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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	18 December 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 17.12.2019 amending Delegated Regulation (EU) 2016/2251 as regards the specification of the treatment of OTC derivatives in connection with certain simple, transparent and standardised securitisations for hedging purposes

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Delegations will find attached document C(2019) 8950 final.

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Encl.: C(2019) 8950 final



Brussels, 17.12.2019  
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**COMMISSION DELEGATED REGULATION (EU) .../...**

**of 17.12.2019**

**amending Delegated Regulation (EU) 2016/2251 as regards the specification of the treatment of OTC derivatives in connection with certain simple, transparent and standardised securitisations for hedging purposes**

(Text with EEA relevance)

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE DELEGATED ACT**

Article 11 of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR) introduced an obligation for financial counterparties engaged in over-the-counter (OTC) derivative contracts not cleared by a central counterparty (CCP) as well as those non-financial counterparties that are above the clearing threshold defined under Article 10 to have risk-management techniques requiring the timely, accurate and appropriate segregated exchange of collateral (together ‘the margin requirements’). Commission Delegated Regulation (EU) 2016/2251 on risk-mitigation techniques for OTC derivatives not centrally cleared, specifies further these risk-management techniques and provides for an exemption from margin requirements for derivatives associated to covered bonds for hedging purposes and where a set of conditions are met.

Article 42 of Regulation (EU) No 2017/2402 of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (Securitisation Regulation), amends Article 11(15) of EMIR with regard to risk-management techniques.

Considering the degree of substitutability between covered bonds and securitisations and in order to prevent the possibility of distortion or arbitrage, the amended Article 11(15) aim at ensuring a level playing field between the regime for covered bonds and the regime for Securitisation Special Purpose Entities (SSPEs) with respect to risk-mitigation techniques for non-centrally cleared OTC derivatives.

The amended Article 11(15) of EMIR, as introduced by the Securitisation Regulation, requires that the ESAs amend the risk-mitigation techniques Regulatory Technical Standard (RTS) for OTC derivative contracts that are concluded by covered bond entities in connection with a covered bond, or by an SSPE in connection with a securitisation, taking into account the problems that these entities may face in exchanging collateral.

### **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

On May 2018, the ESAs published a consultation paper with their proposal for the draft RTS. The European Supervisory Agencies (ESA)s adopted a draft RTS on the clearing obligation on 12 December 2018 and subsequently submitted it to the Commission.

Together with the draft technical standards, the ESAs submitted a report on how the outcome of these consultations has been taken into account in the development of the final draft regulatory technical standards submitted to the Commission.

### **3. LEGAL ELEMENTS OF THE DELEGATED ACT**

The Draft Delegated act proposes that SSPEs, for OTC derivatives in connection with securitisations that meet the requirements to be classified as securitisations according to the Securitisation Regulation, would be exempted from posting and collecting initial margins and from posting variation margins in the way already implemented for covered bonds. Accordingly, the ESAs suggest basing the conditions applicable to securitisations on those that already apply to covered bonds and adapting them where relevant.

**COMMISSION DELEGATED REGULATION (EU) .../...**

**of 17.12.2019**

**amending Delegated Regulation (EU) 2016/2251 as regards the specification of the treatment of OTC derivatives in connection with certain simple, transparent and standardised securitisations for hedging purposes**

(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 repositories<sup>1</sup>, and in particular Article 11(15) thereof,

Whereas:

- (1) Article 11(15) of Regulation (EU) No 648/2012 has been amended by Article 42(3) of Regulation (EU) 2017/2402 of the European Parliament and of the Council<sup>2</sup>. That amendment was made to ensure that, with regard to the margin requirements for non-centrally cleared OTC derivatives, derivatives associated with covered bonds and derivatives associated with securitisations are treated in the same manner. Since Commission Delegated Regulation (EU) 2016/2251<sup>3</sup> is based on Article 11(15) of Regulation (EU) No 648/2012, that Delegated Regulation should be amended to reflect the amendment made to Article 11(15) of Regulation (EU) No 648/2012 and thus 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 central counterparty and 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. Because securitisation special purpose entities are usually structured to generate little excess of liquidity, they have less assets to be used for the exchange of collateral. That impediment prevents securitisation special purpose entities from exchanging collateral in a way that fully complies with the requirements of Delegated Regulation (EU)

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<sup>1</sup> OJ L 201, 27.7.2012, p. 1.

<sup>2</sup> Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised 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 (OJ L 347, 28.12.2017, p. 35).

<sup>3</sup> Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (OJ L 340, 15.12.2016, p. 9).

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 securitisation special purpose entities in connection with an STS securitisation some flexibility, 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 collect collateral from their counterparties and to subsequently return it when due. Counterparties of securitisation special purpose entities in connection with an STS securitisation are therefore required to post variation margin in cash. They should have the right to receive back part or all of it, while securitisation special purpose entities should only be required to collect the variation margin received in cash and to post variation margin for the amount in cash received. This is in line 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) Delegated Regulation (EU) 2016/2251 should therefore be amended accordingly,
- (4) 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.
- (5) 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 1093/2010 of the European Parliament and of the Council<sup>4</sup>, 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 Council<sup>5</sup>, and the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>6</sup>.

HAS ADOPTED THIS REGULATION:

#### *Article 1*

#### **Amendment to Delegated Regulation (EU) 2016/2251**

In Delegated Regulation (EU) 2016/2251, the following Article 30a is inserted:

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<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> 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).

*“Article 30a*

**Treatment of derivatives in connection with securitisations for hedging purposes**

1. By way of derogation from Article 2(2) and where the conditions set out in paragraph 2 of this Article are met, counterparties may provide in their risk management procedures the following in connection with OTC derivatives contracts that are concluded by a securitisation special purpose entity in connection with a securitisation as defined in point (1) of Article 2 of Regulation (EU) 2017/2402 of the European Parliament and of the Council\* and meeting the conditions of Article 4(5) of Regulation (EU) No 648/2012:
  - (a) that variation margin is not posted by the securitisation special purpose entity but 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 shall apply 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, provided that counterparty is neither the defaulting nor the affected party;
  - (b) the securitisation special purpose entity for 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;
  - (c) the netting set does not include OTC derivative contracts unrelated to the securitisation.

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\* Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised 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 (OJ L 347, 28.12.2017, p. 35).”

*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, 17.12.2019

*For the Commission*  
*The President*  
*Ursula von der LEYEN*