## Single Rulebook Q&A

Institutions, supervisors and other stakeholders can use the Single Rulebook Q&A tool for submitting questions on Directive 2013/36/EU (the Capital Requirements Directive or CRD), and Regulation (EU) No 575/2013 (the Capital Requirements Regulation or CRR), the related Technical Standards developed by the EBA and adopted by the European Commission (RTS and ITS), as well as the EBA guidelines. All questions and related EBA answers can be retrieved under the "Search for Q&A" tab.

Related documents: Additional background and guidance for asking questions [PDF, 118.88 KB]

The overall objective of the Q&A tool is to ensure consistent and effective application of the new regulatory framework across the Single Market, and hence contribute to the building of the Single Rulebook in banking.

The process entails close and ongoing interaction between the EBA and the European Commission to ensure that the responses to the questions submitted remain fully consistent with the European legislative texts.

Read more

### How to submit a question

Questions should be submitted using the form available under the "Submit a question" tab. Enquirers are requested to fill in all the relevant fields. Help on how to fill in the form is available by clicking on the icon next to each field and in the Additional background and guidance for asking questions document. It is recommended to carefully review the guidance before posting questions.

Once questions have been received, they will be reviewed by the EBA and categorised as follows:

- "Questions under review": the question is being processed. The EBA aims to respond within 2 months;
- "Rejected questions": the question does not relate to the implementation of the CRR/CRD or EBA Technical Standards/Guidelines or it has already been answered;
- "Final Q&A": the question has already been answered by the EBA.

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| **Question ID:** | 2013_528 |
| **Legal act :** | Regulation (EU) No 575/2013 (CRR) |
| **Topic :** | Securitisation and Covered Bonds |
| **Article:** | 4 |
| **Paragraph:** | 1 |
| **Subparagraph:** | point (61) |
| **Article/Paragraph :** | None |
| **EBA technical standards & guidelines:** | Not applicable |
| **Name of institution:** | Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) |
| **Country of incorporation / residence:** | Germany |
| **Subject matter :** | Relevance of Recital 50 with regard to the securitisation definition in accordance with Article 4(1) point (61) |
| **Question:** | The last sentence of Recital 50 of Regulation (EU) No 2013/575 declares: “An exposure that creates a direct payment obligation for a transaction or scheme used to finance or operate physical assets should not be considered an exposure to a securitisation, even if the transaction or scheme has payment obligations of different seniority.” Taking into account that the definition of a securitisation in Article 4(1) point (61) of Regulation (EU) 2013/575 does not permit an exemption for transactions or schemes used to finance or operate physical assets, which exposures are considered as creating a direct payment obligation in the meaning of the last sentence of Recital 50 of Regulation (EU) 2013/575? |
| **Background on the question:** | According to No. 10 of the Joint Practical Guide of the European Parliament, the Council, and the Commission it is the purpose of the recitals to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. In addition, recitals shall not contain normative provisions or political exhortations. Against this background and as Article 4(1) point (61) of Regulation (EU) No 2013/575 does not allow for an exclusion of transactions or schemes used to finance or operate physical assets from the securitisation definition, the last sentence of Recital 50 has to be regarded as a sole clarification for transactions or |

schemes for which the criteria for a securitisation are not met. According to letter (b) of Article 4(1) point (61) of Regulation (EU) No 2013/575, the subordination of tranches which determines the distribution of losses during the ongoing life of the transaction or scheme is a necessary and crucial condition for classifying a transaction or scheme as a securitisation. As the securitisation definition does not allow for any exemptions where transactions or schemes are meeting this criterion and the other criteria according to Article 4(1) point (61) of Regulation (EU) No 2013/575, the only legally permissible interpretation of the last sentence of Recital 50 of Regulation (EU) No 2013/575 is that only those exposures are considered as creating a direct payment obligation for which a different seniority of payment obligations belonging to the transaction or scheme does not result in a subordination of tranches that determines the distribution of losses during the ongoing life of the transaction. This is only the case if the seniority of the direct payment obligations determines the distribution of losses not earlier than when the transaction or scheme is terminated, i.e. either where none of the direct payment obligations prior to their maturity can be declared due during the ongoing life of the transaction or scheme or where the transaction or scheme is terminated ahead of schedule as soon as one of the direct payment obligations is not fulfilled when becoming due. Otherwise, an investor that does not receive a full payment on a direct payment obligation would be assigned losses without being able to terminate the transaction or scheme in order to file the obligor for bankruptcy for preventing a further increase of its loss. Beyond this compelling legal reason, a broader interpretation of “exposure that creates a direct payment obligation” would also raise concerns on insufficient capital requirements for the exposures additionally exempted from the securitisation definition. Recognising broadly all cases where the obligor is obliged to make the payment directly to one of the investors for a transaction or scheme, in contrast to indirect payment obligations to the investors referring to already existing exposures, would ignore that these direct payments are additionally ruled by the terms of the transaction or scheme. Unlike for a credit exposure where the payment obligation is independent from the timely payment of other parties’ credit exposures, the terms of a transaction or scheme agreed with other direct creditors can prevent a direct creditor from filing for bankruptcy of the obligor in case of a default event. This can result in significantly higher losses if the assets of the obligor could be further reduced, e.g. if the obligor sells some of its assets for still making payments to other creditors or for other purposes. Extending the interpretation of “exposure created by a direct payment obligation” to cases where the seniority of payment obligations results in a subordination of tranches that determines the distribution of losses during the ongoing life of the transaction would therefore not only be in breach with the definition of a securitisation in accordance with Article 4(1) point (61) CRR but also raise the following questions regarding its practical application: - How could an adequate regulatory treatment of first loss positions be ensured under the Standardised Approach (SA), when outside the securitisation framework the SA does not provide for a consideration of the subordination of tranches which determines the distribution of losses during the ongoing life of the transaction or scheme? - How would the effects of the distribution of losses determined by the subordination of tranches during the ongoing life of the transaction adequately be recognised under the IRB Approach outside the securitisation framework, given that the IRB minimum requirements require an institution to estimate PDs and LGDs separately and therefore do not allow to consider losses given default (LGDs) for subordinated tranches for estimating the probability of default (PD) of a more senior tranche? As a result, applying the methods for non-securitisation exposures to exposures for which the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme would lead to a systematic underestimation of the credit risk underlying subordinated exposures when determining minimum own funds requirements.

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| **Date of submission:** | 14/11/2013 |
| **Status:** | Question under review |
| **Permanent link:** | link |