European Securities and Markets Authority

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EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS AUTHORITY

JOINT COMMITTEE OF THE EUROPEAN SUPERVISORY AUTHORITIES

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Joint Committee Q&As relating to the Securitisation Regulation (EU) 2017/2402

Purpose and status

This document contains answers to questions which fall outside the exclusive competence of either ESMA, EBA or EIOPA. The purpose of this document is to promote common, uniform and consistent supervisory approaches and practices in the day-to-day application of Regulation (EU) 2017/2402[1] (the "Securitisation Regulation" or "SECR"). It does this by providing responses to questions asked by the public, financial market participants, competent authorities and other stakeholders.

This document will be updated as appropriate. Additional questions on the Securitisation Regulation may be submitted to ESMA, EBA or EIOPA through the Q&A tools on their respective websites.

Summary of Q&As

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[1] Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (OJ L 347, 28.12.2017, p. 35).

A summary of the underlying documentation that is essential for the understanding of a transaction

Date of first publication: 26 March 2021

Q1 Article 7(1)(b) of the Securitisation Regulation requires the originator, sponsor and SSPE of a securitisation to make available "[…] *all underlying documentation that is essential for the understanding of the transaction* […]". The penultimate subparagraph of Article 7(1) indicates that "[…] *the originator, sponsor and SSPE may provide a summary of the documentation concerned*". Does this mean that the originator, sponsor and SSPE have a choice between providing the full documentation or a summary thereof?

A1 No. The penultimate subparagraph of Article 7(1) of the SECR should be read in conjunction with the sixth subparagraph of Article 7(1) in respect of the reporting obligations in the first subparagraph of Article 7(1) of the SECR and, in particular, Article 7(1)(b) of the SECR:

Article 7(1) of the SECR, first subparagraph:

"*1. The originator, sponsor and SSPE of a securitisation shall […] make at least the following information available* […]:

[…]

(b) all underlying documentation that is essential for the understanding of the transaction […]."

Article 7(1) of the SECR, sixth subparagraph:

"When complying with this paragraph, the originator, sponsor and SSPE of a securitisation shall comply with national and Union law governing the protection of confidentiality of information and the processing of personal data in order to avoid potential breaches of such law as well as any confidentiality obligation relating to customer, original lender or debtor information, unless such confidential information is anonymised or aggregated."

Article 7(1) of the SECR, penultimate subparagraph:

"In particular, with regard to the information referred to in point (b) of the first subparagraph, the originator, sponsor and SSPE may provide a summary of the documentation concerned."

In other words, the sixth subparagraph of Article 7(1) of the SECR requires an originator, sponsor and SSPE not to breach any national and Union law governing the protection of confidentiality of information and the processing of personal data when making available the information referred to in the first subparagraph of Article 7(1) of the SECR, including the documentation in Article 7(1)(b) of the SECR. This means that only where the disclosure of the full documentation required in Article 7(1)(b) of the SECR would result in such a breach, the reporting entity may instead provide a summary of the documentation concerned (or anonymise or aggregate any confidential information, as set out in the sixth subparagraph of Article 7(1) of the SECR). In all other cases, the documentation shall be provided in full.

Required level of completeness of the information described in points (b), (c) and (d) of the first subparagraph of Article 7(1) of the Securitisation Regulation

Date of first publication: 26 March 2021

Q2

(a) The second subparagraph of Article 7(1) of the Securitisation Regulation requires that the *"the information described in points (b), (c) and (d) of the first subparagraph shall be made available before pricing"*. What is the expected level of completeness of these documents?

(b) Where a document is provided before pricing in "*draft or initial form*", what is the scope for changes post-pricing?

A2

(a) The level of completeness of the information set out in the above-mentioned article should be understood as being the same as described in Article 22(5) of the SECR, i.e. before pricing, the information described in points (b), (c) and (d) of the first subparagraph of Article 7(1) shall be made available before pricing "*at least in draft or initial form*".

(b) It is expected that only minor changes should be made post-pricing, including financial variables (e.g. interest rates, final issued amounts), time data (e.g. optional redemption dates), reference data (e.g. ISIN codes).

Underlying exposure documentation as part of Article 7(1)(b) of the Securitisation Regulation

Date of first publication: 26 March 2021

Q3 Article 7(1)(b) of the Securitisation Regulation requires that the originator, sponsor and SSPE of a securitisation make available "*all underlying documentation that is essential for the understanding of the transaction, including but not limited to, where applicable,*" the documents listed in sub-points (i)-(vi). Should this provision be understood as including an obligation to make available any underlying exposure-level documents (e.g. facility agreements, intercreditor agreements, mezzanine debt documents, hedging documents)?

A3 Article 7(1)(b) of the SECR requires that *all underlying documentation that is essential for the understanding of the transaction…*" be made available. A non-exhaustive list is subsequently provided in sub-points (i)-(vi) of that same sub-paragraph. This non-exhaustive list does not mention underlying exposure-level documents such as facility agreements, intercreditor agreements, mezzanine debt documents, hedging documents. Consequently, underlying exposure-level documents fall under the scope of Article 7(1)(b) of the SECR and must be made available as stipulated by Article 7 of the SECR only to the extent that underlying exposure-level documents are "*essential for the understanding of the transaction*".

Underlying exposure-level documents are often not "*essential for the understanding*" a securitisation. However, for example, in a CMBS transaction with only a few large underlying exposures, such documentation would most likely be "*essential for the understanding of the transaction*".

STS requirements - application of Article 21 (9) of the Securitisation Regulation on transaction documentation

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Q4 How and by whom compliance with Article 21(9) of the Securitisation Regulation should be met and documented using the transaction documentation and/or as part of the internal servicing procedures contained in the servicing agreement?

A4 As regards Article 21(9) of the SECR, the Commission Delegated Regulation (EU) 2020/1226 (hereafter, the "RTS on STS notification") requires the originators and sponsors to confirm compliance with it and to place the requested information under a specific items of the prospectus (item 2.2.2. of Annex 19 of the Commission Delegated Regulation (EU) 2019/980 which entered into force since 21 July 2019). Furthermore, Article 7 (1) (b) (iv) of the SECR requires the originator, sponsor and SSPE to make available to the holders of securitisation positions the servicing agreement. Therefore, the requested information regarding servicing procedures should be found in a publicly available document especially where this documentation explain how the servicing of delinquent and defaulted exposures are taken care of, so as to further facilitate investors' due diligence regarding compliance with Article 21(9) of the SECR.

Provision of STS+ certification by third party verifier agent (TPV)

Date of first publication: 26 March 2021

Q5

(a) **Is the provision of CRR- and LCR-Assessments – also known as "STS Plus or STS+ certification" – by a Third-Party Verifier (TPV) to be considered as provision of advice to the originator, sponsor or SSPE involved in the securitisation which the TPV assesses" (within in the meaning of Articles 28 (1) (c) of Securitisation Regulation)?**

(b) **Should TPVs notify their competent authority (CA) of the provision of "STS Plus or STS + assessments?**

(c) **Should the TPV providing "STS Plus or STS+ certification" services implement specific measures to better identifying, preventing and mitigating actual or potential conflicts arising from the provision of those services when notifying its CA?**

A5

(a) No. TPVs are entities with a limited range of business activities being its main activity to verify whether a securitisation transaction complies with the STS criteria applicable to non-ABCP or ABCP securitisations. To ensure TPV's independence vis-à-vis the originator, sponsor or SSPE, TPVs are prevented from providing any form of advisory, audit or equivalent services to any of the originator, sponsor or SSPE involved in the securitisation transaction, which the TPV assesses as set out in Article 28 (1) (c) SECR. The provision of other services is to be assessed in a case-by-case basis to avoid potential conflict of interest.

The Securitisation Regulation does not explicitly foresee the provision of "STS Plus or STS+ certifications" assessments. The provision of this service seems to also consist in assessing compliance with a certain set of statutory requirements similar to the verifications contained in Article 27 (2) of the SECR. In the case of "STS Plus or STS+ certifications", the TPV adds the respective CRR and LCR assessments on top of the verifications performed under Article 27 (2) of the SECR. Considering the ancillary nature of "STS Plus or STS+ certifications" assessments, the provision of these services should not be considered as the provision of advice to the originator, sponsor or SSPE involved in the securitisation which the TPV assesses according to article 28 (1) (c) of the SECR.

(b) Yes. As set out in Article 28(2) of the SECR, Competent Authorities should be able to ascertain whether changes to the information provided by a TPV at the initial authorisation could affect the Competent Authority's initial assessment. As a result, the provision of "STS Plus or ST+ assessments" should be notified by the TPV to the Competent Authority as a change to the information provided under Article 28(1) of the SECR.

(c) The provision of "STS Plus or STS+" certification services should generally not require specific governance arrangements in addition to the general organisational requirements pursuant to Article 28 (1) of the SECR. However, the TPV should also confirm to its Competent Auhtority that the provision of these services do not fall within Article 28 (1) (c) of the SECR on the prohibition of the provision of advisory services, audit or equivalent services also in terms of the fees charged to the originators, sponsors and SSPE involved in the securitisation which the TPV assesses, which should be non-discretionary and cost based fees.

Whether a "vendor financing" structure can be considered a synthetic securitisation *New*

Date of first publication: 17 December 2021

Q6 Can 'vendor financing' constitute a synthetic securitisation?

A "vendor financing" structure can be described as follows:

A manufacturer sells its products to his own off takers but would like to see its invoices paid at short notice while his off takers need longer payments terms.

The manufacturer and a bank agree that the bank will provide financing to a selected group of these off takers under the condition that the manufacturer provides a 15% first risk guarantee to the bank.

The bank provides the loans directly to the off takers and the bank will take the loans in its lending book.

The definition of synthetic securitisation of Article 2(10) of the SECR states that 'synthetic securitisation' means a securitisation where the transfer of risk is achieved by the use of credit derivatives or guarantees, and the exposures being securitised remain exposures of the originator.

In the structure as described above, the bank holds a pool of loans and partial transfer of credit risk is achieved via the guarantee provided by the manufacturer. The first 15% of losses on the pool will be reimbursed by the manufacturer to the bank. Losses above the 15% will be borne by the bank.

It is unclear whether this kind of structure can be classified as 'synthetic securitisation under Article 2(10) of the SECR.

A6 The transaction described constitutes a securitisation within the meaning of Article 2(1) of the SECR because the credit risk associated with the pool of exposures held by the institution is tranched, the payments in the transaction are dependent upon the performance of the pool of exposures and because it does not meet the characteristics listed in Article 147(8) of Regulation (EU) No 575/2013 applicable to specialised lending.

The transaction also constitutes a synthetic securitisation within the meaning of Article 2(10) of the SECR because the tranching is achieved by means of a guarantee under which the manufacturer has to reimburse the first 15% of losses on the pool to the institution and losses above the 15% are borne by the institution.