



EBA Consultation Paper on the Draft Guidelines on on the STS criteria for ABCP securitisation

This document provides the response of the Dutch Securitisation Association (“DSA”) on the EBA Consultation Paper dated 20 April 2018.

We welcome the opportunity to commend on this Consultation Paper.

DSA Background

The Dutch Securitisation Association was established in 2012 as representative body of the Dutch securitisation industry. Our membership includes issuers of securitisations both from the insurance and banking industry, and we are operating in close cooperation with the Dutch investor community.

Our purpose is to create a healthy and well-functioning Dutch securitisation market.

We try to achieve this i.a. by providing a standard for documentation and reporting of Dutch RMBS and Consumer ABS transactions, promoting (in close cooperation with PCS) further standardisation and improvements in transparency, and active involvement in consultations about future regulation of the securitisation market.

Against this background, we would like to commend, on behalf of all Dutch issuers joined in the DSA, on the EBA Consultation Paper on the Draft Guidelines on the ABCP STS criteria (individual DSA members may also provide their own comments).

Our comments:

Transaction-level criteria

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

Q1. Do you agree with the interpretation of these criteria, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 10: We have serious concerns about the requirement to provide legal opinions, given the sensitivity and confidentiality of such opinions. Rather we would like to see the content as suggested in Par. 10 be covered in the representations and warranties. Especially commingling risk and set-off risk are usually not covered by true sale opinions.

Par. 11(b): Perfection (at a later stage) is not a legal concept in all jurisdictions. Further clarification would be helpful.

Par. 13: Please clarify how and to whom the accessibility and availability of the legal opinion should be arranged: at request, on a (pass-word protected) website, to which third parties? if other than “third party certification agents and competent authorities” should get access, we would prefer to see a limited list. Alternatively, can we use the “confidentiality reasons” to limit the availability of the opinion outside the group of third party certification agents and competent authorities?

Par. 15: We note that “seller’s insolvency” or “insolvency of the seller” or “insolvent” appear in Article 24(1), (2) and (5), 24(9), 24(19) and 24(20), but is only interpreted for the purpose of Article 24(5).

We would prefer to have one interpretation of insolvency to apply to all STS criteria.

Other comments: Please add “material” between “unremedied” and “breaches”.

Q2. Do you agree with the clarification of the conditions to be applicable in case of use of methods of transfer of the underlying exposures to the SSPE other than the true sale or assignment? Should examples of such methods of such transfer be specified further?

Par. 11(a): We do agree with the clarification; examples are not needed.

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

We do believe that the provided guidance is sufficient and that there are no additional severe clawback provisions to be added.

Q4. With respect to the interpretation of the criterion in Article 24(5), should the severe deterioration in the seller credit quality standing, and the measures identifying such severe deterioration, be further specified in the guidelines? Do you believe that the interpretation should refer to the state of technical insolvency (i.e. state where based on the balance sheet considerations the seller reaches negative net asset value with its the liabilities being greater than its assets, without taking into account cash flows or events of legal insolvency), and if yes, should it be specified whether it should or should not be considered as the trigger effecting perfection of transfer of underlying exposures to SSPE at a later stage?

Par. 12: No further specification is needed; technical insolvency without legal insolvency (or resolution) may not necessarily have to trigger perfection in our view, so we prefer the interpretation as provided.

Representations and warranties (Article 24(6))

Q5. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 16: We do agree, although we note that the original lender may not always be (any longer) in a position to provide these representations and warranties.

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

Q6. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 18: Can you confirm that further advances are included in Par. 18(b) or add them to Par. 18 ? Can you also please add a subparagraph referring to portfolio management in ABCP programs where the intention is to improve the position of the investor, since the investor risk is taken by the sponsor in it's role of providing full support for the credit risk, so there is no "implicit support" involved.

Q7. Do you agree with the techniques of portfolio management that are allowed and disallowed, under the criterion of the active portfolio management? Should other techniques be included or excluded?

Par. 19: There are many types of sale outside the ones mentioned under Par. 18 that nevertheless are not intended to actively manage a portfolio (sale for redemption of the notes, sale to facilitate the recovery process etc.). So we propose to delete Par. 19(b).

No resecuritisation at ABCP transaction level (Article 24(8))

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

Par. 22: For the avoidance of doubts, can you please confirm that other structures than senior/junior Notes are also allowed for ABCP.

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

Q8. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 25: The interpretation creates a problem for legacy transactions, since it looks back to “at the time of selection” and legacy transactions may have used different default definitions and other criteria at the time of selection.

Par. 32 and Par. 34: The terminology “at the origination of the securitisation” is confusing. Can you please confirm that this refers to “at the time of origination of the exposures”, since credit checks are performed at the time of origination of the exposure and it is impossible to do a credit check for all exposures at the time of selection for a securitisation.

Par. 35: We would appreciate some more guidance on what determines a “significantly higher than the average credit score”.

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

Par. 27: Reporting as per Article 24(9)(a)(ii) of “time and details of the restructuring as well as their performance since the date of restructuring” will have to be within the infrastructure of the Loan Level Data requirements (Article 7(1)(a)) and in aggregated format in the Investor Report (Article 7(1)(e)(i)).

Par. 28: “neither the debtor nor the guarantor” is very restrictive. This way, the availability of a guarantee as additional security, would become an additional risk of not getting STS status. This cannot be the intention, so please replace this by “either the debtor or the guarantor”.

Q10. Do you agree with the interpretation of the criterion with respect to the exposures to credit-impaired debtors or guarantors that have undergone a debt-restructuring process?

Par. 29 and Par. 30: For the avoidance of doubt, can you please confirm that not all potential sources of information have to be checked at origination of an exposure ?

Par. 31: The reference to all exposures of an obligor rather than the restructured exposure for determining credit impairedness, is not in line with market practice and very detrimental to debtors, and especially retail and SME debtors.

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

Q11. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 36: We would like to see an exception for “ramp-up” or “warehousing” structures, where it is not really possible to meet this requirement.

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

Q12. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 40: While Par. 40 of the Background and rationale states that “this criterion should not aim to excludeleasing transactions from STS securitisation”, we do not see this reflected explicitly in the guidelines.

Q13. Do you agree with the interpretation of the predominant dependence with reference to 30% of total initial exposure value of securitisation positions? Should different percentage be set dependent on different asset category securitised?

Par. 39: A fixed percentage for all asset classes does not reflect the different nature of the asset classes and especially not the different maturity profiles of asset classes.

So we would be in favor of more differentiation in asset classes.

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

Q14. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 42: Can you give further guidance on “not unusually limited”, and especially what determines a “major share” and “relevant scenarios”?

Par. 43(e): We would appreciate more elaboration on the “concise sensitivity analysis”. What are the required scenarios?

Par. 44: Hedging multiple risks with one measure can be beneficial to the investor if not all the risks fully materialise and as long as the measure is large enough to cover the sum of the potential risks.

Par. 45: Can you please indicate how and to whom information/reasoning should be disclosed on a continuous basis? Can this be done in the Investor Report?

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

Q15. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 48: We do agree that this confirmation is required, but wonder whether a simple yes/no will be sufficient or that more explanation may sometimes be needed.

Would it be sufficient to provide a generic description or summary?

Remedies and actions can be very client specific and it might be difficult to specify these in advance.

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

Q16. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

We do agree.

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

Q17. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 56: We do agree, but would appreciate if you could indicate that the exposures you mention in

Par. 56 are examples and not an exhaustive list.

Q18. Do you believe that additional guidance should be provided in these guidelines with respect to the homogeneity requirement, in addition to the requirements specified in the Delegated Regulation (EU) 2018/.... further specifying which underlying exposures are deemed homogeneous?

As we have indicated in our response (like on Q8) on the Consultation on this Delegated Regulation, there remains a lack of clarity on how the definitions will work out for mixed pools. We would appreciate if the guidelines could list some more specific examples of homogeneous pools.

Referenced interest payments (Article 24(16))

Q19. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 57(b): Can you please confirm that ABCP program’s cost of funds are not “interest rates that cannot be observed in the commonly accepted market place” (Par. 54 of the Background and rationale).

Requirements in case of the seller's default or an acceleration event (Article 24(17))

Q20. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 64: Instead of "a seller's default", we would prefer reference to "an unremedied and unwaived seller's default", since a simple seller's default will not always lead to enforcement or acceleration.

Principal payments will not exclusively be used to repay investors when there are obligations ranking higher in the waterfall (taxes, corporate services).

The reference to Article 24(10) does not seem to be correct. Should it be Article 24(7) ?

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

Q21. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 70(a): We do not understand the rationale for looking back at changes in past underwriting standards. Investors prefer to see different vintages of exposures in one pool in order to mitigate the impact of economic cycles and the resulting (countercyclical) changes in underwriting standards.

Other comments: We need more guidance on how "any material changes from prior underwriting standards shall be fully disclosed to potential investors without undue delay": how should this be disclosed (in Investor Reports ?), what is undue delay (in the next Investor Report ?) and especially how do we determine who is a potential investor ?

Q22. Do you agree with this balanced approach to the determination of the expertise of the seller? Do you believe that more rule-based set of requirements should be specified, or, instead, more principles-based criteria should be provided? Is the requirement of minimum of 5 years of professional experience appropriate and exercisable in practice?

Par. 72: We do agree with the principles-based approach and, more specifically, the principles as described in Par. 72.

With regard to Par. 72(d), can you please confirm that this implies that if an originator holds a proper license from a competent authority it meets the requirement of having expertise ?

Can you please confirm that if the origination is outsourced to a sufficiently experienced (according to Par. 72) third party, this criterion is also met ?

Par. 73: We are somewhat surprised by the 5 year requirement in Par. 73, especially where the level 1 text does not refer to time periods. In practice it will be very unlikely that 2 members of the management body and all senior staff responsible for the origination of an entity will have at least 5 years of experience with similar exposures.

The requirement also seems not suitable for corporations originating trade receivables, where the expertise should be defined in terms of running the business that give rise to the exposures (receivables).

Q23. Should alternative interpretation of the "similar exposures" be provided, such as, for example, referencing the eligibility criteria (per Article 24(7)) that are applied to select the underlying exposures? Similar exposure under Article 24(18) could thus be defined as an exposure that would qualify for the portfolio, based on the exposure level eligibility criteria (not portfolio level criteria) which has not been selected for the pool and which was originated at the time of the securitised exposure (e.g. an exposure that has repaid / prepaid by the time of securitisation). Similar interpretation could be used for the term "exposures of a similar nature" under Article 24(18), and "substantially similar exposures" under Article 24(14). The eligibility criteria considered should take into account the timing of the comparison. Please provide explanations which approach would be more appropriate in providing clear and objectively determined interpretation of the "similarity" of exposures.

Par. 67: For the purpose of comparing underwriting criteria it is better to look at asset categories.

Eligibility criteria are not taken into account when exposures are underwritten and are reflective of a mix of factors (investor appetite, funding needs) that are not always directly related to underwriting.

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

Q24. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 75: An insolvency-related event with the servicer should not automatically trigger a replacement of the servicer.

Transaction documentation (Article 24(20))

Q25. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 76: This paragraph is confusing and can better be deleted.

Programme-level criteria

Temporary non-compliance (Article 26(1))

Q26. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 79: Should the 5% be verified by the program administrator or the seller/servicer and with a certain frequency, or is the external verification of a sample sufficient ?

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

Par. 81: We agree with verification covering just Art. 24 (9), (10) and (11).

The 75% replenishment implies a very high frequency of external verification for trade receivable transactions. We suggest a floor of not more frequently than annual verification.

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

Par. 84: We prefer to keep this as simple as possible and leave the sample specifications to the external party performing the verification.

Remaining weighted average life (Article 26(2))

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

Par. 88: Can you please confirm that the maximum maturity "as defined in the documentation" can be interpreted for trade receivables as the contractual payment terms between the seller and its debtor ?

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

Cash flows seem to be the more natural choice for securitisations.

No resecuritisation (Article 26(4))

Q31. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 89: We agree with the interpretation.

Q32. Are there any other market practices – apart from the ones being covered by the clarification provided in the guidance - which would also fall within the conditions of Article 26(4), while from an economical point of view those should not be treated as resecuritisations? Do you agree with the clarification which credit enhancement is to be considered as “establishing a second layer of tranching”?

Par. 90-92: It may be easier to allow all credit enhancement structures in ABCP conduits, with the exception of the one where multiple classes of Commercial Paper are issued (the one in Par. 92).

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

Q33. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 93: We agree with the interpretation.

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

Q34. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Par. 94: Please see our comments on Q14.

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

Q35. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning. Should the “specified events” referred to in Article 26(7)(e) be specified in more detail e.g. as including triggers with regard to the creditworthiness of the sponsor?

With regard to the expertise of the sponsor, we refer to our comments on the Seller’s expertise (Q21-23), with the amendment that “originating and underwriting” should be interpreted as “credit underwriting”.

Expertise of the servicer (Article 26(8))

Q36. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.

Can you please confirm that this only refers to the servicer at transaction level and not the program administrator at program level ?

Par. 99: We do agree with the principles-based approach and, more specifically, the principles as described in Par. 99.

With regard to Par. 99(d), can you please confirm that this implies that if a servicer holds a proper license from a competent authority it meets the requirement of having expertise ?

Can you please confirm that if the servicing is outsourced to a sufficiently experienced (according to Par. 99) third party, this criterion is also met ?

The references to origination, originating and underwriting should be replaced by references to servicing.

Par. 100: We are somewhat surprised by the 5 year requirement in Par. 100, especially where the level 1 text does not refer to time periods. In practice it will be very unlikely that 2 members of the management body and all senior staff responsible for the servicing of an entity will have at least 5 years of experience with similar exposures.

Well run organisations typically build their senior teams around people with different backgrounds and not just (f.i.) mortgage servicers, so this requirement increases the entry barrier for new entrants. And the reference to Par. 101(a) in Par. 100(b)(iii) does not seem to be correct. Should it be Par. 100(a) ?

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

Q37. Do you agree that no other requirements are necessary to be specified further? If not, please provide reference to the relevant provisions of the STS Regulation and their aspects that require such further specification.

Can you please confirm that ABCP program's can also contain transactions that are not themselves securitisations ?