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Structured Finance: the latest news

The following is a summary of some regulatory changes in structured finance and securitisation recently introduced at European and Italian level.

A. THE IMPLEMENTING REGULATION (EU) 2023/2083

1. Introduction

On 29 September 2023, by publication in the Official Journal of the European Union, the European Commission issued Implementing Regulation (EU) 2023/2083 (the "**Implementing Regulation**") concerning the implementing technical standards for the application of Article 16(1)[1] of Directive (EU) 2021/2167 on credit managers and credit buyers (the "**Credit Managers and Buyers Directive**"); these technical standards, in particular, establish uniform European templates for the provision to buyers of information on *non-performing* credit exposures contained in portfolios owned by credit institutions subject to sale[2] .

The Implementing Regulation officially entered into force on 19 October 2023, although the Credit Managers and Buyers Directive has not yet been transposed into Italian law (in this regard, Article 32(1) of the Credit Managers and Buyers Directive sets a deadline of 29 December 2023 for the adoption and publication by the Member States of the legislative, regulatory, and administrative provisions necessary to comply with this Directive)[3].

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[1] Article 16 of the Credit Managers and Buyers Directive provided for the preparation by EBA of "*draft implementing technical standards to specify the templates to be used by credit institutions for the provision of information referred to in Article 15(1), in order to provide detailed information on their credit exposures in the banking book to credit purchasers for the analysis, financial due diligence and valuation of a creditor's rights under a non-performing credit agreement, or of the non-performing credit agreement itself*"; according to Article 15(1) of the Credit Managers and Buyers Directive, on the other hand: *"Member States shall ensure that a credit institution provides a prospective credit purchaser with necessary information regarding a creditor's rights under a non-performing credit agreement, or the non-performing credit agreement itself, and, if applicable, the collateral, so as to enable the prospective credit purchaser to conduct its own assessment of the value of the creditor's rights under the non-performing credit agreement, or of the non-performing credit agreement itself, and the likelihood of recovery of the value of that agreement prior to entering into a contract for the transfer of that creditor's rights under the non-performing credit agreement, or of the non-performing credit agreement itself, while ensuring the protection of information made available by the credit institution and of the confidentiality of business data"*.

[2] In this regard, it should be clarified that, Article 23 of the Credit Managers and Buyers Directive, in relation to cases of breach of the obligation to provide information laid down in Article 15 of that directive, states that: " *Without prejudice to the right of Member States to lay down criminal penalties, Member States shall lay down rules establishing appropriate administrative penalties and remedial measures applicable in at least the following situations:: [...] h) a credit institution fails to communicate the information set out in the national provisions transposing Article 15*". In this regard, it should be noted that, although as of today the sanctions against credit institutions for violations of the aforementioned regulatory obligation have not yet been regulated in our legal system, it will be necessary to wait for the transposition of the Credit Managers and Buyers Directive into Italian law to see how the Italian legislature will regulate the issue of sanctions, by virtue of the aforementioned delegated legislation.

[3] For the sake of completeness, it should be noted that the Credit Managers and Buyers Directive was published in the Official Journal of the European Union on 8 December 2021 and it sets forth a regulatory framework that regulates, *inter alia*, (i) a single regulatory framework for all entities in charge of managing and recovering non-performing bank loans in the various Member States and (ii) the creation of a single secondary credit market, also providing for the overcoming of national limitations on the purchase of non-performing bank loans.

2. Scope

The technical rules, laid down in the Implementing Regulation, apply **to the transfers and sales of non-performing credit agreements[4] by credit institutions, that are established within the territory of the European Union[5]** and whose receivables:

(a) fall into their banking book rather than their trading book[6]; and

(b) are issued as from 1 July 2018 and become non-performing after 28 December 2021, in compliance with the time criteria of the Credit Managers and Buyers Directive[7].

However, these technical standards *do not* apply, *inter alia*, in the following cases:

(a) sales of credit agreements (such as parts of sales of branches, sales of business lines or sales of clients' portfolios) as part of an ongoing restructuring of the selling credit institution in the context of insolvency, resolution or liquidation proceedings;

(b) sales or transfer of non-performing credit agreements through securitisation, subject to the application of Regulation (EU) 2017/2402 and the communication of the relevant information is regulated under Delegated Regulation (EU) 2020/1224 [8] and Implementing Regulation (EU) 2020/1225[9];

(c) sales or transfers of non-performing credit agreements pursuant to *credit default swaps, total return swaps* and other insurance, derivative and sub-participation contracts;

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[4] The term "non-performing credit agreements" refers to those types of agreements that fall under Article 47 (a) (3) of Regulation (EU) no. 575/2013 (*Capital Requirements Regulation*) and which, therefore, may alternatively give rise to the following types of exposures: *"exposure in respect of which a default is considered to have occurred in accordance with Article 178; (b) an exposure which is considered to be impaired in accordance with the applicable accounting framework; (c) an exposure under probation pursuant to paragraph 7, where additional forbearance measures are granted or where the exposure becomes more than 30 days past due; (d) an exposure in the form of a commitment that, were it drawn down or otherwise used, would likely not be paid back in full without realisation of collateral; (e) an exposure in form of a financial guarantee that is likely to be called by the guaranteed party, including where the underlying guaranteed exposure meets the criteria to be considered as non-performing*".

[5] With regard to the wording used by the legislator (i.e., "*transfers and sales of non-performing credit agreements*"), it would appear *prima facie* incomplete, given the absence of an express reference also to *non-performing receivables, in* addition to the relevant agreements. In this regard, it should be noted, however, that even in the original version of the Credit Managers and Buyers Directive, the wording used by the European legislator provided for the exclusive reference to "*credit agreements*" and that such reference was only subsequently expanded (in the final version of the same directive) in order to also include reference to "*creditor's rights arising from a non-performing credit agreement*". Trying therefore to interpret the provisions of the Implementing Regulation teleologically, it could be argued that the relevant provisions also apply to transfers of credit rights and not exclusively to transfers of *credit agreements*.

[6] The 'trading book', according to Article 4(1)(86) of Regulation (EU) No 575/2013 (*Capital Requirements Regulation*), is defined as *'all positions in financial instruments and commodities held by an institution either with trading intent or to hedge positions held with trading intent in accordance with Article 104"*.

[7] Pursuant to Article 16(7) of the Credit Managers and Buyers Directive, indeed, it is stipulated that *"The data templates shall be used for transactions relating to credits issued on or after 1 July 2018 that become non-performing after 28 December 2021. For credits that originate between 1 July 2018 and the date of entry into force of the implementing technical standards referred to in paragraph 1, credit institutions shall complete the data template with the information already available to them"*.

[8] On this point, it should be pointed out that Delegated Regulation (EU) 2020/1224 is that EU-derived legislative act which, by supplementing Regulation (EU) 2017/2402, provides for regulatory technical standards aimed at specifying the information and data on securitisations to be made available by the originator, the sponsor and the SPV.

[9] Implementing Regulation (EU) 2020/1225, in fact, lays down the implementing technical rules regarding the format and standardised forms for the provision of securitisation information and data by the originator, the sponsor and the SPV.

(d) sales or transfers of non-performing credit agreements pursuant to a financial collateral agreement[10] or a financing transaction carried out through the issuance of securities.

3. Information to be provided by credit institutions: types and characteristics

Regarding the information to be provided by credit institutions, it is expected that they will be required to make certain data available to potential buyers for each non-performing credit agreement to be assigned, and in particular:

(a) information about the "counterparty" as set out in Template 1 of Annex 1 of the Implementing Regulation (*e.g.*, the counterparty identifier, the economic activity carried out, certain balance sheet and financial data);

(b) information about the "credit agreement", as indicated in Template 3 of Annex 1 of the Implementing Regulation (*e.g.*, the loan identifier, the technical form of the loan, the accrued and accruing interest, the description of the interest rate type, whether the credit is "securitised", etc.);

(c) information about "collateral, guarantee and enforcement", as set out in Template 4.1 of Annex 1 of the Implementing Regulation (including, for example, the description of the property subject to the security interest, the cadaster identification number of the property, the ranking of the security interest, any creditor whose exposure is secured by a higher ranking loan, the sale agreed price, etc.);

(d) information about the "mortgage ", as set out in Template 4.2 of Schedule 1 of the Implementing Regulation (including, *inter alia*, the mortgage identifier, the amount of the mortgage and secured loan, the ranking, etc.); and

(e) information about the "historical collection of repayments", as indicated in Template 5 of Annex 1 of the Implementing Regulation (*e.g.*, the "type of collection", the "name of external collection agent", the "history of total repayments", etc.).

These pieces of information shall be provided by credit institutions in accordance with the criteria and definitions set out in Annex 2 of the Implementing Regulation and the instructions set out in Annex 3.

In particular, credit institutions shall provide the information reported as 'mandatory' in the glossary of data set out in Annex 2, with the exception of, *inter alia*, the information concerning the following transactions:

(a) sales or transfers involving a single debtor;

(b) sales or transfers involving syndicated credit facilities;

(c) sales or transfers involving a debtor not domiciled in the Union or without a registered office in the Union;

(d) sales or transfers resulting in an assignment of non-performing claims to a company belonging to the same group;

(e) sales or transfers involving non-performing credit agreements that the credit institution has previously acquired from an entity other than a credit institution established within the Union and subject to the requirements of Regulation (EU) No. 575/2013 (*Capital Requirements Regulation*); and

[10] According to Article 2(1)(a) of Directive 2002/47/EC, "financial collateral arrangement" refers to "*a title transfer financial collateral arrangement or a security financial collateral arrangement, whether or not covered by a master agreement or* general *terms and conditions*".

(f) sales or transfers of unsecured non-performing credit agreements where a borrower is a natural person and where such credit agreements do not fall under the scope of Directive 2008/48/EC[11].

Furthermore, credit institutions will have to make a "*reasonable effort*" to provide information for the data fields that are *not* marked as "*mandatory*" in the data glossary set out in Annex II (always with the exception of the transactions set out under (a) to (f) *above*).

Finally, under the Implementing Regulation, credit institutions shall provide the aforementioned information to prospective buyers before the conclusion of a sale agreement or the transfer of a non-performing credit agreement. This should be done in compliance, *inter alia*, with applicable data privacy or banking secrecy legislation.

[11] Directive 2008/48/EC refers to the European legislative act regulating consumer credit agreements and at the same time repealing the previous consumer credit regulations introduced by Directive 87/102/EEC.

B. CONSOB RESOLUTION NO. 22833

1. Foreword

On 9 October 2023, with the approval of Resolution no. 22833, Consob has adopted the implementing provisions (the "**Implementing Provisions**") of Article *4-septies*.2 of Legislative Decree no. 58 of 24 February 1998 (the "**TUF**")[12]. This resolution, published in the Official Gazette no. 244 of 18 October 2023, came into force on 19 October 2023.

However, it is first necessary to clarify the origin of the aforementioned provision, which the Consob Resolution under review intends to implement. It should be noted, in fact, that Article *4-septies*.2 was introduced only recently - with Legislative Decree no. 131/2022 - in order to identify the authorities competent to supervise compliance with Regulation (EU) no. 2017/2402 (the "**Securitisation Regulation**", which regulates credit securitisations at European level and sets out sanctions for non-compliance).

In particular, Consob's competence with respect to the Securitisation Regulation is outlined in paragraph 6 of Article *4-septies*.2 of the TUF, where it is provided that Consob is the competent authority to supervise, inter alia, (i) compliance with Article 3 of the Securitisations Regulation (*i.e*. *sale of securitisations to retail customers*), (ii) compliance by originators, sponsors and securitisation vehicles with Articles 18 to 27 of the Securitisation Regulation (these rules set out requirements for "STS" securitisations, *i.e*. simple, transparent and standardised) and (iii) residually on the fulfilment of the requirements set out in Articles 6, 7, 8 and 9 of the Securitisation Regulation when neither the originator nor the SPV is an entity supervised by the other competent authorities, *i.e.* the ECB, the Bank of Italy, IVASS and COVIP (*e.g.* commercial and/or industrial originators).

Having mentioned their context, the main contents of the Implementing Provisions approved by the Consob resolution are set out below.

2. Content of information requirements and scope of application

The Implementing Provisions apply to securitisation transactions which fall under the Securitisation Regulation.

In particular, such provisions envisage the following:

(a) obligation to notify to Consob the securitisation transactions supervised by the latter (*i.e.*, transactions in which there are *no* sponsors or entities supervised by the other competent authorities regarding the Securitisation Regulation under the TUF, such as, for example, the ECB and the Bank of Italy), summarised in Section 3 below; and

(b) obligation to notify to Consob all the "STS" securitisation transactions (such obligations, also applicable in cases where entities supervised by other authorities are involved in the relevant transactions, given Consob's general competence to supervise compliance by originators, promoters and securitisation vehicles with Articles 18 to 27 of the Securitisation Regulation), summarised in paragraph 4 below.

These disclosure requirements apply with respect to: (i) securitisations carried out after the Implementing Provisions entered into force; and (ii) retroactively, to outstanding securitisations transactions realised after 1

[12] Paragraph 9 of Article 4-septies.2 of the Consolidated Law on Finance provides that: *"In order to ensure compliance with this article and with the regulation referred to in paragraph 1, the Bank of Italy, CONSOB, IVASS and COVIP may issue provisions implementing this article […]"*.

January 2019.

3. The notification of securitisation transactions supervised by Consob

Pursuant to Section II of the Implementing Provisions, original lenders, originators and the special purpose vehicle, at the time of issuance, will be required to disclose to Consob some information relating to securitisations supervised by Consob, using a template published on Consob's website; in particular, such information will cover the following categories:

- identification details of the reporting entity and the securitisation itself;
- the securitisation repository in which any necessary information was rendered public (if applicable);
- information regarding the transaction itself;
- information on the securitised exposure;
- information on positions related to the securitisation; and
- certification of compliance with Articles 6 and 9 of the Securitisation Regulation (which must be provided separately in writing by the "*head of the body with management functions*"; for transactions with multiple originators, such certification must be provided by each originator).

The obliged entities shall only notify Consob one time and must determine who is responsible to disclose the relevant information.

Originators, original lenders and the SPVs are also required to notify Consob of (i) any "significant event", as defined in Article 7(1)(*g)* of the Securitisation Regulation, that impacts or may impact the characteristics of the transaction and, therefore, may affect compliance with Articles 6 to 9 of the Securitisation Regulation and (ii) the closing of securitisation transactions referred to in this paragraph.

4. STS Securitisation

As known, pursuant to Article 27 of the Securitisation Regulation, with respect to "STS" transactions, the originator and the sponsor have the obligation to jointly communicate to ESMA compliance of the relevant securitisation with the requirements under Articles 19 to 22 (for the traditional securitisations), 23 to 26 (for the ABCP securitisations) or *26 bis* to *26 sexies* (for the synthetic securitisations).

The provision also states that "*The originator and the sponsor of a securitisation shall inform their respective competent authorities of the STS notification [...]*", and, on this point, Section III of the Implementing Provisions in question providing further detail.

In particular, the relevant Implementing Provisions require the originator and the promoter " *to inform Consob as soon as a STS securitisation has been notified to ESMA*"[13] and "*to disclose to Consob the detailed information provided for in the relevant data template published on CONSOB's website by attaching such templates completed in the context of the STS notification to ESMA, and to the European Central Bank or the Bank of Italy for significant and less significant entities, respectively*".

In addition, as already envisaged, for the disclosure requirements set out in paragraph 3 above, it is further provided that "*compliance of the transaction with requirements under Articles 20 to 26sexies*[14] *of the Securitisation Regulation must be disclosed in writing by the head of the body with management functions. In*

[13] For more detail regarding the timing required by the Implementing Provisions see the next para. 5 (Timing and method of notification).

[14] These are the simplicity, transparency and standardisation requirements for traditional securitisations, for "ABCP" (*i.e. asset-backed commercial paper programme*) securitisations and for synthetic securitisations.

the case of more than one originator, the statement of compliance must be prepared by each originator".

Finally, if a securitisation no longer meets the requirements set out in Articles 19 to 22, Articles 23 to 26 or Articles *26 bis* to *26 sexies* of the Securitisation Regulation, the originator and, where applicable, the sponsor, in addition to immediately notifying ESMA, shall also inform Consob.

5. Timing and method of notification

With regard to timing, the Implementing Provisions provide as follows:

(a) with respect to notification requirements under Section II (set out in paragraph 3 above), securitisation transactions must be notified to Consob within 15 days of the issue date;

(b) for the information referred to in Sections II, paragraphs 2 and 3 of the Implementing Provisions (*i.e.,* significant events and closing of securitisation transactions), the obliged entities are required to report to Consob without delay;

(c) notice of the STS notification to ESMA and designation of the first contact point entity must be submitted before pricing, where available, and in any event within five business days of notification to ESMA;

(d) lost adherence to STS requirements must be notified without delay; and

(e) for transactions carried out within three months of the entry into force of the Implementing Provisions, as well as for transactions carried out after 1 January 2019 and still outstanding at the date of entry into force of the Implementing Provisions, the obliged entities have two months to make such notification.

Concerning the means of communicating such information, the obliged entities must fill in a special form, following the technical indications contained in specific operational sections at the following *link* on Consob's website: *https://www.consob.it/web/area-operativa-interattiva/cartolarizzazioni*

6. Other provisions

Finally, the Implementing Provisions regulates two further aspects, namely (i) organisational requirements and risk assessments made by originators, promoters and SPV subject to Consob supervision, and (ii) authorisation procedure adopted by Consob for operators assessing compliance with STS requirements.

With reference to the first aspect, it is provided that:

(a) the originator, the sponsor, the SPV and the original lender for securitisations subject to Consob supervision must:

  (i) assess all risks, including reputational risks, that may arise from the securitisation transaction in which they are involved; and

  (ii) implement, instruct and maintain adequate policies and procedures to address possible risks;

(b) the body entrusted with strategic supervision must exercise control over these procedures and policies; and

(c) the body with control functions must periodically assess and monitor the effectiveness and periodically the adequacy of the procedures, policies and specific measures adopted.

With regard to the second point, the Implementing Provisions allow a third party to, if conditions in Article 28 of the Securitisation Regulation are met, request authorisation to Consob by submitting the information set forth in Delegated Regulation 2019/885[15] and in accordance with the technical procedures laid down by Consob.

[15] The Delegated Regulation 2019/885 supplements the Securitisation Regulation with regard to regulatory technical standards specifying the information to be provided to the competent authority in the application for authorisation of a third party assessing STS compliance.

C. RTS IN RISK RETENTION

1. Introduction

On 18 October 2023, with publication in the Official Journal of the European Union, the European Commission adopted the Delegated Regulation (EU) 2023/2175 (the "**RTS Regulation**") which provides more detailed specifications for the risk retention requirements for originators, original lenders, sponsors and servicers of securitised exposures and provides requirements for compliance with the obligation to maintain on an ongoing basis a material net economic interest ("*risk retention*") in securitisation transactions, pursuant to art. 6 para. 7, of Regulation (EU) 2402/2017[16] ("**Securitisation Regulation**"), as amended by Regulation (EU) No. 557/2021.

The RTS Regulation, formally effective on 7 November 2023, follows the final draft of regulatory technical standards published on 12 April 2022 by the European Banking Authority (EBA), following the consultation opened on 30 June 2021, which also involved the European Securities and Market Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).

The RTS Regulation repeals Delegated Regulation (EU) 625/2014 (the "**RD 625**"), except from art. 43 para. 6, of the Securitisation Regulation[17] .

Below there are the main provisions and obligations introduced by the RTS Regulation.

2. *Servicers* and risk retention

Those concerning the material net economic retention by servicers of NPEs in a traditional securitisation[18] are among the major innovations introduced by the Securitisation Regulation, as amended by Regulation (EU) No. 557/2021, to which the completion of the RTS Regulation was conditional.

The RTS Regulation, in art. 2, para. 1 (d) requires that the operator complies with the experience requirement as stipulated in art. 19 of the RTS Regulation. This requirement would be met to the extent that one of the following conditions is fulfilled:

(a) the members of the management body of the servicer and the senior staff, other than the members of the management body, responsible for servicing exposures of a similar nature to those securitised have adequate knowledge and skills in the servicing of such exposures;

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[16] With reference to art. 6 para. 7, of Regulation (EU) 2402/2017 it was provided that "*the EBA, in close cooperation with the ESMA and the European Insurance and Occupational Pensions Authority (EIOPA) […] shall develop draft regulatory technical standards to specify in greater detail the risk-retention requirement […]*".

[17] Art. 43, para. 6, of the Securitisation Regulation provides that *"in respect of securitisations the securities of which were issued before 1 January 2019 credit institutions or investment firms as defined in points (1) and (2) of Article 4(1) of Regulation (EU) No 575/2013, insurance undertakings as defined in point (1) of Article 13 of Directive 2009/138/EC, reinsurance undertakings as defined in point (4) of Article 13 of Directive 2009/138/EC and alternative investment fund managers (AIFMs) as defined in point (b) of Article 4(1) of Directive 2011/61/EU shall continue to apply Article 405 of Regulation (EU) No 575/2013 and Chapters I, II and III and Article 22 of Delegated Regulation (EU) No 625/2014, Articles 254 and 255 of Delegated Regulation (EU) 2015/35 and Article 51 of Delegated Regulation (EU) No 231/2013 respectively as in the version applicable on 31 December 2018."*

[18] Pursuant to art. 2(25) of the Securitisation Regulation, an "NPEs securitization" is defined as *"a securitisation backed by a pool of non-performing exposures the nominal value of which makes up not less than 90 % of the entire pool's nominal value at the time of origination and at any later time where assets are added to or removed from the underlying pool due to replenishment, restructuring or any other relevant reason"*.

(b) the business of the servicer, or of its consolidated group for accounting or prudential purposes, has included the servicing of exposures of a similar nature to those securitised for at least five years prior to the date of the securitisation; or

(c) all the following points are complied with:

(i) at least two of the members of the servicer's management body have relevant professional experience in the servicing of exposures of a similar nature to those securitised, on a personal level, of at least five years;

(ii) senior staff, other than the members of the management body, have relevant professional experience in the servicing of such exposures, on a personal level, of at least five years;

(iii) the servicing function of the servicer is backed up by a back-up servicer that complies with point (b) above.

The art. 19 para. 2 of the RTS also provides that, in order to be evidence of the number of years of such professional experience, it must be disclosed in detail to enable institutional investors to fulfil their due diligence obligations under art. 5 of the Securitisation Regulation, in accordance with confidentiality requirements.

In line with the risk retention requirements of the RTS Regulation regarding multi-originator transactions, the regulator, in art. 2, para. 6, of said Regulation, regulates the obligation to maintain net economic interest in the context of the multi-servicer securitisation transactions. Indeed, art. 2, para. 6, provides that the requirement of the maintenance of net economic interest may be satisfied:

(a) by the servicer with the predominant economic interest in the successful workout of the exposures of the traditional NPEs securitisation. Such prevalence would be determined on the basis of objective criteria, including the transaction's fee structure, the servicer's available resources and expertise to manage the exposures' workout process; or

(b) by each servicer, on a pro rata basis by reference to the securitised exposures that it manages, which shall be calculated as the sum of the net value of the securitised exposures that qualify as non-performing exposures and of the nominal value of the performing securitised exposures.

With reference to the net economic interest retention option referred to in art. 6 para. 3 (c) of the Securitisation Regulation[19] (so-called random selection), it is further provided that the management standards applied by the servicer must be the same as those applied with respect to managed exposures that have not been securitised.

In addition, art. 15 of the RTS Regulation specifies servicing fees, that they must not be such as to prejudice the net economic interest retained by the *servicer*. In fact, the agreements on the fixed or variable (*i.e.,* calculated on the basis of the evolution of parameters or the performance of the recovery activity) payment of fees on a priority basis for the activity performed must satisfy the following conditions:

[19] Pursuant to art. 6 para. 3(c) of the Securitisation Regulation: *"the retention of randomly selected exposures, equivalent to not less than 5% of the nominal value of the securitised exposures, where such non-securitised exposures would otherwise have been securitised in the securitisation, provided that the number of potentially securitised exposures is not less than 100 at origination"*.

(a) the amount of the fees is set on an arm's length basis having regard to comparable transactions (in the absence thereof, reference shall be made to *fees* applicable to similar transactions in other markets or to parameters that appropriately take into account the service being provided and the type of securitisation);

(b) the fees are structured as consideration for the provision of the service and do not create, in favour of the servicer, a privileged claim in the securitisation cash flows that effectively declines the portion of the retained interest faster than the transferred interest.

These requirements, however, are *not* satisfied if the *fees* are payable or secured in advance in any form (in whole or in part) before the service is rendered (so-called *upfront fees*) and if the actual relevant net economic interest is less than the minimum net economic interest required by the Securitisation Regulation.

3. *Risk retention* in NPEs securitisations

Art. 9 of the RTS Regulation provides that, in the context of non-performing securitisation transactions, the calculation of 5% must be performed *not* on the nominal value of the securitised portfolio, but on the net value of the non-performing exposures (*i.e.*, the difference between the nominal value of the credit and the discount that is agreed upon at the time the credit is purchased with the investor/buyer (so-called *NBV approach*)).

4. The status of the originator institution and *risk retention*

The Securitisation Regulation, in art. 6, para. 1 (2) stipulates that the risk retention obligations are to be fulfilled by an entity other than one that has been established or operates exclusively for the purpose of securitising exposures.

The RTS Regulation, at art. 2 para. 7, complete the above provision by providing that an entity may *not* be understood as an "entity [...] to have been established or to operate for the sole purpose of securitising exposures" when:

(a) the entity has a strategy and the capacity to meet payment obligations consistent with a broader business model that involves material support from capital, assets, fees or other sources of income and is not based exclusively or upfront on securitised exposures; and

(b) the members of the management body have the necessary experience to pursue the established business strategy, as well as adequate corporate governance arrangements.

5. *Risk retention* and price discount

With respect to the obligation to retain the first loss tranche equal to at least 5% of each securitised exposure (see art. 6 (3) (d) of the Securitisation Regulation), the RTS Regulation provides that such risk retention can also be satisfied by the originator selling the underlying exposures at a discount to the originator, if both of the following conditions are met:

(a) the amount of the discount is not less than 5% of the nominal value of each exposure; and

(b) the discounted sale amount is refundable to the *originator* only if that discounted sale amount is not absorbed by losses related to the credit risk associated to the securitised exposures.

6. Re-securitisations

Art. 17 para. 1, of the RTS Regulation provides, with respect to transactions in derogation to art. 8 of the Securitisation Regulation, the fulfilment of the *risk retention* obligation with respect to both levels of the transaction (*i.e., both at the securitisation* and resecuritisation level); in para. 2 provides, however, exceptions regarding the retention of net economic interest in the context of resecuritisation transactions (authorised under art. 8 of the Securitisation Regulation) if all of the following conditions are met:

(a) the originator of the resecuritisation is also the originator and the retainer of the underlying securitisation;

(b) the resecuritisation is backed by a pool of exposures comprised solely of exposures or positions retained by the originator in the underlying securitisation in excess of the required minimum net economic interest; and

(c) there is no maturity mismatch between the underlying securitisation positions or exposures and the resecuritisation.

7. Synthetic *excess spread*

The RTS Regulation, supplementing the Securitisation Regulation, further marks the distinction between the *excess spread* in traditional securitisations and the synthetic *excess spread* (the "**SES**") in synthetic securitisations, attributing only to the latter a relevance for the purposes of net economic interest compliance. In particular, the RTS Regulation, in art. 10, clarifies that the value of the SES exposure may be taken into account for retention purposes in the event that:

(a) the originator of the securitisation acts as retainer within the meaning of art. 6 para. 3(d) of the Securitisation Regulation;

(b) the value of the SES is subject to the capital requirements of the applicable prudential regulations.

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