TSI comments ESMA Consultation Paper on CRA3 implementation (ESMA 2014/150 of 11 February 2014)

We welcome the opportunity to comment on the Consultation Paper on CRA3 implementation. In the following, we would like to draw your attention to certain aspects of the ESMA Consultation Paper on CRA3 implementation (ESMA 2014/150 of 11 February 2014) that may have a severe negative impact on the financing of the corporate sector via ABCP conduit programmes.

1. The scope of the regulation is too wide

We are of the opinion that the RTS based on Article 8b (3) of the CRA3 Regulation (No. 1060/2009) has according to the spirit and purpose of the CRA to be limited to SFIs that are covered by the Prospectus Directive and the Transparency Directive. Moreover, the same rationale should apply in respect of private or bilateral transactions and/or securitisations that are not rated externally. Accordingly, we advocate to limit the scope in article 2 (1) of the draft RTS. We are aware that this is in contrast to the formal wording of the CRA3 Regulation but it is in our view obvious that the regulation was not intended to cover, for example, bilateral and unrated hedgings of portfolio risks or bilateral credit facilities. Such transactions neither have a link to rating agencies nor are any third-party investors concerned which could seek additional rating opinions. All objectives mentioned in the recitals of the EU Regulation No 462/2013 (e.g. independence of ratings, avoiding conflicts of interest, increased rating competition, improvement of information provided for investors) do not apply in those kinds of transaction.

This also means that certain SFI categories (such as asset-backed commercial paper, ABCP) should not be a relevant category for the purposes of Article 8b in general. In particular, fully supported ABCP programmes in which the Sponsor covers the full credit risk of the commercial paper should not be regarded as a structured finance instrument but as a bank risk. Ratings of ABCP programmes are based solely on the rating of the sponsor bank. Rating agencies do not consider the underlying assets when assessing the credit quality of the commercial paper. Hence, fully supported commercial paper – such as

bonds linked to an index or benchmarks – should not be treated as structured finance instruments (substance over form).

2. The disclosure exemptions are too narrow

If ABCP programmes remain subject to the regulation, certain confidential information will need to be kept secret. This relates, for example, to procedures and principles of the credit and collection policy of the corporate sellers. Such corporates (as sellers into an ABCP programme) have to treat securitised assets in the same manner as their unsold receivables portfolio (as required under Article 408 of the CRR). Therefore, the process of managing the corporate's receivables is part of the deal-specific ABCP documentation. Clearly, any disclosure of internal and/or customer-related rules regarding the terms and conditions of the receivables management of such corporates would harm the competitiveness of the corporate and interfere with the confidential relationship existing between the corporate and its customer. We fear that although this information is undoubtedly included in the seller's business secrets, it may not be protected by national or union data protection acts which primarily protect personal data rather than corporate terms of trade.

Furthermore, the deal-specific documentation contains several conditions regarding the commercial terms of the ABCP transaction, including financial covenants and fees. While this information would fall under the Bank Secrecy Act if the counterpart were a banking institution, this is not actually the case because the counterparts (corporate and SPV) are not banks. However, disclosure of such documentation would indirectly breach banking secrets and make it impossible for banks to negotiate individual terms for their ABCP transactions.

Article 8b (2) of the CRA3 regulation should therefore be interpreted in such a way that any information that, if disclosed, would harm the business secrets between the corporate seller and its customers as well

as between the corporate seller and the sponsoring bank should also be protected.

3. ABCP programmes should generally be excluded from the requirement to disclose loan-level information

Most multi-seller ABCP programmes purchase receivables (mostly trade receivables, loans and leases) from corporate customers on almost a daily base. Likewise, receivables purchased may be collected and redeemed daily. Information on the single receivables of a multi-seller ABCP programme, especially when it is fully supported by the sponsor bank, would not be of relevance for the investor or a rating agency because they rely on full support by the sponsoring bank. Current reporting standards provide sufficient information on the portfolios for both investors and rating agencies. Taken account of the fact that larger ABCP programmes may contain between 800,000 and 1,000,000 single receivables at any given time, the collection and disclosure of such loan-level information would be extremely costly and burdensome without producing any benefit – quite apart from the fact that, at time of disclosure, the information may already be outdated.

We understand that by not referring to an Annex in Article 5 of the draft RTS, there is currently no necessity to disclose loan-level information for ABCP programmes, but that this may be changed in the future (see the last paragraph of Article 5). We therefore advocate generally exempting ABCP programmes from the requirement to disclose loan-level data.

4. The requirement to disclose deal-related documentation is not acceptable

We consider the disclosure of deal-specific documentation pursuant to Article 4 (b) ii. to vi. of the draft RTS to be extremely critical. This applies for all kinds of ABS and ABCP programs. In particular, the disclosure of the sale agreement and the servicing agreement means that economically relevant and confidential information about procedures and prices are to be disclosed, inter alia, for competitors.

Even in the USA only limited access is possible (Rule 17g-5 of the Exchange Act). The ESMA should at least reflect on similar rules. Eventually, the interests of investors are sufficiently preserved by the prospectus.

In terms of ABCP Programmes, for the reasons mentioned under point 2 above, the disclosure of deal-specific documentation for corporate sellers would immediately end the securitisation of real economy assets. As a result, corporates would be forced to borrow money from the banking or capital markets in their own name. This does not seem to be an appropriate and reasonable development since it:

- shifts corporate exposures from secured into unsecured;
- constrains the corporate sector to obtain funding;
- increases the counterparty risk to large corporates on the bank side;
- makes the banking sector more vulnerable to economic crises.

We therefore propose that only offering documents and investor reports which contain aggregate information should be disclosed (in accordance with Article 4 (b) i. and (d)). Any other information that could harm confidentiality issues between the originator or the sponsor and their contractual counterparties should not be disclosed.

Finally, we would like to draw your attention to the fact that there are no cash flow models for ABCP programmes. ABCP structure are usually very simple and have – apart from first loss protection by purchase price reduction or reserve account – no further tranching. Furthermore, if such programmes are fully supported, the liquidity bank covers the credit risk of the portfolio so that no cash flow analyses are conducted – by investors or by rating agencies. Article 4 (e) should therefore not apply to ABCP programmes.

» In conclusion, in particular, multi-seller ABCP programmes that securitise real economy assets (such as trade receivables, leases and loans from the corporate sector) should because of their specific nature and structure be exempted from certain obligations. This relates especially to confidentiality issues that are of extreme importance for corporate sellers and would – if not appropriately protected – immediately close the product down. This would not be in the interest of the regulator or of the investor or, indeed, of the financial markets in general.

TSI – What we do

Securitisation in Germany and TSI – the two belong together. True Sale International GmbH (TSI) was set up in 2004 as an initiative of the German securitisation industry with the aim of promoting the German securitisation market.

In the last nine years TSI has strongly supported the development of the German securitisation market. Its concern has always been to give banks an opportunity to securitise loans under German law on the basis of a standardised procedure agreed with all market participants. Another objective is to establish a brand for German securitisation transactions which sets a high standard in terms of transparency, investor information and market making. And finally the goal is to create a platform for the German securitisation industry and its concerns and to bridge the gap to politics and industry.

Nowadays TSI Partners come from all areas of the German securitisation market – banks, consulting firms and service providers, law firms, rating agencies and business associations. They all have substantial expertise and experience in connection with the securitisation market and share a common interest in developing this market further. TSI Partners derive particular benefit from TSI's lobbying work and its PR activities.

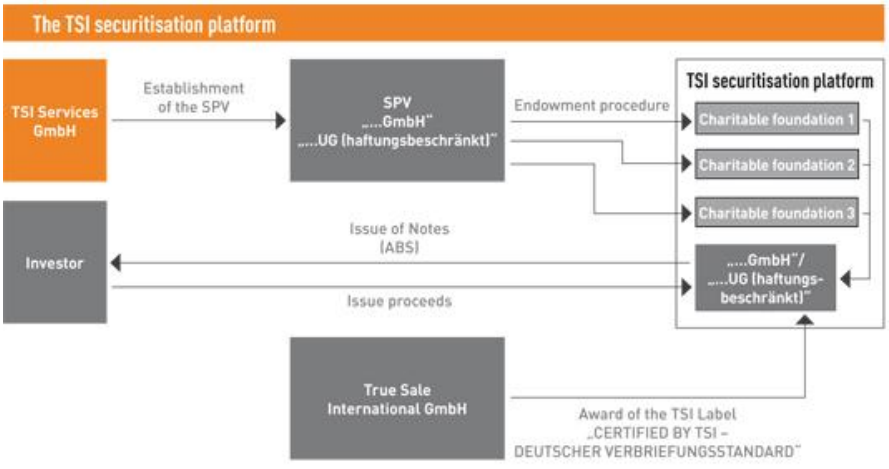
TSI securitisation platform

TSI has been providing special purpose vehicles (SPVs) under German law since 2005. In far more than 80 transactions (as of February 2013), German and other originators have already taken advantage of German SPVs as part of the securitisation process.

The TSI securitisation platform comprises three charitable foundations, which become shareholders in the SPVs set up by TSI. The charitable foundations provide support for academic work in the following fields:

- Capital market research for Germany as a financial centre
- Capital market law for Germany as a financial centre
- Corporate finance for Germany as a financial centre

The three charitable foundations are committed to promoting scholarship and science with a focus on capital market and corporate finance topics.



CERTIFIED BY TSI – DEUTSCHER VERBRIEFUNGSSTANDARD

The high quality of German securitisation transactions reflects the high quality of the standards applied to lending and loan processing.

The brand label DEUTSCHER VERBRIEFUNGSSTANDARD is founded on clearly defined rules for transparency, disclosure, lending and loan processing. Detailed guidelines and samples for investor reporting ensure high transparency for investors and the Originator guarantees, by means of a declaration of undertaking, the application of clear rules for lending and loan processing as well as for sales and back office incentive systems. The offering circular, the declaration of undertaking and all investor reports are publicly available on the TSI website, thus ensuring free access to relevant information.

Events and Congress of TSI

Events of TSI provide opportunities for specialists in the fields of economics and politics to discuss current topics relating to the credit and securitisation markets. The TSI Congress in Berlin is the annual meeting place for securitisation experts and specialists from the credit and loan portfolio management, risk management, law, trade and treasury departments at banks, experts from law firms, auditing companies, rating agencies, service providers, consulting companies and investors from Germany and other countries. Many representatives of German business and politics and academics working in this field take advantage of the TSI Congress to exchange professional views and experience. As a venue, Berlin is at the pulse of German politics and encourages an exchange between the financial market and the world of politics.