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

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## **Presidency non-paper on selected Articles of the STS Regulation**

Following discussions at the Working Party of 12 November 2015, and taking into account written comments received from Member States, the Presidency would like to submit to Member States the present revised drafting proposals on Articles 5, 8(7), 12(2), 13(1), 14, 14a and 14b of the STS Regulation.

Please note that the new changes compared to the first Presidency compromise text are in red track changes. Changes made to the Commission's initial proposal and introduced by the first Presidency compromise text are in blue.

### **Article 5**

The Presidency would like to have a debate on Article 5 of the STS Regulation. A number of suggestions have been made, such as distinguishing between investors and potential investors, between public securitisations and private securitisations, deletion of Article 8b in the Regulation on credit rating agencies etc. The Presidency would like to get a better feeling on the appetite of Member States to explore any of these alternatives.

### **Article 8(7)**

[...]

7. The underlying exposures, at the time of transfer to the SSPE, shall not include exposures in default within the meaning of Article 178, **paragraph** 1 of Regulation (EU) No 575/2013 or



exposures to a credit-impaired debtor or guarantor, who, to the best knowledge of the originator or original lender:

- (a) has declared insolvency or had a court grant his creditors a right of enforcement or material damages as a result of a missed payment within three years prior to the date of origination or has undergone a debt restructuring process within three years prior to the date of transfer or assignment of the underlying exposures to the SSPE, except if:
- (i) a restructured underlying exposure has not presented new arrears since the date of the restructuring which must have taken place at least one year prior to the date of transfer or assignment of the underlying exposures to the SSPE; and
  - (ii) the information provided by the originator, sponsor and SSPE in accordance with Article 10, paragraph 1 explicitly sets out the proportion of restructured underlying exposures, the time and details of the restructuring as well as their performance since the date of the restructuring;
- (b) was, at the time of origination, transfer or assignment of the underlying exposures to the SSPE and where applicable, on a national public credit registry of persons with adverse credit history or other credit registry that is publicly available to the originator or original lender;
- (c) has a credit assessment or a credit score indicating that the risk of contractually agreed payments not be made is significantly higher than for similar exposures held by the originator which are not securitised.

[...]

#### **Justification - Article 8(7):**

*Point (a): In light of concerns expressed by a number of Member States, a provision has been added in order to ensure full transparency with regard to re-structured loans included in the pool of underlying assets.*

*Point (b): Following up on the discussion at the last WP meeting and taking into account the various situations in Member States, the wording has been more closely aligned to the EBA advice while allowing accommodating situations where there is no registry or no public registry.*

#### **Article 12(2)**

[...]

- “ 2. Transactions within an ABCP programme shall be backed by a pool of underlying exposures that are homogeneous in terms of asset type, such as pools of trade receivables, pools of



~~commercial~~ corporate loans, leases and credit facilities to undertakings of the same category to finance capital expenditures or business operations, pools of auto loans and leases to borrowers or lessees or loans and pools of credit facilities to individuals for personal, family or household consumption purposes. A pool of underlying exposures shall only comprise one asset type. ~~The pool and~~ shall have a remaining weighted average life of not ~~t~~ more than ~~one~~two years and none of the underlying exposures shall have a residual maturity of longer than ~~two~~three years, except for pools of auto loans, auto leases and equipment lease transactions which shall have a remaining exposure weighted average life of not ~~t~~ more than ~~four~~four years and none of the underlying exposures shall have a residual maturity of longer than ~~seven~~seven years. The underlying exposures shall not include loans secured by residential or commercial mortgages or fully guaranteed residential loans, as referred to in paragraph 1, point (e) of Article 129 of Regulation (EU) No 575/2013. The underlying exposures shall contain contractually binding and enforceable obligations with full recourse to debtors with defined payment streams relating to rental, principal, interest, or related to any other right to receive income from assets warranting such payments. The underlying exposures shall not include transferable securities listed on a trading venue, as defined in Directive 2014/65/EU. ”

[...]

#### **Justification - Article 12(2):**

*In light of Member States’ comments regarding maturity caps within an ABCP programme, the Presidency considers that the thresholds in the Commission’s proposal might be too low for specific categories of underlying assets as evidenced by existing ABCP programmes. In order not to negatively impinge on an existing and well-functioning ABCP market, it is suggested to extend the maturity limits for these categories of assets. This is counterbalanced by a lowering of maturities on the other asset categories, bringing the latter closer in line with the EBA advice. It should be noted that in most cases, taking into account the nature of the underlying transactions of an ABCP programme, the suggested maturities would not lead to an increase of the weighted average maturity of the programme itself compared to the Commission’s proposal.*



## Article 13(1)

### *Programme level requirements*

1. At all times, at least ~~98{Z%}~~ of the aggregate exposure amount of all exposures underlying the transactions within an ABCP programme shall fulfil the requirements of Article 12 ~~of this Regulation~~.

[...]

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### Justification - Article 13(1):

*Taking into account the recalibration of Article 12(2) and the fact that flexibility granted in this paragraph would solely aim at preventing the disqualification of the whole programme in case an issue arises with regard to an underlying transaction, the Presidency suggests fixing Z at 98%.*

## Article 14

### *STS notification requirements and ESMA website*

1. The originator, sponsor and SSPE shall jointly notify ESMA by means of the template referred to in paragraph 5 ~~of this Article~~ that the securitisation meets the requirements of Articles 7 to 10 or Articles 11 to 13 ~~of this Regulation~~ ('STS notification'). The STS notification shall include an explanation ~~concise justification~~ by the originator, sponsor and SSPE of how ~~regarding the compliance with~~ each of the STS criteria set out in Articles 8 to 10 or Articles 12 and 13 has been complied with. ESMA shall publish the STS notification on its official website pursuant to paragraph 4. The originator, sponsor and SSPE shall also inform their competent authorities ~~iesy~~. ~~The originator, sponsor and SSPE of a securitisation and~~ shall designate amongst themselves one entity to be the first contact point for investors and competent authorities.
- 1a. Where the originator, sponsor and SSPE use the services of ~~rely on~~ a third party authorised pursuant to Article 14a to assess whether ~~check that~~ a securitisation complies with Articles 7 to 10 or Articles 11 to 13 ~~of this Regulation~~, the STS notification shall include a statement that the compliance with the STS criteria was confirmed ~~checked~~ by that third party. The notification shall include the name of the third party, its place of establishment ~~{OPTION 2B:~~ and the name of the competent authority that authorised it}.



2. Where the originator or original lender is not a credit institution or investment firm as defined in Article 4, paragraph 1, points (1) and (2) of Regulation No 575/2013 established in the Union the notification pursuant to paragraph 1 shall be accompanied by the following:
  - (a) confirmation by the originator or original lender that its credit-granting is done on the basis of sound and well-defined criteria and clearly established processes for approving, amending, renewing and financing credits and that the originator or original lender has effective systems in place to apply such processes in accordance with Article 5a.
  - (b) confirmation by the originator or original lender as to a declaration on whether the elements mentioned in point (a) are subject to supervision.
3. The originator, sponsor and SSPE shall immediately notify ESMA and their competent authority when a securitisation no longer meets the requirements of either Articles 7 to 10 or Articles 11 to 13 of this Regulation.
4. ESMA shall maintain a list of all securitisations for which the originators, sponsors and SSPEs have notified that they meet the requirements of Articles 7 to 10 or Articles 11 to 13 of this Regulation on its official website. ESMA shall update the list where the securitisations are no longer considered to be STS following a decision of competent authorities or a notification by the originator, sponsor or SSPE. Where the competent authority has imposed administrative sanctions or remedial measures in accordance with Article 17, it shall immediately notify ESMA thereof. ESMA shall immediately indicate on the list that a competent authority has imposed administrative sanctions or remedial measures in relation to the securitisation concerned.
5. ESMA, in close cooperation with EBA and EIOPA, shall develop draft implementing technical standards ~~that specify~~ing the format in which the information referred to in that the originator, sponsor and SSPE provide to comply with their obligations under paragraph 1 and shall provide the format by means of standardised templates.

ESMA shall submit those draft implementing technical standards to the Commission by [~~six~~ three months after entry into force of this Regulation].

Power is delegated to the Commission to adopt the implementing technical standards referred to in this paragraph in accordance with the procedure laid down in Article 15 of Regulation (EU) No 1095/2010.”

## **Article 14a**

### *Third party verifying STS compliance*

1. A third party referred to in Article 14, paragraph 1a shall be authorised by ~~[OPTION 2A: ESMA]~~~~[OPTION 2B: the competent authority]~~ of the Member State where it is established to assess the compliance of securitisations with the STS criteria laid down in Articles 7 to 10 or



Articles 11 to 13 ~~of this Regulation. [OPTION 2A: ESMA][OPTION 2B: The competent authority]~~ shall grant the authorisation if the following conditions are met:

- (a) the third party ~~operates on a not for profit basis. It may~~ only charge non-discriminatory and cost-based fees to the originators, sponsors or SPEs involved in the securitisations which the third party assesses/examines, sufficient to cover the expenditure relating to the assessment of the compliance with STS criteria without differentiating fees depending on, or correlated to, the result of its assessment;
- (b) ~~The third party is not an originator, sponsor or original lender the third party is established for the sole purpose of assessing the compliance with STS criteria and the performance of other activities shall not compromise the independence or integrity of its assessment;~~
- (c) the members of the management body of the third party have professional qualifications, knowledge and experience that are adequate for the task of the third party and they are of good repute and integrity;
- (d) the management body of the third party includes a majority of independent directors, whose compensation shall not depend on the business performance of the third party representing experts and investors in the STS securitisation market;
- (e) the third party takes all necessary steps to ensure that the verification of STS compliance is not affected by any existing or potential conflicts of interest or business relationship involving the third party, its shareholders or members, managers, employees or any other natural person whose services are placed at the disposal or under the control of the third party. ~~To that end, the third party shall establish, maintain, enforce and document an effective internal control system governing the implementation of policies and procedures to~~ identify and prevent potential conflicts of interest. Potential or existing conflicts of interest which have been identified shall be eliminated or and mitigated and disclosed without delay. ~~possible conflicts of interest and The third party shall establish, maintain, enforce and document adequate procedures and processes to ensure the independence of the verification/assessment of STS compliance. The third party shall periodically monitor and review those policies and procedures in order to evaluate their effectiveness and assess whether they should be updated;~~
- (f) the third party can demonstrate that it has proper operational safeguards and internal processes that enable it to assess STS compliance.

~~[OPTION 2A: ESMA][OPTION 2B: The competent authority] may~~ shall withdraw the authorisation when ~~a~~ third party no longer complies with the ~~above~~ conditions set out in the first subparagraph.



2. ~~[OPTION 2A: ESMA]~~~~[OPTION 2B: ]~~the competent authority~~]~~ may charge cost-based fees to the third party referred to in paragraph 1, in order to cover necessary expenditures relating to the assessment of applications for authorisation and to the subsequent monitoring of the compliance with the conditions set out in paragraph 1. ]“

3. ESMA shall develop draft regulatory technical standards specifying the information to be provided to the competent authorities in the application for the authorisation of a third party in accordance with paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by [six months after entry into force of this Regulation].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

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## **Article 14b**

### *Liability in connection with STS notification*

The originator, and sponsor [and SSPE] shall be jointly liable for any losses or damages resulting from an incorrect or misleading STS notification pursuant to Article 14, paragraph 1.~~notification based on an incorrect assessment of the STS criteria. [OPTION 2: Where the originator, sponsor and SSPE rely on a third party in accordance with Article 14, paragraph 1a to assess the STS criteria, the third party shall be jointly liable with the originator, sponsor and SSPE for an incorrect assessment of the STS criteria, except where the third party can prove that its assessment of the STS criteria was based on fraudulent or incorrect materials submitted to its examination.]~~

### **Justification – Certification process:**

*Based on the written comments received from Member States and following the discussion of the Working party of 12 November 2015, the Presidency would like to submit for discussion the above package for STS certification based on Option 2 of the first Presidency compromise text. The following features have been added or changed:*

- *In light of split views of Member States on who shall be in charge of authorisation of third parties (ESMA or national competent authorities) the Presidency proposes a middle ground solution where national competent authorities are in charge of authorisation, but a coherent European approach is guaranteed through an ESMA empowerment to issue regulatory technical standards.*



- *The criteria to be authorised as a third party have been modified so as to open up this possibility to a broad range of entities. The not-for-profit criterion is removed and replaced with rules regarding the fees to be charged which are inspired by the regulation on credit rating agencies. Criterion (b) is replaced by a criterion allowing third parties to perform other activities while providing for adequate independence and integrity of the STS assessment using wording from the CRA regulation.*
- *Robust provisions on the prevention, identification, elimination and management of conflicts of interest are introduced in line with similar provisions in the CRA regulation.*
- *A new criterion provides for proper operational safeguards and internal processes.*
- *The wording of Articles 14 and 14a has been clarified and its consistency has been improved.*
- *In light of the views expressed by a majority of Member States, the joint liability of the third party has been removed from the text.*

*The suggestion aims at ensuring a sufficient but light touch supervisory involvement with respect to the authorisation of third parties verifying STS compliance. The involvement of third party remains optional according to Article 14.*

#### Open issue:

The Presidency would like to further check with Member States whether they would be supportive of the idea of a number of Member States to introduce a clear hierarchy in terms of responsibilities and liability. It has been suggested that the sponsor should by default be the key player when it comes to compliance with the STS criteria and the notification under Article 14. If there is no sponsor this role would be attributed to the originator. The same would apply in terms of liability. Such a restructuring of provisions would in turn also impact the supervisory architecture in e.g. Article 21, the competent authority of the sponsor becoming the key competent authority or a *de facto* “lead supervisor”.

This way to proceed would have the advantage to enhance the clarity of the text and could also facilitate a solution on Article 21. However it might be questionable whether for instance the SSPE holding all the underlying assets should be left completely out when it comes to compliance and liability. Moreover the supervisory architecture where one competent authority has the lead over the others could be seen as problematic, notably in cross-border situations.

