



JC 2018 15

04 May 2018

Consultation Paper

Draft Regulatory Technical Standards

Amending Delegated Regulation (EU) 2016/2251 on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) of Regulation (EU) No 648/2012 in the context of the STS securitisations under Regulation (EU) 2017/2402.



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Responding to this consultation

The ESAs invites comments on all proposals put forward in this paper and in particular on the specific questions summarised at the end of this paper.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

Please note that the length of the consultation period has been set to 6 weeks as the scope of this consultation paper is relatively limited. To submit your comments, click on the 'send your comments' button on the consultation page by 15 June 2018. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.



Executive Summary

The ESAs (EBA, ESMA and EIOPA) published on 8 March 2016 the draft regulatory technical standards (RTS) on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP, as required under Article 11(15) of Regulation (EU) No 648/2012 (EMIR) in the form submitted to the European Commission. These were ultimately published in the Official Journal on 15 December 2016 in the form of Delegated Regulation (EU) 2016/2251.

In light of the recent publication of Regulation 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisations (the Securitisation Regulation), the ESAs have been mandated to amend the existing RTS. The Securitisation Regulation amends Regulation (EU) No 648/2012 (EMIR) to ensure consistency of treatment between derivatives associated with covered bonds and derivatives associated with securitisations, with regard to the clearing obligation and the margin requirements on non-centrally cleared OTC derivatives.

In this regard, Article 42 of the Securitisation Regulation amends article 4 EMIR by adding an additional paragraph (5) which excludes both STS securitisations and covered bonds from the clearing obligation, subject to specific requirements. In the same way, Article 42 also amends the mandate of Article 11(15) EMIR, therefore ESAs have to determine the level and type of collateral required with respect to OTC derivative contracts that are concluded by covered bond entities in connection with a covered bond, or by a SSPE in connection with a STS securitisation, taking into account any impediments faced in exchanging collateral with respect to existing collateral arrangements under the covered bond or securitisation.

The amendments to Delegated Regulation (EU) 2016/2251 introduced with this consultation paper aim at fulfilling the amended mandate of Article 11(15) EMIR, by extending the type of exemption currently associated with covered bonds, i.e. no exchange of Initial Margins and collection only of Variation Margins, to STS securitisations, under a set of conditions which are similar to the conditions required for covered bonds (i.e. that the OTC derivatives are used only for hedging purposes, and there are arrangements which adequately mitigate counterparty credit risk with respect to the OTC derivative contract).

Next steps

The draft RTS will be submitted to the Commission for endorsement by 18 July 2018, following which they will be subject to scrutiny by the European Parliament and the Council, before being published in the Official Journal of the European Union.



Background and rationale

1. The ESAs (EBA, ESMA and EIOPA) published on 8 March 2015¹ the draft regulatory technical standards (RTS) on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP, as required under Article 11(15) of Regulation (EU) No 648/2012 (EMIR). The Commission adopted the Delegated Regulation on 4 October 2016². After the non-objection from the European Parliament and Council, the Delegated Regulation (EU/2016/2251) was published in the Official Journal on 15 December 2016 and entered into force on 4 January 2017³, with its implementation being gradually phased in since.

2. In 2015 the Commission proposed two legislative packages to strengthen the securitisation market. Those proposals have been adopted and published in the official journal the 28 December 2017, as Regulation (EU) 2017/2401 amending the Capital Requirements Regulation and Regulation (EU) 2017/2402 (Securitisation Regulation). The Regulation mandates in Article 42 of the Securitisation Regulation the ESAs to consider a specific requirement for securitisations by amending the original RTS mandate given to the ESA in Article 11(15) of EMIR.

3. Also, on 4 May 2017 the European Commission published a proposal⁴ for a Regulation of the European Parliament and of the Council amending EMIR as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

4. The following sections describe the main changes for what concern the OTC derivatives contracts associated to Securitisation, for hedging purposes, introduced by the Securitisation Regulation and the EMIR Review. In the conclusions section, it is described how the ESAs intend to amend the framework of the Delegated Regulation (EU/2016/2251) in order to implement those changes.

New mandates for OTC derivatives in Securitisation Regulation

5. As part of the capital markets union action plan, in 2015 the Commission proposed two legislative packages to strengthen the securitisation market. These are: i) an amendment to the regulation on capital requirements to make the capital treatment of securitisations for banks and

¹ <https://www.eba.europa.eu/documents/10180/1398349/RTS+on+Risk+Mitigation+Techniques+for+OTC+contracts+%28JC-2016-+18%29.pdf/fb0b3387-3366-4c56-9e25-74b2a4997e1d>

² http://ec.europa.eu/finance/financial-markets/derivatives/index_en.htm

³ OJ L 340, 15.12.2016 <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1491392183514&uri=CELEX:32016R2251>

⁴ The proposal and accompanying Impact Assessment and Communication can be found in here: https://ec.europa.eu/info/law/derivatives-emir-regulation-eu-no-648-2012/upcoming_en



investment firms more risk-sensitive and able to reflect the specific features of STS securitisations properly; and ii) a regulation on securitisation applying to all securitisation products, specifying due diligence, risk retention and transparency rules and a clear set of criteria to identify simple, transparent and standardised (STS) securitisations.

6. The CRR amendment also introduces the revision of the Basel securitisation framework, including a new hierarchy of approaches to compute capital requirements on securitisation exposures, which was agreed at the Basel level back in 2016.

7. The two packages have been adopted and published in the Official Journal 28 December 2017 as:

- a. Regulation (EU) 2017/2401 amending the Capital Requirements Regulation on prudential requirements for credit institutions and investment firms to make the capital treatment of securitisations more risk-sensitive and able to reflect properly the specific features of simple, transparent and standardised (STS) securitisations;
- b. Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for STS securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (Securitisation Regulation).

8. In recital 41 of the Securitisation Regulation, it is noted: “There is a degree of substitutability between covered bonds and securitisations. Therefore, in order to prevent the possibility of distortion or arbitrage between the use of securitisations and covered bonds because of the different treatment of OTC derivative contracts entered into by covered bond entities or by SSPEs, Regulation (EU) No 648/2012 should be amended to ensure consistency of treatment between derivatives associated with covered bonds and derivatives associated with securitisations, with regard to the clearing obligation and the margin requirements on non-centrally cleared OTC derivatives”.

9. The intention in the above recital is then made explicit in Article 42 of the Securitisation Regulation, where there are two significant amendments to Regulation (EU) 648/2012 (EMIR), which also includes two mandates, one on clearing obligation and one on OTC-derivative contracts not cleared, to be carried out by the ESAs.

10. The first mandate is introduced by the Article 42 of the Securitisation Regulation which amends article 4 of EMIR. The amendment adds the paragraph (5) which excludes both securitisations within the meaning of the Securitisation Regulation and meeting the requirements of Articles 19 to 22 or Articles 23 to 26 and Article 18 of the Securitisation Regulation (Simple, transparent and standardised or STS securitisations) and covered bonds from the clearing obligation, subject to certain conditions (i.e. that the OTC derivatives have to be used only to hedge interest rate or currency mismatches, and there are arrangements in place which adequately mitigate counterparty credit risk with respect to the



OTC derivative contracts). This first mandate involves amending the RTS originally drafted by ESMA, and it is developed in a separate Consultation Paper [Add link to Clearing Obligation CP].

11. In the same way, Article 42 amends the Article 11(15) EMIR, and introduces a second mandate developed in this Consultation Paper, which is the one relevant to the Delegated Regulation (EU) 2016/2251 on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) of Regulation (EU) No 648/2012. In accordance with this mandate on Article 11(15) of EMIR, the ESAs have to determine the level and type of collateral required with respect to OTC derivative contracts that are concluded by covered bond entities in connection with a covered bond, or by a SSPE in connection with a STS securitisation, meeting the conditions of Article 4(5) of the EMIR, taking into account any impediments faced in exchanging collateral with respect to existing collateral arrangements under the covered bond or securitisation.

12. The text of the mandate, developed in this Consultation Paper and which amends the RTS on OTC-derivative contracts not cleared, is reported here below for clarity:

“(3) in Article 11 paragraph 15 is replaced by the following:

“15. In order to ensure consistent application of this Article, the ESAs shall develop common draft regulatory technical standards specifying:

- (a) the risk-management procedures, including the levels and type of collateral and segregation arrangements, required for compliance with paragraph 3;
- (b) the procedures for the counterparties and the relevant competent authorities to be followed when applying exemptions under paragraphs 6 to 10;
- (c) the applicable criteria referred to in paragraphs 5 to 10 including in particular what should be considered as a practical or legal impediment to the prompt transfer of own funds and repayment of liabilities between the counterparties.

The level and type of collateral required with respect to OTC derivative contracts that are concluded by covered bond entities in connection with a covered bond, or by a securitisation special purpose entity in connection with a securitisation within the meaning of this Regulation and meeting the conditions of Article 4(5) of this Regulation and the requirements of Articles 19 to 22 or Articles 23 to 26 and Article 18 of Regulation the Securitisation Regulation shall be determined taking into account any impediments faced in exchanging collateral with respect to existing collateral arrangements under the covered bond or securitisation.

The ESAs shall submit those draft regulatory technical standards to the Commission by 18 July 2018. Depending on the legal nature of the counterparty, power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with either Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 or (EU) No 1095/2010.”



EMIR Review

13. In addition to the amendment of EMIR introduced by the Securitisation Regulation, also the European Commission's EMIR Review proposal has been considered when developing the RTS amending the framework on OTC-derivative contracts not cleared.

14. In the EMIR Review Proposal, the main aspects concerning the Securitisation framework to be taken into consideration are two: i) the establishment of Financial Counterparty distinction upon a certain threshold; ii) the widening of Financial Counterparty categorisation to SSPEs.

15. At the moment, in EMIR, there is no distinction among financial counterparties (FCs) depending on the volume of the derivative negotiated. The EMIR review intends to introduce - see Article 4a of the EMIR review Proposal - two types of FCs, depending on the volume of OTC negotiation, and only those FCs which will be above a certain threshold (FC+) of OTC derivatives negotiated, will be obliged to comply with the mandatory clearing obligation set out in article 4 of EMIR.

16. Even more notably, in the context of the EMIR review, in order to ensure that the definition of FCs covers all entities which could qualify as such due to the nature of their activities, it is proposed to include in the definition of an FC in EMIR Article 2(8): alternative investment funds registered under national law (these are currently considered non-FCs under EMIR), Central Securities Depositories, and Securitisation Special Purpose Entities.

17. The combined reading of the (proposed) changes in EMIR described above suggests that, if the EMIR Review proposal were approved, the SSPEs would be subject to EMIR provisions for FC. In practice, even if SSPEs would not be subject to the clearing obligation because they could be classified as FC below the threshold (FC-), SSPEs would be still expected to be subject to the requirements to apply risk mitigation techniques for OTC derivatives not centrally cleared as for Regulation EU/2016/2251.

Conclusions

18. The Securitisation Regulation, entered into force on 17 January 2018, is amending EMIR on article 11(15), introducing a specific treatment for covered bond entities in connection with a covered bond, or by a Securitisation Special Purpose Entity in connection with a securitisation (within the meaning of the Securitisation Regulation and meeting the conditions of paragraph 4(5) of EMIR and the requirements of Articles 7 to 10 or Articles 11 to 13 and Article 6 of the Securitisation Regulation) which takes into account any impediments faced in exchanging collateral with respect to existing collateral arrangements under the covered bond or securitisation.

19. It should be noted that, among the "specific provision on risk mitigation procedure" of the RTS on risk mitigation techniques for OTC derivatives not centrally cleared (Delegated Regulation EU/2016/2251), it is already provided with an exemption from margins requirements for covered bonds of in Article 30, introduced in accordance with the recital 24 of EMIR. This specific provision



seems already to properly implement the mandate of article 11(15) of EMIR as amended by the Article 42 of the Securitisation Regulation, and no other changes to the Delegated Regulation EU/2016/2251, for what concerns the covered bond, should be introduced because of it.

20. In conclusion, regarding the development of these RTS for what concerns the SSPEs and the simple, transparent and standardised (STS) Securitisation, at least two points should be further specified: (a) the content of the amendment of the RTS and (b) the timeline of the development and its submission of the RTS.

Content of the amendment

21. As recalled above, in accordance of the recital 24 of EMIR, Article 30 of the RTS on OTC derivatives which are not centrally cleared provides already a specific treatment from the requirements to exchange collateral for covered bonds. This exemption already implements the mandate specified in the amended mandate of the article 11(15) for the covered bonds component.

22. On the other hand, no specific treatment is in place for SSPEs, and the amendment introduced by the Securitisation Regulation mandates the ESAs to define the level and type of collateral required with respect to OTC derivative contracts that are concluded by securitisation special purpose entity in connection with a securitisation within the meaning of the Securitisation Regulation and meeting the conditions to be a STS Securitisation, taking into account any impediments faced in exchanging collateral with respect the existing collateral arrangements under the securitisation.

23. The amended mandate in article 11(15) of EMIR clarifies that specific treatment for SSPE is strictly restricted only to securitisation meeting the requirements to be classified as STS securitisation. Therefore, SSPEs dealing with derivatives in connection with non-STS securitisation will have to comply with the standard set of requirements of the Delegated Regulation (EU) 2016/2251, independently from the fact that impediment in exchanging collateral can be identical for SSPEs dealing with STS or with non-STS Securitisation.

24. The specific impediment in order to exchange collateral is the substantial lack of assets to be used for the margins in the case of SSPEs in connection to STS Securitisation (likewise for those issuing non-STS securitisations⁵). Securitisations, by construction, are usually structured to generate limited extra liquidity with respect the interest and the principal of the bonds to be repaid to which are dependents. Also, SSPEs generally do not possess extra assets to be allocated as collateral. These represent substantial technical impediments met by the SSPE in order to post collateral in a way that would comply with the set of requirement for the determination of the level and type of collateral according to the Delegated Regulation (EU) 2016/2251.

25. Nevertheless, the potential risk for the derivatives counterparties due to the impediment to post collateral by SSPEs is partially offset with the common practice that OTC counterparties are

⁵ The impediments faced by an SSPE issuing STS securitisations are identical to the impediments faced by an SSPE issuing non-STS securitisations, while the latter has to comply with the full margining requirements.



positioned at the top of the waterfall of payments, being at least as senior as that the most senior tranche.

26. In terms of collection of collateral, from the SSPEs point of view, as reported in the stakeholder response to the first consultation of the on (RTS) on risk mitigation techniques for OTC derivatives not cleared by a central counterparty (CCP), it seems that the practice for SSPEs of collecting margin (variation and initial) is already in place⁶. At the same time, the same stakeholders advised that the features of the OTC derivatives entered by Securitisation, including the risk mitigation techniques generally adopted, are identical to those applied to derivatives entered into in connection with covered bond transactions in all material respects.

27. The fact that there are no substantial differences among the OTC contracts put in place for covered bonds and securitisations, and also that the legislators recognise that, at recital 41 of the Securitisation Regulation⁷ (EU 2017/2402), there is a degree of substitutability between covered bonds and securitisations, in order to prevent the possibility of distortion or arbitrage between the use of securitisations and covered bonds, due to different treatment of OTC derivative contracts entered into by covered bond entities or by SSPEs, the ESAs suggest that SSPEs, for OTC derivatives in connection STS Securitisation, would be exempted from posting and collecting initial margin and from posting variation margins in the same way already implemented for Covered Bond.

Condition to grant the exemption

28. Clearly, in order to prevent possible distortion or arbitrage opportunity not only the collateral exchange should be implemented similarly between Securitisation and Covered Bond, but also the set of conditions, to which the exemption to the ordinary exchange of collateral is granted, should replicate, where applicable, the one in place for Covered Bonds.

29. In this regard, it should be noted that the presence of segregated collateral and the claim that the counterparties of the OTC derivatives contracts would have with respect to other claimants are the main safeguards of the OTC counterparties and represent the substantial similarity among covered bonds and securitisations.

30. In the case of covered bonds, the counterparties' claim on the collateral is preferential with respect to the claim of the issuer institutions' other creditors and is required to be as senior as the claim of the covered bond investors (condition "b" in article 30.2 of DR 2016/2251). In the case of securitisations, this condition is maintained and adapted to the securitisation features, so the counterparties' claim on the collateral is required to be as senior as the claim of the holder of the most senior tranche in the securitisation transaction (see condition "a" in draft article 30a paragraph 2).

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https://www.eba.europa.eu/documents/ddm/com.liferay.portlet.dynamicdatalists.model.DDLRecord/755375/view_upload_files, see especially section 6 page 13 of the answer.

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R2402&from=EN>



31. The condition on the seniority of the claim of the counterparty of the OTC derivatives (condition “b” in article 30.2 of DR 2016/2251) can be neglected, in the case of Covered Bond, only in the case that the counterparty itself is defaulting or by voluntarily waives of the pari passu rank. It should be noted that the voluntary waiving of the pari passu rank was not in the original final RTS submitted by the ESAs in March 2016, but it was introduced by the Commission when the RTS was adopted. The ESAs in response to the Commission adoption of the RTS issued an opinion⁸, September 2016, explicitly asking to remove the voluntary waiver. Nonetheless the final adoption of the Delegated Regulation in October 2016 still contained the voluntary waiver of the pari passu rank, as for the version published in the Official Journal on 15 December 2016. Therefore, this must be interpreted as the Legislators willingness to keep this condition in place for Covered Bonds. On the other side, the voluntary waiver, for the STS Securitisation cannot be identically allowed for the reasons expressed below.

32. In order to avoid distortion or arbitrage opportunity the RTS amendment aims to the replicate the exemption implemented for covered bond issuer or cover pools. Therefore the Counterparties of SSPEs, in connection with the STS Securitisation, would be required to post variation margin in cash and should have the right to get back part or all of it; at the same time, the SSPEs should only be required to post variation margin for the amount of cash that was previously received.

33. In this regard, in order to ensure that that the risks of OTC counterparties are further limited, it is required that the level of credit enhancement⁹ of the most senior tranche is at least 2% of the outstanding tranches on an ongoing basis (see condition “b” in draft article 30a paragraph 2). This condition aims at simulating similar protection obtained from the covered bond cover pool with the over collateralisation requirement of at least 2% for Covered Bond, as stated in the condition “g” in article 30.2 of DR 2016/2251. However, given the distinct characteristics of securitisations and cover bonds, the level of protection of the OTC counterparty would be higher in the latter case due to the additional recourse to the issuer and the rest of its estate, in case where the issuer has defaulted, and the cover pool is not sufficient to meet the covered bond payments, that the OTC counterparty has in the context of a covered bond programme. Therefore, in order to balance the level of protection of the OTC counterparty between both instruments, it is proposed not to take on board for securitisations the waiver of the pari passu condition which is currently stated in the condition “b” in article 30.2 of DR 2016/2251.

34. In the case of covered bonds, the already existing 2% overcollateralization requirement provides a cushion, once the issuer defaults, so that the cover pool can meet the payment obligations due under the covered bond programme, among which that of the OTC provider could be part,

⁸ [https://esas-joint-committee.europa.eu/Publications/Opinions/ESAs%202016%2062%20\(ESAs%20Opinion%20on%20RTS%20on%20OTC%20margins%20%20EMIR+RTS\)-PR.pdf](https://esas-joint-committee.europa.eu/Publications/Opinions/ESAs%202016%2062%20(ESAs%20Opinion%20on%20RTS%20on%20OTC%20margins%20%20EMIR+RTS)-PR.pdf)

⁹ According Article 4 (65) CRR “credit enhancement” means a contractual arrangement whereby the credit quality of a position in a securitisation is improved in relation to what it would have been if the enhancement had not been provided, including the enhancement provided by more junior tranches in the securitisation and other types of credit protection”.



depending on the liquidation of the derivative contract. In the case of SSPEs, because there is no double recourse to the originator, the OTC counterparty is always in a position which is similar to that of a covered bond programme when the issuer has defaulted: the OTC counterparty only has recourse to the cover pool which is what the securitised exposures are. Therefore, in order to provide a similar 2% cushion, it is necessary to establish a minimum credit enhancement to the most senior position to which the OTC counterparty is at least pari-passu. This minimum credit enhancement has been set to 2%, in order to be aligned, as close as possible, to the 2% overcollateralization requirement for covered bonds: it implies that the securitisation exposure amount, which reflects the outstanding tranche amount, will exceed the value of the most senior tranche in at least 2.04%¹⁰. Accordingly, due to the fact that the most senior tranche is the first to be paid in a securitisation, this 2% credit enhancement provides a similar cushion as the 2% overcollateralization does in covered bonds.

35. Also, the condition “e” (“exclusion of contract not related”) in article 30(2) of DR 2016/2251 is replicated with the condition “c” of the draft article 30a (2) in order to prevent the risk that the SSPEs extent the privilege of the exemption of collateral exchange for derivatives not related to the STS securitisation.

36. Other conditions, specific only to cover bonds, such as the condition that the OTC contracts survive in case of resolution or insolvency of the cover bond issuer (condition “a” in article 30(2) of DR 2016/2251) are not replicable or necessary within the framework of the securitisation. For instance, the securitisation originator, the equivalent subject of the cover bond issuer, contrary with respect the cover bond issuer, does not conclude any contract in place of the SSPE. Therefore the surviving of the contract to originator’s insolvency is not an issue in the context of the securitisation. Moreover, the SSPE is the only subject responsible for the OTC contract, which by definition it is not subject of any insolvency procedure¹¹, and it is not possible that the OTC contract survives to the SSPE winding down¹².

37. Similarly, conditions “c” (accordance with national covered bond legislation) and “f” (requirement of meeting the requirements of paragraphs 1-3 of article 129 of the CRR) in article 30(2) of DR 2016/2251 are Covered Bond specific and do not need to be replicated as conditions for Securitisation exemption. To be specific, the preferential qualification of the claim with regard to the originator, the equivalent subject of the cover bond issuer, which is implicit to the registry requirement is not needed in the case of securitisations, as the collateral has been sold to the SSPE and no longer belongs to the originator institution, and there is no recourse against the originator or its estate.

¹⁰ 2.04% = 2% minimum credit enhancement / 98% maximum size of the most senior tranche

¹¹ The SSPE is not, by definition, subject to any insolvency procedure because the securitisation bonds (and the SSPE obligations in general) are repaid with the proceeds from the securitised assets. Therefore, the repayment of a securitisation bond and the interest accrued (which could be in full, partial, or no payment at all) depends on the amount of those proceeds and the seniority of the bond in the waterfall of payments.

¹² The SSPE is winded down when all its securitised assets have amortised, or have been sold, or when it has been subject to an early termination call, and it has paid all its obligations, taking into account the amount of the proceeds and the seniority of the obligations in the waterfall of payments.



38. Finally, the condition “d” (i.e. “only interest risk and currency mismatch hedging purpose”) in article 30(2) of DR 2016/2251 is not necessary for the Securitisation, just because this condition is already in place in the new paragraph 5 of article 4 of EMIR.

Timeline of the mandate

39. According to the mandate in article 11(5) of EMIR, as amended by the article 42 of the Securitisation Regulation, the deadline for the submission of the RTS is 18 July 2018.

40. It must however also be recognized that the finalisation of the EMIR review is not expected before the end of 2018. Finalising the amending RTS with the specific treatment for SSPEs from the RTS requirements for OTC derivatives not centrally cleared, before to have the legal certainty of the review in the scope of EMIR, specifically not knowing precisely to which extent SSPEs will be included in the scope of EMIR, could highly sensitive, because ESAs are demanded to set a specific treatment for entities that can have a different coverage in terms of the scope of application of the Regulation.

41. This refers to the fact that if SSPEs will be classified as FC, as in the European Commission Proposal of the EMIR review, this will imply a substantial change with respect the scope of application of the EMIR requirement with respect how they are applied at the moment for SSPEs. Indeed, it should be recalled that at the moment the implementation of the EMIR Requirement for SSPEs are overall quite limited, just because SSPEs are generally classified as Non-FC, so SSPEs are subject to EMIR clearing and not cleared OTC requirements only in the case that they are classified as NFC+.

42. Similarly, the consultation of these RTS, while the EMIR Review is still pending, should take into consideration that the scope of application of EMIR for SSPEs could be modified during the Parliament and Council discussions over the text of the EMIR Review.

43. Therefore, the ESAs recommends that in case that the SSPEs are classified as FC, as proposed in the EMIR review, the entry into force of these amending RTS should not be subsequent to the entry into force of the EMIR Review, in order to avoid any disordered implementation of the market infrastructure requirements.



Draft regulatory technical standards

In between the text of the draft RTS that follows, further explanations on specific aspects of the proposed text are occasionally provided, which either offer examples or provide the rationale behind a provision, or set out specific questions for the consultation process. Where this is the case, this explanatory text appears in a framed text box.



COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

amending Delegated Regulation (EU) No 2251/2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) of Regulation (EU) No 648/2012 with regard to derivatives used in simple, transparent and standardised securitisations

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories¹³, and in particular Article 11(15) thereof,

Whereas:

- (1) consistency of treatment between derivatives associated with covered bonds and derivatives associated with securitisations, with regard to the clearing obligation and to the margin requirements on non-centrally cleared OTC derivatives Article 42(3) of Regulation (EU) 2017/2402 by amending Article 11(15) of Regulation (EU) 648/2012, extends the scope of Delegated Regulation (EU) No 2251/2016 to cover also securitisation special purpose entities in connection with a securitisation within the meaning of the Article 2 of Regulation (EU) 2017/2402 and meeting the conditions of Article 4(5) of Regulation (EU) No 648/2012 and the requirements of Articles 19 to 22 or Articles 23 to 26 and Article 18 of Regulation (EU) 2017/2402. As a result, Delegated Regulation (EU) No 2251/2016 should be amended to include rules on the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty concluded by a securitisation special purpose entity in connection with a securitisation.
- (2) In accordance with the amended Article 11(15) of Regulation (EU) 648/2012, such rules on the risk-mitigation techniques for OTC derivative contracts not cleared by a

¹³ OJ L 201, 27.7.2012, p. 1.



central counterparty concluded by a securitisation special purpose entity in connection with a securitisation should take account of the impediments faced by those securitisation special purpose entities in providing collateral. The fact that securitisation special purpose entities are usually structured to generate little excess of liquidity results in diminished assets to be used for the exchange of margins. Consequently, it represents a technical impediment faced by the securitisation special purpose entity in the exchange of collateral in a way that complies with the full set of requirements for the level and type of collateral of Delegated Regulation (EU) 2016/2251. Therefore, under a specific set of conditions, securitisation special purpose entities in connection with an Simple, Transparent and Standardised 'STS' securitisation should not be required to post collateral. This should allow for some flexibility for securitisation special purpose entities in connection with an STS securitisation while ensuring that the risks for their counterparties are limited. However, there are no constraints on securitisation special purpose entities in connection with an STS securitisation to return cash previously collected as variation margin. Counterparties of securitisation special purpose entities in connection with an STS securitisation should therefore be required to post variation margin in cash and should have the right to receive back part or all of it, but securitisation special purpose entities in connection with an STS securitisation should only be required to post variation margin for the amount in cash that was previously received. This is consistent also with recital 41 of Regulation (EU) 2017/2402 which refers to the need to ensure consistency in treatment between derivatives associated with covered bonds and derivatives associated with securitisations, with regard to the clearing obligation and to the margin requirements on non-centrally cleared OTC derivatives.

- (3) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority.
- (4) The European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority have conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010¹⁴, the opinion of the Insurance and Reinsurance Stakeholder Group and the Occupational Pensions Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council¹⁵, and the Securities and Markets Stakeholder Group established in accordance

¹⁴ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

¹⁵ Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).



with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council¹⁶.

Delegated Regulation (EU) No 2251/2016 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) No 2251/2016

Delegated Regulation (EU) No 2251/2016 is amended as follows:

A new article (30a) is inserted after Article 30:

“Article 30a

Treatment of derivatives associated to securitisation for hedging purposes

1. With respect to OTC derivatives contracts that are concluded by a securitization special purpose entity in connection with a securitization within the meaning of Regulation (EU) 2017/2402 and meeting the conditions of Article 4(5) of this Regulation (EU) 648/2012, by way of derogation from Article 2(2), where the conditions set out in paragraph 2 of this Article are met, counterparties may provide in their risk management procedures the following:

(a) that variation margin is not posted by the securitisation special purpose entity but that it is collected from its counterparty in cash and returned to its counterparty when due;

(b) that initial margin is not posted or collected.

2. Paragraph 1 applies where all of the following conditions are met:

(a) the counterparty to the OTC derivative concluded with the securitisation special purpose entity in connection with the securitisation ranks at least pari passu with the holders of the most senior securitisation note. This condition applies only where the counterparty to the OTC derivative concluded with the securitisation special purpose entity in connection to the securitisation is neither the defaulting nor the affected party;

(b) the securitisation special purpose entity in connection with the securitisation to which the OTC derivatives contract is associated is subject to a level of credit enhancement of the most senior securitisation note of at least 2 % of the outstanding notes on an ongoing basis;

¹⁶ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC ([OJ L 331, 15.12.2010, p. 84](#)).



(c) the netting set does not include OTC derivative contracts unrelated to the securitisation.”

Explanatory text for consultation purposes

These amendments are intended to implement the mandate of Article 11(15) of Regulation (EU) No 648/2012 (EMIR) as amended by Article 42(3) of Regulation 2017/2402 (Securitisation Regulation).

The amendment in the Securitisation Regulation extends the special provisions adopted for the Covered Bond on the level and type of collateral required with respect to OTC derivative contracts, to those derivative contracts that are concluded by a securitisation special purpose entity in connection with an STS securitisation. These special treatment for the collateral, take into account any impediments faced in exchanging collateral with respect to existing collateral arrangements under the securitisation.

It should be noted that any possible specific treatment for SSPEs with respect to other Counterparties is strictly restricted to STS securitisations, in line with the mandate given to the ESAs.

Question 1: Do stakeholders agree with the amendments for Delegated Regulation (EU) No 2251/2016 suggested in this CP?

Question 2: Are there any additional or alternative requirements for securitisations that stakeholders view should be introduced in Delegated Regulation (EU) No 2251/2016 following the amended mandate in Article 11(15) of EMIR?

Question 3: Do stakeholders consider that the condition in draft Article 30a(2)(a) results in a treatment consistent with that provided in Article 30(2)(b) of Delegated Regulation (EU) No 2251/2016?

Question 4: Do stakeholders consider that the non consideration of the waiver of the pari-passu rank, in conjunction with the minimum 2% credit enhancement, results in a similar protection of the OTC counterparty in the cases of STS securitisations as in the case of covered bonds? Or would it instead be necessary to retain the waiver currently available for covered bonds also for exceptional situations under STS securitisations?

Article 2

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,



*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position]



Accompanying documents

Draft cost-benefit analysis / impact assessment

1. Article 42 of the Securitisation Regulation (Regulation (EU) 2017/2402 approved by the European Parliament and the Council in October 2017) amending Regulation (EU) No 648/2012 (EMIR), effectively amends the mandate of the ESAs (EBA, ESMA, and EIOPA) on the RTS (EU/2016/2251) on risk mitigation techniques for the OTC derivatives not cleared by a central counterparty (CCP). Current draft RTS is the ESAs's response to the mentioned amendment.
2. As per Article 10(1) of the ESAs regulation (Regulation (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 of the European Parliament and of the Council), any RTS developed by the ESAs shall be accompanied by an Impact Assessment (IA) annex which analyses 'the potential related costs and benefits' before submitting to the European Commission. Such annex shall provide the reader with an overview of the findings as regards the problem identification, the options identified to remove the problem and their potential impacts.
3. For the purposes of the IA section of the Consultation Paper, the ESAs prepared the IA with a cost-benefit analysis of the policy options included in the regulatory technical standards described in this Consultation Paper. Given the nature of the study, the IA is high-level and qualitative in nature including some quantitative analysis when possible.

A. Problem identification

4. In the current EMIR implementation Special Purpose Entities (SSPEs) are considered as Non-Financial Counterparties (NFCs), therefore subject to clearing and non-cleared margins obligations only if they fall above a certain threshold (NFC+). The new Securitisation Regulation includes an exemption to clearing obligation for both, cover bonds and securitisations.
5. Due to its specific features, SSPEs may face some impediments in exchanging collateral. Indeed, SSPEs may face a lack of assets to use for the margins as securitisation, by construction, are usually structured to generate limited extra liquidity with respect to the interest and the principal to be repaid of the Bonds to which they are dependents. Additionally, SSPEs generally do not possess extra assets to be allocated as collateral. These represent substantial technical impediment faced by the SSPE in order to post collateral.
6. Moreover, the bilateral collateral exchange would require the SSPE to provide collateral to its derivative counterparty. This would give the derivative counterparty a preferential claim to the assets in the securitisation pool over the securitisation holder which could be incompatible with the senior rights of securitisations holders usually prescribed by the existing securitisations.



7. It is worth to mention that securitisations swaps commonly incorporate transfer triggers and collateral triggers to protect against counterparty credit risk which means that if the counterparty's credit strength is deteriorated, the counterparty needs to transfer the swap to a stronger counterparty or to post collateral so that the SSPE can pay for a replacement swap. Nevertheless, replacing a counterparty because their credit strength has deteriorated might be much more difficult as it would require entering into a replacement swap with margining. In addition, if no modification is made, the need of margin exchange may also limit access to the derivative market for new securitisations transactions as it is unlikely that an issuer trades with an SSPE, if it is required to exchange margin as SSPE as they are currently conceived may face some difficulties to be able to post collateral.

8. Finally, the current regulation results in an inconsistent treatment between two similar products which are cover bonds and securitisations. Cover bonds entities are considered FC within Article 2, point (8) of EMIR, and, therefore subject to clearing obligations and margin requirements. Nevertheless, as mention in paragraph 4, the new securitisation regulation includes an exemption for clearing obligation for both, cover bonds and securitisations and Article 30 of the RTS on risk mitigation techniques for OTC derivatives provides an exclusion from margins requirement for contracts that are concluded in connection with covered bonds if they meet the requirements of Article 30(2). As a result, OTC derivatives issued by covered bond entities are at the moment not subject to margins whereas OTC derivatives in connection with an SSPE might become subject to margins if they are considered NFCs+. Indeed, recital 41 of the new securitisation regulation, states that there is a degree of substitutability between covered bonds and securitisations. The different treatment between derivatives associated with covered bonds and derivatives associated with securitisations could possibly originate distortion or arbitrage in the use of these two products.

9. The main discernible aspects in the legal structure of the Covered bond and Securitisation are that the covered bonds are unconditional obligations of the originator/issuer which are backed by the establishment of a cover assets pool. In this regards, the transaction' bankruptcy remoteness is achieved by legislative provisions (i.e. full recourse to the originator's remaining estate, pari-passu with the rest of non-preferential creditors, in case of its insolvency, once the cover pool is consumed). On the other side, with a Securitisation there is a transfer of the underlying assets to a SSPE, which completely isolate the securitized assets from the originator and its possible bankruptcy. In this case, the securitisation investors have recourse to the originator assets only if the originator provides some form of specific credit enhancement (guarantee or insurance) and to the limit of it.

B. Policy objectives

10. The main objective of the RTS is to specify alternative margins requirements for SSPEs, dealing with STS Securitisation, and to make them more proportionate in line with the risk profile and specific characteristics of the STS Securitisation.

11. As a result, the specific objectives of the guidelines are to:



- Align regulatory requirements between covered bonds and securitisation to ensure a consistent treatment between derivatives associated with them.
- Define the necessary set conditions to be under the new requirements to guarantee an adequate risk coverage for all counterparties.

12. The general objectives of the guidelines are to:

- Reduce administrative burden and compliance costs without putting financial stability at risk.
- Ensure accurate risk profile adjustment of the OTC derivatives' risk mitigation techniques.

C. Baseline scenario

13. Article 2, point (8) of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR) defines financial counterparty as an investment firm, a credit institution, an insurance undertaking, an assurance undertaking, a reinsurance undertaking, an UCITS or an occupational retirement provision (all subject to required authorisation and conditions). On the other hand, Article 2 point (9) of the same regulation specifies that any other undertaking established in the Union shall be considered 'non-financial counterparty'. Therefore, EMIR currently considers Securitisation Special Purpose Entities (SSPEs) as Non-Financial Counterparties (NFCs).

14. Article 10(1) of EMIR introduces two types of NFC, and only if the position in OTC derivatives of the NFC falls above a certain threshold (NFC+), it will be obliged to comply with the mandatory clearing obligation. The defined threshold should be set by the ESMA taking into account the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivatives. The way the clearing thresholds are calculated is set in EMIR in Article 10(2)¹⁷.

15. In particular, for all financial counterparties and the biggest non-financial counterparties (NFCs+):

- all standardised OTC derivatives contracts must be centrally cleared through CCPs;
- CCPs must comply with stringent prudential, organisational and conduct of business requirements in order to adequately cover their exposures to diverse risks. EMIR also ensures that CCPs are subject to robust supervisory oversight.
- if a contract is not cleared by a CCP, risk mitigation techniques must be applied.

¹⁷ The positions in OTC derivative to be over or under the set threshold are calculated as the rolling average position over 30 working days.



16. Nevertheless, article 42 of the Securitisation Regulation amending article 4 of EMIR includes an exemption for clearing obligation for both, cover bonds and securitisations.

17. Risk-mitigation techniques for uncleared OTC derivative contracts are developed in the RTS on risk mitigation techniques for OTC derivatives not cleared (EU/2016/2251) which implies the application of variation margin and initial margin mitigation techniques¹⁸. The scope of the Risk-mitigation techniques for uncleared OTC derivatives reflects the one of the clearing obligation and applies to all financial counterparties and 'NFC+'. The Risk-mitigation techniques for uncleared OTC derivatives require them to exchange two types of margins. The first type is variation margin (VM), which is exchanged daily and protects counterparties against exposures related to the current market value of their OTC derivative contracts. The second type is initial margin (IM) to cover future exposures. The initial margin requirement applies to financial counterparties and NFC+ above the threshold set by the ESMA.

18. Furthermore, SSPEs are subject to the distinction between NFC+/- depending on if their positions¹⁹ in OTC-derivatives are over or below the set threshold as per Article 10 of the EMIR regulation. This distinction is important as NFCs+ are subject to clearing obligation whereas NFCs- are not²⁰. The volume of outstanding securitisations within Europe in the first quarter of 2017 was 1.244bn²¹. This volume could be potentially exposed to OTC derivatives and therefore, potentially subject to the distinction between NFCs+/-.

19. Nevertheless, the problems described in paragraphs 4-8 might have a much higher impact if some aspects of EMIR review are finally approved. Indeed, Article 1(1) of the EMIR review modifies the current Article 2(8) of EMIR, including securitisation special purpose entities as financial counterparties.

20. Additionally, there is currently no distinction within the EMIR framework between financial counterparties regarding their level of positions in OTC derivatives. This means that every undertaking considered as FC as per Article 2, point (8) of EMIR should be subject to clearing obligation. Nevertheless, Article 4a of the EMIR review introduces two types of FC, and only if the position in OTC derivatives of the FC falls above a certain threshold (FC+), it will be obliged to comply with the mandatory clearing obligation. Nonetheless, FC- will remain subject to the application of risk mitigation techniques (IM/VM) as set in the ESAs RTS (EU/2016/2251). As per non-financial counterparties, the defined threshold should be set by the ESMA taking into account the systemic

¹⁸ It should be noted that Article 30 of the RTS on risk mitigation techniques for OTC derivatives provides an exclusion from margins requirement for contracts that are concluded in connection with covered bonds if they meet the requirements of Article 30(2).

¹⁹ The positions in OTC derivative are calculated as the rolling average position over 30 working days.

²⁰ NFCs- are subject neither to clearing obligation nor to Risk-mitigation techniques for uncleared OTC derivatives.

²¹ Data according to the 1Q 2017 Securitisation Data Report published by the Association of financial Markets in Europe (AFME). See <https://www.afme.eu/en/reports/Statistics/afme-securitisation-data-report-q1-2017/>



relevance of the sum of net positions and exposures per counterparty and per class of OTC derivatives. The way the clearing thresholds are calculated is set in EMIR review in Article 1022.

21. As a result, if the EMIR proposal is endorsed, SSPEs would fall under FC+/- categorisation and, therefore, all of them could become subject to clearing or to the Risk-mitigation techniques for uncleared OTC derivatives irrespective of the volume of their position in OTC derivatives.

22. Finally, it is worth to mention that Article 42 of EMIR amends article 11(15) of EMIR and specifically mandates the ESAs to draft an RTS to further develop the risk mitigation techniques that will apply to OTC derivative contracts that are concluded by covered bond entities in connection with a covered bond, or by a securitisation special purpose entity in connection with a simple, transparent and standardised (STS) securitisations taking into accounts the problems that these entities may face in exchanging collateral.

D. Options considered

23. The current consultation paper aims to amend the RTS on risk mitigation techniques for OTC-derivative contracts not cleared as mandated by the Securitisation Regulation and to address any other upcoming problem that could arise from the modifications included in this proposal.

24. As a result, to address the problems defined in paragraphs 4 to 8, the following options have been considered:

- Include a specific treatment for margin requirements with respect to OTC derivative contracts that are concluded by securitisation special purpose entities in connection with a STS securitisation or to maintain the status quo (not to include a specific treatment).
- If a specific treatment is included, define the exclusion for margin requirements with respect to OTC derivative contracts that are concluded by securitisation special purpose entity in connection with an STS securitisation in a similar manner as the exclusion for cover bonds is defined, subject to specific adjustment to Securitisation features.

E. Assessment of the options and the preferred option(s)

25. The option of maintaining the status quo would result in retaining the scenario described in the problem definition in paragraphs 4 to 8. SSPEs would remain subject to margin obligation and may face problems in posting collateral due to the lack of liquidity or to the existing collateral arrangements under the securitisation. Indeed, the new Securitisation Regulation includes an exemption to clearing obligation for securitisations and directly mandated the ESAs to develop an RTS defining the applicable risk mitigation techniques for covered bonds and STS securitisations “taking into account any impediments faced in exchanging collateral with respect to existing

²² The positions in OTC derivative to be over or under the set threshold are calculated as an aggregate month-end average position for the months March, April and May.



collateral arrangements under the covered bond or securitisation". In this statement, the Securitisation Regulation is specifically recognising the fact that securitisations might face some problems in exchanging collateral.

26. Some securitisations, as well as covered bonds, already possess important risk mitigants which make imposing of the margining and clearing obligation overly burdensome. Indeed, the potential risk for the counterparties of the OTC derivative due to the impediment to post collateral by the SSPE is partially offset with the common practice that OTC counterparties are positioned at the top of the waterfall of payments, so they are at least as senior as that the most senior tranche. Additionally, the derivative counterparty benefits from the appropriate segregation of the assets in the securitisation panel.

27. Against this background, the preferred option is to include an exclusion from margins requirement for securitisation (implemented in a similar way and under the same set of conditions where applicable as it is already set in Article 30 of the RTS for covered bonds).

28. This exemption will only apply to STS Securitisations (simple, transparent and standardised) as it is specified in the mandate included in the Securitisation Regulation which mandates the EBA to define the level and type of collateral required with respect to OTC derivative contracts that are concluded by an SSPE in connection with a Securitisations meeting the conditions to be an STS Securitisation.

29. Nevertheless, it is challenging to provide an accurate quantification of the number of SSPEs or the value of outstanding securitisation that would fall under each category of NFC and therefore, subject to margin obligation. Nonetheless, and in order to provide an order of magnitude, the volume of outstanding securitisations within Europe in the first quarter of 2017 was €1.244bn²³. This volume could be potentially expose to OTC derivatives and therefore, could potentially fall under margin posting requirement if the SSPE is considered NFC+ and if there is a change in the counterparty (i.e. if there is a replacement because the counterparty has been downgraded). Additionally, all the new securitisations issuances might potentially become subject to margin posting requirement if they are exposed to OTC derivatives and the undertaking is above the defined threshold. The volume of new issuances within Europe during 2016 was €238.6bn⁷. However, in the first quarter of 2017 the volume of issuances was €36.7bn⁷ a decline of 38.9%⁷ from the fourth quarter of 2016 and a decline of 35.7%⁷ from the first quarter of 2016. Although there is no certainty about the volume of new securitisations that may be issued after the new regulation enters into force, this data can approximate an order of magnitude about the potential volumes that may become affected by risk mitigation techniques for OTC derivatives.

30. If the proposed changes of the EMIR review are implemented (see paragraphs 18-20) the potential impact described in paragraph 28 will be more significant as the margin requirement will be applicable irrespective of the volume of the SSPE's position in OTC derivatives.

²³ Data according to the 1Q 2017 Securitisation Data Report publishes by the AFME.
See <https://www.afme.eu/en/reports/Statistics/afme-securitisation-data-report-q1-2017/>



31. The specific treatment will be similar to the one already implemented for covered bonds in Article 30 of the RTS on OTC derivatives. Actually, recital 41 of the Securitisation Regulation specifically states that there is a degree of substitutability between the two products that could result in arbitrage between their use if the applicable margins requirements diverge. Therefore, the preferred option to prevent any possible distortion or arbitrage opportunity is to implement this specific treatment in a similar way and using a comparable set of conditions to those for covered bonds, which take in to account specific features of securitisations that may differ from cover bonds.

32. Article 30 (g) of the RTS states that “the cover pool of the covered bond to which the OTC derivative contract is associated is subject to a regulatory collateralisation requirement of at least 102 %”. Although over-collateralisation is not possible within a securitisation structure, deleting this condition with any further changes will result in a different level of risk mitigation and therefore, in potential arbitrage in the use of both structures. To avoid this, the preferred option is to request at least a 2% of credit enhancement for the most senior tranche. This condition will guarantee an approximately 2% of extra coverage as the 102% of overcollateralization guarantees for cover bonds.

33. SSPEs that do not meet the conditions specified in article 30a of the RTS will not be exempt from posting collateral to its derivative counterparty. Therefore, to address the impediments faced by SSPEs when posting collateral, the interposition of a third-party collateral provider may be necessary.



Overview of questions for consultation

Question 1: Do stakeholders agree with the amendments for Delegated Regulation (EU) No 2251/2016 suggested in this CP?

Question 2: Are there any additional or alternative requirements for securitisations that stakeholders view should be introduced in Delegated Regulation (EU) No 2251/2016 following the amended mandate in Article 11(15) of EMIR?

Question 3: Do stakeholders consider that the condition in draft Article 30a(2)(a) results in a treatment consistent with that provided in Article 30(2)(b) of Delegated Regulation (EU) No 2251/2016?

Question 4: Do stakeholders consider that the non consideration of the waiver of the pari-passu rank, in conjunction with the minimum 2% credit enhancement, results in a similar protection of the OTC counterparty in the cases of STS securitisations as in the case of covered bonds? Or would it instead be necessary to retain the waiver currently available for covered bonds also for exceptional situations under STS securitisations?