SSPE, it is in fact the “title” over the assets that is transferred; 2) to encompass all title transfer scenarios across jurisdiction, it is proposed to add “transfer with the same legal effect”; 3) to respond to concerns from various MS, the wording has



been adapted in order to better take into consideration the features of national insolvency laws;

4) in line with the EBA report, it is proposed to insert a reference to the provision of a legal opinion.

5) the wording clarifies that when the originator is not the original lender (i.e. when the original lender has transferred the assets or claims against the debtors to an originator), the conditions regarding the enforceability of the true sale/assignment also applies to the transfer between the original lender and the originator.

Art. 8(2)

The drafting suggestion strengthens the wording in order to ensure that the underlying exposures are not encumbered.

Art. 8(3)

The changes clarify and strengthen the wording. The last sentence also clarifies that at least the same eligibility criteria shall be met by exposures transferred after the closing of the transaction.

Art. 8(4)

1) In line with the conclusions drawn at the last WP, the notion of “homogeneous” has been clarified by using the wording contained in Recital (18). The wording also clarifies that a pool cannot be a mixed pool of assets.

2) The wording limits the scope of transferable securities which cannot be included in the underlying exposures to “transferable securities listed on a trading venue” (within the meaning of MiFID2).

Art. 8(5)

Amendment is for terminology coherence purposes.

Art. 8(6)

1) The wording clarifies timing issues;

2) Editorial change;

3) Clarification regarding underwriting standard in line with Criterion 4 of the EBA Report on qualifying securitisation (page 54).

Art. 8(7)

Editorial change.

Art. 8(7)(a)

In line of concerns expressed at the WP, the wording has been modified in order not to create an unlevel playing field for specific MSs.

Art. 8(7)(b)

The wording is adapted to reflect the fact that not all MS have a public or official register of persons with adverse credit history. The condition in Art. 8(7)(b) shall be met at the time of origination only as it is almost impossible to check this requirement at the time of transfer to the SSPE for all exposures.

Art. 8(7)(c)

As the notion of “average debtor” is not an operational one for



all types of loans, it is proposed to insert a wording ensuring that the criteria can be applied in all cases.

Art. 8(8)	The wording contains one clarification and aims at aligning the Article with Criteria 5 of the EBA Report on qualifying securitisation (page 56).
Art. 8(9)	Clarification requested by certain MS.
Art. 9 (1)	Editorial change.
Art. 9(2)	The wording clarifies that derivatives (whether exchange traded derivatives or OTC derivatives) may not be entered into by the SSPE, except for covering interest rate and currency mismatches.
Art. 9 (3)	Text added to ensure that any referenced interest payments under the securitisation assets and liabilities shall be based on generally used market interest rates or sectoral rates reflective of the cost of funds.
Art. 9 (4) (a)	This amendment aims at clarifying the meaning of 'no substantial amount of cash' as requested by certain MS.
Art. 9 (4) (b)	Text added for clarification.
Art. 9(6)	For clarity purposes, parts of Art. 9(6) have been moved to a new Art. 9(6a).
Art. 9(6a)	New paragraph to stress the importance of the servicer's experience and the necessity of the servicer having policies in place.
Art. 9(7)	The proposed amendments streamline and simplify the wording.
Art. 10(1)	1) The wording reflects the concern expressed that the data should be made available to investors (or potential investors) at the time of pricing (and not at the time of investing). 2) The wording also limits the data coverage for trade receivables as trade receivables usually have a shorter maturity.
Art. 10 (2)	Text added to clarify 'appropriate and independent party'.
Art. 10 (3)	As requested by MSs, text added to clarify that the originator or sponsor may provide a liability cash flow model to investors through third party specialist providers.
Art. 10 (4)	Editorial change.
Art. 11	Paragraph has been redrafted to reflect the splitting of the requirements in the following articles. The second sub-paragraph has been transferred from Art. 12(1)
Art. 12(1)	<u>General comment</u> : Paragraph has been redrafted to avoid the enumeration of the articles, which are not applicable to ABCP. It is proposed to import directly in the body of Article 12 those articles of Section 1 which remain applicable to ABCP.



Art. 12(1a)	In line with Art. 8(1).
Art. 12(1b)	In line with Art. 8(2).
Art. 12(1c)	In line with Art. 8(3).
Art. 12(1d)	In line with Art. 8(5).
Art. 12(1e)	In line with Art. 8(7).
Art. 12(1f)	In line with Art. 8(8).
Art. 12(1g)	In line with Art. 8(9).
Art. 12(1h)	In line with Art. 9(2), except that for ABCP, this point concerns only the sponsor (not the investors) and, hence, disclosure is not necessary.
Art. 12(1i)	In line with Art. 9(7).
Art. 12(1j)	In line with Art. 10(1) subject to the ABCP specificities (role of the sponsor).
Art. 12(2)	1) “homogeneous” is clarified in line with Art. 8(4); 2) for certain types of transactions, it is proposed to extend the maturity. To be discussed.
Art. 12(3)	The wording reflects Criterion 9 of the EBA Report on qualifying securitisation (page 77).
Art 12(4)	In line with Art. 9(4)(a).
Art. 12(5)	The wording is amended to delete the reference to residential loans, as those loans are excluded from the set of eligible underlying exposures.
Art. 12(6)	The amendment for the sake of clarification.
Art. 12(6)(c)	Point (c) is deleted as the provision was inspired by similar ABS provisions, which cannot apply to ABCPs. For ABCPs the principle is that sellers transfer receivables depending on their day-to-day business. Certain businesses have a seasonality, and thus the amount and quality of the underlying exposures of the ABCP vary over time. Such a process is fairly normal and should not lead to a termination of the revolving period since the SSPE only issues securities where it receives exposures.
Art. 12(7)	In line with Art. 9(6) and (6a). Point (d) of last sub-paragraph is transferred to new Art. 12a.
Art. 12a	<u>General comment:</u> New article to group provisions relating to the sponsor of an ABCP programme.
Art. 12a(1)	The wording is taken from the former Art. 13(4).
Art. 12a(2)	The wording is taken from the former Art. 13(4). The wording also imposes an obligation on sponsors to disclose a description of the liquidity support provided. The wording also clarifies that the support provided should be at programme level.



Art. 12a(3)	The wording is taken from Art. 12(7)(d) and Art. 14(2a)
Art. 12a(4)	In line with former Art. 13(2). The wording clarifies who is responsible and at what level for the risk retention. Please note that, according to article 11, “seller” means “originator” or “original lender” and, hence, encompasses both entities.
Art. 12a(5)	1) The proposal is in line with the suggestion of certain MS to place the responsibility in connection with Art. 5 (Transparency) on the sponsor at an ABCP programme level. The suggestion is based on the prominent role played by sponsors in ABCP programmes and the importance for investors to have a clear view on the liquidity facility and the responsibility of the sponsor. 2) Given the short maturity of the investments in ABCP transactions, it has been specified that the information should be made available to the investors “in a timely manner”.
Art. 12a(6)	This paragraph has been transferred from Art. 13(7)(f).
Art. 13(1)	It is proposed to insert some flexibility as regards the compliance of the criteria on an ABCP programme level to ensure that, if a small part of the transactions no longer fulfils the STS criteria, this will not immediately disqualify the whole programme. Threshold to be discussed.
Art. 13(2)	The paragraph has been transferred to Art. 12a(4).
Art. 13(2a)	The wording imposes that an ABCP programme be fully supported by a sponsor.
Art. 13(3)	The wording clarifies that an ABCP programme cannot “be” a securitisation or re-securitisation. An ABCP programme merely “contain” (re-)securitisation transactions.
Art. 13(4)	The provision has been transferred to Art. 12a(1) and 12a(2).
Art. 13(5)	The wording clarifies that only investors in ABCP transactions qualifying as STS have discretions in exercising the options.
Art. 13(6)	In line with Art. 9(2).
Art. 13(7)	1) The wording takes into account the fact that there is not a trustee involved; 2) Art. 13(7) – the last sentence is transferred to Art. 12a(6).
Art. 13(7a)	New paragraph in line with Art. 9(6a) for the servicer.
Art. 13(8)	The substance of this requirement is now contained in Art. 12a(5).
Art. 14 (1) (Option 1)	As requested by certain MSs, the wording proposed imposes that the STS notification includes a concise justification by the originator, sponsor and SSPE regarding the compliance with each of the STS criteria.



Art. 14 (2) (Option 1)	Clarification that the exemption only applies to EU institutions.
Art. 14 (2) (b) (Option 1)	Editorial change.
Art. 14 (5) (Option 1)	In order to provide for a swifter implementation of this provision, it is proposed that ESMA shall draft an ITS instead of an RTS and that it shall submit this draft ITS to the Commission by six month after entry into force of the STS regulation.
Art. 14 (1) (Option 2)	Idem Art. 14 (1) (Option 1).
Art. 14 (1a) (Option 2)	Paragraph added to better frame the case where an independent third party checks compliance with the STS criteria.
Art. 14 (2) (Option 2)	Idem Art. 14 (2) (Option 1).
Art. 14 (2) (b) (Option 2)	Editorial change.
Art. 14 (5) (Option 2)	Idem Art. 14 (5) (Option 1).
Art. 14a	The new Art 14a provides for an authorization procedure for independent third parties checking compliance with the STS criteria. This authorization could either be done by ESMA (Option 2A) or the competent authority designated under Art. 15 (4a) (Option 2B).
Art. 14b	Article added to clarify the liability regime relating to STS notifications.
Art. 15 (1) (b)	Text aligned to points (a) and (c) – (e).
Art. 15 (1) (e)	Text deleted in order to avoid legal uncertainty due to a contrario readings of other legislative acts where there is no explicit reference to the ECB. The ECBs empowerments as a competent authority for banking supervision result directly from the SSM regulation.
Art. 15 (2) and (3)	Text deleted in order to avoid legal uncertainty due to a contrario readings of other legislative acts where there is no explicit reference to the ECB. The ECBs empowerments as a competent authority for banking supervision result directly from the SSM regulation.
Art. 15 (4)	1) Text changed for clarification; 2) The amendment aims at avoiding unnecessary administrative burden for MSs with respect to the notification of competent authorities since ESMA is required to publish on its website a list of competent authorities pursuant to paragraph 5; 3) Deadline added to the notification process.
Art. 15 (4a)	New paragraph 4a providing Member States the flexibility to appoint only one or more competent authorities for supervisory tasks related to STS securitisations.
Art. 15 (4b)	Following comments from Member States, new paragraph 4b



	clarifying that e.g. SMEs or other corporates would not be subject to direct supervision.
Art. 15 (5)	Text added for the sake of consistency.
Art. 16	References corrected and text added to provide more details on the review to be conducted by competent authorities.
Art. 17 (1)	Text added to ensure that MS lay down rules establishing administrative sanctions and remedial measures applicable 'at least' to the situations specified in points (a) to (f), alignment to CRD IV.
Art. 17 (1) (ba)	Text added to ensure that MS lay down rules establishing administrative sanctions or remedial measures in case of a breach of Art. 6.
Art. 17 (1) (d)	Text added to ensure that MS lay down rules establishing administrative sanctions and remedial measure in case of a breach of Art. 14 (2).
Art. 17 (1) (e)	Text added to ensure that MS lay down rules establishing administrative sanctions and remedial measures in case of a breach of Art. 14 (3).
Art. 17 (1) (f)	Text added to ensure that MS lay down rules establishing administrative sanctions or remedial measures in case a third party authorized pursuant to Art. 14a has failed to properly check the compliance of the securitisation with STS criteria [only relevant if OPTION 2 with respect to Art. 14 will be retained].
Art. 17 (2)	Clarification.
Art. 17 (2) (c)	Editorial change.
Art. 17 (2) (d)	1) Reference to point (ba) of paragraph 1 is inserted; 2) Text added for clarification.
Art. 17 (2) (e)	Alignment with UCITS V.
Art. 17 (2) (f)	Alignment with UCITS V.
Art. 17 (2) (g)	In line with point (e).
Art. 17 (2) (h)	Text added to ensure that in case of an infringement of Art. 17 (1) (f), the competent authority can temporarily withdraw the authorization of the third party to check compliance of a securitization with STS criteria [only relevant if OPTION 2 with respect to Art. 14 will be retained].
Art. 17 (3)	The amendment clarifies that application of sanctions and remedial measures on members of the management body is optional and subject to conditions laid down in national law; alignment with CRD IV and BSR.



Art. 17 (4)	Alignment of wording to wording used in other financial services texts.
Art. 18 (1) (ba)	Alignment with CRD IV (Art. 64).
Art. 18 (2)	As requested by certain MS, the amendment ensures that competent authorities when determining sanctions take into account whether the infringement is intentional or results from a factual error (cf. proportionality).
Art. 18 (2) (c)	Alignment with CRD IV (Art. 70)
Art. 18 (2) (f)	Editorial change.
Art. 18 (4)	The text is aligned to CRD IV and BSR.
Art. 21 (1a)	This amendment aims at further clarifying how CAs shall closely coordinate their supervision.
Art. 21 (2)	Text deleted as unnecessary.
Art. 21 (3)	Text clarifies that where a CA is aware of an infringement, it shall inform the CA of the entity suspected of such infringement.
Art. 21 (4)	Text added to ensure that the CA finding the infringement shall notify without delay, the competent authority of the originator, sponsor and SSPE, as well as ESMA, EBA and EIOPA of its findings.
Art. 21 (5a)	New paragraph 5a has been added to clarify that for cross-border disagreements between CAs, CAs cooperate in order to find a mutually acceptable solution.
Art. 21 (5b)	Text added to clarify which CA has the final say in case of persistence of disagreement.
Art. 21 (5c)	Clarification of the binding mediation procedure.
Art. 21 (5d)	This paragraph has been added to ensure that during the decision process, a securitisation appearing on the list maintained by ESMA pursuant to Article 14 shall continue to be considered as STS.
Art. 22	<u>General comment</u> : In line with CRD IV, the publication only concerns administrative sanctions and not remedial measures.
Art. 22 (1)	Alignment with CRD IV.
Art. 22 (3)	Alignment with CRD IV and streamlining of the text.
Art. 22 (4)	In line with Art 22 (1).
Art. 22 (6)	Text aligned to (EU) N° 596/2014 (MAR).
Art. 22 (7)	Administrative simplification.
Art. 25 (1)	Text added for the sake of consistency.
Art. 27 (2)	Editorial change.
Art. 27 (3)	1) Cross-reference has been corrected; 2) Editorial change.



Art. 28 (2)	Text added for the sake of consistency.
Art. 28 (3):	Text added for clarification.
Art. 28 (4):	Cross-reference to CRR has been corrected.
Art. 29 (3):	Text added to ensure that the ESMA report will cover due diligence and risk retention rules.
Art. 29a new:	Report and review clause with respect to STS synthetic securitization.
Art. 30	Text added to specify that the report shall take into consideration international developments in the area of securitisation. An equivalence regime for STC/STS of third countries could be considered in future.

