



# Consultation Paper

Amendments to the EMIR Clearing Obligation under the Securitisation Regulation



## Responding to this paper

The European Supervisory Authorities (ESA) invite responses to the questions listed in this Consultation Paper on the amendments to the EMIR Clearing Obligation under the Securitisation Regulation.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input - Consultations'.

Please follow the instructions given in the document Reply form for the Consultation Paper on the Amendments to the EMIR Clearing Obligation under the Securitisation Regulation also published on the [ESMA website](http://www.esma.europa.eu).

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives the ESAs should consider.

Please note that the length of the consultation period has been set to six weeks as the scope of this consultation paper is relatively limited. The ESAs will consider all comments received by **15 June 2018**.

## Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

## Data protection

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Legal Notice'.

## Who should read this paper

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from counterparties who are entering into OTC derivatives transactions with covered bond issuers



or with cover pools for covered bonds, or who are entering into OTC derivatives transactions with Securitisation Special Purpose Entities (SSPEs), as well as central counterparties (CCPs).

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## Acronyms used

EBA	European Banking Authority
EIOPA	European Insurance and Occupational Pensions Authority
EMIR	European Market Infrastructures Regulation – Regulation (EU) 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
FC	Financial Counterparty
NFC	Non-Financial Counterparty
NFC+	Non-Financial Counterparty subject to the clearing obligation, as referred to in Article 10(1)(b) of EMIR
OTC	Over-the-counter
Q&A on EMIR	Questions and Answers on the implementation of EMIR available on ESMA's website
RTS	Regulatory Technical Standards
SSPE	Securitisation Special Purpose Entity

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## Executive Summary

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### Reasons for publication

This consultation paper seeks stakeholders' views on the regulatory technical standards that the ESAs are required to draft under Article 4(6) of Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories (EMIR), as amended under Article 42(2) of Regulation (EU) No 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 (Securitisation Regulation).

The input from stakeholders will help the ESAs in finalising the relevant technical standards to be drafted and submitted to the European Commission for endorsement in the form of a Commission Delegated Regulation, i.e. a legally binding instrument directly applicable in all Member States of the European Union. One essential element in the development of draft technical standards is the analysis of the costs and benefits that those legal provisions will imply. Input in this respect and any supportive data will be highly appreciated and kept confidential where required.

### Contents

This paper provides explanations on the draft regulatory technical standards specifying criteria for establishing which arrangements under covered bonds or securitisations adequately mitigate counterparty risk.

The structure of this consultation paper contains an introduction on the clearing obligation, an overview of the objective and approach for the technical standards on the clearing obligation presented in the consultation paper, and clarifications on the conditions for the arrangements in relation to covered bonds and the arrangements in relation to securitisation that could enable to benefit from an exemption from the clearing obligation.

### Next steps

As provided for by Regulations (EU) No 1093/2010/, No 1094/2010 and No 1095/2010 of the European Parliament and Council establishing the EBA, EIOPA and ESMA respectively, a public consultation is conducted on the draft technical standards before they are finalised and submitted to the European Commission for endorsement in the form of a Commission Delegated Regulation.

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## Introduction

1. With the overarching objective of reducing systemic risk, EMIR introduces the obligation to clear certain classes of OTC derivatives in Central Counterparties (CCPs) that have been authorised (for European CCPs) or recognised (for third-country CCPs) under the EMIR framework. Ensuring that the clearing obligation reduces systemic risk requires a process of identification of classes of derivatives that should be subject to mandatory clearing.
2. EMIR foresees two possible processes for the identification of the relevant classes of OTC derivatives:
  - The “bottom-up” approach described in EMIR Article 5(2), according to which the determination of the classes to be subject to the CO will be done based on the classes which are already cleared by authorised or recognised CCPs.
  - The “top-down” approach described in EMIR Article 5(3), according to which ESMA will on its own initiative identify classes which should be subject to the clearing obligation but for which no CCP has yet received authorisation.
3. ESMA has conducted the bottom-up approach in several instances, determining that certain classes of OTC derivatives meet the criteria defined in EMIR to become subject to the clearing obligation and as a result submitted several draft regulatory standards to the European Commission. Three Delegated Regulations on the clearing obligation that are based on the technical standards submitted by ESMA have since been adopted and have entered into force.
4. These Delegated Regulations cover several classes of OTC derivatives in the interest rate and credit derivative asset classes. These Delegated Regulations also contain a phase-in that have allowed for a phased implementation of the clearing obligation. Four categories of counterparties have been defined along with their corresponding start dates.
5. As of the date of publication of this consultation paper, the counterparties belonging to two of these categories as defined in the Delegated Regulations, Category 1 and Category 2, have to clear. Broadly speaking, they correspond respectively to clearing members as well as to financial counterparties with a high volume of activity in OTC derivatives, taking also into account the other entities from their group where applicable. The details for the implementation of the clearing obligation, in particular the classes of OTC derivatives subject to the obligation as well as the definitions and associated timetables of these categories of counterparties are maintained in a dedicated register, the Public Register, accessible on ESMA's website<sup>1</sup>.
6. In the two Delegated Regulations on the clearing obligation of certain OTC interest rate derivatives, derivatives associated with covered bonds benefit from an exemption regime when certain conditions are met.
7. Article 42 of the Securitisation Regulation amends EMIR (see Annex I), through, inter alia, the addition of two new paragraphs to Article 4 regarding the Clearing obligation (paragraphs 4(5) and 4(6)). It is

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<sup>1</sup> The “Public Register for the Clearing Obligation under EMIR” is available under the post-trading section of : <http://www.esma.europa.eu/page/Registries-and-Databases>

understood that the amendment of Article 4 of EMIR aims at ensuring a level playing field between the regime for covered bonds and the one for securitisation with respect to the clearing obligation.

8. The amendment of Article 4 of EMIR under the Securitisation Regulation includes a mandate for the ESAs to draft regulatory technical standards specifying criteria for establishing which arrangements under covered bonds or securitisations adequately mitigate counterparty risk. It is the topic addressed in the consultation paper.

## 1. The clearing obligation in relation to the Securitisation Regulation

9. As explained in General Question 3(iii) of the ESMA Q&A document on EMIR implementation<sup>2</sup>, SSPEs do not meet the definition of FCs under Article 2 of EMIR and are considered Non-Financial Counterparties (NFCs)<sup>3</sup>. Under EMIR, NFCs above the clearing threshold (NFC+) in accordance with Article 10 of EMIR, have to comply with the clearing obligation.
10. As a result, SSPEs that would fall under the NFC+ category under EMIR would be subject to the clearing obligation and would need to clear their transactions in the mandated classes of OTC derivatives.
11. However, the changes to the clearing obligation introduced by the Securitisation Regulation aim at ensuring a level playing field with respect to the clearing obligation between the regime for derivatives transactions associated with covered bonds and the regime for derivatives transactions associated with securitisations. Indeed, derivatives transactions associated with covered bonds are specifically addressed in the two Delegated Regulations on the clearing obligation covering OTC interest rate derivative classes and benefit from an exemption regime, under Article 1(2) of these two Delegated Regulations.
12. The Securitisation Regulation amends EMIR with respect to both covered bonds and securitisations, by including, inter alia, an exemption regime from the clearing obligation along with a mandate for the ESAs to draft regulatory technical standards specifying criteria for establishing which arrangements under covered bonds or securitisations adequately mitigate counterparty risk and thus the conditions to benefit from an exemption from the clearing obligation.

**Question 1: Do you have any comments on the conditions and objectives for developing the technical standards on the clearing obligation under the mandate of Article 4(6) of EMIR?**

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<sup>2</sup> The Q&A document is available at the following address: [https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52\\_qa\\_on\\_emir\\_implementation.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf)

<sup>3</sup> The ESAs are aware of the Refit proposal published by the European Commission on 4 May 2017 in the context of the EMIR Review which could amend the definition of FCs. However, at this stage the proposal is subject to negotiations by the European Parliament and the Council and it is therefore not part of this consultation.

## 2. The clearing obligation in relation to Covered Bonds

13. Recital 16 of EMIR clarifies that, in determining which classes of OTC derivative contracts are to be subject to the clearing obligation, “ESMA should take into account the specific nature of OTC derivative contracts which are concluded with covered bond issuers or with cover pools for covered bonds”.
14. ESMA took this Recital into account when developing the draft technical standards on the clearing obligation of OTC interest rate derivative classes. Both the technical standards and the related Delegated Regulations (see Article 1(2) of Commission Delegated Regulations (EU) No 2015/2205 and 2016/1178 in annex II) include a provision listing the conditions for benefiting from the exemption from the clearing obligation.
15. A covered bond is defined as a debt instrument issued by a bank (the covered bond issuer) in which the bond is secured by a pool of financial instruments (the cover pool). The cover pool consists of assets which are generally mortgages or public sector debt, and usually include derivative contracts to hedge specific risks such as interest rate risks or currency risks.
16. Cover bonds are an important source of funding for issuers, allowing them to access cheaper financing because of the recourse to the cover pool afforded to bondholders.
17. Covered bond issuers typically enter into hedging arrangements in order to mitigate the mismatch between the cash flows on the cover pool assets and the payments on the covered bonds. For example, currency mismatches can arise when the payments to bondholders are denominated in a currency different from the currency of the assets in the cover pool. Interest rate mismatches can arise for example when the assets of the cover pool are based on floating rates while the covered bond holder receives fixed interest rates. OTC derivatives are concluded for the purpose of hedging those mismatches.
18. The analysis and the consultation on the set of conditions required to benefit from an exemption from the clearing obligation has already been conducted by ESMA when developing the first technical standards on the clearing obligation under Article 5 of EMIR. Those conditions are now part of the related Delegated Regulations which have entered into force. The ESAs are suggesting to leverage this work and to migrate the conditions from the Delegated Regulations into the proposed technical standards under Article 4(6) of EMIR.
19. However, it is to be noted that two of the conditions included under Article 1(2) of the two Delegated Regulations (EU) No 2015/2205 and 2016/1178 on the clearing obligation are now included in EMIR as a result of the amendments introduced by the Securitisation Regulation. Such conditions thus do not need to be repeated in the technical standards. The two conditions are:
  - a. the derivatives must be used to hedge interest rate or currency mismatches (Article 1(2)(a) of the Delegated Regulations). This condition is now covered under the new Article 4(5)(b) of EMIR.
  - b. the covered bond must meet the requirements of Article 129 of Regulation (EU) No 575/2013 (Article 1(2)(e) of the Delegated Regulations). This condition is now covered under the new Article 2(30) of EMIR.

20. In practice, to avoid repetition, it also means that the two Delegated Regulations on the clearing obligation must be amended so that all the conditions mentioned above are removed from the Delegated Regulations as they are either included in EMIR now or are added to the new technical standards.

**Question 2: Do you agree with the proposed approach to migrate the conditions of the two Delegated Regulations on the clearing obligation into the new technical standards developed under Article 4(6)? If not, what new information should be taken into account to decide on a different approach and different conditions?**

### 3. The clearing obligation in relation to Securitisation

21. No equivalent Recital to Recital 16 of EMIR for covered bonds exists in EMIR for securitisation and no specific provision addressing the case of OTC derivative transactions associated to securitisation have been included in the draft technical standards developed by ESMA and the corresponding Delegated Regulations.
22. However, SSPEs benefit from similar collateral arrangements to the covered bond issuers, providing comparable protection to bondholders against the credit risk of the issuer. This similarity of protection explains the objective of the Securitisation Regulation to create a level playing field between the two regarding the clearing obligation and thus to provide for similar exemptions to both.
23. Accordingly, the ESAs suggest basing the conditions applicable to securitisations on those that already apply to covered bonds, and adapting them where relevant. Several of those conditions are specific to covered bonds and not relevant for securitisations: registration/recording of the cover pool in accordance with national covered bond legislation and no termination of the derivative in case of resolution/insolvency of the covered bond issuer. The ESAs suggest not to include those conditions in the technical standards.
24. In effect, only three conditions applicable to covered bonds appear to be relevant to securitisations:
  - a. The requirement for the counterparty to the OTC derivative to rank at least *pari passu* with the investors (Article 1(2)(d) of the two Delegated Regulations on the clearing obligation). The ESAs propose to include this condition for securitisations.
  - b. The requirement that OTC derivatives be used only to hedge interest rate or currency mismatches. However, as mentioned above this condition is already covered in EMIR. There is therefore no need to repeat it in the draft regulatory technical standards.
  - c. The over collateralisation requirement of 2% for covered bonds. In order to provide a similar 2% cushion for securitisation, it appears necessary to establish a minimum credit enhancement to the most senior position to which the OTC counterparty is at least *pari passu*, and to be aligned it is proposed to be set at 2%.
25. Note however, that the ESAs suggest two changes to the *pari passu* ranking condition for securitisations:
  - a. In the context of a covered bond, the OTC derivative counterparty can waive the right to be *pari passu* with the covered bond bondholders. This is because, the OTC derivatives counterparty benefits from recourse to the issuer of the covered bonds in addition to the collateral arrangements with respect to the cover bond pool. In a securitisation, no such recourse exists against the issuer and the protection offered to investors relies solely on the full collateralisation of the pool of assets. Should the OTC derivative counterparty waive its right to a *pari passu* ranking, there would no longer be any adequate credit risk mitigation and the exemption from clearing would not apply.
  - b. Securitisations by definition include several classes of investors and it may be desirable to clarify that the OTC derivative counterparty must rank *pari passu* with the most senior investors.

26. As a result, the ESAs suggest deleting the “or waives the pari passu rank” at the end of the condition in article 1(2)(d) when it pertains to securitisations only (for the avoidance of doubt it will remain for covered bonds).
27. Lastly, it is to be noted that the Securitisation Regulation also amends Article 11(5) of EMIR regarding risk mitigation techniques for OTC derivatives not cleared by a CCP. It introduces a second mandate for the ESAs 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 SSPE in connection with a STS securitisation, meeting the conditions of Article 4(5) of EMIR, taking into account any impediments faced in exchanging collateral with respect to existing collateral arrangements under the covered bond or securitisation.
28. This second mandate is addressed in a separate consultation paper<sup>4</sup>. However, as the two mandates are related, the two consultation papers should be read in conjunction. The intention is to develop consistent drafting under the two mandates to the extent possible, in particular with respect to the conditions described in this section and their rationale.
29. The draft RTS that reflects all the above conditions is in Annex III.

**Question 3: Do you agree with the proposed approach to mirror for securitisation the conditions applicable in the case of covered bonds but to exclude the conditions that are assessed as only relevant for covered bonds? If not, what additional information should be taken into account to decide on a different approach and different conditions, and specifically what should be these different conditions?**

**Question 4: Do you agree that the waiver of the pari passu rank only applies for covered bonds and not to securitisations? Do you agree that it is better to clarify that the pari passu ranking applies with respect to the most senior bondholders?**

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<sup>4</sup> The consultation paper on the risk mitigation techniques under Article 11(15) of EMIR is available at the following address: <https://www.eba.europa.eu/regulation-and-policy/market-infrastructures/draft-regulatory-technical-standards-on-risk-mitigation-techniques-for-otc-derivatives-not-cleared-by-a-central-counterparty-ccp>

## Annex I - Extract from the Securitisation Regulation amending EMIR

### Article 42 Amendment to Regulation (EU) 648/2012

Regulation 648/2012/EU is amended as follows:

- (1) in Article 2 points 30 and 31 are added:
  - "(30) "covered bond" means a bond meeting the requirements of Article 129 of Regulation (EU) No 575/2013."
  - (31) "covered bond entity" means the covered bond issuer or cover pool of a covered bond."
- (2) in Article 4 the following paragraphs 5 and 6 are added:
  - "5. Article 4(1) shall not apply 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 Regulation [the Securitisation Regulation] provided that:
    - (a) in the case of *securitisation special purpose entities*, the *securitisation special purpose entity* shall solely issue securitisations that meet the requirements of Articles 19 to 22 or Articles 23 to 26 and Article 18 of Regulation [the Securitisation Regulation];
    - (b) the OTC derivative contract is used only to hedge interest rate or currency mismatches under the covered bond or securitisation; and
    - (c) the arrangements under the covered bond or securitisation adequately mitigate counterparty credit risk with respect to the OTC derivative contracts concluded by the covered bond entity or *securitisation special purpose entity* in connection with the covered bond or securitisation.
  6. In order to ensure consistent application of this Article, and taking into account the need to prevent regulatory arbitrage, the ESAs shall develop draft regulatory technical standards specifying criteria for establishing which arrangements under covered bonds or securitisations adequately mitigate counterparty credit risk, within the meaning of paragraph 5.  
The ESAs shall submit those draft regulatory technical standards to the Commission by [six months after entry into force of *the Securitisation Regulation*]. Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010."
- (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 meeting 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 Regulation [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 [six months after entry into force of *the Securitisation Regulation*.] 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 Regulations (EU) No 1093/2010, (EU) No 1094/2010 or (EU) No 1095/2010."

## **Annex II - Article 1(2) of Commission Delegated Regulations (EU) 2015/2205 and 2016/1178**

### Article 1

#### Classes of OTC derivatives subject to the clearing obligation

2. The classes of OTC derivatives set out in Annex I shall not include contracts concluded with covered bond issuers or with cover pools for covered bonds, provided those contracts satisfy all of the following conditions:

- (a) they are used only to hedge the interest rate or currency mismatches of the cover pool in relation with the covered bond;
- (b) they are registered or recorded in the cover pool of the covered bond in accordance with national covered bond legislation;
- (c) they are not terminated in case of resolution or insolvency of the covered bond issuer or the cover pool;
- (d) the counterparty to the OTC derivative concluded with covered bond issuers or with cover pools for covered bonds ranks at least *pari passu* with the covered bond holders except where the counterparty to the OTC derivative concluded with covered bond issuers or with cover pools for covered bonds is the defaulting or the affected party, or waives the *pari passu* rank;
- (e) the covered bond meets the requirements of Article 129 of Regulation (EU) No 575/2013 of the European Parliament and of the Council and is subject to a regulatory collateralisation requirement of at least 102 %.

## **Annex III - Draft Regulatory Technical Standards on the Clearing Obligation**

**COMMISSION DELEGATED REGULATION (EU) No .../..**  
**supplementing Regulation (EU) No 648/2012 of the European Parliament and**  
**of the Council with regard to regulatory technical standards on the clearing**  
**obligation**

of [ ]

(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>5</sup>, and in particular Article 4(6) thereof,

Whereas:

- (1) Regulation (EU) 2017/2402 amends Regulation (EU) No 648/2012 and includes an exemption framework from the clearing obligation for OTC derivative contracts concluded by the covered bond entity or securitisation special purpose entity in connection with the covered bond or securitisation, provided that certain conditions are met.
- (2) Regarding OTC derivative contracts concluded by the covered bond entity in connection with the covered bond, Delegated Regulations (EU) 2015/2205 and 2016/1178 already included a set of conditions to be met for these OTC derivative contracts to be excluded from the scope of the clearing obligation.
- (3) The amendments to Regulation (EU) No 648/2012 provide for an equivalent exemption framework for OTC derivative contracts concluded by both covered bond entities or securitisation special purpose entities, taking into account the similar protection offered to the investors in covered bonds and securitisations against counterparty credit risk.

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<sup>5</sup> OJ L 201, 27.7.2012, p. 1.

- (4) The conditions with regards to OTC derivative contracts which are concluded by covered bond entities and that were included in Delegated Regulations (EU) 2015/2205 and 2016/1178 should be removed from these regulations and included in this Delegated Regulation, except for those conditions which are now included in Regulation (EU) No 648/2012.
- (5) In view of the similar nature and purpose of the OTC derivative contracts which are concluded by covered bond entities and securitisation special purpose entities in connection with the covered bonds or securitisations and in view of the similar collateral arrangements in place to mitigate counterparty credit risk in both covered bonds and securitisations, the conditions for an exemption from the clearing obligation applicable in the case of OTC derivative contracts which are concluded by covered bond entities should also apply to the OTC derivative contracts which are concluded by securitisation special purpose entities.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authorities to the European Commission.
- (7) The European Supervisory Authorities have conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits. The European Supervisory Authorities have also requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010, 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, and the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.

**HAS ADOPTED THIS REGULATION:**

*Article 1 – Arrangements under the covered bond that mitigate counterparty credit risk when the conditions of Article 4(5) of Regulation 648/2012 are also met*

1. The arrangements under the covered bond are considered to adequately mitigate counterparty credit risk, in the meaning of Article 4(5) of Regulation 648/2012, with respect to the OTC derivative contracts concluded by the covered bond entity in connection with the covered bond, when they ensure that such contracts satisfy all of the following conditions:
  - (a) they are registered or recorded in the cover pool of the covered bond in accordance with national covered bond legislation;
  - (b) they are not terminated in case of resolution or insolvency of the covered bond issuer or the cover pool;

- (c) the counterparty to the OTC derivative concluded with covered bond issuers or with cover pools for covered bonds ranks at least pari passu with the covered bond holders except where the counterparty to the OTC derivative concluded with covered bond issuers or with cover pools for covered bonds is the defaulting or the affected party, or waives the pari passu rank; and
- (d) the covered bond is subject to a regulatory collateralisation requirement of at least 102%.

*Article 2 – Arrangements under the securitisation that mitigate counterparty credit risk when the conditions of Article 4(5) of Regulation 648/2012 are also met*

1. The arrangements under the securitisation are considered to adequately mitigate counterparty credit risk, in the meaning of Article 4(5) of Regulation 648/2012, with respect to the OTC derivative contracts concluded by the securitisation special purpose entity in connection with the securitisation, when they ensure that such contracts satisfy all of the following conditions:
  - (a) the counterparty to the OTC derivative concluded with securitisation special purpose entities for securitisations ranks at least pari passu with the holders of the most senior tranche in the securitisation except where the counterparty to the OTC derivative concluded with securitisation special purpose entities for securitisations is the defaulting or the affected party; and
  - (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.

*Article 3 – Amendment to Commission Delegated Regulation (EU) 2015/2205*

Commission Delegated Regulation (EU) 2015/2205 is amended as follows:

1. In Article 1, paragraph 2 is deleted.

*Article 4 – Amendment to Delegated Regulation (EU) 2016/1178*

Commission Delegated Regulation (EU) 2016/1178 is amended as follows:

1. In Article 1, paragraph 2 is deleted.



*Article 5 – 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]*

## **Annex IV - Impact assessment**

### **1. Executive Summary**

30. Pursuant to Article 10(1) of the Regulations establishing the EBA, EIOPA and ESMA, the ESAs are empowered to develop draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards (RTS) by means of delegated acts under Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts within the scope of action of the ESAs. The same article demands that the ESAs conduct open public consultations on draft RTS and that they analyse the related potential costs and benefits, where appropriate. Such consultations and analyses shall be proportionate in relation to the scope, nature and impact of the draft RTS.
31. The purpose of the draft RTS presented in Annex of the consultation paper is to specify the criteria for establishing which arrangements under covered bonds or securitisations adequately mitigate counterparty credit risk requirements, and thus clarifying the cases where the clearing obligation would not apply 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.
32. This Annex has two sections. The first section is the introduction, which sets out the background for the RTS. The second section details the baseline and thus explains the starting point for assessing the incremental rule related to the ESAs draft RTS. The final section provides an overview of the benefits and costs associated with the proposals set out in the RTS.

### **2. Introduction**

33. Article 42 of the Securitisation Regulation amends EMIR and in particular Article 4 regarding the clearing obligation. This amendment of EMIR aims at ensuring a level playing field between covered bonds and securitisations with regards to the clearing obligation, i.e. it provides a common framework for both to benefit from an exemption, provided a number of conditions are met.
34. Under Article 4(6) of EMIR, the ESAs have to develop draft RTS specifying criteria for establishing which arrangements under covered bonds or securitisations adequately mitigate counterparty credit risk, within the meaning of Article 4(5) of EMIR, i.e. the paragraph providing an exemption to certain OTC derivatives in association to covered bonds or securitisations.
35. In addition, as some of the conditions to benefit from an exemption from the clearing obligation were already covered in the two Commission Delegated on the clearing obligation of interest rate derivative classes and that some have been added to EMIR by the amendments included in the Securitisation Regulation, the draft RTS also contains amendments to the two Commission Delegated on the clearing obligation of interest rate derivative classes.
36. Lastly, as mentioned in the consultation paper, the mandate on the clearing obligation is related to the mandate on the risk mitigation techniques also introduced in EMIR by the Securitisation Regulation. As a result, the analysis takes into account that the two mandates are related.

### 3. Baseline

37. With regards to covered bonds, based on a Recital included in EMIR, the conditions regarding covered bonds to benefit from an exemption have already been assessed by ESMA at the time of the draft RTS on the clearing obligation, are in the Commission Delegated Regulations that are based on these draft RTS, which have been adopted and entered into force since. As a result, the baseline for covered bonds is thus the set of conditions that are already applicable. And in practice, this would mean that these conditions and the exemption regime cover a large set of covered bonds, and that the vast majority of the corresponding OTC derivatives would not be cleared.
38. With regards to securitisations, there was no equivalent Recital, so the draft RTS on the clearing obligation and the corresponding Commission Delegated Regulations did not contain a specific treatment for securitisations.
39. However, under EMIR, SSPEs are NFCs and only NFCs above the clearing threshold (NFCs+) are subject to the clearing obligation. Furthermore, counterparties in Category 4 as defined in the Commission Delegated Regulations on the clearing obligation, which covers NFCs+, have not yet had to start clearing. Indeed, the Commission Delegated Regulations contain a phase-in based on the categories the counterparties are part of. In addition, given the nature and the objective of the OTC derivatives contract associated to securitisations, it is less likely that the OTC contracts would meet all the characteristics of the standardised swaps that are offered for clearing and that are in scope for the clearing obligation. Taking all the above into account, it is thus expected that the vast majority of the corresponding OTC derivatives would not be cleared.
40. Going further, in the case of securitisations, the baseline also integrates what is already in Level 1, i.e., the amendments to EMIR that have been introduced by the Securitisation Regulation. Indeed, it may sometimes be very difficult to disentangle the effects of the Level 1 provisions, for which an impact assessment covering the general aspects of the Regulation has been already performed and published by the European Commission, and the effects of the Level 2 provisions.
41. Yet, given Article 4(5) of EMIR now creates a level playing field between covered bonds and securitisations through a common exemption regime, we can assume that the baseline for securitisations is very close to the baseline for covered bonds as defined above. This is also in line with the approach of the ESAs in setting the conditions for securitisations, i.e. applying the same ones as for covered bonds, to the extent they are relevant.

### 4. Cost benefit analysis

42. Conditions for covered bonds

Policy objective	Specifying criteria for establishing which arrangements under covered bonds adequately mitigate counterparty credit risk, within the meaning of Article 4(5) of EMIR, i.e. the paragraph providing an exemption to certain OTC derivatives in association to covered bonds.
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Technical proposal	Migrate the conditions from the Commission Delegated Regulations on the clearing obligation for the interest rate OTC derivative classes onto this new draft RTS, except for the conditions now already covered in Level 1 following the amendment to EMIR introduced by the Securitisation Regulation.
Benefits	Leverages the work already conducted at the time of the Commission Delegated Regulations on the clearing obligation, and then validated through the approval and entry into force process of these Regulations.  Ensures continuity and stability of regime.
Costs	No significant one-off or on-going additional costs to regulators or compliance costs for the relevant supervised entities identified.

43. Conditions for securitisations

Policy objective	Specifying criteria for establishing which arrangements under securitisations adequately mitigate counterparty credit risk, within the meaning of Article 4(5) of EMIR, i.e. the paragraph providing an exemption to certain OTC derivatives in association to securitisations.
Technical proposal	Mirror the conditions applicable to covered bonds to the extent they are relevant for securitisations.
Benefits	As explained above, the baseline is understood to be similar to the baseline for covered bonds, and thus this approach allows for consistency between covered bonds and securitisation, which is in line with the aim of the Securitisation Regulation amendments to EMIR to create a level playing field with regards to the clearing obligation.
Costs	No significant one-off or on-going additional costs to regulators or compliance costs for the relevant supervised entities identified.

**Question 5: Do you identify other benefits and costs not mentioned above associated to the proposed approach? If you advocated for a different approach in the responses to the previous questions, how would it impact this section on the impact assessment? Please provide details.**