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

REGULATION (EU) 2017/2402 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Securitisation involves transactions that enable a lender or a creditor – typically a credit institution or a corporation – to refinance a set of loans, exposures or receivables, such as residential loans, auto loans or leases, consumer loans, credit cards or trade receivables, by transforming them into tradable securities. The lender pools and repackages a portfolio of its loans, and organises them into different risk categories for different investors, thus giving investors access to investments in loans and other exposures to which they normally would not have direct access. Returns to investors are generated from the cash flows of the underlying loans.

(2) In its communication of 26 November 2014 on an Investment Plan for Europe, the Commission announced its intention to restart high-quality securitisation markets, without repeating the mistakes made before the 2008 financial crisis. The development of a simple, transparent and standardised securitisation market constitutes a building block of the Capital Markets Union (CMU) and contributes to the Commission's priority objective of supporting job creation and a return to sustainable growth.

(3) The Union aims to strengthen the legislative framework implemented after the financial crisis to address the risks inherent in highly complex, opaque and risky securitisation.

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It is essential to ensure that rules are adopted to better differentiate simple, transparent and standardised products from complex, opaque and risky instruments and to apply a more risk-sensitive prudential framework.

(4) Securitisation is an important element of well-functioning financial markets. Soundly structured securitisation is an important channel for diversifying funding sources and allocating risk more widely within the Union financial system. It allows for a broader distribution of financial-sector risk and can help free up originators' balance sheets to allow for further lending to the economy. Overall, it can improve efficiencies in the financial system and provide additional investment opportunities. Securitisation can create a bridge between credit institutions and capital markets with an indirect benefit for businesses and citizens (through, for example, less expensive loans and business financing, and credits for immovable property and credit cards). Nevertheless, this Regulation recognises the risks of increased interconnectedness and of excessive leverage that securitisation raises, and enhances the microprudential supervision by competent authorities of a financial institution's participation in the securitisation market, as well as the macroprudential oversight of that market by the European Systemic Risk Board (ESRB), established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council[(4)], and by the national competent and designated authorities for macroprudential instruments.

(5) Establishing a more risk-sensitive prudential framework for simple, transparent and standardised ('STS') securitisations requires that the Union clearly define what an STS securitisation is, since otherwise the more risk-sensitive regulatory treatment for credit institutions and insurance companies would be available for different types of securitisations in different Member States. This would lead to an unlevel playing field and to regulatory arbitrage, whereas it is important to ensure that the Union functions as a single market for STS securitisations and that it facilitates cross-border transactions.

(6) In line with the existing definitions in Union sectoral legislation, it is appropriate to provide definitions of all the key concepts of securitisation. In particular, a clear and encompassing definition of securitisation is needed to capture any transaction or scheme whereby the credit risk associated with an exposure or pool of exposures is tranched. An exposure that creates a direct payment obligation for a transaction or scheme used to finance or operate physical assets should not be considered an exposure to a securitisation, even if the transaction or scheme has payment obligations of different seniority.

(7) A sponsor should be able to delegate tasks to a servicer, but should remain responsible for risk management. In particular, a sponsor should not transfer the risk-retention requirement to his servicer. The servicer should be a regulated asset manager such as an undertaking for the collective investment in transferable securities (UCITS) management company, an alternative investment fund manager (AIFM) or an entity referred to in Directive 2014/65/EU of the European Parliament and of the Council[(5)] (MiFID entity).

(8) This Regulation introduces a ban on resecuritisation, subject to derogations for certain cases of resecuritisations that are used for legitimate purposes and to

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clarifications as to whether asset-backed commercial paper (ABCP) programmes are considered to be resecuritisations. Resecuritisations could hinder the level of transparency that this Regulation seeks to establish. Nevertheless, resecuritisations can, in exceptional circumstances, be useful in preserving the interests of investors. Therefore, resecuritisations should only be permitted in specific instances as established by this Regulation. In addition, it is important for the financing of the real economy that fully supported ABCP programmes that do not introduce any re-tranching on top of the transactions funded by the programme remain outside the scope of the ban on resecuritisation.

(9) Investments in or exposures to securitisations not only expose the investor to credit risks of the underlying loans or exposures, but the structuring process of securitisations could also lead to other risks such as agency risk, model risk, legal and operational risk, counterparty risk, servicing risk, liquidity risk and concentration risk. Therefore, it is essential that institutional investors be subject to proportionate due-diligence requirements ensuring that they properly assess the risks arising from all types of securitisations, to the benefit of end investors. Due diligence can thus also enhance confidence in the market and between individual originators, sponsors and investors. It is necessary that investors also exercise appropriate due diligence with regard to STS securitisations. They can inform themselves with the information disclosed by the securitising parties, in particular the STS notification and the related information disclosed in this context, which should provide investors with all the relevant information on the way STS criteria are met. Institutional investors should be able to place appropriate reliance on the STS notification and the information disclosed by the originator, sponsor and securitisation special purpose entity (SSPE) on whether a securitisation meets the STS requirements. However, they should not rely solely and mechanistically on such a notification and such information.

(10) It is essential that the interests of originators, sponsors, original lenders that are involved in a securitisation and investors be aligned. To achieve this, the originator, sponsor or original lender should retain a significant interest in the underlying exposures of the securitisation. It is therefore important for the originator, sponsor or original lender to retain a material net economic exposure to the underlying risks in question. More generally, securitisation transactions should not be structured in such a way so as to avoid the application of the retention requirement. That requirement should be applicable in all situations where the economic substance of a securitisation is applicable, whatever legal structures or instruments are used. There is no need for multiple applications of the retention requirement. For any given securitisation, it suffices that only the originator, the sponsor or the original lender is subject to the requirement. Similarly, where securitisation transactions contain other securitisations positions as underlying exposures, the retention requirement should be applied only to the securitisation which is subject to the investment. The STS notification should indicate to investors that the originator, sponsor or original lender is retaining a material net economic exposure to the underlying risks. Certain exceptions should be made for cases in which securitised exposures are fully, unconditionally and irrevocably guaranteed in particular by public authorities. Where support from public resources

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is provided in the form of guarantees or by other means, this Regulation is without prejudice to State aid rules.

(11) Originators or sponsors should not take advantage of the fact that they could hold more information than investors and potential investors on the assets transferred to the SSPE, and should not transfer to the SSPE, without the knowledge of the investors or potential investors, assets whose credit-risk profile is higher than that of comparable assets held on the balance sheet of the originators. Any breach of that obligation should be subject to sanctions to be imposed by competent authorities, though only when such a breach is intentional. Negligence alone should not be subject to sanctions in that regard. However, that obligation should not prejudice in any way the right of originators or sponsors to select assets to be transferred to the SSPE that *ex ante* have a higher-than-average credit-risk profile compared to the average credit-risk profile of comparable assets that remain on the balance sheet of the originator, as long as the higher credit-risk profile of the assets transferred to the SSPE is clearly communicated to the investors or potential investors. Competent authorities should supervise compliance with this obligation by comparing the assets underlying a securitisation and comparable assets held on the originator's balance sheet.
The comparison of performance should be made between assets that are *ex ante* expected to have similar performances, for example between non-performing residential mortgages transferred to the SSPE and non-performing residential mortgages held on the balance sheet of the originator.
There is no presumption that the assets underlying a securitisation should perform similarly to the average assets held on the originator's balance sheet.

(12) The ability of investors and potential investors to exercise due diligence and thus make an informed assessment of the creditworthiness of a given securitisation instrument depends on their access to information on those instruments. Based on the existing *acquis*, it is important to create a comprehensive system under which investors and potential investors will have access to all the relevant information over the entire life of the transactions, to reduce originators', sponsors' and SSPEs' reporting tasks and to facilitate investors' continuous, easy and free access to reliable information on securitisations. To enhance market transparency, a framework for securitisation repositories to collect relevant reports, primarily on underlying exposures in securitisations, should be established. Such securitisation repositories should be authorised and supervised by the European Supervisory Authority (European Securities and Markets Authority) ('ESMA'), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(6)]. In specifying the details of such reporting tasks, ESMA should ensure that the information required to be reported to such repositories reflects as closely as possible existing templates for disclosures of such information.

(13) The main purpose of the general obligation for the originator, sponsor and the SSPE to make available information on securitisations via the securitisation repository is to provide the investors with a single and supervised source of the data necessary for performing their due diligence. Private securitisations are often bespoke. They are important because they allow parties to enter into securitisation transactions without

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disclosing sensitive commercial information on the transaction (e.g. disclosing that a certain company needs funding to expand production or that an investment firm is entering a new market as part of its strategy) and/or related to the underlying assets (e.g. on the type of trade receivable generated by an industrial firm) to the market and competitors. In those cases, investors are in direct contact with the originator and/or sponsor and receive the information necessary to perform their due diligence directly from them. Therefore, it is appropriate to exempt private securitisations from the requirement to notify the transaction information to a securitisation repository.

(14) Originators, sponsors and original lenders should apply to exposures to be securitised the same sound and well-defined criteria for credit-granting which they apply to non-securitised exposures. However, to the extent that trade receivables are not originated in the form of a loan, credit-granting criteria need not be met with respect to trade receivables.

(15) Securitisation instruments are generally not appropriate for retail clients within the meaning of Directive 2014/65/EU.

(16) Originators, sponsors and SSPEs should make available in the investor report all materially relevant data on the credit quality and performance of underlying exposures, including data allowing investors to clearly identify delinquency and default of underlying debtors, debt restructuring, debt forgiveness, forbearance, repurchases, payment holidays, losses, charge offs, recoveries and other asset performance remedies in the pool of underlying exposures. The investor report should include in the case of a securitisation which is not an ABCP transaction data on the cash flows generated by underlying exposures and by the liabilities of the securitisation, including separate disclosure of the securitisation position's income and disbursements, namely scheduled principal, scheduled interest, prepaid principal, past due interest and fees and charges, and data relating to the triggering of any event implying changes in the priority of payments or replacement of any counterparties, as well as data on the amount and form of credit enhancement available to each tranche. Although securitisations that are simple, transparent and standardised have in the past performed well, the satisfaction of any STS requirements does not mean that the securitisation position is free of risks, nor does it indicate anything about the credit quality underlying the securitisation. Instead, it should be understood to indicate that a prudent and diligent investor will be able to analyse the risks involved in the securitisation.
In order to allow for the different structural features of long-term securitisations and of short-term securitisations (namely ABCP programmes and ABCP transactions), there should be two types of STS requirements: one for long-term securitisations and one for short-term securitisations corresponding to those two differently functioning market segments. ABCP programmes rely on a number of ABCP transactions consisting of short-term exposures which need to be replaced once matured. In an ABCP transaction, securitisation could be achieved, inter alia, through agreement on a variable purchase-price discount on the pool of underlying exposures, or the issuance of senior and junior notes by an SSPE in a co-funding structure where the senior notes are then transferred to the purchasing entities of one or more ABCP programmes. However, ABCP transactions qualifying as STS should not include any resecuritisations. In