

IMPORTANT NOTICE TO NOTEHOLDERS

EDML 2019-1 B.V.

(the **Issuer**)

Notice is hereby given with respect to the notes of the following classes:

- The EUR 315,000,000 Class A Notes due January 2058; common code 207679526 and ISIN XS2076795264.
- The EUR 8,750,000 Class B Notes due January 2058; common code 207679631 and ISIN XS2076796312.
- The EUR 7,000,000 Class C Notes due January 2058; common code 207679640 and ISIN XS2076796403.
- The EUR 7,000,000 Class D Notes due January 2058; common code 207679658 and ISIN XS2076796585.
- The EUR 4,375,000 Class E Notes due January 2058; common code 207679674 and ISIN XS2076796742.
- The EUR 7,875,000 Class F Notes due January 2058; common code 207679682 and ISIN XS2076796825.
- The EUR 40,000,000 Class RS Notes due January 2058; common code 207679704 and ISIN XS2076797047.

(collectively, the **Notes**)

Notice is hereby given by the Issuer to the holders of the Notes that as per 25 October 2022, Elan Woninghypotheek B.V. has taken over the role of Retention Holder and Reporting Entity. The modification is allowed under - and has been made to ensure continued compliance with - the EU Securitisation Regulation. The modification has been effectuated in reliance on clause 23.8 of the Trust Deed.

Amsterdam, 25 October 2022

EDML 2019-1 B.V

Represented by Intertrust Management B.V., Director

Basisweg 10, 1043 AP Amsterdam

The Netherlands

Allen & Overy LLP

MEMORANDUM

To

From Allen & Overy LLP

Our ref 0013427-0004452 EUO2: 2002655736.5

Date 25 October 2022

Subject **EDML 2019-1 / 2021-1 - risk retention**

1. INTRODUCTION

- 1.1 We have prepared a memorandum in which we discuss, among other things, why in our view Elan Woninghypotheeken B.V. (**Elan**) could validly retain the required interest under the risk retention requirements under Article 5(1)(c) of Regulation (EU) 2017/2402 (the **EU Securitisation Regulation**) (the **EU Risk Retention Requirements**) as the Original Lender (as defined below) and a Limb (a) Originator (as defined below) for the EDML 2021-1 securitisation transaction and the EDML 2019-1 securitisation transaction (the **Transactions**) (the **RR Memorandum**).
- 1.2 The implementation of the risk retention requirements set out in Article 6 of the EU Securitisation Regulation is subject to the development of the corresponding regulatory technical standards, as provided for in Article 6(7) (the **Recast Risk Retention RTS**). As at the date hereof, the Recast Risk Retention RTS have not been finalised. In this regard it should be noted that the European Banking Authority (**EBA**) published and submitted for endorsement by the European Commission its final report on the draft regulatory technical standards on 12 April 2022 (the **Draft Recast Risk Retention RTS**). Such draft will now be subject to scrutiny by the European Parliament and Council before the finalised text of the Draft Recast Risk Retention RTS can be published in the Official Journal and enter into force on the 20th day thereafter. Therefore, while it is likely that some changes will be made, we would not expect material changes to be made to the Draft Recast Risk Retention RTS before it is finalised and enters into force (the latter is expected at some point in Q3 2022). In the meantime, the application of the EU risk retention requirements is subject to the application of the transitional provisions under Article 43(7) of the EU Securitisation Regulation, whereby the risk retention technical standards that applied pre-1 January 2019, namely Chapters I, II and III and Article 22 of Commission Delegated Regulation (EU) 625/2014 (the **CRR Risk Retention RTS**) continue to apply. The risk retention requirements set out in Article 6 of the EU Securitisation Regulation together with the provisions of the CRR Risk Retention RTS are together referred to in this RR Memorandum as the **EU Risk Retention Requirements**.

- 1.3 In section 3 hereof an extract of this RR Memorandum is provided confirming that in our view Elan is an Original Lender (as defined below) and should be regarded as a Limb (a) Originator (as defined below) pursuant to the Primary Market Requirement (as defined below) for the purposes of Article 6 of the EU Securitisation Regulation. (the **Extract**).
- 1.4 This Extract is provided to you on a non-reliance basis and for the purposes of information only on the strict understanding that we assume no duty or liability whatsoever to as a result or otherwise and may not be passed on to any other person for any purpose.

2. ELAN WONINGHYPOTHEKEN

- 2.1 Elan was established on 23 January 2015 and commenced origination of Dutch residential mortgage loans on or about 12 June 2015. Elan, by having appointed the Elan Servicer (as defined below) as its agent is able to benefit from the Elan Servicer's umbrella licence within the meaning of Article 2:105 of the Dutch financial supervision act (**Wft**). Elan is an "admitted institution" of Quion Groep B.V. (**Quion**) in accordance with Article 2:105 Wft and Article 4:5 Wft, so it is permitted to act as an offeror (*aanbieder*) of mortgage loans for the purposes of Article 2:60 Wft. Elan's business is to originate mortgage loans. Elan has entered into a secured Euro revolving credit facility with Goldman Sachs International Bank (**GSIB**) to finance its mortgage business activities (the **Elan Credit Facility**). Originally the Elan Credit Facility was entered into by Elan with Goldman Sachs Lending Partners LLC (**GSLP**), however GSLP novated its position under the Elan Credit Facility to GSIB as of 1 June 2019. The origination of mortgage loans to consumers is in principle financed by Elan by means of drawings under the Elan Credit Facility. Once the volume of Elan's portfolio of mortgage loans was large enough, it started to fund itself through the securitisation of a large part, but not all of the mortgage loans originated by it. In respect of the securitisations undertaken by it, Elan was advised by arrangers. Elan is the lender of record to all of the mortgage loans included in the portfolios of the EDML 2019-1 securitisation transaction and the EDML 2021-1 securitisation transaction. The proceeds of the securitisations are used by Elan to repay (part of) the outstanding amount under the Elan Credit Facility.
- 2.2 As a result of the Elan Credit Facility provided by GSIB, which is an important source of income for Elan and enables it to originate mortgage loans, Elan is consolidated for accounting purposes within GSIB's accounts. However, we do not consider that this detracts from Elan's eligibility to act as risk retainer in its own right as original lender or originator.
- 2.3 Elan has an independent management board, consisting of Maples Fiduciary Services (Netherlands) B.V. (the **Elan Management Board**). Elan has legal and financial advisors in respect of (any changes to) its mortgage business and the financing arrangements it has entered into. Elan, after having considered its mortgage business, resolved to establish and to implement its strategy and mortgage business and delegated the marketing, distribution, origination, servicing and special servicing of the mortgage loans entered into by it, to experienced third parties to act in accordance with its business strategy, such as in particular Quion and its affiliates Quion Services B.V. (**Quion Services**) and Dutch Mortgage Portfolio Management B.V. (**DMPM**). Quion is currently the highest rated servicer in the European market. In 2020, Fitch upgraded both Quion's Dutch Residential Primary and Special Servicer ratings to "RPS1-" and "RSS1-", respectively and affirmed these ratings in 2021. DMPM has a licence to act as a credit intermediary pursuant to Article 2:80 Wft. Each of Quion and DMPM is regulated by the Dutch Authority for the Financial Markets (**AFM**) and have the relevant experience to support Elan's mortgage business.
- 2.4 Ultimately, Elan has considered the envisaged operation of its mortgage business when the Elan platform was established, is responsible for the delegation to third parties, is the lender of record

of the mortgage loans concluded by it with consumers and the Elan Management Board resolves decisions in respect of its funding arrangements.

3. EXECUTIVE SUMMARY OF THE RR MEMORANDUM

- 3.1 Article 6(1) of the EU Securitisation Regulation, requires the ‘originator’, ‘sponsor’ or ‘original lender’ of a securitisation as a direct obligation to retain on an on-going basis a material net economic interest in the securitisation of not less than 5 per cent., with such retention being only through one of the methods set out in Article 6(3). Elan will not be a sponsor meaning that it is necessary to consider if Elan can satisfy the applicable definition of “originator” or “original lender” within the meaning of the EU Securitisation Regulation.
- 3.2 The EU Securitisation Regulation definition of an “originator” (as set out in Article 2(3)) is an entity which either:
- (a) itself or through related entities, directly or indirectly, was involved in the original agreement which created the obligations or potential obligations of the debtor or potential debtor giving rise to the exposures being securitised (such an originator being a **Limb (a) Originator** pursuant to the **Primary Market Requirement**); or
 - (b) purchases third party exposures on its own account and then securitises them (such an originator being a **Limb (b) Originator** pursuant to the **Secondary Market Requirement**).
- 3.3 The EU Securitisation Regulation definition of an “original lender” (set out in Article 2(20)) is an entity which, itself or through related entities, directly or indirectly, **concluded** the original agreement which created the obligations or potential obligations of the debtor or potential debtor giving rise to the exposures being securitised (an **Original Lender**).
- 3.4 The definition of Original Lender is very similar to the definition of a Limb (a) Originator. The difference is the requirement for the Original Lender to have “concluded” the original agreement giving rise to the securitised exposures, rather than – merely - being “involved” in such original agreement as set out in the definition of a Limb (a) Originator.
- 3.5 In assessing whether an entity satisfies the definition set out above, we consider that it is necessary to take into account the technical position under the respective definitions and also the policy or spirit of appropriate interest alignment, which underlies the EU Risk Retention Requirements.
- 3.6 Elan qualifies both as a Limb (a) Originator and Original Lender as it concluded – as lender of record - the original agreement which created the obligations of the debtor being securitised and was thereby directly involved in such original agreement.
- 3.7 For the purpose of Article 6 of the EU Securitisation Regulation, for Elan to qualify as an ‘originator’ it must meet the ‘sole purpose’ test. We note, however, that it is unclear whether such test also needs to be satisfied by an entity acting as retainer by virtue of being a ‘original lender’ because article 6 only refers to an ‘originator’. The EU Securitisation Regulation and the Draft Recast Risk Retention RTS do not expressly refer to original lenders in this context. There is no conclusive guidance on this point. Taking a conservative interpretation, for the purpose of the RR Memorandum we applied the test to Elan nevertheless.
- 3.8 The EU Securitisation Regulation provides (in Article 6(1)) that an entity shall not be considered to be an ‘originator’ for retention purposes if it has been "established or operates for the sole purpose of securitising exposures". This requirement is often referred to as the “**sole purpose**”

test” and indicates that a broader business purpose is required in order for the entity to be an eligible retainer.

- 3.9 The Draft Recast Risk Retention RTS provides additional guidance as to the interpretation of the sole purpose test, although (as noted above) the Draft Recast Risk Retention RTS have not yet been finalised. Article 2(7) of the Draft Recast Risk Retention RTS states that appropriate consideration should be given to each of the following non-exhaustive principles (the satisfaction of which would support the conclusion that an ‘originator’ has not been established and does not operate for the sole purpose of securitising exposures) (the **Draft Recast Risk Retention RTS Requirements**):

For the purposes of assessing whether an entity has been established or operates for the sole purpose of securitising exposures as referred to in the first subparagraph of Article 6(1) of Regulation (EU) 2017/2402, the following shall be taken into account:

- (i) *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, by virtue of which the entity does not rely on the exposures to be securitised, on any interests retained or proposed to be retained in accordance with this Regulation or on any corresponding income from such exposures and interests as its sole or predominant source of revenue [(Draft Recast Risk Retention RTS Requirement 1)];[and]*
- (ii) *the responsible decision makers have the necessary experience to enable the entity to pursue the established business strategy, as well as adequate corporate governance arrangements [(Draft Recast Risk Retention RTS Requirement 2 and together with Draft Recast Risk Retention RTS Requirement 1, the (Draft Recast Risk Retention RTS Requirements)].*

- 3.10 In light of the fact that the Draft Recast Risk Retention RTS are not yet finalised, in interpreting the requirements of the “sole purpose test” set out in Article 6(1), the RR Memorandum also takes into account the findings of the report published by the EBA on 22 December 2014 (the **EBA Report**) setting out its advice to the European Commission on the functioning of the pre-1 January 2019 retention requirements under the CRR regime. The EBA Report made a number of observations about the requirements and current market practices under them and also made certain recommendations for changes with respect to such requirements and practices.

Draft Recast Risk Retention RTS Requirement 1

- 3.11 Elan’s business involves the origination and provision of residential mortgage loans to individuals located in the Netherlands and all activities conducive thereto. Elan has been in existence since 2015 and is active in the Dutch residential mortgage market, lending to the public in the Netherlands.

The objects of Elan are, among other things, (a) to advance mortgage loans to natural persons for the purpose of financing the purchase and/or ownership of residential properties situated in the Netherlands, (b) to hedge interest rates and other financial risks arising out of its business by entering into derivative transactions (including, swap agreements), and (c) to perform all activities which are incidental to or which may be conducive to any of the foregoing. Elan has more than seven years of experience in the origination and provision of residential mortgage loans to individuals located in the Netherlands. As set out above, Elan is an “admitted institution” of Quon in accordance with Article 2:105 Wft and Article 4:5 Wft, so it is permitted to act as an offeror (*aanbieder*) of mortgage loans for the purposes of Article 2:60 Wft.

We understand that as part of its strategy Elan has appointed Quion Services (the **Elan Servicer**) on an arms-length basis to originate, administer and service the residential mortgage loans on its behalf in accordance with Elan's underwriting criteria and that this delegation has been laid out in a contractual framework entered into at the time of establishment of the Elan platform, which framework also includes that the Elan Servicer is liable to Elan for any breach of Elan's underwriting criteria or any representation or warranty in respect of any mortgage receivable originated by Elan, subject to certain limitations. In addition, Elan has separately appointed DMPM (the **Elan Portfolio Manager**) to perform a number of ongoing supervisory services on its behalf, such as claim recording, acting as a point of escalation for any deviation from interest rate policy or standard underwriting criteria and certain enforcement decisions.

We understand that Elan holds a substantial cash reserve account to ensure continuity of funding of newly originated mortgage loans and further advances, at all times holds a substantial portfolio of mortgage receivables for its own account (i.e. at the date of the RR Memorandum such portfolio amounted to almost EUR 80 million) and it does not securitise any assets more than 30 days past due or where assets are bridge loans. Bridge loans are held by Elan on its balance sheet until maturity / redemption of the bridge loans.

We understand that Elan does not have significant share capital, but has secured funding lines that preclude the need for significant share equity. Elan has enough resources (other than securitisation) to meet the payment obligations under its contractual arrangements and to enable it to continue its mortgage business and accordingly does not solely or predominantly rely on the securitisation of the exposures under the mortgage loans to meet its payment obligations.

We have considered the fact that Elan is currently heavily dependent on Goldman Sachs entities for its credit lines. The tie up with a particular source of capital is not in our view determinative to the question of whether the sole purpose test is met and in any event we note that it is the combination of securitisations and funding lines that Elan relies upon to support its business objectives. We do not consider that the funding arrangements between Elan and GSIB detract from Elan's eligibility to act as risk retainer in its own right as original lender or originator. In addition, thereto, we understand that ongoing discussions take place (with the support of Goldman Sachs) as to whether and how additional funders could become part of the Elan platform, so attracting funding from multiple parties is a viable option open to Elan.

Whilst ultimately a question of fact, we consider that this is consistent with a broader business model and satisfies Draft Recast Risk Retention RTS Requirement 1.

Draft Recast Risk Retention RTS Requirement 2

- 3.12 We understand that the Elan Management Board has the necessary experience to enable it to pursue Elan's business strategy. The corporate governance arrangements are adequate in that they comply with the applicable regulatory licence requirements.

We understand that, at the inception of the mortgage platform, Elan and its legal advisors reviewed and, where in their view required, commented on all documentation, including underwriting criteria, loan conditions, product specifications and related program contracts. The set-up of the mortgage platform is such that Elan has delegated a large number of the day to day operational and supervisory activities to experienced service providers pursuant to contractual agreements entered into by Elan with such parties at the outset of the Elan platform.

The Elan Servicer has been appointed by Elan to originate, administer and service residential mortgage loans on Elan's behalf in accordance with the underwriting criteria set by Elan in consultation with the Elan Servicer and approved by the Elan Portfolio Manager and the Elan Management Board in compliance with all applicable laws and regulations in the Netherlands.

The specific duties of the Elan Servicer include, among other things, the origination of mortgage loans on behalf of Elan in accordance with Elan's underwriting criteria, the collection of payments of principal, interest and other amounts in respect of the mortgage loans and the implementation of arrears procedures (including, the enforcement of mortgages). It is also responsible for checking that the interest rates in respect of the mortgage loans set or reset by the Elan Portfolio Manager (see below) comply with the requirements of Elan's interest rate policy (including, compliance with applicable law and regulations). The Elan Servicer has wide expertise in servicing exposures of Elan and other mortgage originators of a similar nature to those securitised as part of the Transactions and has well documented and adequate policies, procedures and risk management controls relating to the servicing of such exposures.

Elan has also appointed the Elan Portfolio Manager to perform a number of ongoing day to day services on its behalf. The services provided by the Elan Portfolio Manager include setting and resetting interest rates in respect of mortgage loans on behalf of Elan in accordance with Elan's interest rate policy.

In addition, the Elan Portfolio Manager reviews and approves certain amendments to Elan's underwriting criteria, interest rate policy or mortgage documentation as proposed by the Elan Servicer from time to time, for example in order to implement changes in applicable laws. The Elan Portfolio Manager also reviewed and approved the underwriting criteria, interest rate policy and mortgage documentation proposed by the Elan Servicer on establishment of the Elan platform, which were then approved by the Elan Management Board. The Elan Portfolio Manager's other duties include reviewing mortgage applications forwarded to it where it is not clear if the mortgage application should be approved or rejected by the Elan Servicer in accordance with the underwriting criteria, instructing Elan or the Elan Servicer on behalf of Elan regarding any decision on borrower special servicing situations presented to it and upon request reviewing certain other matters relating to the origination and servicing of mortgage loans.

Under the agreement entered into between Elan and the Elan Portfolio Manager Elan is entitled to receive daily, monthly and quarterly reports from the Elan Portfolio Manager. The daily reports include an overview of offer letters and originated loans for each separate day including key characteristics such as fixed rate period, risk buckets and amortization types including a glossary. The monthly reports set out key portfolio characteristics (including, composition of portfolio, LTV's, DTI's, CPR, seasoning, portfolio return, stratification of origination quarter, fixed rate periods, interest rates, remaining term to maturity and redemption type, including a glossary). The quarterly reports provide market commentary on market and pricing dynamics, product characteristics and competition.

We understand that, on a quarterly basis, the Elan Portfolio Manager discusses the aforementioned quarterly reports and proposed substantive changes with the Elan Management Board whereby the Elan Management Board has the right to object to such changes. Furthermore, we understand that Elan makes decisions on matters which fall outside the express delegation referenced above, such as the launch of a new mortgage product. For example, when Elan launched the 'Elan Plus Hypotheek' brand in 2017, the Elan Management Board and the legal advisors of Elan independently reviewed all related loan conditions and other related documents prior to signing off on them.

From the above it can be concluded that Elan has established a tailored operational and legal and governance framework in accordance with Dutch law for the purpose of executing its business strategy whereby it leverages the specific expertise and market knowledge of the Elan Servicer and the Elan Portfolio Manager. The contractual framework provides for a clear assignment of tasks, whereby day-to-day decisions are being made on behalf of Elan by the best placed contracting party of Elan and in accordance with a pre-approved framework and documentation

and whereby Elan, through regular meetings, maintains oversight, remains involved and takes decisions and approvals on matters outside the terms of the express contractual delegation.

The Elan Management Board thereby continues to act as the body that maintains general oversight and control of the business to ensure that it is being run in accordance with the business strategy and the contractual framework.

- 3.13 We understand that, although it receives advice from duly-experienced third parties and the Elan platform by its nature contemplates and requires the involvement of multiple third parties, the Elan Management Board forms its own independent opinions about the business activities of Elan.

In conclusion, on the basis of the information above, we consider that the manner in which Elan operates its business and pursues its strategy satisfy Draft Recast Risk Retention RTS Requirement 2.

- 3.14 Based on the above, we consider that Elan is an Original Lender and should be regarded as a Limb (a) Originator pursuant to the Primary Market Requirement for the purposes of Article 6 of the EU Securitisation Regulation.

- 3.15 With respect to compliance with the risk retention requirements under Article 6 of the UK Securitisation Regulation (the **UK Risk Retention Requirements**), we note that the UK Securitisation Regulation largely mirrors (but with some adjustments and subject to the application of the transitional relief in certain areas) the EU Securitisation Regulation, including in the area of risk retention. We are of the view that the analysis in this Extract relating to the application of the EU Risk Retention Requirements to the Transaction would on the date hereof, apply mutatis mutandis, to application of the UK Risk Retention Requirements, however future divergence between the EU and UK risk retention regimes cannot be ruled out.

Allen & Overy LLP

MEMORANDUM

To

From Allen & Overy LLP

Our ref 0013427-0004452 EUO2: 2002655334.6

Date 25 October 2022

Subject **Changing risk retainer**

1. INTRODUCTION

- 1.1 We have prepared a memorandum in which we discuss why in our view an envisaged change in retention holder from Goldman Sachs Bank Europe SE (**GSBE**) to Elan Woninghypotheken B.V. (**Elan**) for the EDML 2021-1 securitisation transaction and the EDML 2019-1 securitisation transaction (the **Transactions**) is allowed under the EU Risk Retention Requirements (as defined below) in the current circumstances (summarized below) (the **Memorandum**).
- 1.2 The implementation of the risk retention requirements set out in Article 6 of Regulation (EU) 2017/2402 (the **EU Securitisation Regulation**) is subject to the development of the corresponding regulatory technical standards, as provided for in Article 6(7) (the Recast Risk Retention RTS). As at the date hereof, the Recast Risk Retention RTS have not been finalised. In this regard it should be noted that the European Banking Authority (**EBA**) published and submitted for endorsement by the European Commission its final report on the draft regulatory technical standards on 12 April 2022 (the **Draft Recast Risk Retention RTS 2022**). Such draft will now be subject to scrutiny by the European Parliament and Council before the finalised text of the Draft Recast Risk Retention RTS 2022 can be published in the Official Journal and enter into force on the 20th day thereafter. Therefore, while it is a distinct possibility that some changes will be made, we would not expect material changes to be made to the Draft Recast Risk Retention RTS 2022 before it is finalised and enters into force (the latter is expected at some point in Q3 2022). In the meantime, the application of the EU risk retention requirements is subject to the application of the transitional provisions under Article 43(7) of the EU Securitisation Regulation, whereby the risk retention technical standards that applied pre-1 January 2019, namely Chapters I, II and III and Article 22 of Commission Delegated Regulation (EU) 625/2014 (the **CRR Risk Retention RTS**) continue to apply. The risk retention requirements set out in Article 6 of the EU Securitisation Regulation together with the provisions of the CRR Risk Retention RTS are together referred to in this Memorandum as the **EU Risk Retention Requirements**.

- 1.3 In section 3 hereof an extract of this Memorandum is provided confirming that in our view the change of identity of the retention holder is allowed under the EU Risk Retention Requirements in the current circumstances (the **Extract**).
- 1.4 This Extract is provided to you on a non-reliance basis and for the purposes of information only on the strict understanding that we assume no duty or liability whatsoever to as a result or otherwise and may not be passed on to any other person for any purpose.

2. BACKGROUND

- 2.1 In a securitisation transaction, multiple parties are potentially eligible to act as the retention holder.
- 2.2 It has come to GSBE's attention that the European Central Bank (**ECB**) questions the eligibility of GSBE as a 'limb (a) originator' within the meaning of article 6 of the EU Securitisation Regulation. After assessing the situation and having discussed it with the relevant stakeholders in the Transactions it has been agreed to implement a change in retention holder from GSBE to Elan for both Transactions to address these concerns.

3. EXECUTIVE SUMMARY OF THE MEMORANDUM

- 3.1 The EU Securitisation Regulation does not include an explicit reference to the possibility of a change of the retainer and does not go beyond an implicit contemplation that there will be retention on an ongoing basis by a retainer throughout the term of a securitisation. It should also be noted that the CRR as its predecessor contained similar level 1 text and the CRR Risk Retention RTS did not elaborate further on the possibility of a change of retainer. However, in order to greater specify the risk retention requirement applicable under the EU Securitisation Regulation, regulatory technical standards are being developed by the EBA in accordance with Article 6(7) of the EU Securitisation Regulation with regard to, among other things, the prohibition of hedging or selling the retained interest.
- 3.2 In the drafts of the regulatory technical standards developed by the EBA in order to further specify the risk retention requirements under the EU Securitisation Regulation, the EBA has consistently and explicitly considered requirements regarding the possibility of a change in risk retainer in specific circumstances which circumstances include, as further elaborated below, 'legal reasons beyond the current retainer's control'. In doing so it is apparent the EBA interprets and considers that the level 1 text of the EU Securitisation Regulation is permissive of a change of risk retainer in such circumstances.

Draft Recast Risk Retention RTS July 2018

- 3.3 The EBA published and submitted to the European Commission its final advice on the draft regulatory technical standards on 31 July 2018 (the **Draft Recast Risk Retention RTS July 2018**).
- 3.4 The Draft Recast Risk Retention RTS July 2018 states in Recital 13 that "*Where insolvency proceedings have been commenced in respect of the retainer or the retainer is, due to the transfer of a direct or indirect holding in the retainer or for legal reasons beyond its control and beyond the control of its shareholders, unable to continue acting as retainer, it should be possible for the remaining retained material net economic interest, instead, to be retained by another entity which should comply with all requirements of Article 6 of Regulation (EU) 2017/2402 and this Regulation as at the date when such entity becomes the retainer provided the intention of the change of retainer is to continue to ensure the quality of the securitisation transaction and its attractiveness to investors.*"

Note that the consultation version dated 15 December 2017 of the Draft Recast Risk Retention RTS July 2018 (the **Consultation Paper of Draft Recast Risk Retention RTS July 2018**) even included a mandatory requirement to change risk retainer (as opposed to the possibility) in Article 17 “*where the retainer is, due to the transfer of a direct or indirect holding in the retainer or for legal reasons beyond its control and beyond the control of its shareholders, unable to continue acting as retainer*”.

However, due to responses received in the consultation phase with respect to the mandatory nature of Article 17 of the Consultation Paper of Draft Recast Risk Retention RTS July 2018 and to the interaction between (i) the mandatory application of Article 17 of the Consultation Paper of Draft Recast Risk Retention RTS July 2018 with (ii) the prohibition on selling the material net economic interest set out in Article 12 of the Consultation Paper of Draft Recast Risk Retention RTS July 2018 and with the retention requirements set out in Article 6 of the EU Securitisation Regulation, the EBA replaced Article 17 of the Consultation Paper of Draft Recast Risk Retention RTS July 2018 with Recital 13 in the Draft Recast Risk Retention RTS July 2018 as referenced above.

- 3.5 The proposed Article 17 of the Consultation Paper of Draft Recast Risk Retention RTS July 2018 (as well as the final Recital 13 in the Draft Recast Risk Retention RTS July 2018) does nevertheless demonstrate that from the outset of the new securitisation rules the EBA had determined that notwithstanding the lack of a direct reference to such possibility in the EU Securitisation Regulation itself a change in risk retainer would be at least permissible in exceptional circumstances.
- 3.6 Furthermore, in our view any legislation should not be construed or interpreted in such a manner that this would preclude a market participant from continuing to comply with (or from remedying non-compliance with) such legislation even if the change is made in circumstances not explicitly mentioned or contemplated by such legislation.

Draft Recast Risk Retention RTS 2022

- 3.7 The above analysis of the EU Securitisation Regulation is affirmed in the Draft Recast Risk Retention RTS 2022 which currently include in Article 12(3) a list of circumstances in which a change of retainer may occur. This list includes (in (b)) the situation “when the retainer is, for legal reasons beyond its control and beyond the control of its shareholders, unable to continue acting in that capacity”. No changes to article 12(3) are expected. The phrase ‘legal reasons beyond control’ are not clarified. In the absence of such clarification, a common sense interpretation of ‘legal reasons’ would in our view include an instruction (whether formal or informal) by a supervisory authority.
- 3.8 In the situation at hand, a competent authority has raised concerns about GSBE continuing to act as retention holder for the Transactions. A change of the retention holder in this context can therefore be regarded as driven by “a legal reason beyond GSBE’s control and beyond the control of its shareholders, which renders GSBE unable to continue acting in the capacity of a risk retention holder. The ‘legal reason beyond control’ is not to be confused with the term ‘legal necessity’ (e.g. a court order is not required for there to be a legal reason beyond control).
- 3.9 As noted above, we consider the fact that in each draft of the Recast Risk Retention RTS reference is being made to the possibility of a change in risk retainer to be a strong indicator that such change is not incompatible with the EU Securitisation Regulation as well as being indicative of the view of the EBA on the level 1 text.

- 3.10 Given that the change would in our view be implemented due to reasons which qualify as ‘legal reasons beyond the control of GSBE’ within the meaning of article 12(3) of the Draft Recast Risk Retention RTS 2022 the change is therefore in our view permissible.

CRR Risk Retention RTS

- 3.11 Finally, as technically pursuant to Article 43(7) of the EU Securitisation Regulation, the CRR Risk Retention RTS is still in effect until replaced by the Draft Recast Risk Retention RTS 2022, we note that the CRR Risk Retention RTS does not itself rule out the possibility of changing the retainer in extraordinary circumstances. This is partly because the language around risk retention in the CRR is substantially similar to that adopted in the EU Securitisation Regulation in this respect and partly because there is textual support in the CRR Risk Retention RTS for the position.
- 3.12 In that context, while addressing a different issue regarding the modality of risk retention, the fact that retention structures may be amended for extraordinary reasons is also demonstrated by Article 10(41)(d) of the CRR Risk Retention RTS, which states that the same retention option and methodology shall be used to calculate the net economic interest during the life of a securitisation transaction, unless exceptional circumstances require a change and that change is not used as a means to reduce the amount of retained interest. Whilst in this case we are not amending the modality of risk retention, we do consider this to be a further indicator that the CRR Risk Retention RTS demonstrates no policy reason why a change in retainer is not possible in exceptional circumstances as long as the purpose of the retention requirement is not undermined.
- 3.13 Based on the above, we are of the view that the suggested change of retainer is permissible under the EU Risk Retention Requirements as (i) this is a change that is driven by questions raised by the ECB about the eligibility of GSBE as retention holder for the Transactions, (ii) this would not result in an undermining of the purpose of the EU Risk Retention Requirement, is consistent with the Draft Recast Risk Retention RTS 2022 (and the Draft Recast Risk Retention RTS July 2018) and is not incompatible with the EU Securitisation Regulation itself (including its interpretation by the EBA through regulatory technical standards as mandated by Article 6(7) of the EU Securitisation Regulation) and (iii) Elan is in our view an eligible risk retainer and therefore alignment of interests is adequately maintained.
- 3.14 With respect to compliance with the risk retention requirements under Article 6 of the UK Securitisation Regulation (the **UK Risk Retention Requirements**), we note that the UK Securitisation Regulation largely mirrors (but with some adjustments and subject to the application of the transitional relief in certain areas) the EU Securitisation Regulation, including in the area of risk retention. As such and noting there is less guidance with respect to the UK Risk Retention Requirements we are of the view that the analysis in this Extract relating to the permissibility of the change of retainer under the EU Risk Retention Requirements applies mutatis mutandis, to application of the UK Risk Retention Requirements, however future divergence between the EU and UK risk retention regimes cannot be ruled out.
