

EBA/RTS/2022/04

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EBA Final draft regulatory technical standards

specifying the requirements for originators, sponsors, original lenders and servicers relating to risk retention pursuant to Article 6(7) of Regulation (EU) 2017/2402 as amended by Regulation (EU) 2021/557

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1. Executive summary

Regulation (EU) 2017/2402 (the Securitisation Regulation), as amended by Regulation (EU) 2021/557, sets out requirements concerning the retention of a material net economic interest in securitisation and mandates the EBA to prepare, in close cooperation with the European Securities and Market Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA), draft Regulatory Technical Standards (RTS) in this area.

These draft RTS, in accordance with Article 6(7) of the Securitisation Regulation, specify in greater detail the risk retention requirements and, in particular: i) requirements on the modalities of retaining risk, ii) the measurement of the level of retention, iii) the prohibition of hedging or selling the retained interest, iv) the conditions for retention on a consolidated basis, v) the conditions for exempting transactions based on a clear, transparent and accessible index, vi) the modalities of retaining risk in case of traditional securitisations of non-performing exposures, and vii) the impact of fees paid to the retainer on the effective material net economic interest.

These draft RTS have been drafted in such a way as to ensure the alignment of interest (risks) between the securitisation sponsors, originators, original lenders, and, in the case of traditional NPE securitisations, servicers, on the one hand, and the investors buying the securitisation positions or providing the credit protection in synthetic securitisations, on the other. Furthermore, they are intended to facilitate the implementation of the risk retention requirements by the sponsor, originator, original lender and servicer.

These draft RTS carry over a substantial part of the provisions on risk retention set out in the previous RTS on risk retention adopted by the EBA in 2018 under the original Article 6(7) of the Securitisation Regulation, prior to the amendment made as part of the co-legislators response to the COVID-19 crisis under Regulation (EU) 2021/557, with some modifications. Firstly, several additional provisions have been included in the draft RTS, addressing the extended mandate for the EBA on the risk retention under Article 6(7) following amendments to the Securitisation Regulation under Regulation (EU) 2021/557 and addressing specific issues relating to risk retention (modalities of risk retention in traditional NPE securitisations, impact of fees payable to retainers on the risk retention requirement, expertise of the servicer in NPE securitisations, clarification of the synthetic excess spread, retention in resecuritisations and own issued debt instruments). Secondly, several modifications have been made to existing provisions for the sake of ensuring consistency with the mandate and providing further clarity on some specific aspects.

2. Background and rationale

1. These draft regulatory technical standards (draft RTS) have been developed in accordance with Article 6(7) of Regulation (EU) 2017/2402 (the Securitisation Regulation¹) as amended by Regulation (EU) 2021/557 of 31 March 2021² (as part of the Capital Markets Recovery Package (CMRP)), which requests the EBA to specify in greater detail the risk retention requirements, in close cooperation with the ESMA and EIOPA, in particular with regard to some specific areas such as the modalities of retaining risk, the measurement of the level of retention, the prohibition of hedging or selling the retained interest, the conditions for retention on a consolidated basis, the conditions for exempting transactions based on a clear, transparent and accessible index, the modalities of retaining risk in the case of NPE securitisations, and the impact of fees paid to the retainer on the effective material net economic interest.

EBA mandate

2. The CMRP amends the Securitisation Regulation, including the EBA mandate on RTS on risk retention requirements contained in Article 6(7) of that Regulation. The EBA had already adopted RTS on risk retention under the original Article 6(7) of the Securitisation Regulation on 31 July 2018 and transmitted it to the Commission for endorsement.³ These draft RTS include several modifications to RTS adopted by the EBA in 2018:
 - (i) These draft RTS include additional provisions, addressing the amendments to the EBA mandate on risk retention under the CMRP. These additional provisions are focused on two specific aspects: first, the modalities of risk retention in traditional NPE securitisations, and the related issue of the servicer's expertise when acting as a retainer in a traditional NPE securitisation; and second, the impact of fees payable to retainers on the risk retention requirement;
 - (ii) additional provisions have been included for the purpose of addressing some specific issues relating to risk retention, in connection with matters such as retention in resecuritisations, and clarification of the treatment of the synthetic excess spread, which were not reflected in the previous versions of these RTS, or for the sake of further clarity;

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

² Regulation (EU) 2021/557 of the European Parliament and of the Council of 31 March 2021 amending Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation to help the recovery from the COVID-19 crisis

³ <https://www.eba.europa.eu/regulation-and-policy/securitisation-and-covered-bonds/rts-on-risk-retention>



- (iii) several amendments have been made with a view to ensuring the consistency of various provisions in these RTS with the EBA mandate in Article 6(7) of the Securitisation Regulation.
3. Similar to the original RTS on risk retention adopted in 2018, these draft RTS carry over a number of provisions from the currently applicable risk retention requirements set out in the Commission Delegated Regulation (EU) No 625/2014⁴, which is based on the RTS developed by the EBA under the CRR, i.e. Regulation (EU) No 575/2013⁵.
 4. Compared to the Delegated Regulation, certain provisions are not reflected in the present draft RTS that fall outside the realm of the EBA mandate in Article 6(7) of the Securitisation Regulation, including due diligence requirements for institutions becoming exposed to a securitisation position, policies for granting credit, and the disclosure of materially relevant data. Generally, in respect of disclosure, only provisions relating to initial disclosure regarding risk retention are included in these draft RTS, as further specification of ongoing disclosure in terms of issues relating to risk retention is covered by the Delegated Regulation (EU) 2020/1224 on disclosure under Article 7(3) of the Securitisation Regulation. Furthermore, these draft RTS contain provisions which are new compared to the Delegated Regulation. These relate to the circumstances when an entity shall be deemed not to have been established or to operate for the sole purpose of securitising exposures, the prohibition on adverse selection set out in Article 6(2) of the Securitisation Regulation and the change of the retainer.
 5. These RTS do not further specify any risk retention requirements for the securitisation of own liabilities. This is considered done as the sell-side parties of the securitisation are also the debtors of the securitised own liabilities. Hence, any retention of a net economic interest in the securitisation would not add anything to the general incentive of the sell-side parties to avoid a default on their liabilities and to remain solvent.

New aspects of risk retention included in the new EBA mandate

6. As regards the new EBA mandate on risk retention as part of the CMRP, it comprises in particular two different aspects:
 - (i) The specific risk retention ‘modalities’ in the case of securitisations of non-performing exposures (NPE securitisations), both under the already existing requirements as per Article 6(3) of the Securitisation Regulation (insofar as applicable) and the ad hoc derogation as per the new paragraph 3a, whereby the 5% material net economic interest should be calculated on the net value of securitised exposures that qualify as NPEs (*new point (f) in Article 6(7) of the Securitisation Regulation*);

⁴ Commission Delegated Regulation (EU) No 625/2014 of 13 March 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council by way of regulatory technical standards specifying the requirements for investor, sponsor, original lenders and originator institutions relating to exposures to transferred credit risk.

⁵ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.



- (ii) the 'impact' of fees paid to the retainer on the 'effective' material net economic interest referred to in Article 6(1) of the Securitisation Regulation (*new point (g) in Article 6(7) of the Securitisation Regulation*).

NPE securitisations

7. In relation to NPE securitisations, these draft RTS specify how to apply the risk retention options on traditional NPE securitisations, with reference to the net value of non-performing exposures. The alternative options for retaining a net economic interest pursuant to point (a) of Article 6(3) of Regulation (EU) 2017/2402 should be included in the application of the net value approach to the securitised exposures that qualify as non-performing exposures. In addition, the draft RTS set out requirements for the servicer to be considered to have the necessary expertise to act as retainer in traditional NPE securitisations.
8. With respect to the servicer in traditional NPE securitisations, these draft RTS also specify criteria that the servicer should meet to be able to demonstrate that it has the required expertise in the servicing of non-performing exposures, as a precondition for the servicer to act as a retainer in the NPE securitisations. The criteria set out in these draft RTS are consistent with the criteria contained in the EBA guidelines on STS criteria for non-ABCP securitisation, which specify in greater detail a similar requirement on the expertise of the servicer applied to STS securitisations as per Article 21(8) of the Securitisation Regulation.

Impact of fees on the retained net economic interest

9. These draft RTS also specify the requirements for the fees payable to the retainer to comply with the risk retention requirements. The scope of these requirements is not limited to NPE securitisations. While the wording 'fees paid to the retainer' undoubtedly refers to the servicer acting also as retainer in NPE securitisations, the impact of fees payable to retainers in performing securitisations should be deemed to be included as well, insofar as applicable.
10. The term 'fees' is understood as referring to any remuneration payable to the retainer where the retainer acts in any additional capacity as service provider to the securitisation. For instance, this would be the case where the retainer is simultaneously the securitisation's portfolio servicer, liquidity facility provider and/or derivative counterparty. The fees due to these service providers are typically payable in the waterfall on a preferential basis ahead of the interest and amortisation payments due under the securitisation tranches.
11. The term 'impact' is understood as referring to both the amount and structure of the fees payable to the retainer where the amount and/or structure of the fees would undermine the 'effectiveness' of the risk retention requirement. For these purposes, 'effectiveness' is understood to refer to the integrity and soundness of the requirement over time. In other words, the fee structure or amount should not result in the requirement on the alignment of interest eventually ceasing to be met at any time following the initial execution of the securitisation.



12. It should be noted that Recital (6) of these draft RTS provides that the retained material net economic interest should not be prioritised in terms of cash flows to preferentially benefit from being repaid or amortised. In the case of fees, service providers are usually paid before the holders of the securitisation positions because the provision of these services is essential for the transaction to take place. Without prejudice to this general principle, the fees payable to the retainer in its role as the securitisation's service provider should not be set at an amount or structured in a way that undermines the retained material net economic interest. These draft RTS therefore set out conditions for the fees payable to the retainer to comply with this requirement.

Additional provisions addressing some specific issues relating to risk retention

13. Additional provisions have been included for the purpose of addressing some specific issues relating to risk retention, which were not properly fleshed out in the previous versions of these RTS, or for the sake of ensuring further clarity:

- (i) Resecuritisations: while rescuritisations are generally banned by the Securitisation Regulation, competent authorities may authorise these transactions on a case-by-case basis or, following market developments of other rescuritisations undertaken for legitimate purposes which may trigger a need to develop ESMA draft RTS pursuant to Article 8(5) under the SECR. The draft RTS clarify how the risk retention requirement applies in relation to these transactions and how this risk retention must be met separately for each of the securitisation and rescuritisation transactions. Hence, the retention in relation to the former should not be counted for the purposes of meeting the retention regarding the latter transaction. Notwithstanding the above, these draft RTS recognise an exception to this requirement. Where the originator acting as the retainer in the first securitisation(s) securitises exposures or positions retained in excess of the minimum net economic interest and no other exposures or positions are added to the pool of the rescuritisation, the retention for the first transaction should be considered sufficient.
- (ii) Synthetic excess spread: the proposals in these draft RTS recognise the synthetic excess spread (SES) as a possible form of compliance with the risk retention requirement by the originator of a synthetic securitisation as long as it is subject to a capital requirement under the applicable prudential regulation. In the specific case of institutions, the CMRP introduced an amendment by which SES is considered an exposure to the securitisation subject to capital requirements in accordance with Article 248(1)(e) CRR, while the determination of the exposure value of the synthetic excess spread is expected to be specified in the separate EBA RTS on this topic following the mandate under the new paragraph 4 of that Article. It should also be noted that under the retention requirements of Article 6(1) of the Securitisation Regulation it is strictly necessary that any form of retention is measured at origination and retained on an ongoing basis thereafter. It follows that, as for all other forms of retention, also in the case of the treatment



of the exposure value of the SES as retained net economic interest the corresponding part of the net economic interest provided through the exposure value of the SES needs to be determined at origination and the commitment of SES has to be maintained on an on-going basis thereafter throughout the maturity of the transaction. In line with the general treatment, any reductions of the retained net economic interest provided by means of the exposure value of the SES relative to the corresponding retained interest measured at origination may only occur through the allocation of losses to the exposure value of the SES or through the allocation of cash flows to the securitisation where in both cases such allocation meets the requirements of Art. 15(1) of the RTS.

Modifications to some risk retention requirements versus the previous EBA RTS on risk retention

14. Several amendments have been made to the previous EBA RTS on risk retention adopted by the EBA in 2018, with a view to ensuring the consistency of the provisions with the EBA mandate set out in Article 6(7) of the Securitisation Regulation, to address some specific issues with respect to risk retention requirements or to provide further clarity on specific requirements. These include the following changes:

- (i) Particular cases of exposure to the credit risk of a securitisation position by credit derivative counterparties and liquidity facility providers under the previous Article 2, and conditions that holdings of securitisation positions by subsidiaries in third countries had to meet under the previous Article 2 to be considered as not in breach of Article 5 of the Securitisation Regulation have been deleted to align the provisions of the RTS more closely with the mandate set out in the SECR.
- (ii) Initial disclosure of the level of the commitment to retain a material net economic interest in the securitisation (previous Article 15): as these provisions overlap with the Delegated Regulation (EU) 2020/1224 on disclosure under Article 7 of the Securitisation Regulation, both the Article and the corresponding Recital have been deleted. However, the obligation on the retainer to make and disclose a commitment to investors to maintain a material net economic interest in the securitisation on an on-going basis has been retained, as this obligation is not captured by the Delegated Regulation (EU) 2020/1224.
- (iii) Cherry-picking: asset selection requirements in Article 6(2) of the Securitisation Regulation are an integral part of the risk retention framework. If originators were able to cherry pick assets to securitise portfolios of worse credit quality without the investors' or potential investors' knowledge, the purpose and effectiveness of risk retention to align the interests of originators and investors would be severely undermined. In that scenario, while the originator would be using the securitisation to offload risky assets, investors would be misled to rely on the originator's retaining a slice of the risk as evidence of a proper alignment of interests. These draft RTS provide useful clarity on the provision of the ban on cherry picking, in particular on the



comparable assets, and on the focus of the assessment of the competent authority. These draft RTS however do not deal with the exception from the ban on cherry picking (allowed to be applied when any higher credit-risk profile of the assets transferred to the SSPE is clearly communicated to the investors or potential investors) as provided in Recital 11 of the Securitisation Regulation, which is left outside of the scope of these draft RTS.

3. Draft regulatory technical standards

COMMISSION DELEGATED REGULATION (EU) .../...

of XXX

on supplementing Regulation (EU) 2017/2402 of the European Parliament and of the Council with regard to regulatory technical standards specifying the requirements for originators, sponsors, original lenders, and servicers relating to risk retention and partially repealing Commission Delegated Regulation (EU) No 625/2014

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2017/2402 of the European Parliament and of the Council⁶, and in particular Article 6(7), third subparagraph thereof,

Whereas:

- (1) Article 6(3) points (a) to (e) of Regulation (EU) 2017/2402 lay down various options pursuant to which the risk retention requirement may be fulfilled. It should be clarified how to comply with each of those options and, in particular, it should also be set out how the retention options apply to NPE securitisations as set out in Article 6(3a) of Regulation (EU) 2017/2402, having regard to the distinctive features of these transactions. The purpose of the requirement to retain a material net economic interest is to align the interests between two sets of parties in a securitisation: the sell-side parties that transfer the credit risk of the securitised exposures, and the investors that assume or purchase the credit risk. The retention requirement is essential to ensuring that the sell-side parties retain an on-going stake in the securitisation's performance ("skin in the game") and, thus, to preventing the reoccurrence of the "originate to distribute" model. This Regulation, therefore, should not specify how to comply with the risk retention in relation to securitisations of own liabilities, where an adequate alignment of interests by definition occurs since in these transactions the sell-side parties of the securitisation are also the debtors of the securitised own liabilities.
- (2) There is the need to specify how to meet the retention requirement through a synthetic or contingent form of retention. To that end, it should be clarified how a synthetic or contingent form of retention would comply with Article 6(3) points (a) to (e) of Regulation (EU) 2017/2402 and, thus, be deemed as equivalent to retaining a net

⁶ 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 648/2, (OJ L [xxx], [date], p. [x]).



economic interest in the securitisation pursuant to these points. The use of a synthetic or contingent form of retention should be disclosed in the final offering document, prospectus, transaction summary or overview of the main features of the securitisation.

- (3) The synthetic excess spread gives rise to an exposure value that should be taken into account in the measurement of the material net economic interest at origination and, on this basis, it should be recognised as a possible form of compliance with the risk retention requirement by the originator of a synthetic securitisation where it meets the conditions set out in Article 6 of Regulation (EU) 2017/2402 and where it is subject to a capital requirement according to the applicable prudential regulation. Synthetic excess spread can be provided in different ways in a synthetic securitisation, either through credit enhancement to the senior or the mezzanine tranche, or through credit enhancement to all the tranches, including the first loss tranche. When the synthetic excess spread provides credit enhancement to all the tranches, it should be regarded as acting as a first loss tranche of the synthetic securitisation, and, thus, be deemed as a form of complying with Article 6(3) point (d) of Regulation (EU) 2017/2402. Where the synthetic excess spread provides credit enhancement to the senior or mezzanine tranches only, the retainer would need to retain at least a minimum amount in all the tranches. This form of synthetic excess spread should not be admissible as a valid form of contributing to the compliance with the risk retention requirement because Article 6 of Regulation (EU) 2017/2402 excludes retention structures in which the minimum risk retention requirement can be achieved by compensating a deficit in a tranche with the excess in another, with the exception of the above mentioned form of complying with Article 6(3) point (d) of Regulation (EU) 2017/2402.
- (4) Article 6(1) of Regulation (EU) 2017/2402 prohibits selling or hedging the retained economic interest as doing so would remove the retainer's exposure to the credit risk of the retained securitisation positions or exposures and undermine the purpose of this requirement. Therefore, hedging should only be allowed where it hedges the retainer against risks other than the credit risk of the retained securitisation positions or exposures. Hedging should also be allowed where it is undertaken prior to the securitisation as a legitimate and prudent element of credit granting or risk management and does not create a differentiation for the retainer's benefit between the credit risk of the retained securitisation positions or exposures and the securitisation positions or exposures transferred to investors. Furthermore, in securitisations where the retainer commits to retaining more than the minimum material net economic interest of 5%, hedging should not be prohibited for any retained interest in excess of that percentage, provided that these circumstances are disclosed in the final offering document, prospectus, transaction summary or overview of the main features of the securitisation.
- (5) In order to ensure the ongoing retention of the material net economic interest, retainers should ensure that there is no embedded mechanism in the securitisation structure by which the retained material net economic interest measured at origination would necessarily decline faster than the interest transferred. Similarly, the retained material net economic interest should not be prioritised in terms of cash flows to preferentially benefit from being repaid or amortised such that it would fall below 5 % of the ongoing nominal value of the tranches sold or transferred to investors or the exposures securitised, or the 5 % net value in the case of non-performing exposures of traditional NPE securitisations. Moreover, the credit



enhancement provided to the investor assuming exposure to a securitisation position should not decline disproportionately to the rate of repayment on the underlying exposures. This should not prevent the retainer from being remunerated on a priority basis for services rendered to the securitisation's special purpose entity, provided that the remuneration's amount is set on an arm's length basis and the structure of such remuneration does not undermine the retention requirement.

- (6) Insofar as Article 8 of Regulation (EU) 2017/2402 provides for exceptions from the ban on resecuritisations, it is appropriate to set out rules on the manner for these transactions to comply with the retention requirement. As a general rule, the first securitisation(s) of exposures and the second 'repackaged' level of the transaction should be treated as separate for the purposes of meeting the risk retention requirement and, accordingly, there should be an obligation to retain a material net economic interest at each of those levels. The same requirement should apply to transactions with multiple underlying securitisations, such as ABCP programmes other than those referred to in Article 8(4) of Regulation (EU) 2017/2402. Without prejudice to the foregoing, where the securitisation's originator acting as retainer securitises exposures or positions that it had retained in excess of the minimum retention requirement at the first level of a securitisation, that originator should be under no obligation to retain an additional interest at the level of the resecuritisation, provided that no other exposures or positions are added to the resecuritisation's underlying pool. In these cases, the resecuritisation should merely be regarded as a second leg of the same transaction that would make no significant changes on the economic basis of the securitisation and, thus, the original retention at the level of the securitisation should suffice to meet the purpose of the risk retention requirement. Lastly, the mere retranching of a securitisation position into contiguous tranches by the securitisation's originator should not be deemed as a resecuritisation for the purposes of the retention requirement.
- (7) Asset selection requirements in Article 6(2) of Regulation (EU) 2017/2402 are an integral part of the risk retention framework. If originators were able to cherry pick assets to securitise portfolios of worse credit quality in particular without the investors' or potential investors' knowledge, the purpose and effectiveness of risk retention to align the interests of originators and investors would be severely undermined. In that scenario, while the originator would be using the securitisation to offload risky assets, investors would be misled to rely on the originator's retaining a slice of the risk as evidence of a proper alignment of interests. There is the need to provide for criteria that originators may rely on to establish compliance with Article 6(2) of Regulation (EU) 2017/2402. Furthermore, and for the purposes of that Article, criteria on the determination of "comparable assets" should also be provided. Where the comparison referred to in that Article 6(2) is not possible because all the comparable assets are transferred to the SSPE, such securitisation should be considered as meeting the requirements of Article 6(2), provided this is disclosed in the final offering document, prospectus, transaction summary or overview of the main features of the securitisation.
- (8) Where insolvency proceedings have been commenced in respect of the retainer or the retainer is unable to continue acting in that capacity for reasons beyond its control or the control of its shareholders, it should be possible for the remaining retained material net economic interest to be retained by another legal entity complying with Article 6 of Regulation (EU) 2017/2402, so that the alignment of interest continues to occur.



- (9) Article 6(1) subparagraph 4 of Regulation (EU) 2017/2402 provides that only servicers that can demonstrate expertise in the servicing of non-performing exposures may act as retainers in a traditional NPE securitisation. It is, therefore, appropriate to set out the criteria that servicers should meet to be able to demonstrate that they have the required expertise in servicing non-performing exposures.
- (10) Commission Delegated Regulation (EU) No 625/2014⁷ is supplementing risk retention provisions in Regulation (EU) 575/2013, in particular Article 405 of that Regulation, which have been amended by Regulation (EU) 2017/2401 and superseded by Article 6 of Regulation (EU) 2017/2402. Commission Delegated Regulation (EU) No 625/2014 should now be repealed as its provisions are no longer relevant, subject to the transitional provision laid out in Article 43(6) of Regulation (EU) 2017/2402.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority to the Commission.
- (12) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council⁸,

HAS ADOPTED THIS REGULATION:

Article 1
Definitions

For the purposes of this Regulation the following definitions apply:

- (a) ‘contingent form of retention’ means the retention of a material net economic interest through the use of guarantees, letters of credit and other similar forms of credit support ensuring an immediate enforcement of the retention;
- (b) ‘synthetic form of retention’ means the retention of a material net economic interest through the use of derivative instruments;

Article 2
Retainers of a material net economic interest

1. The requirement that the retained material net economic interest shall not be split amongst different types of retainers under Article 6(1) of Regulation (EU) 2017/2402 shall mean that it shall be fulfilled in full by any of the following:

⁷ Commission Delegated Regulation (EU) No 625/2014 of 13 March 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council by way of regulatory technical standards specifying the requirements for investor, sponsor, original lenders and originator institutions relating to exposures to transferred credit risk (OJ L 174, 13.06.2014, p. 16).

⁸ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

- (a) the originator or multiple originators;
 - (b) the sponsor or multiple sponsors;
 - (c) the original lender or multiple original lenders;
 - (d) the servicer or servicers in a traditional NPE securitisation, provided that they meet the requirement on expertise set out in Article 18.
2. Where multiple originators fulfil the retention requirement, it shall be fulfilled by each originator on a pro rata basis by reference to the securitised exposures for which it is the originator.
3. Where multiple original lenders fulfil the retention requirement, it shall be fulfilled by each original lender on a pro rata basis by reference to the securitised exposures for which it is the original lender.
4. By way of derogation from paragraphs 2 and 3, the retention requirement may be fulfilled in full by a single originator or original lender provided that either of the following conditions is met:
 - (a) the originator or original lender has established and is managing the ABCP programme or other securitisation;
 - (b) the originator or original lender has established the ABCP programme or other securitisation and has contributed more than 50 % of the total securitised exposures measured by nominal value at origination.
5. Where multiple sponsors fulfil the retention requirement, it shall be fulfilled by either:
 - (a) the sponsor whose economic interest is most closely aligned with the investor's interest as agreed by the multiple sponsors on the basis of objective criteria including, inter alia, the transaction's fee structure, the sponsor's involvement in the establishment and management of the ABCP programme or other securitisation and the exposure to the credit risk of the securitisations;
 - (b) each sponsor proportionately to the number of sponsors.
6. Where multiple servicers fulfil the retention requirement, it shall be fulfilled by either:
 - (a) the servicer with the predominant economic interest in the successful workout of the exposures of the traditional NPE securitisations, as agreed by the multiple servicers on the basis of objective criteria including, inter alia, the transaction's fee structure and the servicer's available resources and expertise to manage the exposures' workout process; or
 - (b) each servicer on a pro rata basis by reference to the securitised exposures that it manages, which shall be calculated as the sum of the net value of the securitised exposures that qualify as non-performing exposures and of the nominal value of the performing securitised exposures
7. For the purposes of assessing whether an entity has been established or operates for the sole purpose of securitising exposures as referred to in the first



subparagraph of Article 6(1) of Regulation (EU) 2017/2402, the following shall be taken into account:

- (a) the entity has a strategy and the capacity to meet payment obligations consistent with a broader business model that involves material support from capital, assets, fees or other sources of income, by virtue of which the entity does not rely on the exposures to be securitised, on any interests retained or proposed to be retained in accordance with this Regulation or on any corresponding income from such exposures and interests as its sole or predominant source of revenue;
- (b) the responsible decision makers have the necessary experience to enable the entity to pursue the established business strategy, as well as adequate corporate governance arrangements.

Article 3

Fulfilment of the retention requirement through a synthetic or contingent form of retention

1. The fulfilment of the retention requirement in a manner equivalent to one of the options set out in Article 6(3) of Regulation (EU) 2017/2402 through a synthetic or contingent form of retention, shall meet each of the following conditions:
 - (a) the amount retained is at least equal to the amount required under the relevant option to which the synthetic or contingent form of retention corresponds to;
 - (b) the retainer has explicitly disclosed in the final offering document, prospectus, transaction summary or overview of the main features of the securitisation that it will retain on an ongoing basis a material net economic interest in the securitisation through a synthetic or contingent form. The disclosure referred to in this point shall provide all the necessary details on the applicable synthetic or contingent form of retention, including, in particular, the methodology used in its determination and an explanation on which of the options of Article 6(3) of Regulation (EU) 2017/2402 the retention is equivalent to.
2. Where an entity other than an institution as defined in Article 4(1) point (3) of Regulation (EU) No 575/2013 and other than an insurance or reinsurance undertaking as defined in Article 13, points 1 and 4, respectively of Directive 138/2009/EC, retains an economic interest through a synthetic or contingent form of retention, the retained interest shall be fully collateralised in cash and held under arrangements as referred to in Article 16(9) of Directive 2014/65/EU⁹.

Article 4

The retention of not less than 5% of the nominal value of each of the tranches sold or transferred to investors

The retention of not less than 5 % of the nominal value of each of the tranches sold or transferred to investors as referred to in Article 6(3)(a) of the Regulation (EU) 2017/2402 may be complied with through any of the following methods:

⁹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).



- (a) The retention of not less than 5 % of the nominal value of each of the securitised exposures, provided that the retained credit risk ranks *pari passu* with or is subordinated to the credit risk securitised in relation to the same exposures;
- (b) The provision, in the context of an ABCP programme, of a liquidity facility, where the following conditions are met:
 - (i) the liquidity facility covers 100 % of the share of the credit risk of the securitised exposures of the relevant securitisation transaction that is being funded by the respective ABCP programme;
 - (ii) the liquidity facility covers the credit risk for as long as the retainer has to retain the material net economic interest by means of such liquidity facility for the relevant securitisation transaction;
 - (iii) the liquidity facility is provided by the originator, sponsor or original lender in the securitisation transaction;
 - (iv) the investors have been given access to appropriate information within the initial disclosure to enable them to verify that points (i), (ii) and (iii) are complied with.
- (c) The retention of an exposure which exposes its holder to the credit risk of each issued tranche of a securitisation transaction on a pro-rata basis (vertical tranche) of not less than 5 % of the total nominal value of each of the issued tranches.

Article 5

The retention of the originator's interest in a revolving securitisation or securitisation of revolving exposures

The retention of the originator's interest of not less than 5% of the nominal value of each of the securitised exposures as referred to in Article 6(3) point (b) of Regulation (EU) 2017/2402 shall only be considered fulfilled, where the retained credit risk of such exposures ranks *pari passu* with or is subordinated to the credit risk securitised in relation to the same exposures.

Article 6

The retention of randomly selected exposures equivalent to not less than 5% of the nominal value of the securitised exposures

1. The pool of at least 100 potentially securitised exposures from which retained and securitised exposures are randomly selected, as referred to in Article 6(3) point (c) of Regulation (EU) 2017/2402, shall be sufficiently diverse to avoid an excessive concentration of the retained interest.
2. When carrying out the selection of retained exposures, the retainer shall take into account appropriate quantitative and qualitative factors to ensure that the distinction between retained and securitised exposures is random. The retainer of randomly selected exposures shall take into consideration, where appropriate, factors such as vintage, product, geography, origination date, maturity date, loan



- to value ratio, property type, industry sector, and outstanding loan balance when selecting exposures.
3. The retainer shall not designate different individual exposures at different points in time, except where this may be necessary to fulfil the retention requirement in relation to a securitisation in which the securitised exposures fluctuate over time, either due to new exposures being added to the securitisation or to changes in the level of the individual securitised exposures.
 4. Where the retainer is the securitisation's servicer, the selection conducted in accordance with this Article shall not lead to a deterioration in the servicing standards applied by the retainer on the transferred exposures relative to the retained exposures.

Article 7

The retention of the first loss tranche

1. The retention of the first loss tranche in accordance with Article 6(3)(d) of Regulation (EU) 2017/2402 may be fulfilled by holding either on-balance sheet or off-balance sheet positions and by any of the following methods:
 - (a) provision of a contingent form of retention or of a liquidity facility in the context of an ABCP programme, provided that each of these methods meets all of the following criteria:
 - (i) it covers at least 5 % of the nominal value of the securitised exposures;
 - (ii) it constitutes a first loss position in relation to the securitisation;
 - (iii) it covers the credit risk for the entire duration of the retention commitment;
 - (iv) it is provided by the retainer;
 - (v) the investors have been given access within the initial disclosure to appropriate information to enable them to verify that points (i) to (iv) are complied with;
 - (b) overcollateralisation, as referred to in Article 242 point (9) of Regulation (EU) No 575/2013, if that overcollateralisation operates as a 'first loss' position of not less than 5 % of the nominal value of the securitised exposures.
2. Where the first loss tranche exceeds 5 % of the nominal value of the securitised exposures, it shall be possible for the retainer to only retain a pro-rata portion of such first loss tranche, provided that this portion is equivalent to at least 5 % of the nominal value of the securitised exposures.

Article 8

The retention of a first loss exposure of not less than 5% of every securitised exposure

1. The retention of a first loss exposure at the level of every securitised exposure as referred to in Article 6(3) point (e) of Regulation (EU) 2017/2402 shall only be considered to be fulfilled, where the retained credit risk is subordinated to the credit risk securitised in relation to the same exposures.



2. By way of derogation from paragraph 1, the retention may also be fulfilled by the sale at a discounted value of the underlying exposures by the originator or original lender, where each of the following conditions is satisfied:
 - (a) the amount of the discount is not less than 5 % of the nominal value of each exposure;
 - (b) the discounted sale amount must be refundable to the originator or original lender if, and only if, such discounted sale amount is not absorbed by losses related to the credit risk associated to the securitised exposures.

Article 9

Application of the retention options on traditional NPE securitisations

1. In case of NPE securitisations in accordance with Article 6(3a) of Regulation (EU) 2017/2402, Articles 4(a) and 5 to 8 shall be applied to the share of non-performing exposures in the pool of underlying exposures of a securitisation considering any reference in relation to the nominal value of the securitised exposures as a reference to the net value of the non-performing exposures.
2. For the purposes of Article 6, the net value of the retained non-performing exposures shall be computed using the same amount of the non-refundable purchase price discount that would be applied had the retained non-performing exposures been securitised.
3. For the purposes of Article 4(a), Article 5 or Article 8, the net value of the retained part of the non-performing exposures shall be computed using the same percentage of the non-refundable purchase price discount that applies to the part that is not retained.
4. Where the non-refundable purchase price discount has been agreed at the level of the pool of underlying non-performing exposures as referred to in Article 6(3a) second subparagraph of Regulation (EU) 2017/2402 or at sub-pool level, the net value of individual securitised non-performing exposures included in the pool or sub-pool, where applicable, shall be calculated by applying a corresponding share of the non-refundable purchase price discount agreed at pool or sub-pool level to each of the non-performing securitised exposures in proportion to their nominal value or, where applicable, its outstanding value at the time of origination.
5. Where the non-refundable purchase price discount includes the difference between the nominal amount of one tranche or several tranches of an NPE securitisation underwritten by the originator for subsequent sale and the price at which this tranche or these tranches are first sold to unrelated third parties as referred to in Article 6(3a) second subparagraph of Regulation (EU) 2017/2402, that difference shall be taken into account in the calculation of the net value of individual securitised non-performing exposures by applying a corresponding share of the difference to each of the non-performing securitised exposures in proportion to their nominal value.

Article 10

Measurement of the level of retention

1. When measuring the level of retention of the net economic interest, the following criteria shall be applied:



- (a) the origination shall be considered as the time at which the exposures were first securitised, such as the date of the issuance of securities, or the date of the signature of the credit protection agreement or the date of the agreement on a refundable purchase price discount;
 - (b) where the calculation of the level of retention is based on nominal values, it shall not take into account the acquisition price of assets;
 - (c) the finance charge collections and other fee income received in respect of the securitised exposures in a traditional securitisation net of costs and expenses (traditional excess spread) shall not be taken into account when measuring the retainer's net economic interest;
 - (d) where the originator acts as the securitisation's retainer and applies the retention option in accordance with Article 6(3)(d) of Regulation (EU) 2017/2402, and where the exposure value of the 'synthetic excess spread' that provides credit enhancement to all the tranches of the synthetic securitisation and serves as a first loss protection is subject to capital requirements in accordance with the prudential regulation applicable to the originator, it may take the exposure value of the 'synthetic excess spread' into account when measuring the material net economic interest in accordance with Article 7 by treating the exposure value of the synthetic excess spread as retention of the first loss tranche, in addition to any actual retention of the first loss tranche;
 - (e) the retention option and methodology used to calculate the net economic interest shall not be changed during the life of a securitisation transaction, unless exceptional circumstances require a change and that change is not used as a means to reduce the amount of the retained interest.
2. The retainer shall not be required to constantly replenish or readjust its retained interest to at least 5 % as losses are realised on its retained exposures or allocated to its retained positions.

Article 11

Measurement of retention for exposures in the form of drawn and undrawn amounts of credit facilities

The calculation of the net economic interest to be retained for credit facilities, including credit cards, shall be based only on amounts already drawn, realised or received and shall be adjusted in accordance with changes to those amounts.

Article 12

Prohibition of hedging or selling the retained interest

1. The obligation in the first subparagraph of Article 6(1) of Regulation (EU) 2017/2402 to retain on an ongoing basis a material net economic interest in the securitisation shall be deemed to have been met only where, taking into account the economic substance of the transaction, both of the following conditions are met:
 - (a) the retained material net economic interest is not subject to any credit risk mitigation or hedging of either the retained securitisation positions or the retained exposures. Hedges of the net economic interest shall be permitted



- only where they do not hedge the retainer against the credit risk of either the retained securitisation positions or the retained exposures;
- (b) the retainer does not sell, transfer or otherwise surrender all or part of the rights, benefits or obligations arising from the retained net economic interest.
2. Retained exposures or securitisation positions may be used as collateral for secured funding purposes including, where relevant, funding arrangements that involve a sale, transfer or other surrender of all or part of the rights, benefits or obligations arising from the retained net economic interest, provided that such use as collateral does not transfer the exposure to the credit risk of these retained exposures or securitisation positions to a third party.
3. The condition of paragraph 1(b) shall not apply
- (a) in the event of the insolvency of the retainer;
 - (b) when the retainer is, for legal reasons beyond its control and beyond the control of its shareholders, unable to continue acting in that capacity; or
 - (c) in the case of retention on a consolidated basis in accordance with Article 14.

Article 13

Exemptions in accordance with Article 6(6) of Regulation (EU) 2017/2402

The transactions referred to in Article 6(6) of Regulation (EU) 2017/2402 shall include securitisation positions in the correlation trading portfolio which are reference instruments satisfying the criterion in Article 338(1) point (b) of Regulation (EU) No 575/2013 or are eligible for inclusion in the correlation trading portfolio.

Article 14

Retention on a consolidated basis

A mixed financial holding company as defined in Article 2 point (15) of Directive 2002/87/EC, a parent institution or a financial holding company established in the Union satisfying, in accordance with Article 6(4) of Regulation (EU) 2017/2402, the retention requirement on the basis of its consolidated situation shall, in the case the retainer is no longer included in the scope of supervision on a consolidated basis, ensure that one or more of the remaining entities included in the scope of supervision on a consolidated basis assumes an exposure to the securitisation so as to ensure the ongoing fulfilment of the requirement.

Article 15

Requirements on the allocation of cash flows and losses to the retained interest and on fees payable to the retainer

1. There shall be no arrangements or embedded mechanisms in the securitisation by virtue of which the retained interest at origination would decline faster than the interest transferred. The retained interest shall not be prioritised in the allocation of cash flows to preferentially benefit from being repaid or amortised ahead of the transferred interest. The amortisation of the retained interest via cash flow allocation or through the allocation of losses that,



in effect, reduce the level of retention over time shall not be deemed as a breach of the criteria set out in this paragraph.

2. Arrangements on fees payable to the retainer on a priority basis to remunerate that retainer for services of any kind provided to the securitisation shall only be deemed as complying with the previous paragraph where all of the following conditions are met:
 - (a) the amount of the fees is set on an arm's length basis having regard to comparable transactions in the market. In the absence of comparable transactions in the relevant market, the set amount may be deemed compliant by reference to fees payable in similar transactions in other markets or by using appropriate valuation metrics, taking into account the type of securitisation and the service being provided; and
 - (b) the fees are structured as a consideration for the provision of the relevant service and do not create a preferential claim in the securitisation cash flows that effectively declines the retained interest faster than the transferred interest.

The conditions in points (a) and (b) shall not be considered to be met where the fees are guaranteed or payable up-front in any form, in full or in part in advance of the service being provided post-closing, and where the effective material net economic interest after deducting such fees is lower than the minimum net economic interest required under the respective retention option in accordance with Article 6(1) of Regulation (EU) 2017/2402.

3. The fees payable to the retainer may be contingent on the performance of the securitised assets or the evolution of relevant market benchmarks, provided that the criteria laid out in paragraph 1 and 2 are complied with.

Article 16

Retention requirement in resecuritisations

1. In the context of a resecuritisation as far as permitted in accordance with Article 8 of Regulation (EU) 2017/2402, a retainer shall retain the material net economic interest in relation to each of the respective transaction levels.
2. By derogation from paragraph 1, the originator of a resecuritisation shall not be obliged to retain a material net economic interest also at the transaction level of the resecuritisation where all of the following conditions are met:
 - (a) the originator of the resecuritisation is also the originator and the retainer of the underlying securitisation;
 - (b) the resecuritisation is backed by a pool of exposures comprising solely exposures or positions which were retained by the originator in the underlying securitisation in excess of the required minimum net economic interest prior to the date of origination of the resecuritisation;
 - (c) there is no maturity mismatch between the underlying securitisation positions or exposures and the resecuritisation.

3. The retranching of an issued tranche into contiguous tranches by the securitisation's originator shall not be deemed as a resecuritisation for the purposes of this Article.

Article 17

Assets transferred to the SSPE

1. For the purposes of Article 6(2) of Regulation (EU) 2017/2402, assets held on the balance sheet of the originator that meet the eligibility criteria according to the documentation of the securitisation shall be deemed as comparable to the assets to be transferred to the SSPE where, at the time of the selection of the assets, both of the following conditions are met:
 - (a) the expected performance of both the assets to be further held on the balance sheet and the assets to be transferred is determined by similar relevant factors;
 - (b) as a result of the similarity referred to in point (a) and on the basis of indications such as past performance or applicable models, it can be reasonably expected that the performance of the assets to be further held on the balance sheet would not be significantly better over the time period referred to in Article 6(2) of Regulation (EU) 2017/2402 than the performance of the assets to be transferred.
2. The assessment whether the originator has complied with Article 6(2) of Regulation (EU) 2017/2402 shall take into account the actions the originator has taken to comply with that Article. In particular, these shall include any internal policies, procedures and controls put in place by the originator to prevent the systematic or intentional selection for securitisation purposes of assets of a worse average credit quality than comparable assets retained on its balance sheet.
3. Article 6(2) of Regulation (EU) 2017/2402 shall be deemed complied with where, after the securitisation, there are no exposures left on the originator's balance sheet that are comparable to the securitised exposures (other than the exposures which the originator is already contractually committed to securitise) and where the fact that no comparable assets (other than exposures which the originator is already contractually committed to securitise) remain on the balance sheet of the originator is being clearly communicated to investors.

Article 18

Expertise requirement on the servicer of a traditional NPE securitisation

1. The servicer shall be deemed to have expertise in servicing non-performing exposures in accordance with subparagraph 4 of Article 6(1) of Regulation (EU) 2017/2402 where:
 - (a) the members of the management body of the servicer and the senior staff, other than the members of the management body, responsible for servicing non-performing exposures have adequate knowledge and skills in the servicing of such exposures;



- (b) the business of the servicer, or of its consolidated group for accounting or prudential purposes, has included the servicing of non-performing exposures for at least five years prior to the date of the securitisation; or
 - (c) all of the following points are complied with:
 - (i) at least two of the members of its management body have relevant professional experience in the servicing of non-performing exposures, on a personal level, of at least five years;
 - (ii) senior staff, other than the members of the management body, who are responsible for managing the entity's servicing of non-performing exposures have relevant professional experience in the servicing of such exposures, on a personal level, of at least five years;
 - (iii) the servicing function of the servicer is backed up by a back-up servicer compliant with point (b).
2. For the purpose of demonstrating the number of years of professional experience, the relevant expertise shall be disclosed in sufficient detail, in accordance with the applicable confidentiality requirements, to permit investors to carry out their due diligence obligations under Article 5 of Regulation (EU) 2017/2402.

Article 19
Repeal

With effect from entry into force of this Regulation, Commission Delegated Regulation (EU) No 625/2014 shall be repealed without prejudice to Article 43(6) of Regulation (EU) 2017/2402.

Article 20
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Brussels,

For the Commission

The President

4. Accompanying documents

4.1 Draft cost-benefit analysis / impact assessment

A. Problem identification

1. The financial crisis demonstrated that the following problems have materialised in securitisation transactions: (i) originators, sponsors or original lenders may have had little incentive to adequately screen the credit risk characteristics of the exposures they intended to securitise, given that the credit risk of the securitised exposures was transferred to securitisation investors and credit enhancement providers; and (ii) some securitisation transactions proved to be particularly opaque concerning the information on the credit risk features of the securitised exposures. Such information was not sufficiently available and accessible to investors. Misaligned incentives and the lack of information and transparency in some securitisation transactions contributed to excessive risk-taking in parts of the securitisation industry and to a broad lack of confidence in securitisation transactions. These outcomes not only led to losses and to the drying up of liquidity and funding in the securitisation markets, but also contributed to the overall freezing of the interbank markets.
2. Article 6 of the Securitisation Regulation, as amended by Regulation (EU) 2021/557, sets out risk retention requirements on originators, sponsors or originator lenders in securitisation transactions. These provisions address the fundamental problem of the possible misalignment of interests and incentives in securitisation transactions between the investors, on the one hand, and the originator, sponsor or original lender, on the other.
3. The Securitisation Regulation replaces the risk retention requirements previously set out in Regulation (EU) No 575/2013, Articles 254 and 255 of Delegated Regulation (EU) 2015/35 and Article 51 of Delegated Regulation (EU) No 231/2013. Article 410 of Regulation (EU) No 575/2013 mandated the EBA to develop draft regulatory technical standards to specify in greater detail the retention requirement applicable to institutions set out in Article 405 of that Regulation. Based on the draft RTS submitted by the EBA, the Commission adopted Commission Delegated Regulation (EU) No 625/2014. Following the adoption of Commission Delegated Regulation (EU) No 625/2014, the Securitisation Regulation was enacted. The Securitisation Regulation mandated the EBA to develop RTS on risk retention applicable not only to institutions but to all parties within the scope of application of the Securitisation Regulation, which the EBA submitted to the Commission in 2018. The Securitisation Regulation has recently been amended by Regulation (EU) 2021/557, which has extended the scope of the EBA mandate on the RTS on risk retention.



B. Objectives of the RTS

4. These draft RTS have been developed in accordance with Article 6(7) of the Securitisation Regulation, as amended by Regulation (EU) 2021/557, which requires the EBA to develop draft RTS to specify in greater detail the risk retention requirement, in particular with regard to:
 - (a) the modalities for retaining risk pursuant to paragraph 3 of Article 6 of the Securitisation Regulation, including the fulfilment through a synthetic or contingent form of retention;
 - (b) the measurement of the level of retention referred to in paragraph 1 of Article 6 of the Securitisation Regulation;
 - (c) the prohibition of hedging or selling the retained interest;
 - (d) the conditions for retention on a consolidated basis in accordance with paragraph 4 of Article 6 of the Securitisation Regulation;
 - (e) the conditions for exempting transactions based on a clear, transparent and accessible index referred to in paragraph 6 of Article 6 of the Securitisation Regulation;
 - (f) the modalities of retaining risk pursuant to paragraph 3 and 3a in the case of NPE securitisation; and
 - (g) the impact of fees paid to the retainer on the effective material net economic interest within the meaning of paragraph 1.

C. Cost-benefit analysis

5. The present draft RTS largely replicate many of the existing provisions in Commission Delegated Regulation (EU) No 625/2014 and the EBA RTS on risk retention adopted in 2018, while a number of the provisions proposed in the draft RTS have already been implemented (at least in part) pursuant to Commission Delegated Regulation (EU) No 625/2014. These replicated requirements are therefore not expected to involve material costs for supervisors and institutions or to have a material impact on transactions that are currently being structured or carried out within the most relevant segments of active securitisation markets.
6. With respect to the new requirements proposed in these draft RTS, the following can be expected:
 - a) Some additional requirements, in particular regarding some aspects of NPE securitisations, provide additional clarity on risk retention in the case of portfolios of non-performing exposures and may therefore contribute positively to structuring securitisations on the non-performing exposures;
 - b) other additional requirements may however pose challenges to the market and are expected to require a significant effort by the supervisors for them to be implemented



correctly (such as requirements on the fees paid to the retainer, the net value regime for NPE securitisations, the experience of the servicer, and the adverse selection of assets).

4.2 Feedback on the public consultation

The EBA publicly consulted on the draft proposal contained in this paper.

The consultation period lasted three months and ended on 30 September 2021. The EBA received 12 responses (5 confidential and 7 non-confidential) and a public hearing was held on 14 September 2021. The Banking Stakeholders Group ('BSG') issued no opinion. All public responses are published on the EBA's website.

This report presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them, if deemed necessary.

In certain cases, several industry bodies made similar comments, or the same body repeated its comments in response to different questions. In such cases, the comments and the EBA analysis are included in the section of this paper where the EBA considers them most appropriate.

Changes to the draft RTS have been incorporated as a result of the responses received during the public consultation.

Summary of key issues

The industry respondents requested further clarification, re-wording adjustments and/or relaxation of the requirements, in particular relating to:

- 1) fees payable to retainers. Several respondents suggested amending Article 15 (and to consequently amend Recital 6) to explicitly exclude fees typically paid in priority (e.g. servicing fees and operating expenses for the SSPE) or fees relating to pre-closing, closing and post-closing services (e.g.: when an originator acts as arranger/joint lead manager/underwriter);
- 2) retention via Synthetic excess spread (SES). Some respondents requested (i) that the SES exposure value should count towards any form of retention rather than merely the first loss tranche retention option; (ii) clarification that the maturity requirement for SES does not preclude 'use it or lose it' SES;
- 3) servicer-retainer. Respondents requested (i) modification of the retention requirement under Article 2(6)(b), allocating it pro rata on the basis of the net value of the exposures managed by each servicer at origination rather than to the number of servicers; (ii) the inclusion, in Article 2(1), of a provision with the aim of allowing the servicer to still be the retainer even after termination of its appointment and a change of servicers; and (iii) consideration being given to the perception that the provisions in Article 19 of the draft RTS are much stricter than the requirements as stipulated in the EBA guidelines on the STS criteria.

- 4) provisions on ABCP programmes set out in Recital 8 of the draft RTS. Some respondents asked for clarification, specifically on programmes not meeting the conditions of Article 8(4) of the Securitisation Regulation.
- 5) NPE securitisations. Some respondents asked for clarification on the following points:
 - a) computation of the net value of the retained exposures when part of each securitised exposure is retained under retention options in the pool other than those under Article 6 (randomly selected exposures);
 - b) possibility of mixed situations (i.e. when part of the NRPPD is agreed on at the exposure level and another part is agreed at the sub-pool level).
 - c) nominal value of the issued tranches versus the net value of the non-performing exposures for retention purposes
- 6) change of retainer. Some respondents requested the addition to Article 12(3) of the provision set out in limb (ii) of Recital (10), according to which, a change of retainer is permitted in the event it is 'unable to continue acting in that capacity for reasons beyond its control or the control of its shareholders'.
- 7) securitisations of own issued debt instruments. A couple of suggestions were received:
 - a) A respondent noted that the term 'issuer' – provided by Article 16 – is not defined in the Securitisation Regulation and in the Draft RTS and can be understood to mean the SSPE. Therefore, it suggested replacing the word 'issuer' with references to 'originator' and 'original lender'
 - b) one respondent proposed replacing the Recital 7 wording with the one set out in Recital 1 to the pre-2019 CRR retention RTS, which currently apply under the transitional provisions of the Securitisation Regulation (the wording of which was also included in the EBA earlier draft RTS of July 2018).
- 8) assets transferred to the SSPE (Comparability). A respondent proposed amending Article 18 (3) excluding exposures that the originator is committed to securitise, to take into account scenarios in which the originator holds assets for multiple securitisations concurrently; another proposed stating that only assets that are eligible for securitisation pursuant to a transaction's written documentation (e.g. "eligibility criteria") have to fulfil the requirements of Article 18.
- 9) cash collateralisation of synthetic/contingent risk retention for non-credit institutions. A respondent suggested that entities that would, if acting as investors, qualify as 'institutional investors' (within the meaning of Article 2(12) of the Securitisation Regulation), or as eligible providers of unfunded credit protection (within the meaning of Article 201(1)(a)-(e) CRR) should be excluded from cash collateralisation and, in the remainder of cases, other forms of collateral, other than cash, should be permitted where their fair market value is maintained in an amount equal to the retained material net economic interest.



A detailed presentation of the comments received and of the EBA response is included in the table set out below.



Summary of responses to the consultation and the EBA’s analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Responses to questions in Consultation Paper EBA/CP/2021/27			
<p>Question 1. Do you agree with the provisions in Article 9 with respect to the application of the retention options on the NPE securitisations, and the ‘net value’ regime of the NPE securitisations? Are the retention options specified under Articles 4 to 8 sufficiently clear using the net value regime? Are there any other aspects of NPE securitisation and the net value regime that should be clarified in the RTS?</p>	<p>Some respondents requested amendments to Article 9 in order to include the following points:</p> <p>i) the proposed mechanism for establishing the non-refundable purchase price discount (NRPPD) for retained randomly selected exposures should presumably also apply to the retention options involving a pro rata retention of a portion of each securitised asset (Articles 4(a) and 5 of the draft RTS) since (like randomly selected exposures) the</p>	<p>The RTS as consulted are explicit about the computation of the net value of the retained exposures that are not securitised under Article 6 (randomly selected exposures). However, they do not mention the rules for the computation of the net value when part of each securitised exposure is retained under other retention options in the pool, namely Article 4(a) (retention of no less than 5% of the nominal value of each of the securitised exposures), Article 5 (retention of the originator's</p>	<p>Added a paragraph in Article 9 clarifying the application of the net value also in connection with the alternative retention option pursuant to Article 4(a), Article 5 and Article 8 of the RTS</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>retained portion of each asset in these circumstances is not securitised;</p> <p>ii) the NRPPD in the circumstances under point i) may be established by any of the methods referred to in Article 6(3a) of the Securitisation Regulation;</p> <p>iii) the methods identified in Article 6(3a) of the Securitisation Regulation in the text of the draft RTS, ideally flagging that any combination of these methods is permitted;</p> <p>iv) where a NRPPD is agreed at the level of each individual securitised exposure at the time of origination, the net value of each non-performing exposure shall be calculated by deducting the NRPPD from the exposure's nominal value;</p> <p>v) points (a) to (e) of Article 6(3) of the Securitisation Regulation should be qualified by interpreting references to the nominal value of the securitised exposures/nominal value of the issued tranches as references to the net value of the non-performing exposures (in addition to Articles 4 to 8 of the draft RTS as proposed).</p>	<p>interest in a revolving securitisation or securitisation of revolving exposures) and Article 8 (retention of a first loss exposure of every securitised exposure).</p> <p>Article 6(3a) second subparagraph of the Securitisation Regulation clarifies two ways of calculating the net value when the NRPPD has been agreed at the exposure or pool level. However, with regard to the possibility of mixed situations (i.e. when part of the NRPPD is agreed at the exposure level and another part is agreed at the sub-pool level) there is ambiguity as to whether it is contemplated or not in Level 1, and this should be clarified in the RTS.</p> <p>This is already dealt with in Level 1 (Article 6(3a) first subparagraph, which specifies that 'in the case of NPE securitisations, where a non-refundable purchase price discount has been agreed, the retention of a material net economic interest for the purposes of that paragraph shall not be less than 5 % of the sum of the net value of the securitised exposures that qualify as non-performing exposures and, if applicable, the nominal value of any performing securitised exposures'. There is therefore no need to further specify this issue in the RTS.</p>	<p>Modified Article 9, paragraph 3 along these lines by adding a clarification on the treatment of NRPPD agreed at the level of sub-pools.</p> <p>No change</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>The following requests for clarifications were addressed:</p> <p>i) difference between ‘nominal value’ and ‘outstanding value’, since the Securitisation Regulation requires the deduction of the NRPPD either from the exposure’s nominal value or, where applicable, its outstanding value at the time of origination;</p> <p>ii) if provisions under Article 9(4) refer to single trades relating to transfer tranches to investors; in cases of disposal of the notes in separate trades to different investors (e.g. multi-originators transactions), the RTS should contemplate the implications of a more flexible approach (e.g., a maximum period in which trades are relevant; ongoing adjustment of the retention requirement).</p> <p>Lastly, a respondent proposed adjusting the definition of ‘non-refundable’ in order to make certain that: (i) a purchase price discount is also non-refundable if the nominal value of all issued tranches is equal to or lower than the sale price of the portfolio and (ii) the potential unexpected upside defined as excess/variable return, might be</p>	<p>The meaning of these concepts is well known. No need to further specify in the RTS.</p> <p>In line with the wording used in the second subparagraph of Article 6(3a) of the Securitisation Regulation, the RTS use the term ‘subsequent sale’, without further specification, in order not to limit the period of time between the origination date and the date of placement to investors, which is transaction-specific.</p> <p>If there is an upside for the seller in the purchase price discount agreement, it means that the seller may get a refund and, therefore, it does not fit the concept of “non-refundable”. There is therefore no need to further specify the issue in the RTS.</p>	<p>No change</p> <p>No change</p> <p>No change</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Interaction between Article 9 and Article 2 of the draft RTS	<p>distributed to the originator/original lender if it holds the junior tranche.</p> <p>A respondent pointed out that Article 9(1) would not capture the allocation principles set out in Articles 2(2) and 2(3) in case of multiple originators/original lenders.</p> <p>Therefore, the respondent proposed amending Article 2(2) to make it clear that, in cases of NPE securitisations, the pro rata allocation set out in Articles 2(2) and 2(3) is based on the net value of the securitised exposures for which the relevant party is the originator or original lender. Proposed amendment: <i>‘where multiple originators fulfil the retention requirement, it shall be fulfilled by each originator on a pro rata basis by reference to the nominal value, or, in the case of NPE securitisations, the net value of the securitised exposures for which it is the originator’</i></p>	<p>Article 9 only covers references to nominal value in Articles 4 to 8 (modalities of retention). Article 2(2 and 3) does not use the term ‘nominal value’, but instead ‘by reference to the securitised exposures for which it is the originator/original lender’. As the modalities of retention apply taking into account the net value, it follows that the “reference to the securitised exposures” has to be made using the net value in the case of NPE securitisations. There is therefore no need to further specify the issue in the RTS.</p>	No change
Nominal value of issued tranches versus net value of the non-performing exposures	<p>A respondent pointed out that the connection between the nominal value of the securitised exposure and the net value of the non-performing exposures provided in Article 9(1) may create confusion and distortions in the application of the ‘vertical tranche’ method set out in Article 4(c). In fact, the nominal amount of the notes in an NPE securitisation, similarly to the case of securitisations of performing exposures, would not only reflect the net value of the underlying securitised exposures,</p>	<p>For Article 4(c), it is irrelevant whether the underlying portfolio is considered using the nominal or the net value, as what applies is the nominal value of the issued tranches. Therefore, it has to be clarified that paragraphs b and c of Article 4 are not affected by the calculation of the net exposure value of the securitised exposures, as the nominal value of the issued tranches already reflects the NRPPD of the securitised exposures. Even in cases where the NRPPD includes the discount in the sale of certain tranches in the securitisation, it does not affect the</p>	Modified Art 9 by only referring to Articles 4(a) and 5 to 8 and excluding points (b) and (c) of Article 4.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Retention by multiple servicers	but also other factors (e.g. initial costs, reserves, etc.). Three respondents requested the modification of the retention requirement under Article 2(6)(b), allocating it pro rata on the basis of the net value of the exposures managed by each servicer at origination rather than the number of servicers.	obligation to retain 5 % of the total nominal value of these tranches under paragraphs b and c of Article 4. Making the allocation on the basis of the net value for non-performing exposures and the nominal value of performing exposures managed by each servicer at origination, rather than on the basis of the number of servicers, would ensure a better alignment of interest.	Modified Article 2(6)(b) along these lines by specifying the net economic interest to be retained by individual servicers on a pro-rata basis in respect of the net value of non-performing exposures and the nominal value of performing exposures it manages
Servicer as retainer and termination of servicer's appointment	Two respondents suggested including, in Article 2(1), a provision with the aim of allowing the servicer to still be the retainer even after termination of its appointment and a change of servicers. Moreover, they requested an operative provision of Recital 10 of the draft RTS on how a transfer of the retention should take place. Against this backdrop, they suggested extending the exception in Article 12 (3) to expressly permit the retained interest to	The general rules for a change of the retainer in Article 12 (3) should also apply in cases of a change of servicer. See also the EBA analysis below It is not clear why the exception in Article 12 (3), which allows the sale or transfer of the retained positions in the event of the retainer's insolvency,	No change No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>be transferred to a new replacement servicer, or other eligible retainer, at the option of the securitisation’s investors and not only in case of insolvency.</p> <p>Irrespective of the EBA’s conclusions/position on this point, the implications, for risk retention, of replacing a servicer-retainer should be clarified to avoid confusion.</p> <p>Three respondents requested adding to Article 12(3) the provision set in limb (ii) of Recital (10), in accordance with which, a change of retainer is permitted in the event it is <i>‘unable to continue acting in that capacity for reasons beyond its control or the control of its shareholders’</i>.</p>	<p>should apply differently when the retainer is a servicer.</p> <p>Taking into account the Level 1 text that does not include any direct reference to the case of a change of retainer but generally requires retention on an ongoing basis by a retainer throughout the maturity of a securitisation, the objective of Article 12 is not to identify situations in which, for whatever reason, a change of retainer may occur but rather to allow for a change of the retainer only in a very limited number of exceptional circumstances, in which the retainer is unable to continue performing this role, and the remaining material net economic interest is therefore retained by another entity, so that the alignment of interests is maintained.</p> <p>The change of the retainer cannot be based on a voluntary decision – which would fall within the prohibition of Article 12 – but has to be the necessary and unavoidable consequence due to reasons beyond the control of the retainer itself and of its shareholders.</p>	<p>Modified Article 12(3) by further specifying the exhaustive list of exceptional circumstances under which a change of retainer may occur taking due account of the Level 1 requirements in this regard.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Master servicer and special servicer as retainers	A respondent requested the specification in Article 1 (d) that - in the jurisdictions where such distinction is relevant - both the master servicer and the special servicer (severally) would be entitled to fulfil retention requirements set out under Article 6(1) of Regulation (EU) 2402/2017.	Article 1(d) does not exist in the RTS. And the distribution of risk retention among servicers is dealt with in Article 2(6) using the definition of the term 'servicer' in accordance with point (13) of Article 2 of the Securitisation Regulation.	
Measurement of the level of retention	A respondent suggested that, for consistency purposes, the criteria in limb (b) of Article 10(1) should provide for an express carve out for NPE securitisations.	Article 9 states that in the case of NPE securitisation the calculation of the level of retention is not based on nominal values but rather on net values. Therefore, Article 10(1)(b), which refers exclusively to the calculation of the level of retention based on nominal values, does not apply to NPE securitisations.	No change
Servicing fees	In the light of the alignment of interests, a respondent pointed out the necessity 'to make fees payable to the servicer transparent'. It suggested fees being contingent on recoveries and to request independent verification of the alignment of servicing fees with the market standard or at arms' length in case the servicer is linked to the NPE portfolio owner.	Transparency is out of the mandate of the RTS. Article 15(2)(a) already establishes that 'the amount of the fees is set on an arm's length basis'.	No change
Transparency on NPE securitisations	A respondent highlighted the need to increase the transparency of NPE securitisations by disclosing the transfer price or acquisition price and the discount rate (expected yield) of the respective NPE portfolio.	Transparency lies outside the scope out of the mandate of the RTS.	No change
Question 2. Do you agree with the provisions with respect to the synthetic excess spread?			



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
<p>Are there any aspects relating to the synthetic excess spread being considered in the measurement of the material net economic interest that should be clarified in these RTS, taking into account that separate RTS will be developed that will determine the exposure value of the synthetic excess spread?</p>	<p>A respondent proposed amending Article 10(1)(d) to take into account the following observations: (i) new SES capital charge (introduced by capital markets recovery package) should count towards (i.e. be deducted from the required material net economic interest for) any form of retention rather than merely the first loss tranche retention option; (ii) clarify that the maturity requirement for synthetic excess spread (SES) does not preclude ‘use it or lose it’ SES (or ideally deletion of this requirement).</p> <p>From a more general point of view, the respondent noted that the new SES capital charge is economically punitive and, in practice, likely to be minimally impacted by SES-based retention. In practice, the majority of transactions including SES make use of the full deduction option, rather than demonstrating the transfer of significant credit risk</p>	<p>SES operating as a virtual first loss tranche should count only towards the form of retention based on the actual first loss tranche by adding its amount to it.</p> <p>Agree that the meaning of “that is continuously available” would need further clarification and therefore redrafting of the requirements on the consideration of the exposure value of the SES as a means of risk retention</p> <p>General comment that is not directly linked to the consultation</p>	<p>Delete the last part of Article 10(1)(d) and modify part of its contents and of Recital 4 (now 3) to further clarify the treatment.</p> <p>No change</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Further observations	<p>associated with the underlying exposures under Article 245(1)(a) CRR.</p> <p>A respondent pointed out that the amount of synthetic excess spread that is permitted to count towards the required material net economic interest for risk retention purposes would be fully aligned with the SES exposure value for purposes of the new SES capital charge and would not be subject to additional requirements.</p> <p>A respondent stated that it is not its practice to consider synthetic excess spread (nor retained first loss tranches) as an additional alignment of interests. While admittedly it does entail additional risk retained, in practice these are both intended to cover a part of expected losses and do not lead to the alignment of interests as per tranches placed with investors throughout the life of the transaction. Effective risk retention may be lower from the moment synthetic excess spread and / or retained first loss tranches are used up.</p>	<p>See analysis above</p> <p>The same effect occurs when the first loss tranche is eroded by losses and does not affect the eligibility of that modality of retention, because risk retention is measured at origination and the retention requirements do not differentiate between the coverage of expected and unexpected losses.</p>	<p>No change</p>
<p>Question 3. Do you agree with the provisions set out in Article</p>			



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
15 on fees payable to the retainer?			
Scope of Article 15	<p>Several respondents suggested amending Article 15 (and consequently amending Recital 6) to explicitly exclude fees typically paid as a priority (e.g. servicing fees and operating expenses for the SSPE) or fees relating to pre-closing, closing and post-closing services (e.g.: when an originator acts as arranger/joint lead manager/underwriter).</p> <p>According to these respondents, the deduction of these fees – even at arm’s length and appropriately in light of the risks assumed and services provided – would not be reasonable and would make many securitisations uneconomical.</p> <p>Therefore, they suggested to clarify that deduction should be applied where guaranteed of upfront fees depend on the outstanding amount and/or credit quality of the securitised assets over time.</p>	<p>In view of these comments, fees linked to services provided pre-closing should be excluded from this requirement.</p>	<p>Modified the last subparagraph in Article 15(2) by including an additional differentiation in terms of fees that are guaranteed or payable up-front in any form, in full or in part, <i>in advance of the service being provided post-closing</i>.</p>
Criteria set out in Article 15(2)	<p>Some respondents suggested removing the requirements set out in paragraph 2(a) of Article 15 in relation to the meaning of the term ‘arm’s length’.</p> <p>Some respondents highlighted the opportunity to have solely objective criteria to verify the compliance of fees payable to the retainer with the provisions of Article 15. Therefore, they proposed removing the paragraph 2(b) of Article 15, stating</p>	<p>The concept is widely employed, and well understood, in contract and legal interpretation. For this reason, it should not be removed.</p>	<p>No change</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>that the notions of ‘genuine’ and ‘undue preferential claim’ are vague, very problematic to demonstrate and would lead to a legal, regulatory and operational uncertainty for both the financial industry and the supervisor.</p>	<p>Agree that these notions are vague. Dropping them will make the requirement stricter but clearer.</p>	<p>Modified Article 15(2)(b) by deleting the vague terms ‘genuin’ and ‘undue’ in the provision.</p>
<p>Operational application of the ‘fluctuation over time’”(Article 15(3)</p>	<p>A respondent requested clarification the operational application of the ‘fluctuation over time’ of the fees payable to the retainer.</p>	<p>‘Fluctuation over time’ means that the fees can be contingent on the performance of the securitised assets or the evolution of relevant market benchmarks, which should be clarified accordingly.</p>	<p>Modified Article 15(3) by replacing the term ‘fluctuation over time’ with a more specific wording.</p>
<p>Question 4. Do you agree with the provisions with respect to securitisations of own-issued debt instruments?</p>			
<p>Definition of ‘issuer’</p>	<p>One respondent noted that the term ‘issuer’ – provided by Article 16 – is not defined in the Securitisation Regulation or in the draft RTS and can be understood to mean the SSPE. Therefore, it suggested to replace the word ‘issuer’ with references to ‘originator’ and ‘original lender’.</p>	<p>Clarifying whether or not the entity that securitises its own liabilities fulfils the definition of originator or original lender goes beyond the mandate under Article 6(7) of the Securitisation Regulation. However, in relation to securitisations of own liabilities, there is a need to clarify that, since the risk remains with the sell-side parties of the securitisation which are also the debtors of the securitised exposures no risk retention requirement should be further specified in</p>	<p>Deleted Article 16 and the corresponding Recital 7 and insert a sentence in Recital 1 to provide a general clarification of the issue</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		the RTS as the entire credit risk of the securitised exposures remains with those sell-side parties.	
Interaction between Article 16 and Recital 7 of the draft RTS	One respondent suggested adding at the end of the Article 16 the words ' <i>or similar own debt instruments</i> ', in order to align it with Recital 7.	See EBA analysis above	No change
Extension of the scope of Article 16	One respondent suggested extending the exception provided in Article 16 to securitisations in which the underlying assets are real estates, registered movable assets and in rem or personal rights.	This goes beyond the mandate of the RTS, as such an exemption should be stated in Level 1	No change
Rewording of Recital 7	<p>One respondent proposed replacing the Recital 7 wording with the one set out in Recital 1 to the pre-2019 CRR retention RTS, which currently apply under the transitional provisions of the Securitisation Regulation (the wording of which was also included in the EBA earlier draft RTS of July 2018).</p> <p>According to the respondent, the following provision could more clearly articulate the high-level principles for this exemption: '<i>Where an entity exclusively securitises assets consisting of its own liabilities, alignment of interests is established automatically the for that securitisation. Where it is clear that the credit risk remains with the originator, the retention of interest by the originator is</i></p>	See EBA analysis above	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<i>unnecessary and would not improve on the pre-existing position’.</i>		
Question 5. Do you agree with the provisions with respect to resecuritisations?			
Clarifications on provisions on ABCP programmes set out in Recital 8 of the draft RTS	A respondent requested clarification that Recital 8 refers to partially supported ABCP programmes and/or those programmes not meeting the conditions of Article 8(4) of the Securitisation Regulation.	Agree. Article 8(4) of the Securitisation Regulation states: ‘A fully supported ABCP programme shall not be considered to be a resecuritisation for the purposes of this Article, provided that none of the ABCP transactions within that programme is a resecuritisation and that the credit enhancement does not establish a second layer of tranching at the programme level.’ and the provision should be clarified by a reference to that requirement.	Modified Recital 8 (Recital 6 now), third sentence, by inserting the clarification that the provision refers to ABCP programmes “other than those referred to in Article 8(4) of Regulation (EU) 2017/2402”.
	One respondent proposed deleting the following sentence from Recital 8: <i>‘The same requirement should apply to transactions within multiple underlying securitisations, such as ABCP programme’.</i> According to the respondent, this sentence: (i) is unnecessary as the application of the risk retention requirements to ABCP programmes is highly fact-pattern specific; (ii) raises concerns as it is open to interpretation.	See comment above.	
	Another respondent requested clarification as to whether - pursuant to Recital 8 – in addition to the retention provided by the sponsor at the level of the ABCP programme (i.e. through ‘full credit support liquidity line’), another retention should be	In such a case, additional compliance with the retention requirements at the level of individual ABCP transactions is only required if there is a second layer of tranching at the programme level.	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	implemented at the ABCP transaction level (which is characterised as a securitisation according to the definition).		
Rewording of Article 17	Minor suggestion to the wording of Article 17 (2) wording, with the aim of clarifying that ‘all’ conditions set out in the Article have to be met.	Agree	Modified the first sentence of Article 17(2) accordingly
<p>Question 6. Do you agree with the provisions in Article 18 with respect to assets transferred to SSPE? Are there any additional aspects that should be further specified in these RTS, taking into account that no clarification is provided with respect to Recital 11 of the Securitisation Regulation (for example, do you see any specific implications for the securitisations of NPE securitisations and how these should be tackled)?</p>			
Interaction between Recital 11 of the Securitisation Regulation and Article 18 of the draft RTS.	A respondent requested clarification as to whether Article 18 includes the right of originators or sponsors to select ex-ante assets with a higher-	Article 18 only clarifies the concept of comparability between securitised and non-securitised assets in Article 6(2) SECR. The explicit inclusion of this	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>than-average credit-risk profile as long as this is clearly communicated to (potential) investors.</p>	<p>transparency requirement, mentioned in Recital 11 SECR, would go beyond the mandate as it would be a substantial modification of Article 6(2) SECR.</p>	
<p>Exclusions from comparability test</p>	<p>A respondent suggested explicitly excluding NPEs from the comparability test provided under Article 18.</p>	<p>NPEs are also subject to the comparability test, which is explicitly mentioned in the example in the second paragraph of Recital 11 of Regulation (EU) 2017/2402</p>	<p>No change</p>
	<p>A respondent proposed amending Article 18 (3) to exclude exposures that the originator is committed to securitise, to take into account scenarios in which the originator holds assets for multiple securitisations concurrently. Article 18(3) should be amended as follows (ithe proposed modifications in italics):</p> <p>‘Article 6(2) of Regulation (EU) 2017/2402 shall be deemed complied with where, after the securitisation, there are no exposures left on the originator’s balance sheet that are comparable to the securitised exposures (<i>other than exposures which the originator is committed to securitise</i>) and where the fact that no comparable assets (<i>other than exposures which the originator is committed to securitise</i>) remain on the balance sheet of the originator is being clearly communicated to investors’.</p>	<p>Agree</p>	<p>Modified Article 18(3) by inserting “other than exposures which the originator is already contractually committed to securitise)” in the text.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Wording suggestions	<p>A respondent suggested explicitly stating that only assets that are eligible for securitisation pursuant to a transaction's written documentation (e.g. 'eligibility criteria') have to fulfil the requirements of Article 18.</p>	Agree	<p>Modified Article 18(1) by additionally specifying that only assets held on the originator's balance sheet that meet the eligibility criteria in accordance with the documentation of the securitisation shall be deemed comparable for the purposes of the requirement</p>
<p>Question 7. Do you agree with the provisions set out in Article 19 with respect to the expertise of the servicer of a traditional NPE securitisation?</p>			
Expertise requirement for servicers of NPE securitisations	<p>A respondent considered the provisions in Article 19 of the draft RTS much stricter than the requirements as stipulated in the EBA guidelines on the STS criteria. In particular, Article 19(2) was felt to be very rigid in terms of years of experience, asking for a back-up servicer and not taking into account the possibility of an entity being prudentially regulated.</p>	<p>The purpose is different as servicing NPEs is a more specialised business than servicing performing exposures within an STS securitisation.</p>	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Additional requirement for special servicers acting as retainers	A respondent highlighted the existence of ‘double-decker’ securitisation structures, encompassing a ‘master servicer’ (responsible for ensuring the compliance of the transaction with the law and the prospectus) and a ‘special servicer’, delegated to the day-to-day active management of the exposures and usually acting as retainer. The respondent suggested including - as an additional requirement for special servicers acting as retainers - sufficient independence from the master servicer in determining how to carry out the day-to-day management activity.	It is not clear why independence from the master servicer improves the alignment of interest. If there is no such independence, the master servicer might be responsible for the risk retention requirement in accordance with Article 2(6)(a), as it would have the predominant economic interest, but only as long as it fulfils the definition of servicer in the Securitisation Regulation.	No change
Question 8. Do you have any comments on the remaining Articles of these draft RTS?			
Sole purpose test	Three respondents – while supporting the principles-based approach applied in the draft RTS – proposed minor amendments to Article 2(7) in order to: i) further clarify that the sole purpose test requires ‘appropriate consideration’ being given to the relevant principles (i.e. it does not mean that each of the identified principles is given equal weight and fully satisfied in all circumstances); (ii) track more closely the wording of Article 6(1) of the Securitisation Regulation itself (deletion of the words ‘or predominant’ in letter b).	Both requirements should be fulfilled in order for the sole purpose test to be met.	No change



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>A respondent interpreted the ‘sole purpose test’ provisions as an intention to capture situations in which the retainers do not own significant assets other than the exposures to the relevant securitisation. Therefore, it suggested that Article 2(7) should refer to this criterion as the key principle for the ‘sole purpose test’.</p>	<p>The paragraph explicitly targets income rather than the composition of the balance sheet, as income better reflects the business model of the retainer.</p>	<p>No change</p>
<p>Clarification on certain origination/retention structures</p>	<p>Two respondents requested clarification on whether the following structure of origination / retention is acceptable in the context of the limb (b) definition of originator: the securitised assets are not registered on the balance sheet of the originator for a minimum period of time but are instead (i) directly sold to an SSPE; (ii) the exposure to the credit risk of the securitised assets by the originator is in the form of a guarantee, put option or contingent repurchase agreement; (iii) first losses are subscribed by the originator.</p>	<p>The question is whether the “originator” meets the definition of an originator under limb (b) of Article 2 point (3) of the Securitisation Regulation or rather the definition of a sponsor under limb (a) of Article 2 point (5) of that Regulation, as it is not purchasing the third party’s exposures, and whether the guarantee, put option, or contingent repurchase agreement can be interpreted to be equivalent to an actual purchase by the institution acting as originator. Those questions are out of the scope of the mandate for these RTS.</p>	<p>No change</p>
<p>Consolidated application – entities other than relevant credit institutions</p>	<p>A respondent requested clarification that the ability to fulfil the retention requirement on a consolidated basis should also apply to originators or original lenders other than credit institutions (as it was explicitly stated in the CEBS Guidelines to Article 122a, paragraph 71).</p>	<p>This would require amending Article 6(4) of the Securitisation Regulation, which only contemplates the fulfillment of the risk retention requirement on a consolidated basis in the specific cases of ‘mixed financial holding company established in the Union within the meaning of Directive 2002/87/EC of the European Parliament and of the Council, a parent institution or a financial holding company established in the Union, or one of its subsidiaries within the meaning of Regulation (EU) No 575/2013’. The</p>	



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>Two respondents pointed out that, according to the Securitisation Regulation, the ability to fulfil the risk retention on a consolidated basis under Article 6(4) should also apply to sponsors, originators or original lenders other than credit institutions and should apply whether or not such entities are established in the EU. This issue should be considered as part of the wider review of the Securitisation Regulation.</p>	<p>proposed amendments are therefore regarded as being outside the scope of the mandate for these RTS.</p>	<p>No change</p>
<p>Vertical retention for revolving securitisations</p>	<p>A respondent proposed reinstating – in Article 4(a) – the guidance on revolving securitisations and retention of the originator’s interest that exists under Regulation (EU) 625/2014 and that was included by the EBA in the draft RTS of July 2018. It would assure legal certainty for existing securitisations that rely on this guidance.</p>	<p>As per its title, Article 5 already contemplates the retention of the originator’s interest in revolving securitisations.</p>	<p>No change</p>
<p>Risk retention amount</p>	<p>A respondent stated that the minimum requirement of 5% for retention is low as it would be quite quickly covered by origination fees, placement fees and/or advisory fees at origination; therefore it suggested increasing the minimum requirement to 20%.</p>	<p>Adjusting the minimum percentage of the retained interest to be held is outside the scope of the mandate for these RTS.</p>	<p>No change</p>
<p>Cash collateralisation of synthetic/contingent risk retention for non-credit institutions</p>	<p>A respondent proposed modifying Article 3(2) as the requirement for the cash collateralisation of synthetic and contingent forms of risk retention when held by entities other than credit institutions would be disproportionate, unduly restrictive and creates an uneven playing field.</p>	<p>Regulation (EU) 625/2014, which only applies to CRR-regulated institutions already includes such a provision that only excludes credit institutions from the corresponding requirement.. However, as the scope of application of the Securitisation Regulation is cross-sectoral, other supervised entities subject to</p>	<p>Modified Article 3(2) by extending the exemption from the application of the requirement to certain investment</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>In its view, in case of entities that would not, if acting as investors, qualify as 'institutional investors' (within the meaning of Article 2(12) of the Securitisation Regulation), or as eligible providers of unfunded credit protection (within the meaning of Article 201(1)(a)-(e) CRR), forms of collateral other than cash should be permitted where their fair market value is maintained in an amount equal to the retained material net economic interest.</p> <p>Another respondent proposed adding, at the end of Article 3(2), the wording '<i>covered by an eligible form of credit risk mitigation according to Chapter 4 of Regulation (EU) 575/2013</i>'. The justification is to provide an effective protection for investors against the default risk of the retainer.</p>	<p>similar capital requirements, such as investment firms, insurance or reinsurance undertakings, should also be exempted from that requirement now.</p> <p>The cash collateralisation requirement is already included in Regulation (EU) 625/2014, and the EBA does not see solid arguments to change it for the Securitisation Regulation.</p> <p>The requirement for cash collateralising the synthetic or contingent form of retention means that adding the additional requirement suggested is unnecessary</p>	<p>firms covered by the current definition of institution, insurance undertakings and reinsurance undertakings</p> <p>No change</p>
<p>Alignment with non-EU regulation</p>	<p>A respondent pointed out the need to seek alignment in the details of the risk retention rules, between EU and non-EU regulations, in order to promote cross-border investments.</p>	<p>This issue is not covered by the RTS mandate.</p>	
<p>Retention option and methodology to calculate the</p>	<p>A respondent proposed the following extension to Article 10(1)(e): '<i>The retention option and methodology used to calculate the net economic</i></p>	<p>The EBA is of the view that changes in the methodology during the life of the transaction that are not due to exceptional circumstances would add</p>	<p>No change</p>



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net economic interest in case of revolving securitisations	<p><i>interest shall not be changed during the life of a securitisation transaction, unless exceptional circumstances require a change or a renewal of a revolving transaction takes place and that change is not used as a means to reduce the amount of the retained interest’.</i></p> <p>The aim of this proposal is to make the Article more suitable for revolving securitisation transactions that are periodically renewed as part of a renewal process.</p>	complexity for both supervisors and investors to determine the compliance with the risk retention requirement by the retainer and should therefore not be allowed.	
True-sale securitisation of a portfolio hedged by a synthetic securitisation	<p>A respondent requested that guidance be provided on risk retention where a traditional (true-sale) securitisation is executed on a portfolio of underlying assets that is also (partially) hedged by a synthetic securitisation. Two scenarios are provided as examples.</p> <p><u>Scenario 1</u>: a traditional securitisation complies with risk retention rules by way of retention of the first loss tranche. This first loss tranche exceeds the minimum retention of 5% and retains for example 20% (comprising of a class C and a class B note). What would be the considerations if at a later stage a (either first or second loss) synthetic securitisation on a pool of assets is structured which in part overlaps with the pool in the first true sale securitisation assuming that the overall risk retention on the true-sale securitisation is still a minimum of 5% although this could hedge part of</p>	The RTS are not an appropriate means for providing guidance on such very specific cases, which might instead be clarified by means of a Q&A.	No change



Comments

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the first 5% of losses in the first loss tranche.

Scenario 2: a fully retained securitisation (i.e. notes A, B and C). How would a situation be considered where the credit risk on the class B and C notes were hedged as long as the class A notes are also fully retained? The question arises as to whether the class A notes can be counted towards the retained position as the class B and C notes already amount to 5% of the nominal value of the securitised exposures, while, as the transaction is fully retained, effectively all the risks of the traditional securitisation transaction are retained.
