

06 August 2013



The European Banking Authority
Tower 42 (level 18)
25 Old Broad Street
London EC2N 1HQ

By email to EBA-CP-2013-14@eba.europa.eu

Dear Sirs

Consultation Paper on Draft Regulatory Technical Standards on the retention of net economic interest and other requirements related to exposures to transferred credit risk under Articles 394, 395, 397 and 398 of Regulation (EU) No [xx/2013] and on [...] (EBA/CP/2013/14)

The role of the Financial Markets Law Committee (the “FMLC” or the “Committee”) is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

The FMLC is grateful for the opportunity to respond to the recent consultation of the European Banking Authority (the “EBA”) setting out draft Regulatory Technical Standards (“RTS”) for the European risk retention regime.¹ These RTS have been produced pursuant to the Capital Requirements Regulation (Regulation (EU) No 575/2013; the “CRR”).

Question 2 of the consultation states as follows:

The EBA would also like to understand if, for new securitisations – there are transactions that are likely not to be able to meet the retention requirements following the CRR and associated draft RTS.

The FMLC understands this question to be asking whether after (i) the application of the CRR on 1 January 2014 and (ii) the production of related RTS, it is likely to be impossible, in the context of some types of securitisation, for the requirements of the European risk retention regime to be met.² The implication of this is that the CRR and draft RTS will make material changes to the existing European risk retention regime. In the FMLC’s view, this draws attention to an issue of legal uncertainty which is explained below.³

The provisions of the CRR are not materially different to the existing risk retention provisions in the second Capital Requirements Directive (Directive 2006/48/EC; “CRD II”).⁴ It is somewhat surprising, therefore, that the draft RTS contain clear differences of substance to the current guidance which was published by the Committee of European Banking Supervisors (“CEBS”) on the basis of CRD II. It is not clear why the draft RTS and the CEBS guidance should differ substantively given that they are based on highly similar provisions.⁵

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The FMLC is given to understand that the following two matters were taken into account by the EBA in interpreting the CRR for the purposes of preparing the draft RTS:

1. comments, made during negotiation of the CRR, from representatives of the European Parliament and the Council of the European Union which made clear their subjective intent as regards the CRR's risk retention provisions; and
2. the fact that the risk retention provisions are found within a Regulation (rather than a Directive).

Turning to point 1 above, in considering the types of matter which can be taken into account when interpreting European legislation (in this case for the purposes of preparing draft RTS), the Committee acknowledges that "*travaux préparatoires*" may be relevant. However, the Committee notes that informal statements made in the course of the negotiation of a legislative instrument (in particular those that are unpublished) would not normally be relied upon. This has been well established in the jurisprudence on which the European Court of Justice (the "ECJ") relies.⁶ It also reflects the fact that interpretation on the basis of unpublished documents and/or unrecorded statements would make it difficult for those people who are subject to legislation to predict how it will be applied.

Article 10(1) of Regulation 1093/2010/EU—the Regulation which establishes the EBA—provides that draft RTS produced by the EBA "[...] shall be delimited by the legislative acts on which they are based".⁷

It is clear from this provision that the EBA is under a strong obligation to produce draft RTS by close reference to the underlying text.

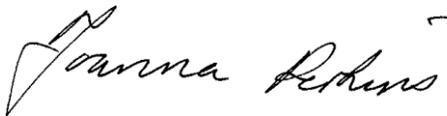
Turning to point 2 above, the FMLC thinks it important to note that the fact that a provision appears in a Regulation rather than a Directive should not affect the way in which the provision is interpreted. That a provision appears in a Regulation rather than a Directive has the consequence only that a Member State is not under an obligation to transpose the provision and that the provision may have direct effect for persons within its contemplation.

In view of the above, and in the interests of legal certainty, the FMLC urges the EBA

to ensure that its final draft RTS clearly reflect the legislative text pursuant to which they are produced.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me to arrange such a meeting or should you require further information or assistance.

Yours faithfully



Joanna Perkins
FMLC Director

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- ¹ The EU risk retention regime requires, first, that certain entities responsible for bringing financial instruments to market assume exposure to those same instruments and, second, that other specified entities invest exclusively in financial instruments which comply with the first requirement.
 - ² The intended meaning of the words "new securitisations" is not clear given that the CRR and relevant RTS will apply to all securitisations (existing and future). It may be inferred that the EBA intends to grandfather existing securitisations but this is not addressed in the consultation.
 - ³ The FMLC has been given to understand that many responses to question 2 will be that—following the CRR and associated RTS—there are indeed likely to be cases involving new transactions where it will be unlikely that the risk retention requirements can be met.
 - ⁴ The FMLC acknowledges that certain differences between the CRR and CRD II provisions exist. For example, the meaning of "retention of net economic interest" in the CRR is wider and the provisions of the Regulation are extended to investment firms. The definition of "sponsor" is also broadened to include investment firms. In this regard, the FMLC is given to understand that the effect of the broadening on collateralised loan obligations may not be as great as that which is implied by paragraph 28 of the consultation's draft cost-benefit analysis.
 - ⁵ The CEBS guidance can be seen as the antecedent of the draft RTS and the consultation states that the guidance has been taken into account in the drafting of the RTS. The consultation says that "in its drafting of these RTS and ITS, the EBA has taken into account: i) the changes in the level 1 text of CRR compared to CRD II; ii) the current Guidelines on Article 122a and the associated Q&A published in September 2011 and iii) relevant market developments."
 - ⁶ The Advocate General in Case 28/76 *Milac* [1976] ECR 1639 noted at 1664 that "everyone, and in particular practitioners and Courts in the Member States, must have access to" a document to be relied on for the purposes of interpretation. The Advocate General in the joined Cases 824-825/79 *Folci* [1980] ECR 3053 noted at 3066 that "it would be contrary to principle to take into account [...] material that is not published, in any form."
 - ⁷ The second paragraph of Article 10(1) reads in full: "Regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based."