

ALLEN & OVERY



Capital Requirements Directive IV Framework *The Securitisation Framework*

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CRD IV Framework:

The Securitisation Framework

This briefing paper is part of a series of briefings on the implementation of Basel III in Europe via the Capital Requirements Directive IV¹ (**CRD IV**) and the Capital Requirements Regulation² (**CRR**), replacing the Banking Consolidation Directive³ (**BCD**) and the Capital Adequacy Directive⁴. The legislation is highly complex: these briefings are intended to provide a high-level overview of the architecture of the regulatory capital and liquidity framework and to draw

¹ 2013/36/EU.

² Regulation 575/2013.

³ 2006/48/EU.

⁴ 2006/49/EU.

attention to the legal issues likely to be relevant to the in-house lawyer. This briefing is for general guidance only and does not constitute definitive advice.

NOTE: In relation to the topics discussed in this briefing, the CRD IV and the CRR contain a number of discretions for member states in relation to national implementation. The regime may therefore differ across member states in a number of respects.

This briefing paper is based on information available as of 17 January 2014.

Background and scope

The securitisation framework deals with the recognition of the off-balance sheet transfer of securitised assets (both for traditional and synthetic securitisations) and the risk weighting of securitisation exposures, including those arising from the provision of credit risk mitigants, investments in securitisation and the extension of liquidity facilities and credit enhancement.

The focus of this briefing paper is on the re-cast securitisation framework as set out in Articles 242 to 270 of the CRR, which applies from the start of 2014, and it is an update of our earlier publication of November 2008 on this topic which addressed certain points under the re-cast BCD.

Sources

CRR (*Regulation 575/2013*): Part Three, Title II, Chapter 5, Articles 4.1, 136, 242-270 and 404-410.

CRD IV (*Directive 2013/36/EU*): Article 82.

PRA Rulebook: PS7/13, SS9/13, SS5/13, CP5/13 and CP4/13.⁵

FCA IFPRU: PS13/10, CP13/6.⁶

CRA Regulation (*Regulation (EC) 1060/2009*).

FSB Principles for Reducing Reliance on CRA Ratings.

Basel Committee on high-cost credit protection.

⁵ See: <http://www.bankofengland.co.uk/pru/Pages/publications/implemcrdiv.aspx>.

⁶ See: <http://www.fca.org.uk/your-fca/documents/ps13-10-crd-iv-for-investment-firms>.

Background and scope (continued)

This briefing paper deals primarily with the **banking book** treatment of securitisations and securitisation exposures. However, it should be noted that, following the amendments made under the Capital Requirements Directive III (*Directive 2010/76/EU*) (**CRD III**), which amendments were implemented in the UK in 2011, the regulatory capital treatment for securitisation positions held in the trading book has been aligned with that of the banking book, which removed any potential arbitrage between the two books. Under the CRD IV/CRR regime, the position on this point remains the same. The trading book is discussed further in Client Briefing 11 (*Trading Book*).

Finally, it should also be noted that this briefing paper's main focus is the UK regime applicable to Prudential Regulation Authority (**PRA**) regulated firms (which include credit institutions as well as a number of investment firms "designated" for prudential supervision by the PRA), rather than the legislative framework that will apply to Financial Conduct Authority (**FCA**) regulated entities.

Sources (continued)

CRD III (*Directive 2010/76/EU*): Article 1.5.

BCD (*Directive 2006/48/EC*): Articles 94-101 and 122a, Annex IX.

UK Financial Conduct Authority (**FCA**) Policy Statement (*PS13/10*) CRD IV for Investment Firms (December 2013).

UK Prudential Regulation Authority (**PRA**) Policy Statement (*PS7/13*) Strengthening capital standards: implementing CRD IV, feedback and final rules (December 2013).

PRA Supervisory Statement (*SS9/13*) Securitisation (December 2013) (the **PRA Supervisory Statement**).

Key changes and points to note

- In general, the re-cast securitisation framework under the CRR retains many of the key concepts from the BCD regime. For example, the concept of significant risk transfer (**SRT**) is retained, as is the concept of implicit support. In addition, it remains the case that the risk-weighting of securitisation exposures is sensitive to the concentrative effects of tranching and that the granularity of the underlying asset pool may be a factor in certain circumstances.
- CRD IV and the CRR apply the retention and investor due diligence requirements to credit institutions and investment firms (rather than just credit institutions as under the pre-CRR regime).
- The inclusion of the re-cast securitisation framework provisions in the CRR, which has direct effect in member states (unlike the securitisation framework provisions in the BCD, which required national implementation), is expected to reduce the implementation differences in the rules as between member states, although, as noted below, certain matters remain a matter of national discretion.
- As the CRR is directly applicable in all member states without the need for implementation at national level, the PRA's adopted approach was not to transpose the text of the CRR into its rules, but to delete any conflicting domestic rules. As a result, the Prudential Sourcebook for Banks, Building Societies and Investment Firms (**BIPRU**) has less relevance now, as it has been substantially replaced by the provisions of the CRR and a new PRA Rulebook CRR Firms

(**PRA Rulebook**)⁷ accompanied by a series of supervisory statements, including a securitisation framework-related supervisory statement which essentially carries across some of the pre-CRR policy on SRT, waivers, notifications, permissions and related regulatory capital calculation methodology.^{8 9}

- In line with G20 commitments and the principle of the Financial Stability Board and the Basel reforms aimed at reducing reliance on external credit ratings,¹⁰ CRD IV and the CRR are aimed at encouraging relevant institutions to strengthen their own risk analysis on the assets they hold and to eliminate sole or mechanistic reliance on external credit ratings. However, the use of external credit ratings is permitted in prescribed circumstances and to the extent necessary, and the concept of the external ratings-based approach has been retained in the re-cast securitisation framework, although certain provisions on the use of external ratings have been strengthened (with a new provision added prohibiting institutions from actively soliciting the withdrawal of less favourable ratings and a requirement for the European Banking Authority

(**EBA**) to develop certain implementing technical standards on the mapping of credit assessment in the context of CRR credit quality steps – discussed in more detail below).¹¹

- As under the pre-CRR regime, synthetic securitisations must also meet the Credit Risk Mitigation (**CRM**) requirements (as relevant) – see Client Briefing 5 (*Collateral: Funded Credit Risk Mitigation in the Banking Book*) and Client Briefing 6 (*Unfunded Credit Risk Mitigation in the Banking Book: Guarantees and Credit Derivatives*).
- While Basel III (and the CRD IV framework) largely preserves the parameters for the securitisation framework, it should be noted that the Basel Committee on Banking Supervision (**BCBS**) is separately considering further changes on this front. In particular, the changes proposed by the BCBS are described to be intended to make capital requirements for securitisations more prudent and risk sensitive, to mitigate mechanistic reliance on credit ratings and to reduce cliff effects. In connection with this work, the BCBS has published two consultations on a revised securitisation framework. If the proposed changes are implemented, such changes may have an impact on current incentives to securitise and/or invest in securitisations. This briefing does not intend to address these proposals. For a detailed discussion of the industry concerns relating to the proposals set out in the first BCBS consultation paper, please refer to the response letter of the Global Financial Markets Association. While the outcome of the Basel consultation process is not yet clear, if further changes to the securitisation framework are adopted by the BCBS, implementation in Europe would, in due course, involve revisions to the CRD IV/CRR regime.

⁷ The PRA Rulebook is available at: <http://fshandbook.info/FS/prerulebook.jsp>. It should also be noted that for the FCA-regulated firms, the CRR regime is implemented via a new Prudential Sourcebook for Investment Firms (**IFPRU**, see: <http://fshandbook.info/FS/html/handbook/IFPRU>), which carries across most of the existing securitisation framework-related guidance.

⁸ The PRA supervisory statements are available at: <http://www.bankofengland.co.uk/pru/Pages/publications/implementcrd1v.aspx>.

⁹ The pre-CRR/legacy policy statements with regard to securitisations and SRT (LSS11/13, LSS10/13 and LSS9/13) and the PRA Supervisory Statement regarding firm's use of securitisation under the CRR regime (SS9/13) are available at: <http://www.bankofengland.co.uk/pru/Pages/publications/securitisation.aspx>.

¹⁰ Please refer to the FSB Principles for Reducing Reliance on CRA Ratings of 27 October 2010 available at: http://www.financialstabilityboard.org/publications/r_101027.pdf; and the paper entitled "Basel III: A global regulatory framework for more resilient banks and banking systems" of December 2010 (as revised in June 2011), available at: <http://www.bis.org/publ/bcbs189.htm>.

¹¹ Articles 269(2)(d) and 270, CRR.

Pre-CRR position

With the entry into force of the CRD (*Directive 2006/48/EC* and *Directive 2006/49/EC*), which implemented Basel II in the EEA, a new regulatory framework for securitisations (including a new risk-weighting framework for notes issued by securitisation vehicles and other exposures to such vehicles) was established, aimed at harmonising standards for the removal of credit risk from the

originator's or sponsor's balance sheet under securitisation structures, and aligning regulatory capital more closely to actual credit risk with respect to the risk weighting of on- and off-balance sheet exposures.

In the UK, the securitisation framework under the BCD was implemented via provisions in BIPRU Chapters 9 and 11.

Key concepts under the pre- and post-CRR framework

Effect of tranching on risk weighting

A securitisation repackages and tranches exposures to an underlying pool of assets. As under the BCD, the securitisation framework under the CRR seeks to align the effect of tranching on credit risk by requiring deduction of junior exposures to securitisation vehicles, and differential risk weighting of other exposures.

SRT

A connected issue associated with tranching is risk transfer. Recognising that the regulatory capital benefits associated with off-balance sheet treatment of securitised assets should reflect the transfer of economic risk, the securitisation framework includes an anti-arbitrage requirement that SRT must occur as a precondition to off-balance sheet treatment of securitised assets.

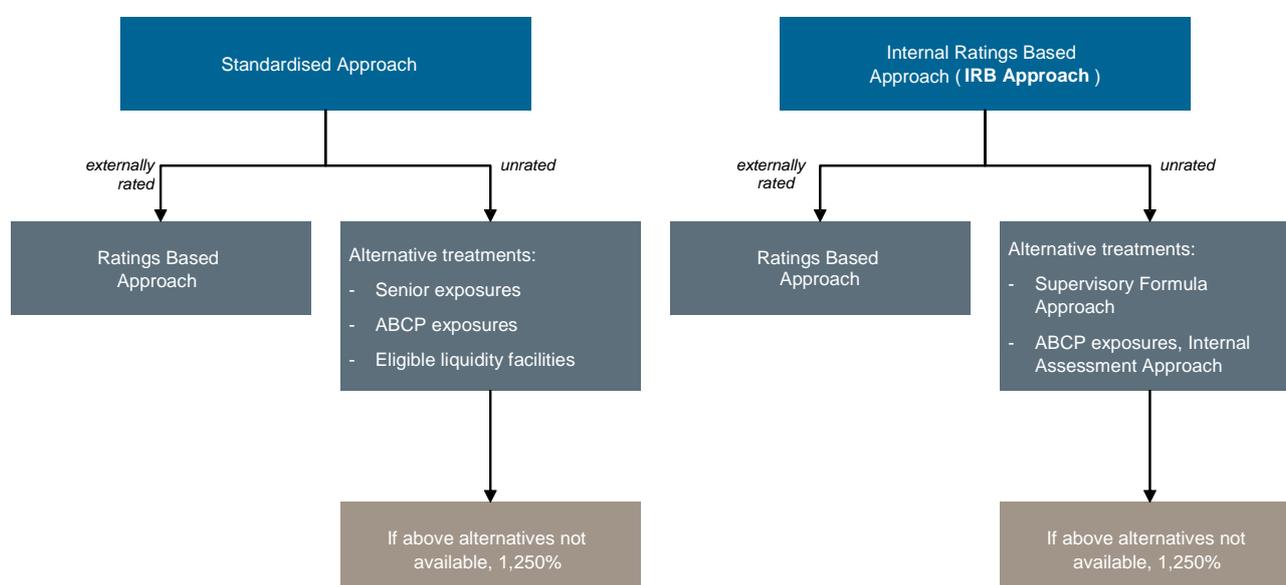
In a supervisory statement that accompanies the PRA Rulebook, the PRA confirmed that it will seek to ensure that the securitisation framework is not used to undermine or arbitrage other parts of the prudential framework, noting that in relation to other similar credit protection arrangements, including those subject to credit risk mitigation or trading book rules, the impact of certain features (eg significant premium or call options) may cast doubt on the extent of risk transferred and the resulting capital assessment. As an overarching principle for the concept of the SRT, any reduction in capital must be matched by a commensurate transfer of risk to third parties and, where the method used to calculate regulatory capital requirements post-securitisation results in a particularly significant reduction in capital requirements, the PRA will generally be sceptical and will apply a high degree of scrutiny in its assessment of whether commensurate risk transfer is achieved.¹²

¹² PRA SS9/13, paragraphs 2.10 and 4.1-4.2.

Hierarchies of approaches for calculation of risk-weighted exposure amounts (RWEA)

The securitisation framework has a strict hierarchy of methods to determine the capital requirements for securitisation positions, the starting point for which will be the credit risk framework adopted by a firm under Pillar One (minimum capital

requirements) – a high-level illustration of this hierarchy is set out in a diagram below:



External ratings

Under the CRR, the definition of the external credit assessment institution (**ECAI**) has been amended to create a more direct link with the concept of rating agencies within the scope of the EU Regulation on credit rating agencies (*Regulation (EC) 1060/2009 (as amended)*), the **CRA Regulation**). Therefore, eligible ECAIs would include an EU-registered credit rating agency, or a third country credit rating agency that is certified in accordance with the CRA Regulation.¹³ The types of ratings issued by eligible

¹³ Articles 4(1)(98), 135 and 138, CRR. Please note that certain types of central bank issuing credit ratings which are exempt from the CRA Regulation are also within the scope of the ECAI definition. For further details, please refer to the EBA's website at:

ECAIs will also need to be within the scope of the CRA Regulation, meaning that certain types of credit ratings and assessments, such as private ratings (as defined in the CRA Regulation), that are outside the scope of the CRA Regulation, will also be outside the scope for the purposes of the securitisation framework.

It should also be noted that the determination of interaction between the credit quality steps used to risk-weight the assets, as provided for in the CRR, and the corresponding credit assessments of the

<http://www.eba.europa.eu/regulation-and-policy/external-credit-assessment-institutions-ecai>.

ECAIs (ie the so-called “**mapping**”) is to be developed by the Joint Committee of EBA, EIOPA and ESMA via draft implementing technical standards, which are required to be submitted to the European Commission by 1 July 2014.¹⁴ In the UK, the PRA expects institutions to continue using the (pre-CRR) PRA mapping of ECAI credit assessments to credit quality steps, as set out in the relevant supervisory statement that accompanies the PRA Rulebook, until it is superseded by the mapping that will be adopted by the European Commission.¹⁵ Please refer to the Annex at the end of this briefing paper for further details.

¹⁴ Article 136, CRR.

¹⁵ PRA SS9/13, paragraph 7, Tables 1-4.

Granularity

Under the IRB Approach, granularity (ie diversity of exposures in the underlying pool of assets) is important where the securitisation exposure is rated – the approach of the framework being that non-granular pools are insufficiently diverse, and should therefore attract a higher risk weight.

Given the differences between the weighting of exposures to rated and unrated securitisations, and between the treatment of granular and non-granular pools, in certain deals (particularly those involving non-granular pools), consideration should be given to whether a rating is likely to be counterproductive (ie by resulting in higher regulatory capital requirements for investors which are regulated).

Post-CRR position: re-cast securitisation framework

Scope and definitions

The securitisation framework applies to exposures arising from securitisations, with the provisions on SRT and certain related risk-weight provisions referring to “traditional” and “synthetic” securitisations. In general, the regime requires the “economic substance” of the transaction to be taken into account by a firm when determining whether the securitisation framework will apply.¹⁶

The definitions of securitisation, traditional securitisation and synthetic securitisation under the CRR are substantially the same as those which applied under the previous CRD regime. By way of background, a “securitisation” is a “transaction or scheme, whereby the credit risk associated with an exposure or pool of exposures is tranching, having both of the following characteristics: (a) payments in the transaction or scheme are dependent upon the performance of the exposure or pool of exposures; (b) the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme”.

A traditional securitisation is defined to mean a securitisation (within the meaning of the above definition) “involving the economic transfer of the exposures being securitised ... by the transfer of ownership of the securitised exposures from the originator institution to an SSPE [being a securitisation special purpose entity] or through sub-participation by an SSPE”. A synthetic securitisation is defined as a securitisation (within the above definition) “where the transfer of risk is achieved by the use of credit derivatives or guarantees, and the exposures being securitised remain exposures of the originator institution”.

In general, these definitions capture the securitisation structures involving credit risk tranching commonly used in the UK market. It is also worth noting that recital 50¹⁷ of the CRR helpfully clarifies that an exposure which creates a direct payment obligation used to finance or operate physical assets (such as a new loan provided directly (or indirectly via an SPV) to an operation entity or property company) is outside the scope of the securitisation definition; instead, this type of exposure would fall within the specialised lending framework.

With regard to covered bond deals (including those involving traditional or structured covered bonds), it should be noted that these types of instruments fall outside the securitisation framework in general and are instead treated as a type of “secured borrowing” under the CRR.

General requirements

The primary requirements under the regime relate to: (a) conditions associated with off-balance sheet treatment, to which the concepts of SRT and implicit support apply; (b) risk weighting of securitisation exposures; and (c) risk retention and investor due diligence.

¹⁷ Recital 50 states that: “In order to ensure that the risks and risk reductions arising from institutions’ securitisation activities and investments are appropriately reflected in the capital requirements of institutions it is necessary to include rules providing for a risk-sensitive and prudentially sound treatment of such activities and investments. To this end, a clear and encompassing definition of securitisation is needed that captures any transaction or scheme whereby the credit risk associated with an exposure or pool of exposures is tranching. An exposure that creates a direct payment obligation for a transaction or scheme used to finance or operate physical assets should not be considered an exposure to a securitisation, even if the transaction or scheme has payment obligations of different seniority.”

¹⁶ Articles 243(5) and 244(5), CRR; PRA SS9/13, paragraph 2.2.

Institutions subject to the CRD IV/CRR regime are also subject to high-level requirements on systems and controls, including the general stress and scenario testing rule which requires such institutions to carry out stress tests and scenario analysis as part of their obligations under the overall Pillar Two rules. The PRA also expects an institution's stress testing of securitisation activities to take into account existing securitisations and pipeline transactions and to have in place procedures to assess and respond to the results of that stress testing.¹⁸ More specifically, in the context of securitisation risk, originator, sponsor or investor firms are also required to evaluate and address, through appropriate policies and procedures, the risks arising from all securitisations (including on-balance sheets deals), as well as reputational risks, to ensure, in particular, that the economic substance of the transaction is fully reflected in risk assessment and management decisions. In addition, an originator institution of a revolving securitisation transaction involving early amortisation provisions should have liquidity plans to address the implications of both scheduled and early amortisation.¹⁹

Conditions to off-balance sheet treatment – originators

The conditions to off-balance sheet treatment (to which the concepts of SRT and implicit support apply) are split into separate (although somewhat overlapping) conditions for traditional and synthetic securitisations. These conditions do not apply in respect of securitisations which remain on the balance sheet of the originator. Given the relatively low capital requirements that apply in respect of certain asset classes, and the requirements for deductions or 1,250% risk weighting in respect of junior exposures to securitisations, the tendency for originators to treat securitisations of certain assets (particularly residential mortgages) as on-balance sheet is likely to continue. Originators will need to

determine on a case-by-case basis whether off-balance sheet treatment results in a lowering of regulatory capital.

Conditions common to all off-balance sheet securitisations – SRT

An originator of a traditional securitisation may obtain regulatory capital relief in respect of a securitisation exposure “*if significant credit risk associated with the securitisation exposures has been transferred*”. SRT must be met on a continuing basis and the securitisation framework provides for the following three options that a firm may choose from when seeking to demonstrate how it achieves SRT for any given transaction:

- **Option 1:** the originator does not retain more than 50% of the risk-weighted exposure amounts of mezzanine securitisation positions,²⁰ where these are: (a) positions to which a risk weight lower than 1,250% applies; and (b) more junior than the most senior position in the securitisation and more junior than any position in the securitisation rated credit quality step 1 or 2; or
- **Option 2:** where there is no mezzanine position, but the originator does not hold more than 20% of the exposure values of securitisation positions that are subject to a deduction or 1,250% risk weight and where the originator can demonstrate that the exposure value of such securitisation positions exceeds a reasoned estimate of the expected loss on the securitised exposures by a substantial margin; or
- **Option 3:** (this is subject to national discretion) permission may be granted by the relevant competent authority to an originator to make its own assessment if the competent authority is satisfied that the originator can meet certain requirements. The PRA has confirmed that it intends to grant such permission subject to satisfaction of certain conditions, which approach

¹⁸ PRA SS9/13, paragraph 2.11.

¹⁹ CRD IV Article 82; PRA Rulebook, Internal Capital Adequacy Assessment, Chapter 3 and Chapter 7 (<http://fshandbook.info/FS/html/PRA/ICAA/-link-/PDF>); PRA SS5/13.

²⁰ The CRR defines the meaning of “mezzanine securitisation positions” by reference to risk weighting of more junior and more senior positions in the same securitisation (Articles 243(3) and 244(3), CRR).

broadly follows the policy adopted by the UK competent authority under the BCD regime.²¹

SRT requirements

UK firms that seek capital relief under Options 1 or 2 should note the following CRR and PRA Rulebook provisions (which should be familiar for the most part as they carry over the requirements which applied under the BCD regime):

- *Notification requirements:* The firms are required to notify the PRA no later than one month after the date of the transfer. The notification must include sufficient information to allow the PRA to assess the purported transfer. The type of information that is required to be provided to the PRA is prescribed in the relevant supervisory statement and would include, among others, a copy of the firm's SRT policy applied to the transaction in question, details of reliance on ECAIs, description of risks retained, key transaction documents, including investor presentation materials, details of any connected parties involved in the transaction, details of the rationale for the transaction, etc.²²
- *No pre-approval:* While the PRA does not operate a pre-approval process for securitisation transactions, it does expect a firm to discuss with its supervisor at an early stage securitisation transactions that are material or have complex features.²³
- *PRA power of recharacterisation:* Notwithstanding the firm seeking relief under Options 1 or 2, where the PRA considers that the possible reduction in risk-weighted exposure amounts achieved via the securitisation is not justified by a commensurate transfer of credit risk to third parties, the SRT will be considered to have **not** been achieved, in which case the relevant institution will not be able to recognise any reduction in risk-weighted exposure due to the transaction. The PRA confirmed that after the transaction has closed, the PRA will provide a view on the SRT and it may reassess its

judgement of the achievement of commensurate risk transfer if the level of credit risk transfer in a transaction changes materially. It should be noted that under the CRR, the PRA is required to keep the EBA informed about the exercise of this power, so that the EBA can monitor the range of practices in this area and issue guidelines, the implementation of which guidelines by member states will be reviewed by the EBA with a view to providing by 31 December 2017 its advice to the European Commission on whether a binding technical standard is required. As noted at the end of this briefing paper, the EBA's consultation on draft guidelines was published on 17 December 2013.²⁴

- *Disclosure considerations:* Where a firm claims a regulatory capital reduction from securitisation transaction in its disclosure to the market, the PRA will expect the firm to assess, in the light of the PRA's stated policy, the materiality of (either full or partial) risk of recharacterisation and, if relevant, for such disclosure to include caveats making clear such risk.²⁵

The firms that seek permission under Option 3 should note the following:

- *Conditions:* The PRA intends to grant permission for an originator to make its own assessment of SRT only where it is satisfied that all of the conditions, as set out in the CRR and supported by the PRA Supervisory Statement, are satisfied.²⁶
- *Waiver requirements:* A firm may only use Option 3 where it has first obtained a waiver from the PRA and provided the relevant information to the PRA for each transaction. The length of the permission is subject to certain restrictions and provisions are also made for multiple transaction permissions, but in the case of the latter certain materiality limits will also apply.²⁷
- *Notification of changes:* Any changes in circumstances from those under which the permission was granted must be notified to the

²¹ Articles 243 and 244, CRR.

²² PRA Rulebook, Credit Risk, Chapter 3 (<http://fshandbook.info/FS/html/PRA/CR/-link-/PDF>); PRA SS9/13, paragraphs 3.2, 3.7-3.8.

²³ PRA SS9/13, paragraph 2.8.

²⁴ Articles 243(2), 243(6), 244(2) and 244(6), CRR; PRA SS9/13, paragraphs 3.3 and 3.11; EBA/CP/2013/45.

²⁵ PRA SS9/13, paragraph 2.8.

²⁶ Articles 243(4), 244(4), CRR; PRA SS9/13, paragraph 3.4.

²⁷ PRA SS9/13, paragraphs 3.4-3.21.

PRA. This is to ensure that the SRT is met on a continuing basis.²⁸

- *Position with regard to pre-1 January 2014 waivers:* As noted above, from the start of 2014, waivers and permissions granted previously under BIPRU cease to have effect by operation of law. The PRA has confirmed that where the pre-CRR rules are replaced by substantially equivalent requirements in the CRR (as is the case with the securitisation framework), the PRA has power to grant an equivalent permission when exercising a national discretion given to it under the CRR. Accordingly, the PRA's adopted approach was to grant CRR-based permissions with effect from 1 January 2014 to all those firms which previously held an eligible pre-CRR waiver, provided the requirements and applicable conditions were complied with at all times or relevant firms had a remediation plan in place.²⁹

Conditions common to all off-balance sheet securitisations – implicit support

The prohibition on implicit support restricts an originator from providing support in respect of the securitisation beyond its contractual obligations with a view to reducing potential or actual losses to investors. This continues to import an element of intention on the part of an originator or sponsor, but the re-cast securitisation framework under the CRR goes further by seeking to further flesh out the concept of a transaction “*executed at arm's length conditions*”.³⁰ The CRR does not define the meaning of this term, but requires the EBA to issue guidelines on what constitutes arm's length conditions and when a transaction is not structured to provide support. While it is not clear when such guidelines will become available, the re-cast

²⁸ PRA SS9/13, paragraph 3.21.

PRA CP5/13, PRA Rulebook, Appendix 2, Chapter 3, paragraph 3.22.

²⁹ PRA Rulebook, Waivers Transitional Provisions (<http://fshandbook.info/FS/html/PRA/WTP/-link-/PDF>); PRA CP5/13, Chapter 14.

PRA CP5/13, Chapter 14 and the PRA Rulebook, Annex A: Waivers transitional provisions.

³⁰ Article 248, CRR, PRA SS9/13, paragraph 5.

Article 248, CRR, PRA CP5/13, Appendix 2, Chapter 3, paragraph 5.

securitisation framework sets out the factors that should be considered when assessing whether or not the transaction is structured to provide support. These include the consideration as to the price of repurchase, the institution's capital and liquidity position before and after repurchase, the performance of the securitisation positions and the impact of support on the losses expected to be incurred by the originator relative to investors.

The consequences of providing implicit support are potentially very damaging – the originator is required to hold capital against the securitised exposures as if they had not been securitised, and publicly disclose that it has given support.

The restrictions around implicit support and improvement of positions in the securitisation have given rise to some debate in the past in the context of asset replenishment and substitution (both in the traditional and synthetic context). Rating agency requirements prohibit replenishment or substitution where to do so causes a deterioration in the credit quality of the pool of securitised exposures and originators will need to continue being careful when managing the risks in this regard.

UK approach

The position on the repurchase of securitisation positions by the originator beyond its contractual obligations is addressed in the supervisory statement to the PRA Rulebook, where it is clarified that securitisation documentation should make clear that such repurchases are not mandatory and may only be made at fair market value.

Helpfully, the PRA Supervisory Statement carries across certain additional guidance (which previously existed under BIPRU 9),³¹ namely, the factors that the PRA will consider in deciding whether the support has been appropriately reflected in the assessment of the SRT (ie whether the nature of the support is precisely described in the securitisation documents, whether the maximum degree of support that can be given can be ascertained at the time of the securitisation and whether the firm's risk-weighted exposures to the securitisation are

³¹ BIPRU 9.6.5G and 9.6.6G.

assessed on the basis that the firm has provided support to the maximum extent permitted, etc).

In the Supervisory Statement to the PRA Rulebook, the PRA confirmed that if a firm is found to have provided support to a securitisation, the expectation that the firm will provide future support to its securitisations is increased and the PRA will take into account this increased expectation in future assessments of commensurate risk transfer for such firm.

Off-balance sheet transactions – traditional securitisation – other conditions

The other conditions which apply to traditional securitisation are set out in the CRR and require that:³²

- the securitisation documentation reflects the economic substance of the transaction;
- the securitised exposures are put beyond the reach of the originator and its creditors, including in bankruptcy and receivership; legal opinions from qualified legal counsel are required in this regard (and the opinions must be reviewed and updated as needed from time to time);
- the transferee is a special purpose vehicle;
- the originator does not retain effective or indirect control over the transferred exposures;³³
- any purchase or repurchase of securitisation positions by the originator or sponsor beyond its contractual obligations is exceptional and may only be made at arm's length conditions;
- any clean-up call is exercisable at the option of the originator when 10% or less of the value of the securitised exposures remains unamortised,

³² Article 243(5), CRR.

³³ This does not prevent the originator from retaining servicing rights (Article 243(5)(d), CRR). Also, this restriction against control includes the obligation to reassume transferred risk (Article 243(5)(d), CRR, which corresponds to BIPRU 9.4.10R that applies under the BCD regime).

and such call is not structured to provide credit enhancement; and

- the securitisation documentation does not include provisions that require positions in the securitisation to be improved by the originator (other than in the case of early amortisation provisions), including provisions which alter the underlying credit exposures or increase the yield payable to holders of positions in the securitisation in response to a deterioration in the credit quality of the underlying pool.

Off-balance sheet transactions – synthetic securitisation – other conditions, high-cost credit protection and other SRT considerations

The other conditions, which apply to synthetic securitisation (and which on many fronts overlap with those prescribed for traditional securitisations) are set out in the CRR and include the following:³⁴

- the securitisation documentation reflects the economic substance of the transaction;
- the credit risk is transferred via credit protection which complies with certain eligibility and other requirements for credit risk mitigation under CRR Article 247(2);
- certain terms and conditions are not included in the credit risk transfer instruments, including, among others, termination provisions related to the increase of the firm's cost of credit protection in response to a deterioration of the credit quality of the exposures. With regard to this condition, it should be noted that the PRA confirmed in the supervisory statement to the PRA Rulebook that originators are required to have regard to the high-cost credit protection and, in particular, the policy statement relating to this topic by BCBS and to incorporate the relevant assessment for

³⁴ Article 244(5), CRR.

the purposes of SRT considerations (eg meaning incorporation of any premium payable for protection);³⁵

- a legal opinion is provided confirming that the credit protection is enforceable in all relevant jurisdictions;
- the securitisation documentation makes it clear that any purchase or repurchase of securitisation positions by the originator or sponsor beyond its contractual obligations may only be made on arms' length conditions; and
- any clean-up call is exercisable at the option of the originator when 10% or less of the value of the securitised exposures remains unamortised, and such call is not structured to provide credit enhancement.

In addition, the supervisory statement to the PRA Rulebook provides further insight as to what the PRA expects firms to consider when assessing the SRT in the context of maturity. That is, the PRA expects firms to consider whether the transaction contains an option to terminate the protection at the discretion of the protection buyer (examples of features that would generally indicate a positive incentive for the protection buyer to call a transaction are set out in the supervisory statement).

Risk weighting of securitisation exposures

As noted above, as a general rule, institutions that are subject to the CRD IV framework must hold regulatory capital calculated in accordance with the securitisation framework against all of their securitisation positions. These are defined to include exposures to securitisations (including exposures arising under derivatives entered into with securitisation vehicles), and the provision of credit protection to securitisation positions. This includes, for example, counterparty exposure of derivative positions transacted with a securitisation vehicle and an originator's exposures to its own off-balance sheet securitisations, but excludes exposures to on-balance sheet securitisations (for

which the originator is to be regarded as having continuing exposure to the underlying assets).³⁶ The treatment should generally be the same for an originator holding a securitisation position as it would be for a third party investor, the main difference being that an originator or sponsor holding securitisation positions can “cap” the capital requirement on those positions to the capital required on the underlying securitised exposures, as if they had not been securitised.³⁷ Significantly, any capital charges applicable under the securitisation framework will be subject to any higher capital charges applied under the securitisation investor due diligence requirements.³⁸

Approaches under the securitisation framework

When calculating minimum capital requirements under the securitisation framework, institutions are permitted to use the Standardised Approach or the IRB Approach.

Firms using the Standardised Approach to determine capital requirements for securitisation exposures are required to do so by reference to a table which applies a risk weight based on any relevant external credit assessment/rating (detailed in Table 1 in the Annex to this briefing paper). For off-balance sheet exposures, the institution must apply a credit conversion factor (**CCF**) and then risk-weight the resultant credit equivalent amount. If the exposure is rated, then a CCF of 100% must be applied (except in respect of certain specified exposures under unrated eligible liquidity facilities and cash advance facilities, which attract lower CCFs and therefore lower regulatory capital requirements). If the relevant rating is below a certain level or the position is unrated (except if the position is the most senior exposure in a securitisation or is in respect of an eligible liquidity facility), a risk weighting of 1,250% is required.

³⁶ Article 245(3), CRR defines “securitisation positions” to mean “exposures to securitisations (including exposures arising under interest rate or currency derivatives with securitisation vehicles), and the provision of credit protection to securitisation positions”.

³⁷ Article 252, CRR.

³⁸ Articles 245(6) and 407, CRR.

³⁵ PRA SS9/13, paragraphs 6.

Notwithstanding these general rules, the exposure values may be modified using CRM. As noted above, as an exception to the general rule for unrated exposures, where the composition of the underlying pool of securitised assets is known at all times, a firm may look through to the risk weighting of the pool and apply a weighted average risk weight by multiplying the risk weight of the underlying assets by a concentration ratio equal to the nominal amount of all tranches in the structure divided by the nominal amount of all tranches junior to or *pari passu* with the tranche in which the firm has a holding.

Firms using the IRB Approach to determine capital requirements for securitisation exposures³⁹ are required to do so using: (a) for rated positions (or where a rating may be inferred), a ratings based approach (**RB Approach**) (similar to the Standardised Approach, although RB Approach charges are generally lower and contemplate greater differentiation between certain positions); or (b) for unrated positions, a supervisory formula approach (**SF approach**) (using a specified formula based on the relevant structure and underlying assets). For further details on the risk weights applied under the RB Approach, see Table 2 in the Annex to this briefing paper. If the IRB Approach is used, then the capital requirement in respect of any securitisation exposure is capped at the requirement that would have applied in respect of the underlying assets/exposures had they not been securitised, where known.

In certain respects, the approaches are applied differently between different kinds of exposures (and accordingly, different parties). Please see Table 1 in the Annex to this briefing paper for a summary of the approaches under the securitisation framework. As noted above, under the RB Approach, securitisations with underlying pools which are non-granular (ie which have six or fewer underlying obligors) attract higher risk weightings.

³⁹ If the institution has received approval for the use of the IRB Approach for credit risk of the types of exposures securitised, then it must also use the IRB Approach for its securitisation exposures. Conversely, an institution may not use the IRB Approach for securitisation exposures unless it has received the approval referred to above. If the institution is using both the IRB Approach and the Standardised Approach, then it should use the approach used with respect to the greater share (although the supervisor may deviate from this rule to ensure appropriate capital levels).

Early amortisation provisions in securitisations of revolving exposures

Originators of securitisations of revolving exposures subject to early amortisation provisions are subject to additional capital requirements where early amortisation may be triggered other than for non-economic reasons (such as material changes in tax laws or regulations).⁴⁰ An originator of such a securitisation is required to hold additional capital against its exposure to the investors' interest in the structure (weighting the exposure on the basis of the weighting applicable to the securitised exposures), multiplied by a CCF. The CCF is determined by the nature of the amortisation (a "controlled" amortisation generally receiving a lower CCF than an "uncontrolled" amortisation), and the nature of the securitised exposures (differentiating retail and non-retail securitised exposures, and committed and non-committed securitised exposures). In summary, however, committed credit lines and uncommitted non-retail credit lines receive a CCF of 90% (controlled) or 100% (uncontrolled). Retail credit lines receive a staggered CCF (ranging from 0% to 40% for controlled early amortisation securitisations, and 0% to 100% for uncontrolled early amortisation securitisations). Accordingly, securitisations of revolving retail credits with provision for early amortisation will require careful modelling in respect of excess spread early amortisation triggers to mitigate the regulatory capital impact on the originator.

⁴⁰ Article 256(7), CRR.

Treatment of re-securitisation positions

A “re-securitisation” is “securitisation where the risk associated with an underlying pool of exposures is tranching and at least one of the underlying exposures is a securitisation position”.⁴¹

Re-securitisation positions are subject to substantially higher capital charges. This approach

⁴¹ Article 4(1)(63), CRR.

therefore acts as a deterrent in respect of investing in relevant structures such as CDOs of ABS. It should also be noted that these increased re-securitisation capital charges will be subject to any higher capital charges applied under the securitisation investor due diligence requirements.⁴²

⁴² Articles 261, 245 and 407, CRR.

Risk retention and investor due diligence

The risk retention and investor due diligence requirements which became effective for new securitisations on 1 January 2011 are carried over in Part Five of the CRR and apply in respect of European-regulated credit institutions and investment firms. It should be noted that the previous guidance, which applied to interpret the BCD requirements, is still in the process of being re-cast, and the CRR guidance is unlikely to be available until spring 2014 or later.

Under the CRR, European-regulated credit institutions or investment firms are restricted from assuming credit risk exposure to a securitisation position unless certain requirements are met, including a requirement that the originator, sponsor or original lender in respect of the securitisation has explicitly disclosed that it will retain, on an ongoing basis, a net economic interest of not less than 5% via one of five specified holding options.⁴³ In addition, European-regulated credit institutions or investment firms are also required to comply with general due diligence, stress testing and asset data monitoring requirements in respect of any securitisation positions held by such institutions, as well as provisions that require such institutions to be able to demonstrate with regard to each of their individual securitisation positions that they have a thorough understanding of all structural features of a securitisation relevant to the performance of any exposure held by such institutions.

The penalty for non-compliance (where the relevant breach arose as a result of the negligence or omission of the relevant firm) is framed as a proportionate additional risk weight “of no less than 250% of the risk weight (capped at 1,250%)”

which would otherwise apply to the relevant securitisation position (in the manner specified in Article 245(6))⁴⁴ and provision is made for further increases with each subsequent infringement of the relevant provisions.

For further discussion of the re-cast risk retention and investor due diligence requirements, please refer to our client briefing entitled “EU risk retention: EBA final advice on technical standards largely stays the course” of December 2013, our client briefing entitled “EU risk retention and due diligence requirements: CRD IV consultation rocks the boat” of May 2013 and our client briefing entitled “CLO spotlight: CRD IV consultation on EU risk retention guidance spells trouble” of May 2013, as well as materials available on our ABS Regulatory Reform Roadmap website.

⁴³ The retention options are: (i) a vertical slice; (ii) in certain circumstances, an originator’s interest (such as a seller’s share in a master trust structure); (iii) in certain sufficiently granular transactions, randomly selected equivalent exposures held on-balance sheet; (iv) a first loss tranche; or (v) a first loss exposure in every securitised exposure in the transaction.

⁴⁴ Or, in the case of trading book, Article 337(3), CRR.

EBA technical standards and guidelines

The CRR mandates that various technical standards and guidelines shall be produced. In connection with the securitisation framework, the following standards and guidelines shall be produced:

CRR SOURCE	TECHNICAL STANDARDS/ GUIDELINES REQUIRED	DEADLINE FOR SUBMISSION TO THE EUROPEAN COMMISSION	EBA PUBLICATIONS
Article 243(2)-(6) (<i>Traditional securitisation – recognition of SRT</i>) Article 244(2)-(6) (<i>Synthetic securitisation – recognition of SRT</i>)	The competent authorities are required to keep EBA informed about the exercise of national discretion and EBA is required to monitor the range of practices and issue guidelines. EBA to review the member states' implementation of such guidelines and provide advice to the European Commission on whether a binding technical standard is required.	Before 31 December 2017.	Consultation on draft guidelines on significant credit risk transfer relating to Article 243 and Article 244 of the CRR (December 2013) (<i>EBA/CP/2013/45</i>).
Article 248(2) (<i>Implicit support – arm's length conditions</i>)	EBA is required to issue guidelines on what constitutes arm's length conditions and when a transaction is not structured to provide support.	No date specified.	Not published.
Article 259(1)(b) (<i>Hierarchy of methods</i>) and Article 262(2)-(3) (<i>Supervisory formula method for securitisation transactions</i>)	In certain circumstances, an institution may only use the supervisory formula method subject to the prior permission of the competent authority, provided certain conditions are fulfilled. The competent authorities are required to keep EBA informed about the exercise of national discretion and EBA is required to monitor the range of practices and issue guidelines.	No date specified.	Not published.
Article 270 (<i>ECAIs – credit quality steps mapping</i>)	Draft implementing technical standards to determine for all ECAIs, in accordance with certain principles, the mapping of the credit quality steps.	1 July 2014.	Not published.

CRR SOURCE	TECHNICAL STANDARDS/ GUIDELINES REQUIRED	DEADLINE FOR SUBMISSION TO THE EUROPEAN COMMISSION	EBA PUBLICATIONS
Articles 410(2) (<i>Uniform condition of application</i>), 405 (<i>Retained interest of the issuer</i>), 406 (<i>Due diligence</i>), 408 (<i>Criteria for credit granting</i>) and 409 (<i>Disclosure to investors</i>)	Draft regulatory technical standards to specify in greater detail the interpretation of requirements of Articles 405, 406, 408 and 409.	1 January 2014.	EBA final draft regulatory technical standards on the retention of net economic interest and other requirements relating to exposures to transferred credit risk and draft implementing technical standards relating to the convergence of supervisory practices with regard to the implementation of additional risk weights (17 December 2013) (<i>EBA/RTS/2013/12</i> and <i>EBA/ITS/2013/08</i>).
Articles 410(3) (<i>Uniform condition of application</i>) and 407 (<i>Additional risk weight</i>)	Draft implementing technical standards to facilitate convergence of supervisory practices with regard to the implementation of Article 407, including measures to be taken in the case of breach of the due diligence and risk management obligations.	1 January 2014.	<p>Consultation on draft regulatory technical standards on the retention of net economic interest and other requirements relating to exposures to transferred credit risk (May 2013) (<i>EBA/CP/2013/14</i>).</p> <p>The final standards will not be available until adopted by the European Commission and until a confirmation of no objection is received from the European Parliament and the Council.</p>

National discretions and UK implementation

The CRR provides competent authorities with certain discretions.

CRR SOURCE	NATURE OF DISCRETION	PRA APPROACH ⁴⁵
Article 243(2)-(5) (<i>Traditional securitisation – recognition of SRT</i>) Article 244(2)-(5) (<i>Synthetic securitisation – recognition of SRT</i>)	A competent authority may decide on a case-by-case basis that SRT shall not be considered to have been transferred to third parties.	In respect of PRA authorised firms, the PRA intends to exercise all of these discretions. With regard to transitional provisions for existing waivers and permissions granted in the context of the securitisation framework under the BCD regime, the PRA confirmed that, while such waivers and permissions cease to have effect by operation of law from 1 January 2014, where the CRR regime provides for substantially equivalent requirements, the PRA has the power to grant an equivalent permission when exercising a national discretion, provided, if applicable, the relevant conditions are satisfied. The Waivers Transitional Provisions section to the PRA Rulebook sets out in its schedules waivers that are treated as CRR permissions (as defined) with existing conditions remaining in force with a requirement, in certain cases, for firms to confirm that they materially comply with the relevant rules and any conditions attached to the waivers or have a remediation plan in place.
Article 256(7) (<i>Securitisation of revolving exposures with early amortisation provisions – similar transactions</i>)	A competent authority may permit, provided certain conditions are satisfied, that institutions may apply a treatment which approximates closely Article 256(6) for determining the conversion factor.	
Article 259(3) (<i>ABCP internal assessment approach</i>)	Subject to certain conditions, a competent authority may grant institutions permission to use the Internal Assessment Approach.	
Article 259(1)(b) (<i>Hierarchy of methods</i>) and Article 262 (<i>Supervisory formula method for securitisation transactions</i>)	In certain circumstances, an institution may only use the supervisory formula method subject to the prior permission of the competent authority, provided certain conditions are fulfilled.	
Article 263(2) (<i>Exceptional treatment for liquidity facilities where pre-securitisation RWEA cannot be calculated</i>)	An institution may, on an exceptional basis and subject to the permission of the competent authority, temporarily apply the method set out in Article 263(3) for the calculation of RWEA for an unrated securitisation position in the form of liquidity facility that meets certain conditions.	

⁴⁵ For a full list of discretions intended to be exercised by the UK regulators, please see: (i) PRA Rulebook, Waivers Transitional Provisions; PRA PS7/13, Chapter 15 and PRA CP5/13, Chapter 14; and (ii) FCA IFPRU TP1; FCA PS13/10 and FCA CP13/6, Annex 3.

Further reading

Client Briefing 1 (*Introduction to Regulatory Capital and Liquidity*)

Client Briefing 5 (*Collateral: Funded Credit Risk Mitigation in the Banking Book*)

Client Briefing 6 (*Unfunded Credit Risk Mitigation in the Banking Book: Guarantees and Credit Derivatives*)

Client Briefing 11 (*Trading Book*).

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Annex

These tables are provided for illustrative purposes only. For additional details, please refer to the securitisation framework supervisory statement to the PRA Rulebook (as set out in the PRA SS9/13)⁴⁶ and the CRR securitisation framework provisions.

Table 1 – Approaches under the securitisation framework

CREDIT ASSESSMENT OF POSITION	STANDARDISED APPROACH	IRB APPROACH	
Rated	Prescribed risk weights (RWs)		
	Long-term ratings:		
	Credit quality step 1: AAA to AA-	20%	RB Approach, prescribed RWs (see Table 2 below) Max. capital requirement: K_{IRB} ⁴⁷ (if known)
	Credit quality step 2: A+ to A-	50%	
	Credit quality step 3: BBB+ to BBB-	100%	
	Credit quality step 4: BB+ to BB-	350%	
	All other cases: B+ and below	1,250%	
	Short-term ratings:		
	Credit quality step 1: A-1/P-1	20%	
	Credit quality step 2: A-2/P-2	50%	
Credit quality step 3: A-3/P-3	100%		
All other cases:	1,250%		
Unrated	Most positions: Deduction or 1,250%	SF Approach ⁴⁸	
	Limited exceptions for: (i) most senior exposure and (ii) eligible liquidity facilities	Max. capital requirement: K_{IRB} (if known)	

⁴⁶ PRA SS9/13, paragraph 7, Tables 1-4.

⁴⁷ This is 8% of the risk-weighted exposure amounts that would be calculated under the IRB Approach in respect of the securitised exposures, had they not been securitised, plus the amount of expected losses associated with those exposures calculated under the IRB Approach (Article 260, CRR).

⁴⁸ If K_{IRB} is unknown, then all positions must be deducted.

Table 2 – RB Approach risk weights – IRB Approach⁴⁹

CREDIT QUALITY STEP	INTERIM LONG-TERM MAPPING	MOST SENIOR TRANCHE ⁵⁰	BASE ⁵¹	TRANCHES BACKED BY NON-GRANULAR POOLS ⁵²
1	AAA	7%	12%	20%
2	AA	8%	15%	25%
3	A+	10%	18%	35%
4	A	12%	20%	35%
5	A-	20%	35%	35%
6	BBB+	35%	50%	50%
7	BBB	60%	75%	75%
8	BBB-	All positions: 100%		
9	BB+	All positions: 250%		
10	BB	All positions: 425%		
11	BB-	All positions: 650%		
Below 11	Below BB-/all other ratings/unrated	All positions: 1,250%		

CREDIT QUALITY STEP	INTERIM SHORT-TERM MAPPING	SENIOR POSITIONS	BASE	TRANCHES BACKED BY NON-GRANULAR POOLS
1	A-1/P-1	7%	12%	20%
2	A-2/P-2	12%	20%	35%
3	A-3/P-3	60%	75%	75%
All other credit assessments		All positions: 1,250%		

⁴⁹ Under the IRB Approach, the term “rated” includes an external rating or an inferred rating (Article 259, CRR).

⁵⁰ When determining whether a tranche is the most senior, it is not required to take into considerations amounts due under interest rate or currency derivative contracts, fees due, or other similar payments (Article 261, CRR).

⁵¹ The risk weights set out in this column apply if the risk weights for senior positions and tranches backed by non-granular pools do not apply and it is not a re-securitisation position (Article 261, CRR).

⁵² The risk weights set out in this column should be used if the number of underlying exposures is less than six (Article 261, CRR).

