



European Securities and
Markets Authority

Response form for the Consultation Paper on STS notification



Responding to this paper

ESMA invites responses to the questions set out throughout its Consultation Paper on Draft technical standards on content and format of the STS notification under the Securitisation Regulation (ESMA33-128-33). Responses are most helpful if they:

- respond to the question stated;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all responses received by 19 March 2018.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

- Insert your responses to the questions in the Consultation Paper in the present response form.
- Please do not remove tags of the type <ESMA_QUESTION_STS_1>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
- When you have drafted your response, name your response form according to the following convention: ESMA_STS_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_STS_ABCD_RESPONSEFORM.
- Upload the form containing your responses, **in Word format**, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open consultations” → “Draft technical standards on content and format of the STS notification under the Securitisation Regulation”).

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. **Please clearly indicate by ticking the appropriate checkbox on the website submission page if you do not wish your contribution to be publicly disclosed.** A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.





Data protection

Information on data protection can be found at www.esma.europa.eu under the heading “Data protection”.

Who should read the Consultation Paper

This consultation paper will be of interest to key parties in a securitisation including originators, sponsors, SSPE and institutional investors in securitisation.



General information about respondent

Name of the company / organisation	Association for Financial Markets in Europe (AFME)
Activity	Other Financial service providers
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Europe

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_STS_1>

On behalf of the Association for Financial Markets in Europe (AFME) and its members, we welcome the opportunity to comment on the draft technical standards on the content and format of the STS notification under the Securitisation Regulation.

<ESMA_COMMENT_STS_1>

Q1 : Do you agree that some general information elements will facilitate the identification of the securitisation and are thus needed to be included in the STS notification?

<ESMA_QUESTION_STS_1>

AFME members agree that it would be useful to provide a certain amount of general information in the STS notification to facilitate the identification of an STS notification. In general, this should be limited to information designed to identify the securitisation, information that is directly relevant to the STS criteria being met or references to other sources of information on the securitisation. The data suggested in the general information section of Annex I (for non-ABCP securitisations) seems a reasonable for these purposes

The general information of Annex II (for ABCP securitisations) is also reasonable in general, but we would note that disclosing information relating to the originators of ABCP transactions in the STS notification is not appropriate and is inconsistent with the disclosure regime as it applies to ABCP securitisations. Accordingly, fields STSA2, STSA8 and STSA19 should be amended to exclude reference to the originator and fields STSA20, STSA21 and STSA22 should be deleted.

In addition, the reference to the date on which the securities are "deemed" to be issued (in both STSS12 and STSA12) is confusing. There is a date on which securities are actually issued but there would not generally be a "deemed" issuance date. We would suggest date the prospectus is approved (for standalone public securitisations), the date of the final terms (for programmatic public securitisations) or the transaction signing date (for ABCP transactions and non-ABCP private securitisations) instead. For ABCP programmes, we would suggest the date of first issuance as this will normally be known with some certainty by the time transaction parties would be in a position to file an STS notification.

<ESMA_QUESTION_STS_1>

Q2 : Do you agree that the list of items in paragraph 15 should be included in the STS notification? Do you have any further proposals? If yes, please also state the reasons.

<ESMA_QUESTION_STS_2>

See our response to Question 1.

<ESMA_QUESTION_STS_2>

Q3 : Do you agree that the proposed list of items in paragraph 17 should be published on ESMA public website?

<ESMA_QUESTION_STS_3>

In respect of the anonymised notifications for private securitisations, AFME members are of the view that minimal information should be made publicly available in order to avoid the possibility that the transaction would be able to be identified when read together with other publicly available information, e.g. the public financial statements of the lender or borrower. Accordingly, we would suggest that the only information made publicly available should be the unique reference number assigned by ESMA to the STS notification document. That document could then be made available to investors and potential investors who would derive comfort from the fact that the corresponding number appeared on the ESMA's public website.



<ESMA_QUESTION_STS_3>

Q4 : Do you agree with the proposal to have three different explanation types in the STS notification, depending on the nature of the criteria?

<ESMA_QUESTION_STS_4>

AFME members do not agree with this proposal. It is our strong view that the flexible approach described in paragraph 18(a) of the CP is preferable.

This view stems from the fact that the type and length of explanation required in respect of a criterion will vary from transaction to transaction. The length and complexity of the information will vary not only based on the inherent complexity of the particular criterion, but also (and perhaps even principally) based on the particular facts and circumstances of that transaction. For example, the "no severe clawback provisions" criterion might only need a confirmation if it is a transaction where the local insolvency laws are well-known and it is widely accepted in the market that they do not contain severe clawback provisions. Conversely, in a new jurisdiction with limited securitisation activity and less well-developed insolvency laws, the conclusion is likely to be accompanied by a complex, reasoned explanation. In either case, the "concise explanation" categorisation suggested by ESMA in the CP would be inappropriate.

Since the inclusion of fulsome explanations is one of the sell side's best ways of establishing good faith and a lack of negligence (and thereby avoiding the imposition of the sanctions contemplated at Article 32(2) of the Securitisation Regulation), originators, sponsors and issuers will be highly incentivised to err on the side of providing more information, not less. This is surely consistent with the desire for increased information to be made available to investors in order to promote their ability to make their own assessment of transactions prior to investing.

In the event that ESMA does not agree with AFME members that the flexible approach described in paragraph 18(a) is preferable, it is essential that ESMA make clear that the categorisation of each criterion as requiring a "confirmation", a "concise explanation" or a "detailed explanation" represents a floor, rather than a ceiling. That is, it must be clear that providing more explanation than strictly required by the categorisation is always acceptable. This is so that originators and sponsors who feel that their transaction requires a more complex explanation in respect of a particular criterion can give that explanation and ensure that investors, potential investors and competent authorities are in possession of all the information required in order to come to a reasoned conclusion about the transaction and its compliance with the relevant STS criterion. From an originator's and sponsor's point of view, ensuring there is adequate disclosure is an essential part of managing the risk of liability and administrative sanctions when doing a securitisation. Restricting the level of disclosure permitted would risk causing originators and sponsors to seek alternative means of funding themselves and (for those with regulatory capital requirements) managing their capital requirements.

<ESMA_QUESTION_STS_4>

Q5 : Do you agree with the proposal of cross-referring in a STS notification between the STS elements and those from Prospectus, where available, or otherwise other securitisation documentation? If not, please also state the reasons.

<ESMA_QUESTION_STIS_5>

Yes. AFME members support the principle of providing the explanations required in the STS notification by reference to the prospectus or other disclosure required to be made under Article 7 of the Securitisation Regulation. Indeed, we expect that in general parties making an STS notification under Article 27 of the Securitisation Regulation in respect of a public securitisation will frequently wish to demonstrate compliance with each of the criteria using only references to the prospectus prepared for the purposes of offering the securitisation's securities in order to avoid differential disclosure problems and prospectus liability.

Since the prospectus is required to include "the necessary information which is material to an investor", issuers, originators and sponsors will be keen to ensure there is no suggestion of material information being disclosed elsewhere, or even that information is being disclosed in a different format elsewhere.

In respect of private securitisations, the same general principles of avoiding the potential for repetitiveness apply, along with the general commercial interest originators, originators and issuers will have in making ensuring that relevant information is described once in a consistent fashion rather than having to be reformatted to meet the demands of different forms and thereby opening up the possibility of small differences or inconsistencies in the way the same information is described that might lead to confusion or, in the worst cases, litigation at a later stage.

As a separate matter, AFME members wish to express their serious concern with the cross-referencing/table of correspondence between the STS criteria and the Prospectus Directive (or, from 1 July 2019, the Prospectus Regulation) disclosure annexes set out in Table 1 of the CP and in the "cross-references to the prospectus" column of both Annex I and Annex II to the Draft RTS. While we understand that ESMA was trying to be helpful by indicating the section of the prospectus where the relevant information might be found, AFME members worry that this is more likely to end up being confusing and potentially highly problematic.

The principal reason for this is that – while there may be similarities – the STS criteria were not designed to map specifically to any particular disclosure requirement under the Prospectus Directive or Prospectus Regulation. As a result, where there are similarities these are accidental and imperfect. The cross reference to the legislative requirements for prospectus disclosure therefore will create confusion where originator or sponsors feel that some part of the explanation for how an STS criterion is met does not match up with the required disclosure item referenced in the "cross-references to the prospectus" column.

More generally, as ESMA will be aware, cross-reference tables or margin annotations are provided as a matter of course for most (if not all) competent authorities, allowing them to assess more quickly whether the relevant disclosure annexes/building blocks have been

complied with. Prospectuses are not, however, generally written in a way that adheres strictly to the structure of those annexes and the content of a prospectus is not limited to that required by them. Rather, prospectuses are generally written in a more narrative form expected in the international capital markets, while taking care to ensure that the elements of the relevant annexes are mentioned.

Consequently, we would urge ESMA to remove the mentions of specific disclosure items in the "cross-references to the prospectus" column of both Annex I and Annex II in the final RTS. The column itself should, of course, remain but it should be left blank in the template STS notifications annexed to the final RTS so that issuers, originators and sponsors can come to a conclusion with their advisers (including any authorised third party verifier) about which sections of the prospectus best explain how the transaction meets the requirements of each STS criterion and should be referenced in that column.

<ESMA_QUESTION_STS_5>

Q6 : Do you agree that for the list of items in table 2 only a confirmation should be required in the STS notification, accompanied by the cross reference to the relevant section in prospectus or other securitisation documentation? If not, please state your reasons and any further suggestion.

<ESMA_QUESTION_STS_6>

Please see our response to Question 4.

<ESMA_QUESTION_STS_6>

Q7 : Do you agree that for the list of items in Table 3 a concise explanation shall be required in the STS notification, accompanied by the cross reference to the relevant section in prospectus or other securitisation documentation? If not, please state your reason and any further suggestion.

<ESMA_QUESTION_STS_7>

Please see our response to Question 4.

<ESMA_QUESTION_STS_7>

Q8 : Do you agree that for the list of items in table 4 a detailed explanation shall be required in the STS notification, accompanied by the cross reference to the relevant section in prospectus or other securitisation documentation? If not, please state your reason and any further suggestion.

<ESMA_QUESTION_STS_8>

Please see our response to Question 4.

<ESMA_QUESTION_STS_8>

Q9 : Do you agree with the proposal to require the use of XML templates for the STS notification notified to the ESMA?

<ESMA_QUESTION_STS_9>

AFME members do not support a mandatory use of the XML format for reporting. There are several other formats AFME members (and market participants more generally) use or are currently contemplating moving to. In addition to XML, these include CSV, XLS and JSON. These are often more appropriate for market participants' reporting systems which,

in turn, are designed to support the particular needs of their individual businesses. The data format in which the STS notification is submitted should not be too prescriptive and data formats other than XML should be allowed.

<ESMA_QUESTION_STS_9>

Q10 : Do you agree with the format of the proposed notification templates as described in Annexes I and II of the draft ITS?

<ESMA_QUESTION_STS_10>

In addition to our comments above, our principal comment on the STS notification templates is that they do not appear to contemplate the possibility that an ABCP transaction will be notified as STS in the absence of a corresponding notification that the ABCP programme funding it is also STS. This is a serious omission and it is essential that it be corrected.

We believe that this omission is in clear contradiction to the policy intention of the level 1 legislation. For example, Article 23 of the Securitisation Regulation specifically contemplates the possibility of an STS transaction being considered STS independent of the ABCP programme that funds that transaction – the STS status of which is separately contemplated at Article 23(2). This is not an accident of drafting, but a deliberate policy choice made by the co-legislators in the legislative process. The original Commission proposal for this language contemplated that:

"ABCP securitisations shall be considered 'STS' where the ABCP programme complies with the requirements in Article 13 of this Regulation and all transactions within that ABCP programme fulfil the requirements in Article 12."

The original drafting proposed by the Commission clearly required both the ABCP programme and all transactions within it to be STS in order for an ABCP securitisation to get the benefit of the STS designation. If ESMA adopts the approach proposed, it will be frustrating wishes of the co-legislators they clearly expressed by making the change from the original Commission proposal outlined above.

Likewise, Article 243(1) of the Capital Requirements Regulation (as amended by Regulation (EU) 2017/2401) specifically contemplates the capital treatment of exposures to an "ABCP transaction that qualify as positions in an STS securitisation" independently of the treatment for the corresponding ABCP programme (whether STS or not). Further, it is only logical to assume that an ABCP transaction could be treated as STS (and should be able to be notified as such) independent of the programme that funds it. Making the STS status of an ABCP transaction dependent on the programme that funds it is the equivalent of making the STS status of a non-ABCP transaction dependent on the identity or funding model of that transaction's investors. It is a nonsense because the source of the funds for a securitisation does not affect the simplicity, transparency or standardisation of the transaction itself. Moreover, and as a practical matter, interpreting the Securitisation Regulation such that ABCP transactions will not be able to be notified as STS separate from the programmes that fund them is likely to cause the STS initiative to fail with respect to the ABCP markets.

At the moment, most AFME members who are ABCP programme sponsors have concluded that it will not be practicable for them to obtain STS designation for their STS programmes. This is because of the difficulties associated with ensuring that all of the transactions to meet the transaction-level criteria (both as an initial and an ongoing matter) as well as ensuring that programme-level criteria are complied with. The jurisdictional requirements in relation to the originators of STS transactions present particular difficulties.

That said, AFME members who are ABCP programme sponsors are far more optimistic about their ability to meet the transaction-level criteria in respect of certain individual transactions. Not surprisingly, they are keen to do this where possible so that they can take advantage of the more benign regulatory treatment accorded to STS securitisation exposures.

As a result, for the inclusion of ABCP in the STS regime to have any meaningful effect, it will be necessary for individual ABCP transactions to be able to be notified as STS, regardless of whether the ABCP programme by which they are funded is itself notified as STS. As a separate matter, AFME members consider that Article 27(1) clearly makes STS notification in respect of ABCP transactions and ABCP programmes the exclusive responsibility of the sponsor. This is not reflected in the Draft RTS. For example, Article 2(1) of the draft RTS is ambiguous where it says "...the originators and sponsors shall refer to Annex I if the securitisation is a non-ABCP securitisation and to Annex II if the securitisation is an ABCP securitisation". It should say "... originators and sponsors shall refer to Annex I if the securitisation is a non-ABCP securitisation **and sponsors shall refer** to Annex II if the securitisation is an ABCP securitisation". AFME members would urge ESMA to ensure that the final RTS is completely clear that only sponsors have responsibility for STS notifications in respect of ABCP securitisations.

The final matter we wish to raise with respect to STS notifications is the significant potential for compliance uncertainty raised by the interaction of the definition of an "ABCP transaction" and the STS notification provisions. More specifically, the definition of an "ABCP transaction" in the Securitisation Regulation ("a securitisation within an ABCP programme") does not contemplate the possibility of a securitisation funded by multiple funders some or all of which might be ABCP programmes. It seems to AFME members that, where that is the case, multiple STS notifications may need to be given in respect of the same transaction.

In respect of ABCP programme funders – and provided the transaction met the requirements of Article 24 of the Securitisation Regulation – STS notifications would need to be given separately by each sponsor of the relevant programme funding the transaction. This is consistent with programme sponsor responsibility for STS notifications in ABCP securitisations. Any sponsor not giving such a notification would not be entitled to treat the transaction as STS in its programme.

In respect of non-ABCP programme funders – and provided the transaction met the requirements of 20, 21 and 22 of the Securitisation Regulation – the notification would need to be given by the originator (as there is likely not a sponsor of the underlying transaction, only

sponsors in respect of each ABCP programme). This STS notification would apply in respect of any non-ABCP programme funder of the transaction.

This seems to be the approach most consistent with the legislative intent, since only transactions that meet the ABCP transaction STS criteria would be capable of being treated as STS ABCP transactions (and then only to the extent funded by ABCP programmes). Likewise, only transactions that meet the non-ABCP STS criteria would be capable of being treated as non-ABCP STS securitisations (and then only to the extent funded outside ABCP programmes). We would be grateful if ESMA could advise market participants in its final report on the STS notification RTS if it would propose some alternative approach to this issue.

<ESMA_QUESTION_STS_10>

Q11 : Do you agree with the arguments set out in the preliminary CBA? Do you think that other items should be factored into the CBA and if so, for what reasons?

<ESMA_QUESTION_STS_11>

AFME members disagree with much of the analysis presented in the CBA for the reasons set out in our answer to Question 4. The benefits of harmonisation are realised to the extent possible by the need for originators, sponsors and issuers to explain how they comply with the criteria laid out in the Securitisation Regulation. What is more, these explanations will be informed by the Guidelines adopted by the EBA pursuant to Articles 19(2) and 23(3). We do not believe that imposing requirements relating to the length and/or complexity of explanations as contemplated by the CP will lead to increased comparability between transactions for users/investors.

Moreover, for the reasons set out in our answer to Question 4, we believe that the flexible approach will incentivise originators, sponsors and issuers to provide more fulsome explanations of how they comply with the STS criteria, which should make it easier for competent authorities to supervise compliance rather than making it more challenging as suggested by the CBA.

For the reasons set out in our response to Question 5, we agree that the ability to cross-reference to an offering document or underlying transaction document in the STS notification is a benefit that will help reduce unnecessary duplication with existing documents.

However, this benefit is equally available under the flexible approach described in the CP.

<ESMA_QUESTION_STS_11>