Regulation (EU) 2017/2401 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms

REGULATION (EU) 2017/2401 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 12 December 2017

amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms

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) Securitisations are an important constituent part of well-functioning financial markets insofar as they contribute to diversifying the funding and risk diversification sources of credit institutions and investment firms (‘institutions’) and releasing regulatory capital which can then be reallocated to support further lending, in particular the funding of the real economy. Furthermore, securitisations provide institutions and other market participants with additional investment opportunities, thus allowing portfolio diversification and facilitating the flow of funding to businesses and individuals both within Member States and on a cross-border basis throughout the Union. Those benefits should however be weighed against their potential costs and risks, including their impact on financial stability. As seen during the first phase of the financial crisis starting in the summer of 2007, unsound practices in securitisation markets resulted in significant threats to the integrity of the financial system, namely due to excessive leverage, opaque and complex structures that made pricing problematic, mechanistic reliance on external ratings or misalignment between the interests of investors and originators (‘agency risks’).

(2) In recent years, securitisation issuance volumes in the Union have remained below their pre-crisis peak for a number of reasons, including the stigma generally associated with such transactions. In order to prevent a recurrence of the circumstances that triggered the financial crisis, the recovery of securitisation markets should be based on sound and prudent market practices. To that end, Regulation (EU) 2017/2402 of the European

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Parliament and of the Council[(4)] lays down the substantive elements of an overarching securitisation framework, with criteria to identify simple, transparent and standardised ('STS') securitisations and a system of supervision to monitor the correct application of those criteria by originators, sponsors, issuers and institutional investors. Furthermore, that Regulation provides for a set of common requirements on risk retention, due diligence and disclosure for all financial services sectors.

(3) In accordance with the objectives of Regulation (EU) 2017/2402, the regulatory capital requirements laid down in Regulation (EU) No 575/2013 of the European Parliament and of the Council[(5)] for institutions originating, sponsoring or investing in securitisations should be amended to adequately reflect the specific features of STS securitisations when such securitisations also meet the additional requirements laid down in this Regulation, and to address the shortcomings which became apparent during the financial crisis, namely mechanistic reliance on external ratings, excessively low risk weights for highly-rated securitisation tranches and, conversely, excessively high risk weights for low-rated tranches, and insufficient risk sensitivity. On 11 December 2014 the Basel Committee on Banking Supervision (the 'BCBS') published its 'Revisions to the securitisation framework' (the 'Revised Basel Framework') setting out various changes to the regulatory capital standards for securitisations to address specifically those shortcomings. On 11 July 2016, the BCBS published an updated standard for the regulatory capital treatment of securitisation exposures that includes the regulatory capital treatment for 'simple, transparent and comparable' securitisations. That standard amends the Revised Basel Framework. The amendments to Regulation (EU) No 575/2013 should take into account the provisions of the Revised Basel Framework as amended.

(4) Capital requirements for positions in a securitisation under Regulation (EU) No 575/2013 should be subject to the same calculation methods for all institutions. In the first instance and to remove any form of mechanistic reliance on external ratings, an institution should use its own calculation of regulatory capital requirements where the institution has permission to apply the Internal Ratings Based Approach (the 'IRB Approach') in relation to exposures of the same type as those underlying the securitisation and is able to calculate regulatory capital requirements in relation to the underlying exposures as if these had not been securitised ('K_{IRB}'), in each case subject to certain pre-defined inputs (the Securitisation IRB Approach — 'SEC-IRBA'). A Securitisation Standardised Approach (SEC-SA) should then be available to institutions that are not able to use the SEC-IRBA in relation to their positions in a given securitisation. The SEC-SA should rely on a formula using as an input the capital requirements that would be calculated under the Standardised Approach to credit risk in relation to the underlying exposures as if they had not been securitised ('KSA'). When the first two approaches are not available, institutions should be able to apply the Securitisation External Ratings Based Approach (SEC-ERBA). Under the SEC-ERBA, capital requirements should be assigned to securitisation tranches on the basis of their external rating. However, institutions should always use the SEC-ERBA as a fallback when the SEC-IRBA is not available for low-rated tranches and certain medium-rated tranches of STS securitisations identified through appropriate parameters. For non-STS

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securitisations, the use of the SEC-SA after the SEC-IRBA should be further restricted. Moreover, competent authorities should be able to prohibit the use of the SEC-SA when the latter is not able to adequately tackle the risks that the securitisation poses to the solvability of the institution or to financial stability. Upon notification to the competent authority, institutions should be allowed to use the SEC-ERBA in respect of all rated securitisations they hold when they cannot use the SEC-IRBA.

(5) Agency and model risks are more prevalent for securitisations than for other financial assets and give rise to some degree of uncertainty in the calculation of capital requirements for securitisations even after all appropriate risk drivers have been taken into account. In order to capture those risks adequately, Regulation (EU) No 575/2013 should be amended to provide for a minimum 15 % risk-weight floor for all securitisation positions. Resecuritisations, however, exhibit greater complexity and riskiness and, accordingly, only certain forms of resecuritisations are permitted under Regulation (EU) 2017/2402. In addition, positions in resecuritisations should be subject to a more conservative regulatory capital calculation and a 100 % risk-weight floor.

(6) An institution should not be required to apply a higher risk weight to a senior position than that which would apply if it held the underlying exposures directly, thus reflecting the benefit of credit enhancement that senior positions receive from junior tranches in the securitisation structure. Regulation (EU) No 575/2013 should therefore provide for a 'look-through' approach according to which a senior securitisation position should be assigned a maximum risk weight equal to the exposure-weighted-average risk weight applicable to the underlying exposures, and such approach should be available irrespective of whether the relevant position is rated or unrated and the approach used for the underlying pool (Standardised Approach or IRB Approach), subject to certain conditions.

(7) An overall cap in terms of maximum risk-weighted exposure amounts is available under the current framework for institutions that can calculate the capital requirements for the underlying exposures in accordance with the IRB Approach as if those exposures had not been securitised (K_{IRB}). Insofar as the securitisation process reduces the risk attached to the underlying exposures, this cap should be available to all originator and sponsor institutions, regardless of the approach they use for the calculation of regulatory capital requirements for the positions in the securitisation.

(8) As pointed out by the European Supervisory Authority (European Banking Authority) ('EBA'), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[(6)], in its report on qualifying securitisation of July 2015, empirical evidence on defaults and losses shows that STS securitisations exhibited better performance than other securitisations during the financial crisis, reflecting the use of simple and transparent structures and robust execution practices in STS securitisation which deliver lower credit, operational and agency risks. It is therefore appropriate to amend Regulation (EU) No 575/2013 to provide for an appropriately risk-sensitive calibration for STS securitisations, provided that they also meet additional requirements to minimise risk, in the manner recommended by the EBA in that report which involves, in particular, a lower risk-weight floor of 10 % for senior positions.

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(9) Lower capital requirements applicable to STS securitisations should be limited to securitisations where the ownership of the underlying exposures is transferred to a securitisation special purpose entity or SSPE ('traditional securitisations'). However, institutions retaining senior positions in synthetic securitisations backed by an underlying pool of loans to small and medium-size enterprises ('SMEs') should also be allowed to apply to these positions the lower capital requirements available for STS securitisations where such transactions are regarded as of high quality in accordance with certain strict criteria, including on the eligible investors. In particular, such subset of synthetic securitisations should benefit from the guarantee or counterguarantee either by the central government or central bank of a Member State or a promotional entity, or by an institutional investor provided that the guarantee or counterguarantee provided by the latter is fully collateralised by cash on deposit with the originator institutions. The preferential regulatory capital treatment for STS securitisations that would be available to those transactions under Regulation (EU) No 575/2013 is without prejudice to compliance with the Union State aid framework, as set out in Directive 2014/59/EU of the European Parliament and of the Council[(7)].

(10) In order to harmonise supervisory practices throughout the Union, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission, having taken account of the report by the EBA, in respect of further specifying the conditions for the transfer of credit risk to third parties, the notion of commensurate transfer of credit risk to third parties and the requirements for competent authorities assessment of transfer of credit risk, both with regard to traditional and synthetic securitisations. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making[(8)]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(11) Technical standards in financial services should ensure adequate protection of investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust the EBA with the elaboration of draft regulatory technical standards which do not involve policy choices, for submission to the Commission.

(12) The Commission should be empowered to adopt regulatory technical standards developed by the EBA, with regard to what constitutes an appropriately conservative method for measuring the amount of the undrawn portion of the cash advance facilities in the context of calculating the exposure value of a securitisation and with regard to further specifying the conditions to allow institutions to calculate K_{IRB} for the pool of underlying exposures of a securitisation like in the case of purchased receivables. The Commission should adopt those draft regulatory technical standards by means of

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delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

(13) Only consequential changes should be made to the remaining regulatory capital requirements for securitisations laid down in Regulation (EU) No 575/2013 insofar as necessary to reflect the new hierarchy of approaches and the specific provisions for STS securitisations. In particular, the provisions related to the recognition of significant risk transfer and the requirements on external credit assessments should continue to apply in broadly the same terms as they do currently. However, Part Five of Regulation (EU) No 575/2013 should be deleted in its entirety with the exception of the requirement to hold additional risk weights which should be imposed on institutions found in breach of the provisions in Chapter 2 of Regulation (EU) 2017/2402.

(14) It is appropriate for the amendments to Regulation (EU) No 575/2013 provided for in this Regulation to apply to all securitisation positions held by an institution. However, in order to mitigate transitional costs insofar as possible and to allow for a smooth migration to the new framework, institutions should continue to apply, until 31 December 2019, the previous framework, namely the relevant provisions of Regulation (EU) No 575/2013 that applied prior to the date of application of this Regulation, to all outstanding securitisation positions that they hold on the date of application of this Regulation,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendment of Regulation (EU) No 575/2013

Regulation (EU) No 575/2013 is amended as follows:

(1) Article 4(1) is amended as follows:

(a) points (13) and (14) are replaced by the following:

(13) "originator" means an originator as defined in point (3) of Article 2 of Regulation (EU) 2017/2402[9];

(14) "sponsor" means a sponsor as defined in point (5) of Article 2 of Regulation (EU) 2017/2402;;

(b) the following point is inserted:

(14a) "original lender" means an original lender as defined in point (20) of Article 2 of Regulation (EU) 2017/2402;

(c) points (61), (62) and (63) are replaced by the following:

(61) "securitisation" means a securitisation as defined in point (1) of Article 2 of Regulation (EU) 2017/2402;

(62) "securitisation position" means a securitisation position as defined in point (19) of Article 2 of Regulation (EU) 2017/2402;