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Disclosure requirements for EU securitisations and consolidated application of securitisation rules for EU credit institutions

The Securitisation Regulation (Regulation (EU) 2017/2402¹) enters into force on 1 January 2019, and contains a set of high-level transparency requirements², in Article 7 of this Regulation, which must be met by reporting entities (i.e. the entity designated among the securitisation originator, sponsor, and Securitisation Special Purpose Entity to fulfil these requirements). The details and standardised templates to be used to fulfil these requirements will be further specified in a Commission Delegated Regulation using as a basis a set of draft regulatory and implementing technical standards developed by ESMA ('the ESMA disclosure templates')³. ESMA and the Commission are currently considering how to address market concerns raised about some aspects of the ESMA disclosure templates. These templates are therefore unlikely to be adopted by 1 January 2019 and, as a result, the Securitisation Regulation transitional provisions⁴ will apply. The transitional provisions require that the CRA3 templates⁵ be used until the ESMA disclosure templates are adopted.

The European Supervisory Authorities (ESAs) have been made aware of severe operational challenges for reporting entities in complying with these transitional provisions, in particular for those reporting entities that have never provided information according to the CRA3 templates (because of the application of Article 8b of the CRA3 Regulation, subsequently repealed by the Securitisation Regulation⁶). This implies that reporting entities may need to make substantial and costly adjustments to their reporting systems to comply with the CRA3 templates on a temporary basis, until the ESMA disclosure templates enter into application.

From a legal perspective, neither the ESAs nor competent authorities (CAs) possess any formal power to allow the disapplication of directly applicable EU legal text – for instance by issuing non-action letters, which exists in some non-EU jurisdictions. Any delays in the application of EU rules would formally need to be endorsed and implemented through EU legislation, which is outside the powers of the ESAs.

Nevertheless, in light of the above-mentioned difficulties and market concerns, the ESAs expect CAs to generally apply their supervisory powers in their day-to-day supervision and enforcement of applicable legislation in a proportionate and risk-based manner. This approach entails that CAs can, when examining reporting entities' compliance with the disclosure requirements of the Securitisation Regulation (which will apply from 1 January 2019, albeit in a non-standardised manner), take into account the type and extent of information already being disclosed by reporting entities. This approach does not entail general forbearance, but a case-by-case assessment by the CAs of the degree of compliance with the Securitisation Regulation.

The ESAs and CAs expect that these difficulties will be solved with the subsequent adoption of the ESMA disclosure templates and thus the expiry of the transitional arrangements involving the CRA3 templates in the Securitisation Regulation.

Separately, the ESAs have also been made aware of challenges that EU banking entities are facing with regard to complying with specific provisions of the CRR Amending Regulation relating to the scope of the Chapter 2 (due-diligence, risk retention, transparency, re-securitisation and criteria for credit-granting) requirements in the Securitisation Regulation⁷. Difficulties arise for EU banking subsidiaries engaging in local securitisation

¹ 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).

² Article 7 of the Securitisation Regulation

³ Submitted on 22 August 2018. See the Final Report here: https://www.esma.europa.eu/sites/default/files/library/esma33-128-474_final_report_securitisation_disclosure_technical_standards.pdf

⁴ Article 43(8) of the Securitisation Regulation.

⁵ Annexes I to VIII of Delegated Regulation (EU) 2015/3

⁶ Article 40 of the Securitisation Regulation. See also <https://www.esma.europa.eu/press-news/esma-news/esma-update-reporting-structured-finance-instruments-information-under-cra>

⁷ Article 1(11) of the CRR Amending Regulation, which replaces, in Article 14 of the CRR, references to Part Five with references to Chapter 2 of the Securitisation Regulation. 'CRR Amending Regulation' refers to 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 (OJ L 347, 28.12.2017, p. 1).

activities in third countries, in particular with regard to compliance with the EU transparency and risk retention rules introduced with the Securitisation Regulation.

With regard to the application of Article 1(11) of the CRR Amending Regulation, the ESAs also expect CAs to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in a proportional manner. This approach does not entail a general forbearance principle, but a case-by-case assessment by the CAs of the degree of compliance with the Securitisation Regulation. This approach entails that CAs can take into account the proposed changes to the scope of Article 14 of the CRR, based on the latest Trilogue Agreement.

The ESAs and CAs expect that the difficulties will be solved with the adoption of the new CRR Amending Regulation ('CRR 2') where, based on the latest Trilogue Agreement, the scope of Article 14 of the CRR is expected to be reduced and references to Chapter 2 will be replaced with reference to Article 5 (due-diligence requirements) only.