

JC 2018 77

12 December 2018

Final Draft Regulatory Technical Standards

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



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Executive summary

On 8 March 2016, the European Supervisory Authorities (ESAs) (the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA)) published draft regulatory technical standards (RTS) on risk-mitigation techniques for over-the-counter (OTC) derivative contracts not cleared by a central counterparty (CCP), as required under Article 11(15) of Regulation (EU) No 648/2012 (the European Market Infrastructure Regulation (EMIR)) in the form submitted to the European Commission. These were published in the Official Journal on 15 December 2016 in the form of Delegated Regulation (EU) 2016/2251.

In light of the 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 simple, transparent and standardised (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; ESAs therefore 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 securitisation special purpose entity (SSPE) in connection with an 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 these amending RTS aim to fulfil 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 similar to the conditions required for covered bonds (i.e. that the OTC derivatives are used only for hedging purposes, and there are arrangements that adequately mitigate counterparty credit risk with respect to the OTC derivative contract).



Background and rationale

1. On 8 March 2015¹, the ESAs (the EBA, ESMA and EIOPA) published draft 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, 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 then.

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

3. The following sections describe the main changes for what concern the OTC derivative contracts associated with securitisation, for hedging purposes, introduced by the Securitisation Regulation. The conclusions section describes how the ESAs intend to amend the framework of Delegated Regulation (EU) 2016/2251 in order to implement those changes.

New mandates for OTC derivatives in Securitisation Regulation

4. In 2015, as part of the capital markets union action plan, the Commission proposed two legislative packages to strengthen the securitisation market. These were: i) an amendment to the regulation on capital requirements to make the capital treatment of securitisations for banks and investment firms more risk-sensitive and able to reflect the specific features of STS securitisations properly; and ii) a regulation on securitisation that applies to all securitisation products, specifying due diligence, risk retention and transparency rules and a clear set of criteria to identify STS securitisations.

5. 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 in 2016.

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>



6. The two packages have been adopted and were 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 STS securitisations;
- b. Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for STS securitisations, 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).

7. 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'.

8. The intention in the above recital is then made explicit in Article 42 of the Securitisation Regulation, in which there are two significant amendments to Regulation (EU) No 648/2012 (EMIR), which also includes two mandates, one on clearing obligations and one on OTC derivative contracts not cleared, to be carried out by the ESAs.

9. The first mandate is introduced by Article 42 of the Securitisation Regulation, which amends Article 4 EMIR. The amendment adds the paragraph 5, which excludes securitisations within the meaning of the Securitisation Regulation, meeting the requirements of Articles 19 to 22 or Articles 23 to 26 and Article 18 of the Securitisation Regulation (STS securitisations), and excludes covered bonds from the clearing obligation, subject to certain conditions (i.e. that the OTC derivatives have to be used to hedge only interest rate or currency mismatches, and there are arrangements in place which adequately mitigate counterparty credit risk with respect to OTC derivative contracts). This first mandate involves amending the RTS originally drafted by ESMA, and it has been developed in a separate RTS.

10. In the same way, Article 42 amends Article 11(15) EMIR, and introduces a second mandate developed in these amending RTS, which is the one relevant to 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) 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 an SSPE in connection with an 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.

11. The text of the mandate, developed in these RTS, which amend 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 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 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 Regulation (EU) No 1093/2010, (EU) No 1094/2010 or (EU) No 1095/2010.



Conclusions

12. The Securitisation Regulation, which entered into force on 17 January 2018, amends EMIR on Article 11(15) and introduces a specific treatment for covered bond entities in connection with a covered bond, or by an SSPE 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.

13. It should be noted that, within 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), an exemption from margin requirements for covered bonds is already provided in Article 30, introduced in accordance with the recital 24 of EMIR. This specific provision seems to properly implement the mandate of Article 11(15) EMIR as amended by Article 42 of the Securitisation Regulation, and no other changes to Delegated Regulation (EU) 2016/2251, for what concerns the covered bond, should be introduced because of it.

14. In conclusion, regarding the development of these RTS for what concerns the SSPEs and the STS securitisation, at least the content of the amendment of the RTS should be further specified.

Content of the amendment

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

16. However, 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 SSPEs in connection with a securitisation within the meaning of the Securitisation Regulation and meeting the conditions required to be an STS securitisation, taking into account any impediments faced in exchanging collateral with respect to the existing collateral arrangements under the securitisation.

17. The amended mandate in Article 11(15) EMIR clarifies that specific treatment for SSPEs is strictly restricted only to securitisations that meet the requirements to be classified as STS securitisations. Therefore, SSPEs that deal with derivatives in connection with non-STS securitisations will have to comply with the standard set of requirements of Delegated Regulation (EU) 2016/2251, independently from the fact that the impediments in exchanging collateral can be identical for SSPEs that deal with STS securitisations and those that deal with non-STS securitisations.



18. The specific impediment needed in order to exchange collateral is the substantial lack of assets to be used for the margins in the case of SSPEs connected to STS securitisations (likewise for those issuing non-STS securitisations⁴). Securitisations are usually structured to generate limited extra liquidity with respect to the interest and to the principal of the bonds to be repaid to which are dependents. In addition, SSPEs generally do not possess extra assets to be allocated as collateral. These represent substantial technical impediments met by the SSPE in terms of posting collateral in a way that would comply with the set of requirements for the determination of the level and type of collateral according to Delegated Regulation (EU) 2016/2251.

19. Nevertheless, the potential risk for the derivative counterparties due to the impediment to posting collateral met by SSPEs is partially offset by the common practice that OTC counterparties are positioned at the top of the waterfall of payments, being at least as senior as the most senior tranche.

20. In terms of the collection of collateral, from the SSPEs' point of view, as reported in the stakeholder response to the first consultation on the RTS on risk-mitigation techniques for OTC derivatives not cleared by a CCP, it seems that the practice of SSPEs collecting margins (variation and initial) is already in place⁵. 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.

21. Because there are no substantial differences among the OTC contracts put in place for covered bonds and securitisations, and also because the legislators recognise that, in recital 41 of the Securitisation Regulation⁶ (Regulation (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 the different treatment of OTC derivative contracts entered into by covered bond entities and by SSPEs, the ESAs suggest that SSPEs, for OTC derivatives in connection with STS securitisations, would be exempted from posting and collecting initial margins and from posting variation margins in the way already implemented for covered bonds.

Condition for granting the exemption

22. Clearly, in order to prevent possible distortion or arbitrage, not only should the collateral exchange be implemented similarly between securitisations and covered bonds, but 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.

⁴ 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.

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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.

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R2402&from=EN>



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

24. 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 Delegated Regulation (EU) 2016/2251). In the case of securitisations, this condition is maintained and adapted to the features of securitisation, 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).

25. The condition on the seniority of the claim of the counterparty of the OTC derivatives (condition 'b' in Article 30(2) of Delegated Regulation (EU) 2016/2251) can be neglected, in the case of covered bonds, only if the counterparty itself defaults or voluntarily waives 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 was introduced by the Commission when the RTS were adopted. In response to the Commission adoption of the RTS, the ESAs issued an opinion⁷, in September 2016, explicitly asking for the voluntary waiver to be removed. Nonetheless, the final adoption of the Delegated Regulation in October 2016 still contained the voluntary waiver of the pari passu rank, as did the version published in the Official Journal on 15 December 2016. This must, therefore, be interpreted as the legislators' willingness to keep this condition in place for covered bonds. On the other hand, the voluntary waiver for STS securitisations cannot be identically allowed for the reasons expressed below.

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

27. 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 enhancement⁸ 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 to simulate protection similar to that obtained from the covered bond cover pool with the overcollateralisation requirement of at least 2% for covered bonds, as stated in the condition 'g' in Article 30(2) of Delegated Regulation (EU) 2016/2251. However, given the distinct characteristics of

⁷ [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)

⁸ According to 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'.



securitisations and covered bonds, the level of protection of the OTC counterparty would be higher in the latter case owing to the additional recourse to the issuer and the rest of its estate, in cases 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 the waiver of the *pari passu* condition for securitisations, which is currently stated in condition 'b' of Article 30(2) of Delegated Regulation (EU) 2016/2251.

28. In the case of covered bonds, the already existing 2% overcollateralisation 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, 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 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 at 2%, in order to be aligned, as close as possible, to the 2% overcollateralisation 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 by at least 2.04%⁹. Accordingly, because the most senior tranche is the first to be paid in a securitisation, this 2% credit enhancement provides a cushion similar to that of the 2% overcollateralisation in covered bonds.

29. In addition, condition 'e' ('exclusion of contract not related') of Article 30(2) of Delegated Regulation (EU) 2016/2251 is replicated with condition 'c' of the draft Article 30a(2) to prevent the risk that the SSPEs extend the privilege of the exemption of collateral exchange for derivatives not related to the STS securitisation.

30. Other conditions, specific only to covered bonds, such as the condition that the OTC contracts survive in case of resolution or insolvency of the covered bond issuer (condition 'a' in Article 30(2) of Delegated Regulation (EU) 2016/2251) are not replicable or necessary within the framework of securitisation. For instance, the securitisation originator (the equivalent subject of the covered bond issuer), contrary to the covered bond issuer, does not conclude any contract in place of the SSPE. Therefore, the surviving of the contract to the 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

⁹ 2.04% = 2% minimum credit enhancement/98% maximum size of the most senior tranche.



definition, is not the subject of any insolvency procedure¹⁰, and it is not possible for the OTC contract survives to the SSPE winding down¹¹.

31. Similarly, conditions 'c' (accordance with national covered bond legislation) and 'f' (requirement of meeting the requirements of paragraphs 1 to 3 of Article 129 of the CRR) of Article 30(2) of Delegated Regulation (EU) 2016/2251 are specific to covered bonds 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 covered 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.

32. Finally, condition 'd' (i.e. 'only interest risk and currency mismatch hedging purpose') in Article 30(2) of Delegated Regulation (EU) 2016/2251 is not necessary for securitisation because this condition is already in place in the new paragraph 5 of Article 4 EMIR.

¹⁰ 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.

¹¹ 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.



Draft regulatory technical standards



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

of **XXX**

[...]

amending Delegated Regulation (EU) 2016/2251 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 repositories¹², 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) No 648/2012, extends the scope of Delegated Regulation (EU) 2016/2251 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) 2016/2251 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) No 648/2012, such rules on the risk-mitigation techniques for OTC derivative contracts not cleared by a

¹² 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 a 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 1093/2010¹³, 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 Council¹⁴, and the Securities and Markets Stakeholder Group established in accordance

¹³ 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).

¹⁴ 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 Council¹⁵.

Delegated Regulation (EU) 2016/2251 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) 2016/2251

Delegated Regulation (EU) 2016/2251 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 securitisation special purpose entity in connection with a securitisation within the meaning of Regulation (EU) 2017/2402 and meeting the conditions of Article 4(5) of Regulation (EU) No 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;

¹⁵ 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.’

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 (the EBA, ESMA and EIOPA) on the RTS (Delegated Regulation (EU) 2016/2251) on risk-mitigation techniques for OTC derivatives not cleared by a CCP. The current draft RTS are the ESA's response to the mentioned amendment.
2. According to Article 10(1) of the ESA regulations (Regulations (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 that analyses 'the potential related costs and benefits' before submitting to the European Commission. Such an annex shall provide the reader with an overview of the findings as regards the identification of the problem, the options identified to solve 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 RTS described in this Consultation Paper. Given the nature of the study, the IA is high level and qualitative in nature including some quantitative analysis wherever possible.

A. Problem identification

4. In the current EMIR, SSPEs are considered non-financial counterparties (NFCs) and are therefore subject to clearing and non-cleared margin obligations only if they fall above a certain threshold (NFCs+). The new Securitisation Regulation includes an exemption to clearing obligations for both covered bonds and securitisations.
5. As a result of their specific features, SSPEs may face some impediments in exchanging collateral. Indeed, SSPEs may face a lack of assets to use for the margins, as securitisations, by construction, are usually structured to generate limited extra liquidity with respect to the interest and to the principal to be repaid of the bonds to which are dependents. In addition, SSPEs generally do not possess extra assets to be allocated as collateral. These represent substantial technical impediments faced by the SSPEs in terms of posting collateral.
6. Moreover, a 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 the securitisation holders, usually prescribed by the existing securitisations.



7. It is worth mentioning that securitisation swaps commonly incorporate transfer triggers and collateral triggers to protect against counterparty credit risk. This 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 its credit strength has deteriorated might be much more difficult than posting collateral, 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 securitisation transactions, as it is unlikely that an issuer will trade with an SSPE if it is required to exchange margin, as SSPEs, as they are currently conceived, may face some difficulties in being able to post collateral.

8. Finally, the current regulation results in an inconsistent treatment between two similar products, which are covered bonds and securitisations. Covered bond entities are considered financial counterparties (FCs) within Article 2(8), of EMIR, and are therefore subject to clearing obligations and margin requirements. Nevertheless, as mentioned in paragraph 4, the new Securitisation Regulation includes an exemption for clearing obligations for both covered bonds and securitisations and Article 30 of the RTS on risk-mitigation techniques for OTC derivatives provides an exclusion from margin requirements 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 not currently 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 treatments between derivatives associated with covered bonds and derivatives associated with securitisations could possibly generate distortion or arbitrage in the use of these two products.

9. The main discernible aspects in the legal structures of covered bonds and securitisations are that the covered bonds are unconditional obligations of the originator/issuer that are backed by the establishment of a cover assets pool. In this regard, the transaction's bankruptcy remoteness is achieved by legislative provisions (i.e. full recourse to the originator's remaining estate, *pari passu* with the rest of its non-preferential creditors, in case of its insolvency, once the cover pool is consumed). With regard to securitisations, there is a transfer of the underlying assets to an SSPE, which completely isolates the securitised assets from the originator and its possible bankruptcy. In this case, the securitisation investors have recourse to the originator's 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 margin 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 of covered bonds and securitisations to ensure the consistent treatment of the derivatives associated with them;
- define the necessary set of conditions to underpin 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 Regulation (EU) No 648/2012 on OTC derivatives, CCPs and trade repositories (EMIR) defines an FC as an investment firm, a credit institution, an insurance undertaking, an assurance undertaking, a reinsurance undertaking, an undertaking for the collective investment in transferable securities (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 a 'non-financial counterparty'. Therefore, EMIR currently considers SSPEs as NFCs.

14. Article 10(1) EMIR introduces two types of NFC. Only if the position in OTC derivatives of the NFC falls above a certain threshold (an NFC+) will it be obliged to comply with the mandatory clearing obligation. The defined threshold should be set by 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 Article 10(2)¹⁶ EMIR.

15. In particular, for all FCs and for the largest NFCs (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.

16. Nevertheless, Article 42 of the Securitisation Regulation amending Article 4 of EMIR includes an exemption for clearing obligations for both covered bonds and securitisations.

¹⁶ The positions in OTC derivatives to be over or under the set threshold are calculated as the rolling average position over 30 working days.



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 techniques¹⁷. The scope of the risk-mitigation techniques for uncleared OTC derivatives reflects the scope of the clearing obligation and applies to all FCs and 'NFCs+'. The risk-mitigation techniques for uncleared OTC derivatives require them to exchange two types of margins. The first type is a variation margin, which is exchanged daily and protects counterparties against exposures related to the current market value of their OTC derivative contracts. The second type is an initial margin, which covers future exposures. The initial margin requirement applies to FCs and NFCs+ above the threshold set by the ESMA.

18. Furthermore, SSPEs are subject to the distinction between NFCs+ and NFCs- depending on whether or not their positions¹⁸ in OTC derivatives are above or below the set threshold, as per Article 10 of the EMIR. This distinction is important, as NFCs+ are subject to clearing obligations whereas NFCs- are not¹⁹. The volume of outstanding securitisations within Europe in the first quarter of 2017 was 1.244 billion²⁰. This volume could potentially be exposed to OTC derivatives and, therefore, potentially subject to the distinction between NFCs+ and NFCs-.

19. Nevertheless, the problems described in paragraphs 4 to 8 might have a much higher impact if some aspects of the EMIR review are finally approved. Indeed, Article 1(1) of the EMIR review modifies the current Article 2(8) of the EMIR, including SSPEs as FCs.

20. In addition, there is currently no distinction within the EMIR framework between FCs with regard to their level of positions in OTC derivatives. This means that every undertaking considered an FC, as per Article 2, point (8), of the EMIR, should be subject to a clearing obligation. Nevertheless, Article 4a of the EMIR review introduces two types of FC; only if the position in OTC derivatives of the FC falls above a certain threshold (FC+) will it be obliged to comply with the mandatory clearing obligation. Nonetheless, an FC- will remain subject to the application of risk-mitigation techniques (initial margin/variation margin) as set in the ESAs' RTS (Delegated Regulation (EU) 2016/2251). As per NFCs, the defined threshold should be set by ESMA taking into account the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivative. The way the clearing thresholds are calculated is set in the EMIR review in Article 10²¹.

¹⁷ It should be noted that Article 30 of the RTS on risk-mitigation techniques for OTC derivatives provides an exclusion from margin requirements for contracts that are concluded in connection with covered bonds if they meet the requirements of Article 30(2).

¹⁸ The positions in OTC derivatives are calculated as the rolling average position over 30 working days.

¹⁹ NFCs- are subject neither to clearing obligation nor to risk-mitigation techniques for uncleared OTC derivatives.

²⁰ Data obtained from the Q1 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/>).

²¹ 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 of March, April and May.



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 mentioning that Article 42 EMIR amends Article 11(15) EMIR and specifically mandates the ESAs to draft 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 an SSPE in connection with STS securitisations, taking into account 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 potential problems 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 SSPEs in connection with an 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 SSPEs in connection with an STS securitisation in a manner similar to that of the definition of exclusion for covered bonds, 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 obligations and may face problems in posting collateral owing to the lack of liquidity or to the existing collateral arrangements under the securitisation. Indeed, the new Securitisation Regulation includes an exemption to clearing obligations for securitisations and directly mandates the ESAs to develop RTS that define the applicable risk-mitigation techniques for covered bonds and STS securitisations 'taking into account any impediments faced in exchanging collateral with respect to existing collateral arrangements under the covered bond or securitisation'. In this statement, the Securitisation Regulation specifically recognises the fact that securitisations might face some problems in exchanging collateral.

26. Some securitisations, as well as covered bonds, already possess important risk mitigants that make the imposition of the margining and clearing obligation overly burdensome. Indeed, the potential risk for the counterparties of the OTC derivative due to the impediment to posting



collateral faced by the SSPE is partially offset by the common practice that OTC counterparties are positioned at the top of the waterfall of payments, so they are at least as senior as the most senior tranche. In addition, the derivative counterparty benefits from the appropriate segregation of the assets in the securitisation panel.

27. Therefore, the preferred option is to include an exclusion from margin requirements for securitisation (implemented in a similar way and under the same set of conditions, where applicable, as already defined in Article 30 of the RTS for covered bonds).

28. This exemption will only apply to STS securitisations as it is specified in the mandate included in the Securitisation Regulation that 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 securitisation meeting the conditions to be an STS securitisation.

29. Nevertheless, it is difficult to provide an accurate quantification of the number of SSPEs or the value of outstanding securitisations that would fall under each category of NFC and would, therefore, be 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 EUR 1.244 billion²². This volume could be potentially exposed to OTC derivatives and could therefore potentially fall under the margin posting requirement if the SSPE is considered an NFC+ and if there is a change in the counterparty (i.e. if there is a replacement because the counterparty has been downgraded). In addition, all the new securitisation issuances might potentially become subject to the 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 EUR 238.6 billion²³. However, in the first quarter of 2017 the volume of issuances was EUR 36.7 billion²⁴, a decline of 38.9%²⁵ from the fourth quarter of 2016 and a decline of 35.7%²⁶ 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, these 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 to 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.

31. The specific treatment will be similar to that already implemented for covered bonds in Article 30 of the RTS on OTC derivatives. In fact, 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 margin requirements diverge. Therefore, the

²² Data obtained from the Q1 2017 Securitisation Data Report published by the AFME (see <https://www.afme.eu/en/reports/Statistics/afme-securitisation-data-report-q1-2017/>).

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *ibid.*



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 into account specific features of securitisations that may differ from covered 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 overcollateralisation 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 prevent this, the preferred option is to request at least a 2% credit enhancement for the most senior tranche. This condition will guarantee an approximately 2% of extra coverage as the 102% of overcollateralisation guarantees for covered 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 to Delegated Regulation (EU) No 2251/2016 suggested in this Consultation Paper (CP)?

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



Views of the Banking Stakeholder Group (BSG)

The CP was presented to the BSG on 4 July 2018. The BSG did not raise any issues with the proposal.



Feedback on the public consultation

The EBA publicly consulted on the draft proposal contained in this paper.

The consultation period lasted for 6 weeks and ended on 15 June 2018. A total of seven responses were received, all of which were published on the EBA website.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

In some cases, industry bodies made similar comments or the same body repeated its comments in the response to different questions. In such cases, the comments and the EBA's analysis are included in the section of this paper where the EBA considers them most appropriate.

Summary of key issues and the EBA's response

Respondents claimed that a special treatment should not be limited to derivatives that rank at least *pari passu* with the most senior class of notes under an STS securitisation, as this would limit the benefit of the exemption in the context of STS securitisations. Stakeholders requested that the draft RTS are amended to provide that the special treatment of derivatives associated with STS securitisations should apply where the swap ranks at least *pari passu* with the relevant STS securitisation tranche with which it is associated.

The ESAs did not amend the text of their proposal on the purpose of this requirement, which is to ensure a high degree of protection of the derivatives counterparty. By lowering the requirement to the mezzanine tranches, the claim of the derivatives counterparty would be substantially diluted. The ESAs recognise the operational challenge for derivatives used for hedging tranche-specific aspects, but they also consider that the treatment of this counterparty would be substantially weakened compared with the treatment of the OTC counterparty benefiting from the similar exemption of covered bonds.



Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
General comments			
<p>Respondents generally support the aim of the draft RTS to ensure a level playing field and consistency of treatment between derivatives associated with covered bonds and derivatives associated with STS securitisations. The RTS broadly achieve that aim, of extending the exemption from certain requirements under the Margin RTS for derivatives associated with covered bonds (i.e. no exchange of initial margin and collection only of variation margin) to STS securitisations. The support is often conditioned to the remarks expressed below in the table.</p>			
Responses to questions in Consultation Paper JC/2018/15			
<p>Question 1. Do stakeholders agree with the amendments for Delegated Regulation (EU) No 2251/2016 suggested in this CP?</p>	<p>Many respondents expressed a general support of the proposal; some of the respondents expressed support that is subject to some specific answers, reported below.</p> <p>A respondent suggested that the variation margin is not posted by the SSPE but that it is collected from its counterparty and returned to its counterparty when due, in cases where the rating of its counterparty is or falls below the credit quality step 2 and where the variation margin is not covered by a guarantee of a counterparty of a credit quality step of at least 2, pursuant to Annex III to Commission Implementing Regulation (EU) 2018/634.</p>	<p>The ESAs consider that linking the exception to the credit quality of the counterparties would differentiate the treatment of securitisations and covered bonds.</p>	<p>No change introduced to the draft RTS with respect to the CP version.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	A respondent asked if the amendments are also applicable to transactions issued before 1 January 2019 that are considered STS under the transitional provisions of Article 43 of Regulation (EU) 2017/2402.	The ESAs rely on the terms of application of the requirements that are established in EMIR and Securitisation Regulation ((EU) 2017/2402).	No change introduced to the draft RTS with respect to the CP version.
	A respondent recommended that the ESAs observe the European Commission's proposal for a covered bond directive, as tabled in March 2018. This directive would also regulate, inter alia, the conditions for covered bond derivatives in Article 11. The respondents strongly advise that the ESAs ensure that the Delegated Regulations and the forthcoming covered bond directive do properly interact with each other and do not disturb well-established covered bond markets. One issue to clarify could be the requirement for pari passu ranking of the derivative counterparty also in insolvency and resolution.	The ESAs consider this recommendation to be beyond the scope of the EMIR mandate as changed by the Securitisation Regulation.	No change introduced to the draft RTS with respect to the CP version.
Question 2. Are there any additional or alternative requirements for securitisations that stakeholders think should be introduced into Delegated Regulation (EU) No 2251/2016 following the amended	Some respondents suggested that the special treatment should not be limited to derivatives that rank at least pari passu with the most senior class of notes under an STS securitisation, as this would limit the practical benefit of the exemption in the context of STS securitisations (e.g. separate currency swaps may be used to hedge different classes of notes in an STS securitisation, with each	The CP introduces the requirement in Article 30a(2)(a) that the derivatives counterparty is required to rank at least pari passu with the most senior note. The purpose of this requirement is to ensure a high degree of protection to the derivatives counterparty. By	No change introduced to the draft RTS with respect to the CP version.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
mandate in Article 11(15) EMIR?	swap ranking pari passu with the class of notes it hedges). Stakeholders requested that the draft RTS are amended to provide that the special treatment of derivatives associated with STS securitisations should apply where the swap ranks at least pari passu with the relevant STS securitisation tranche with which it is associated.	lowering the requirement to the mezzanine tranches, the claim of the derivatives counterparty would be substantially diluted. The ESAs recognise the operational challenge for derivatives used for hedging tranche-specific aspects, they also consider that the treatment of this counterparty would be substantially weakened compared with the treatment of the OTC counterparty benefiting from the similar exemption of covered bonds.	
	A respondent suggested that investors should be granted total transparency on the hedging policy of the securitised portfolio. That implies having knowledge of any discretion left, reset policy or risk limits and having access on an ongoing basis to the effective OTC positions.	The ESAs consider this suggestion more appropriate as a requirement that could be assessed for securitisation in general, not just STS securitisation, as in the mandate of these RTS.	No change introduced to the draft RTS with respect to the CP version.
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?	A respondent expressed disagreement, because it would not be possible to compare recourse to the issuers by the disallowance of a waiver of the pari passu condition.	The ESAs assessed this as a comparable exchange in the drafting of the proposal.	No change introduced to the draft RTS with respect to the CP version.



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
	<p>A respondent did not support the requirement that the derivative counterparty rank pari passu with the most senior securitisation tranche. The requirement for securitisations should be for the counterparty to the OTC derivative that ranks at least pari passu with the investors of the relevant tranche being the subject of the OTC derivative.</p>	<p>As reported above, the Consultation Paper introduces the requirement in 30a(2)(a) that the derivatives counterparty is required to rank at least pari passu with the most senior note. The purpose of this requirement is to ensure a high degree of protection to the derivatives counterparty. By lowering the requirement to the mezzanine tranches, the claim of the derivatives counterparty would be substantially diluted. The ESAs recognise the operational challenge for derivatives used for hedging tranche-specific aspects, but they also consider that the treatment of this counterparty would be substantially weakened compared with the treatment of the OTC counterparty benefiting from the similar exemption of covered bonds.</p>	<p>No change introduced to the draft RTS with respect to the CP version.</p>
	<p>A respondent suggested not using the term 'notes' in paragraph 2(b) but to stick to the usual vocabulary of 'tranche'.</p>	<p>The ESAs consider that the term 'note' is consistent with the legal terms used in the Securitisation Regulation. The ongoing basis requirement in the draft Article 30a is required to protect the OTC counterparty of the SSPE to a similar level as the</p>	<p>No change introduced to the draft RTS with respect to the CP version.</p>



Comments	Summary of responses received	EBA analysis	Amendments to the proposals
		replenishment of the collateral protects the OTC counterparty of the covered bond.	
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 cases of STS securitisations as it does in cases of covered bonds? Or would it instead be necessary to retain the waiver currently available for covered bonds for exceptional situations under STS securitisations?	Some respondents, regarding the requirement of a credit enhancement of 2% of the most senior securitisation tranche, remarked that it would be impossible to guarantee this on an ongoing basis, as there could be defaults on the underlying portfolio. A securitisation is an auto-liquidating structure, in contrast to a covered bond that has a cover pool that can be replenished on a regular basis. Moreover, this requirement would not be consistent with the current market practice that derivatives are pari passu with the relevant tranche hedged by the derivative. The respondents suggested removing this requirement or rephrasing it as follows: the securitisation will provide initial credit enhancement to each securitisation tranche to which the OTC counterparty is at least pari passu (as applicable).	The ESAs consider that the ongoing basis requirement in the draft Article 30a is required to protect the OTC counterparty of the SSPE to a similar level as the replenishment of the collateral protects the OTC counterparty of the covered bond.	No change introduced to the draft RTS with respect to the CP version.
	A respondent believed that it should be mentioned in the text of the delegated act (or a footnote) that if the senior tranche does not exceed 98% of the securitisation, credit enhancement will be considered sufficient.	The requirement on the 2% credit enhancement seems clear, and further clarification seems unnecessary. Furthermore, it would be unusual to use a footnote in EU regulation drafting.	No change introduced to the draft RTS with respect to the CP version.

