

EBA/GL/2016/08

24/11/2016

Guidelines

on implicit support for securitisation transactions

1. Compliance and reporting obligations

Status of these guidelines

1. This document contains guidelines issued pursuant to Article 16 of Regulation (EU) No 1093/2010¹. In accordance with Article 16(3) of Regulation (EU) No 1093/2010, competent authorities and financial institutions must make every effort to comply with the guidelines.
2. Guidelines set the EBA view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. Competent authorities as defined in Article 4(2) of Regulation (EU) No 1093/2010 to whom guidelines apply should comply by incorporating them into their practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.

Reporting requirements

3. According to Article 16(3) of Regulation (EU) No 1093/2010, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance, by 24/01/2017. In the absence of any notification by this deadline, competent authorities will be considered by the EBA to be non-compliant. Notifications should be sent by submitting the form available on the EBA website to compliance@eba.europa.eu with the reference 'EBA/GL/2016/08'. Notifications should be submitted by persons with appropriate authority to report compliance on behalf of their competent authorities. Any change in the status of compliance must also be reported to the EBA.
4. Notifications will be published on the EBA website, in line with Article 16(3).

¹ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, (OJ L 331, 15.12.2010, p. 12).

2. Subject matter, scope and definitions

Subject matter

5. These guidelines specify what constitutes arm's length conditions and when a transaction is not structured to provide support, according to Article 248 of Regulation (EU) No 575/2013². The guidelines also elaborate further on the notification and documentation requirements of Article 248(1) of Regulation (EU) No 575/2013.

Scope of application

6. These guidelines apply in relation to the support provided to securitisations by sponsor institutions and originator institutions beyond their contractual obligations as further specified in paragraph 10, in accordance with Article 248 of Regulation (EU) No 575/2013 and the conditions set out therein. The guidelines are without prejudice to the on-going assessment of significant risk transfer during the life of the securitisation.

Addressees

7. These guidelines are addressed to competent authorities as defined in point (i) of Article 4(2) of Regulation (EU) No 1093/2010 and to financial institutions as defined in Article 4(1) of Regulation (EU) No 1093/2010.

Definitions

8. Unless otherwise specified, terms used and defined in Regulation (EU) No 575/2013 have the same meaning in these guidelines.

3. Implementation

Date of application

9. These guidelines apply from 1 March 2017.

² Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

4. Implicit support

Existing contractual obligations

10. Any transaction (for the avoidance of doubt, including, but not limited to, any amendments to the securitisation documentation and changes to the coupons, yields or other features of the securitisation positions) entered into by (i) a sponsor institution or (ii) an originator institution or (iii), subject to the provisions of paragraph 25, an entity connected to the originator institution in relation to a securitisation or positions therein after the closing of such securitisation, which, pursuant to the terms of the securitisation documentation as in force prior to the entering into of such transaction, the originator institution or, as the case may be, the sponsor institution or the entity connected to the originator institution:

- (a) is under no contractual obligation to enter into; or
- (b) is not under a contractual obligation to enter into on the specific terms of such transaction

should be considered to have been entered into beyond the scope of existing contractual obligations, its particulars should be notified in accordance with paragraph 26 and it should be assessed, in accordance with paragraph 11, whether the transaction is structured to provide support or not. Transactions which, pursuant to the terms of the securitisation documentation as in force prior to the entering into of such transactions, the relevant institution is under a contractual obligation to enter into on the specific terms of such transactions constitute existing support and are not subject to the prohibition set out in Article 248 of Regulation (EU) No 575/2013.

Transaction not structured to provide support

11. For the purposes of Article 248 of Regulation (EU) No 575/2013, a transaction should be considered as not being structured to provide support in any of the cases referred to in paragraphs 12 and 13, taking into account the provisions of paragraph 19.

12. Subject to paragraph 25, where the transaction is carried out by a sponsor institution, the transaction should be considered as not being structured to provide support if it meets either of the following conditions:

- (a) it is executed at arm's length conditions, in accordance with paragraph 15; or
- (b) it is executed on conditions which are more favourable to the sponsor institution than arm's length conditions.

13. Where the transaction is carried out by an originator institution which has transferred significant credit risk associated with the underlying exposures of the securitisation in accordance with Article 243 or Article 244 of Regulation (EU) No 575/2013, the transaction should be considered as not being structured to provide support if it meets the following conditions:

- (a) the transaction is executed:
 - i. at arm's length conditions, in accordance with paragraph 15; or
 - ii. on conditions which are more favourable to the originator institution than arm's length conditions; and
- (b) either (i) the securitisation continues to meet the conditions for significant risk transfer as set out in Article 243 of Regulation (EU) No 575/2013 or, as the case may be, Article 244 of the Regulation, in accordance with these guidelines and with guidelines EBA/GL/2014/05 on significant risk transfer, or (ii) if such conditions are no longer met, the transaction was not entered into with a view to reducing potential or actual losses to investors.

14. If the conditions for significant risk transfer are no longer met, the originator institution should hold own funds against all of the securitised exposures as if they had not been securitised.

Arm's length conditions

15. For the purposes of Article 248 of Regulation (EU) No 575/2013, a transaction should be considered to be executed at arm's length conditions where the terms of the transaction are such as they would be in a normal commercial transaction if:

- (a) the parties had no relationship to each other (including, but not limited to, any special duty or obligation and any possibility to control or influence each other); and
- (b) each party:
 - i. acted independently;
 - ii. entered into the transaction of its own volition;
 - iii. acted in its own interests; and
 - iv. did not enter into the transaction on the basis of extraneous considerations which are not directly connected with the transaction in question (such extraneous considerations including, but not being limited to, any reputational risk which might arise in respect of the originator institution or the sponsor institution should it not proceed with the transaction).

16. In the course of the assessment referred to in paragraph 15, due regard should be given to the information available to each of the parties at the time when the transaction is entered into, and not to such information as becomes available thereafter.

Significant risk transfer

17. When evaluating a transaction in accordance with Article 248 of Regulation (EU) No 575/2013, any assessment of whether the conditions for significant risk transfer as set out in Article 243 or, as the case may be, Article 244 of that Regulation continue to be met should be carried out in accordance with these guidelines and with guidelines EBA/GL/2014/05 on significant risk transfer.
18. A transaction should be deemed to invalidate the conditions for significant risk transfer if, as a result of the transaction, the reduction in risk-weighted exposure amounts the originator institution initially achieved is no longer justified by a commensurate transfer of credit risk to third parties. The factors to be considered should include:
 - (a) the credit risk of the originator institution after undertaking the transaction; and
 - (b) the extent to which the capital or liquidity position of the originator institution is affected by the transaction.

Relevant factors for assessment

19. When assessing whether a transaction is not structured to provide support as set out in paragraph 11, all relevant circumstances should be considered, including the following criteria.
20. The factor contemplated in point (a) of Article 248(1) of Regulation (EU) No 575/2013 (the price of the repurchase) should also be applied to transactions other than a repurchase and, in such cases, the amounts payable or, as the case may be, receivable by the originator institution or by the sponsor institution should be considered. For all transactions, measures of market value should be considered, including quoted prices in active markets for similar transactions that the institution can access at the measurement date. If such measures are not identifiable, then inputs other than quoted prices that are directly or indirectly observable for the asset should be considered; and, if such inputs are not identifiable, then unobservable inputs for the asset should be considered. In the case of unobservable inputs, the originator institution or sponsor institution should provide evidence to its competent authority regarding how the receivable or payable amounts have been valued and which inputs were used. The originator institution or sponsor institution should also demonstrate that this assessment is in line with its credit review and approval process. A transaction should be considered as not having been executed at arm's length conditions if the amounts receivable by the originator institution or, as the case may be, the sponsor institution are materially lower than, or the amounts payable by the originator institution or sponsor institution are materially higher than, the relevant market value.

21. The factor contemplated in point (b) of Article 248(1) of Regulation (EU) No 575/2013 (the institution's capital and liquidity position before and after repurchase) should be considered as also being relevant in the case of transactions other than a repurchase. The conditions for significant risk transfer should be considered as no longer being satisfied if, as a result of the transaction, the reduction in risk-weighted exposure amounts the originator institution initially achieved is no longer justified by a commensurate transfer of credit risk to third parties, which should be the case if the originator institution's capital or liquidity position is materially and adversely affected, directly or indirectly, by the transaction. In making such assessment, among other things, the accounting entries that the participants to the transaction made with respect to the transaction and the changes in their liquidity position should be considered.
22. Regarding the factor contemplated in point (c) of Article 248(1) of Regulation (EU) No 575/2013 (the performance of the securitised exposures), if the underlying exposures being subject to the transaction have been underperforming relative to other securitised exposures or have been reported as non-performing, it should be considered that the transaction is not executed at arm's length conditions if either such underperformance or the foreseeable future performance of such exposures as a result of the circumstances having caused such underperformance is not adequately reflected in the price of the purchase or repurchase.
23. Regarding the factor contemplated in point (d) of Article 248(1) of Regulation (EU) No 575/2013 (the performance of the securitisation positions), if the securitisation positions being subject to the transaction have been underperforming relative to other securitisation positions or have been reported as non-performing, it should be considered (i) whether the cost of measures taken to improve the performance of these securitisation positions has been fully borne by the relevant securitisation investors and (ii) whether the institution which participated in the transaction is negatively affected, directly or indirectly, by the transaction.
24. Regarding the factor contemplated in point (e) of Article 248(1) of Regulation (EU) No 575/2013 (the impact of support on the losses expected to be incurred by the originator relative to investors), it should be considered whether the expected losses of a securitisation position are materially increased or reduced, having regard, among other things, to changes in the market price of the position, in the risk-weighted exposure amounts and in the ratings of securitisation positions.

Notification and documentation

25. The requirement of notification to the competent authorities of any transaction, regardless of whether it provides support to the securitisation, referred to in Article 248(1) of Regulation (EU) No 575/2013 should apply to any transaction which is entered into by an originator institution or by a sponsor institution or which meets the following conditions:
 - (a) it is entered into by an entity, other than the originator institution, (i) which is a parent undertaking of the originator institution, a subsidiary undertaking of the originator institution or a subsidiary undertaking of a parent undertaking of the originator institution or (ii) to or with which the originator institution or another entity contemplated in item (i) provided, directly or indirectly, any financing, support

or instructions or entered into any arrangement in relation to the entering into of such transaction; and

- (b) it would be subject to these guidelines had it been entered into by the originator institution.

Where the conditions set out in subparagraphs (a) and (b) of this paragraph 25 are met, the transaction should be assessed as if it had been entered into by the originator institution.

26. When notifying a transaction as required pursuant to Article 248 of Regulation (EU) No 575/2013 (as further specified in paragraph 25), the originator institution or, as the case may be, the sponsor institution should:

- (a) if it claims that the transaction does not constitute implicit support, provide adequate evidence of meeting the relevant conditions set out in these guidelines; and
- (b) if the transaction is undertaken by one of the entities referred to under item (i) or (ii) of paragraph 25(a), the originator institution should also provide documentation on the type of relationship between the originator institution and the relevant entity or, as the case may be, the financing, support, instructions or arrangements provided or entered into by the originator institution to or with that entity for the purposes of undertaking the relevant transaction.