Securitisation Regulation and CRR / CREFC Europe feedback on EBA mandates

This note summarises the consolidated comments on current EBA securitisation-related mandates that we have been able to collect from CREFC Europe members.

	Securitisation Regulation
1	**Mandate: Article 6(7) (in relation to risk retention)**
1	**Requests:** Use existing risk retention RTS as the starting point, carry forward existing RTS provisions intact, save that: (a) additional flexibility would be helpful in certain areas, e.g. (i) allowing the measurement of retained first loss interest based on asset purchase price, rather than face amount of assets, and (ii) allowing retention on a consolidated basis by majority owned affiliates as under US regime), and (b) supplementary guidance may be needed to address significant new features of the recast regime, e.g. on (i) the scope of the new mandatory direct retention obligation (EU vs non-EU entities, consolidated application, etc.) and (ii) the adverse selection provision. We do not consider the sole purpose test requires further clarification, but if any is to be provided it should be consistent with Commission explanatory memorandum principles. In particular, the following existing RTS provisions should be retained intact: (i) multiple originator provisions, (ii) vertical slice retention via interest in underlying assets provisions and via single vertical security and general flexibility as to form of interest held, and (iii) retention financing provisions.
1	**Explanation:** As a general matter, it is important for business certainty and to avoid unnecessary disruption to markets that continuity with the current regime and applicable guidance/RTS is maintained as far as possible. This is especially important for repeat issuance arrangements and, if the new retention RTS is not applicable from the general application date under the regulation of 1 January 2019, for those deals done to start under the new regime, given that they will need to comply with both the existing RTS and the new RTS (per Article 43(7)). More generally, our above requests seek to achieve the sensible operation of the regime in the context of assets acquired at a discount (such as NPLs as regards interest measurement) and sufficient certainty with respect to compliance under the new concepts which will apply.
2	**Mandate: Article 6(7) (in relation to risk retention)**
2	**Request:** It would be helpful to have guidance on the appropriate interpretation of the concept of “comparable assets” under the adverse selection provision. It would also be helpful to have guidance confirming that concepts referred to in Recital (11) may be taken into account by originators in assessing compliance, e.g. originators may select assets that have a higher average credit risk profile if that higher profile is clearly communicated to investors or potential investors.

	Securitisation Regulation
2	**Explanation:** The adverse selection provision gives rise to a number of questions for transactions including in-scope CRE financing arrangements. It is not clear how "comparable assets" should be interpreted. In addition, the provision gives rise to issues in the context of securitisations involving sub- or non-performing assets, where the assets may have a higher than average credit risk profile. Clarification that concepts referred to in corresponding Recital (11) with respect to compliance through clear communication to investors would be helpful. Given that the adverse selection provision sits in Article 6 which is described as setting out the risk retention requirements in general and that the mandate in Article 6(7) refers in high-level terms to "standards to specify in greater detail the risk retention requirement…", we consider that the mandate would include such guidance within the corresponding technical standards.
3	**Mandate: Article 7(3) (EBA cooperation with ESMA in relation to reporting under Article 7(1)(a) for private securitisations**
3	**Request:** In the context of private transactions, it would be helpful if EBA input to ESMA acknowledged and emphasised the need for flexibility in the templates (and/or the approach to completing them) to be used for reporting. Technical standards specifying the information to be provided should avoid being overly prescriptive, and there should be the ability to indicate that a particular item of information is "not applicable" in relation to a private securitisation.
3	**Explanation:** In the CRE context, private transactions will often be highly bespoke – reflecting the nature of commercial real estate itself, as well as of the variety of requirements, ownership and financing structures and approaches seen in the market. It is difficult to imagine how a reporting template could be universally applicable and relevant across this asset class.
4	**Mandate: Articles 19(2) (in relation to Recital (29) and Article 20(13))**
4	**Request:** Clarify how Recital (29) interacts with Article 20(13) (and/or define "CMBS" as used in Recital (29)), in particular to confirm that Recital (29) seeks to exclude from STS treatment <u>only</u> those CRE debt securitisations that fail to satisfy the criterion in Article 20(13), rather than <u>all</u> transactions with a commercial real estate element.
4	**Explanation:** Recital (29) states – by reference to "strong reliance of the repayment…on the sale of assets securing the underlying assets" but in terms that could be construed as absolute – that "CMBS should not be considered as STS securitisations". However, not every CRE debt securitisation will have the characteristics referred to in Recital (29), and some may objectively satisfy the STS criteria, including that in Article 20(13) – it cannot be the case that they are nevertheless excluded solely by virtue of a Recital. The term "CMBS" may refer to secured corporate borrowing through the capital markets, to a securitisation of amortising real estate loans, or to a granular securitisation backed by loans to SMEs that are secured on their premises. Legislators, regulators and market participants may use the term in different ways – for example, market participants may describe an untranched CRE financing in the capital markets as CMBS, even though it is not a "securitisation" at all in regulatory terms.

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	Examples of types of CRE debt securitisation that should not be affected by Recital (29) include: • a securitisation of what might be called "business property loans" or indeed loans to SMEs (the securitisation of which Recital (27) seeks to protect, through EBA RTS clarifying the homogeneity criteria); • CMBS issued by corporate issuers (such as those backed by German multi-family residential property), which provide the sort of non-bank, capital markets access to finance that Capital Markets Union seeks to promote, and whose historic performance is very good. It is therefore important to clarify the meaning and effect of the Recital, which should, we think, turn on the interaction between the language of Recital (29) and that of Article 20(13).

	CRR Amendment Regulation
5	**Mandate: Article 255(9) in relation to the use of proxy data**
5	**Request:** It would be helpful for the EBA to permit the use of proxy data in the calculation of K_{IRB} as broadly as sensibly possible in order to allow banks to calculate their capital requirements in relation to CMBS investments in a more risk-sensitive way. This is particularly important for non-senior exposures to CMBS transactions, where an inability to use the SEC-IRBA to calculate capital will very likely force banks onto the SEC-ERBA (under Article 254(2)(b) of the amended CRR).
5	**Explanation:** The purchased receivables approach is already permitted to be used (with permission) for exposures to corporates as part of the IRB approach under the existing CRR (see, in particular, Articles 157, 160, 161, 180, 181 and 184 of the CRR), but these provisions do not extend to explicitly permitting the same approach to calculating PD and LGD (and therefore K_{IRB}) for a securitisation exposure. Where a bank investor is able sensibly to estimate an appropriate PD and LGD for an underlying pool of CRE exposures on the basis of the information disclosed under Article 7 of the Securitisation Regulation together with proxy data, there is no policy reason to prohibit this. Indeed, permitting it explicitly would provide certainty for the market and would allow a more risk sensitive and efficient allocation of bank capital.