III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 11 March 2016

on (a) a proposal for a regulation laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation; and (b) a proposal for a regulation amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms

(CON/2016/11)

(2016/C 219/03)

Introduction and legal basis

On 9 December 2015 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on (a) a proposal [1] for a regulation of the European Parliament and of the Council laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (hereinafter the 'proposed securitisation regulation'); and (b) a proposal [2] for a regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms (hereinafter the 'proposed CRR amendment') (together hereinafter the 'proposed regulations') [3].

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union, since the proposed regulations contain provisions affecting: (a) the basic task of the European System of Central Banks (ESCB) of defining and implementing the monetary policy of the Union pursuant to Article 127(2) of the Treaty; (b) the ESCB's task of contributing to the smooth conduct of policies pursued by competent authorities relating to the prudential supervision of credit institutions and the stability of the financial market system pursuant to Article 127(5) of the Treaty; and (c) the tasks conferred on the ECB pursuant to Article 127(6) of the Treaty concerning policies relating to the prudential supervision of credit institutions. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

GENERAL OBSERVATIONS

1. Objectives of the proposed regulations

1.1 The ECB welcomes the objectives of the proposed regulations of promoting the further integration of Union financial markets, diversifying funding sources and unlocking capital for sound lending to the real economy. The development of a common set of substantive rules across the Union regulatory framework for all securitisations is a significant step towards regulatory harmonisation and consistency. The ECB also supports the establishment of criteria to identify a subset of securitisations which can be classified as simple, transparent and standardised (STS) and welcomes the proposed CRR amendment's adjustment to capital charges to provide for a more risk-sensitive treatment for STS securitisations.

1.2 The ECB considers that the proposed regulations strike the right balance between the need to revive the European securitisation market by making the securitisation framework more attractive for both issuers and investors, and the need to maintain the prudential nature of the regulatory framework. The ECB notes that European securitisations with features broadly similar to those of the proposed STS securitisations suffered low levels of losses

(1) COM(2015) 472 final.

(2) COM(2015) 473 final.

(3) The ECB has adopted its opinion based on the proposed regulations (as proposed by the Commission) sent for consultation, but also taking into account the suggested amendments contained in the Council compromise texts, as applicable (2015/0226 (COD), 14537/15 on the proposed securitisation regulation and 2015/0225 (COD), 14536/15 on the proposed CRR amendment).

during the financial crisis [1]. Consequently, it is appropriate for the regulatory framework to distinguish between them and more complex, opaque and bespoke securitisations. In the ECB's view, overall, the proposed STS criteria are generally appropriate and the lower regulatory capital charges applied to them are proportionate to their comparably lower risk profile. The ECB highlights nonetheless that its support for the proposed capital treatment of STS securitisations is predicated on the existence of robust STS criteria, an appropriate attestation procedure and rigorous supervision. Consequently the proposed regulations should, in the ECB's view, be further enhanced and streamlined, as set out below and in the attached technical annex.

2. The ECB's role in the securitisation market — monetary policy and macro-prudential considerations

2.1 The ECB has a strong interest in the sustainable revival of the European securitisation market. As a form of asset-based financing with the capacity both to channel flows of credit to the real economy and to transfer risk, securitisation has particular significance for the transmission mechanism of monetary policy. A healthy European securitisation market is indicative of a functioning capital market in the Union. Particularly where credit institutions' capacity to lend to the real economy is constrained and economic growth remains subdued, securitisation can act as a fresh source of funding and free up capital for lending. Uncertainty regarding the timing of the adoption of the proposed regulations should therefore be avoided in order to provide the necessary regulatory clarity and stability to securitisation market participants to support sustainable growth of the market.

2.2 The ECB has significant experience in the field of securitisation through the Eurosystem's monetary policy operations. On the one hand, it accepts asset-backed securities (ABS) fulfilling applicable eligibility criteria as collateral for the Eurosystem's liquidity-providing reverse transactions and, on the other, it purchases ABS as part of the Eurosystem's expanded asset purchase programme [2]. This informs the ECB's view of the proposed regulations, in particular in relation to transparency, due diligence, investor demand and market functioning. Nonetheless, the ECB notes that the proposed regulations are independent of the Eurosystem collateral framework and the ABS purchase programme (ABSPP) as these are monetary policy instruments that fall within the Eurosystem's exclusive competence.

2.3 Finally, considering the ECB's monetary policy and macro-prudential tasks, the ECB has also participated actively in the public debate on regulatory initiatives on securitisation during which it highlighted the benefits of sound securitisation markets [3], recommended differentiated capital treatment of securitisations and supported a prudent Union framework for STS securitisations [4]. The ECB's specific recommendations on the proposed regulations, as set out below and in the attached technical annex, reflect these positions.

3. Clarification of the ECB's supervisory competences in respect of securitisation

3.1 Notwithstanding the ECB's monetary policy activities in the securitisation market, its role under the new securitisation regime in its capacity as supervisor must be assessed independently. In particular, Article 127(6) of the Treaty only permits the conferral of tasks on the ECB in policy areas relating to the prudential supervision of credit institutions. Accordingly, Article 4(1)(d) of Council Regulation (EU) No 1024/2013 [5] assigns to the ECB, for prudential supervisory purposes, the task of ensuring compliance by significant credit institutions with the relevant Union law which imposes prudential requirements in the area of securitisation. Article 15 of the proposed securitisation regulation designates the ECB as the competent authority for supervision of compliance by significant credit institutions with due diligence obligations, risk retention requirements, transparency requirements and the STS criteria. In light of the above, the ECB is concerned that Article 15 of the proposed securitisation regulation also assigns the ECB supervisory tasks which are not primarily prudential in nature, but rather relate to product markets or investor protection.

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[1] *The impact of the CRR and CRD IV on bank financing, Eurosystem response to the DG FISMA consultation paper*, 10 December 2015.

[2] Decision (EU) 2015/5 of the European Central Bank of 19 November 2014 on the implementation of the asset-backed securities purchase programme (ECB/2014/45) (OJ L 1, 6.1.2015, p. 4). Purchases under the ABS purchase programme began in November 2014.

[3] *The impaired EU securitisation market: causes, roadblocks and how to deal with them*, 11 April 2014, and *The case for a better functioning securitisation market in the European Union — A Discussion Paper*, 29 May 2014, ECB and Bank of England.

[4] *Joint response from the Bank of England and the European Central Bank to the consultation document of the European Commission: 'An EU framework for simple, transparent and standardised securitisation'*, 27 March 2015.

[5] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

3.2 The ECB agrees that it should be competent to ensure compliance by significant credit institutions with due diligence requirements, including verification by significant credit institutions acting as investors in securitisations that risk retention obligations are complied with by the originator, sponsor or original lender (Article 3 of the proposed securitisation regulation), as well as compliance with the rules of Regulation (EU) No 575/2013 of the European Parliament and of the Council [1] (the Capital Requirements Regulation (CRR)) on significant risk transfers (SRTs) and assignment of risk weights to various classes of securitisation products as these tasks are clearly prudential. In this regard, the ECB also agrees that the supervision of compliance with criteria for credit granting as introduced by the Council compromise text [2] would also fall within the prudential tasks being conferred upon the ECB under Article 4(1)(d) of Regulation (EU) No 1024/2013.

3.3 On the other hand, Articles 6 to 14 of the proposed securitisation regulation, which contain the STS criteria and provide for the process of ensuring STS compliance, relate to supervision of the securitisation markets. The ECB considers this task to be clearly outside the tasks relating to the prudential supervision of credit institutions. The ECB welcomes the amendments made by the Council compromise text [3] which permit Member States to designate the competent authorities responsible for supervision of compliance of an originator, sponsor or securitisation special purpose entity (SSPE) with STS criteria, instead of directly assigning this task to competent authorities responsible for their supervision in accordance with the relevant sectoral Union legislation.

3.4 Although there are arguments in favour of characterising these rules as prudential, directly ensuring compliance of significant credit institutions acting as originators, sponsors or original lenders with risk retention rules (Article 4) and transparency requirements (Article 5) should be viewed as primarily relating to supervision of product markets, as these rules ensure alignment of interests between originators, sponsors or original lenders and investors and allow investors to understand, assess and compare securitisation transactions. Therefore the ECB also considers that such tasks cannot be conferred on it. The ECB notes that the Council compromise text [4] also assigns the task of ensuring compliance by credit institutions acting as sponsors, originators, original lenders or SSPEs with the risk retention rules and transparency requirements to authorities designated pursuant to Article 4 of Directive 2013/36/EU of the European Parliament and of the Council [5]. The ECB welcomes that the Council compromise text abstains from a direct reference to the ECB and notes that it would not consider these tasks to be transferred to the ECB by Article 4(1)(d) of Regulation (EU) No 1024/2013.

3.5 Consequently, Article 15 of the proposed securitisation regulation should be amended to ensure that the ECB's competences under the proposed securitisation regulation reflect the tasks conferred on it by Regulation (EU) No 1024/2013.

SPECIFIC OBSERVATIONS

PART I: PROPOSED SECURITISATION REGULATION

4. **Provisions applicable to all securitisations**

4.1 The ECB welcomes the proposed securitisation regulation's consolidation and harmonisation of existing regulatory requirements in a common set of rules for all securitisations, as this significantly simplifies the regulatory framework and reduces inconsistencies and duplication. However, insofar as consolidation is the aim, it should be comprehensive. Like the Council compromise text [6], the ECB therefore recommends the repeal of Article 8b of Regulation (EC) No 1060/2009 of the European Parliament and of the Council [7] but also, after the expiry of the transitional period provided for in Article 28(6) of the proposed securitisation regulation, of the related Commission Delegated Regulation (EU) 2015/3 [8] to avoid unnecessary duplication of transparency and disclosure obligations laid down in Article 5 of the proposed securitisation regulation.

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[1] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

[2] Article 5a of the Council compromise text (2015/0226 (COD), 14537/15). In the following sections the Council compromise text is only discussed in cases when it significantly differs from the proposed regulations (as proposed by the Commission).

[3] Article 15 of the Council compromise text (2015/0226 (COD), 14537/15).

[4] Ibid.

[5] OJ L 176, 27.6.2013, p. 338.

[6] Article 25(5) of the Council compromise text (2015/0226 (COD), 14537/15).

[7] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (OJ L 302, 17.11.2009, p. 1).

[8] Commission Delegated Regulation (EU) 2015/3 of 30 September 2014 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards on disclosure requirements for structured finance instruments (OJ L 2, 6.1.2015, p. 57).

4.2 The ECB also welcomes the proposed securitisation regulation's approach to transparency requirements. However, transparency requirements need to be balanced against the confidentiality of private and bilateral transactions. Article 5 requires data disclosure to existing investors only. Prospectuses or equivalent offering documents, loan-level data and other securitisation documentation should be disclosed to prospective investors as well. However, such data should only be disclosed publicly in the case of public transactions and otherwise should only be disclosed to the prospective investors to which a transaction is marketed. At the same time, the ECB recommends exempting certain securitisations from unnecessary disclosure burdens, such as intra-group transactions or where there is a single investor only ([1]).

4.3 The ECB also recommends that loan-level data is expressly required in Article 5(1)(a), including for those asset-backed commercial paper (ABCP) programmes that are not fully supported or where the underlying asset maturities exceed one year, redacted where this is necessary to protect confidentiality for corporate clients of sponsors ([2]).

5. **Criteria for STS securitisations**

5.1 The success of the STS framework will depend substantially on the extent to which it is used by market participants. It is therefore important that the criteria and their application are not overly complex, to ensure, inter alia, that investors are not hindered in fulfilling their extensive due diligence obligations. The onus of ensuring and notifying compliance with STS criteria rests with the securitising parties. Thus, the clarity of the STS criteria is key to the decision by originators and sponsors to apply the STS framework and expose themselves to the sanctions regime for failing to fulfil the criteria. The ECB considers most of the criteria to be sufficiently clear. However, several of them need to be further specified to ensure legal certainty and efficiency for those interpreting and applying them ([3]). The ECB therefore recommends mandating the European Banking Authority (EBA) to develop, in close cooperation with the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA), regulatory technical standards on STS criteria where further clarification is needed ([4]). While this would extend the timeframe for the proposed securitisation regulation's full implementation, this would be offset by the benefits of lower burdens and greater legal certainty for all involved parties.

5.2 Sound asset quality is key to the STS framework and underpins the capital charges for STS securitisations. Thus, performing loans restructured more than three years prior to inclusion in an STS securitisation can be allowed. However, any relaxation beyond this threshold, such as that contained in the Council compromise text ([5]), would require a recalibration of the capital charges envisaged in the current proposal, to maintain the prudential nature of the STS framework.

5.3 ABCP programmes have the potential to support financing of the real economy. However, preferential regulatory capital treatment should be restricted to ABCP programmes without maturity mismatches between the underlying assets and commercial paper liabilities. The ECB therefore recommends a one-year, rather than a three-year, or as the Council compromise text proposes, up to six-year ([6]), residual maturity cap for underlying assets of STS ABCP programmes, with which most existing ABCP programmes could comply or adjust to, given that around half of assets underlying existing European ABCP programmes are estimated to have a residual maturity of less than one year and consist mostly of trade receivables. From a prudential perspective, maturity mismatches expose investors, in the case of sponsor default, to extension risk and potential losses, and sponsors to liquidity strains or even losses if investors no longer roll over short-term paper in times of market disruption. Finally, a lax maturity cap could give rise to undesirable regulatory arbitrage opportunities between traditional STS securitisations and STS ABCP programmes and, from a policy perspective, could affect the term auto and consumer loan ABS markets.

([1]) See Amendment 28 introducing a new Article 5(2b).

([2]) See Amendment 18 on Article 5(1)(a).

([3]) See, for example, the requirements for expertise laid down, in the case of traditional securitisations, in Articles 8(6) and 9(6) for originators and servicers and, in the case of ABCP programmes, in Article 12(5) and Article 13(7)(c) for sellers and sponsors.

([4]) See Amendment 61 introducing a new Article 14a.

([5]) In the Council compromise text (2015/0226 (COD), 14537/15), Article 8(7)(a)(i) permits the inclusion in STS securitisations of performing loans restructured one year prior to their inclusion. This contrasts with the three-year threshold provided for in Article 8(7)(a) of the proposed securitisation regulation.

([6]) Article 12(2) of the proposed securitisation regulation allows assets with residual maturity of up to three years and imposes a transaction level restriction of a weighted average life of two years. In contrast, the second subparagraph of Article 12(2) and Article 13(1a) of the Council compromise text (2015/0226 (COD), 14537/15) would permit a programme level weighted average life of no more than two years, a transaction level weighted average life of no more than three and a half years and an underlying exposure residual maturity of no longer than six years.

5.4 STS securitisations should meet higher transparency standards than non-STS securitisations as they benefit from preferable regulatory capital treatment which is justified, inter alia, on the basis of a high degree of transparency. Investor reports represent the main source of investor information after the closing of the transaction. The proposed securitisation regulation should therefore clarify that higher standards for investor reporting are mandatory for STS securitisations ([1]).

5.5 Securitisations whose repayment is dependent on collateral liquidation should not qualify under the STS framework ([2]). The performance of such securitisations is highly dependent on assumptions as to whether market risks have been adequately mitigated. Risks may materialise which go beyond the anticipated stress scenarios, thereby invalidating these assumptions. Only securitisations whose repayment depends strictly on obligors' willingness and ability to meet their obligations should be eligible under the STS framework.

6. STS attestation, notification and due diligence

6.1 The ECB welcomes the proposed securitisation regulation's approach of requiring both that securitising parties jointly self attest to the compliance of a securitisation with the STS criteria and that investors conduct their own due diligence on STS compliance. This fundamental mechanism places primary responsibility for STS compliance on the securitising parties, which are best placed to assume it. It also avoids mechanical reliance on third party or supervisory certifications and therefore preserves the incentives of all parties to the securitisation to behave prudently ([3]).

6.2 The ECB recognises the potential benefits which experienced third parties can offer through their accumulated expertise when checking STS compliance, particularly for originators who have not previously securitised or who do so infrequently. However, third parties should not be expressly granted a role by law in the STS attestation process in the proposed securitisation regulation as this would weaken a key pillar of the STS framework ([4]). First, such a regulated role for third parties to certify STS compliance could introduce moral hazard for investors. Investors could have fewer incentives to undertake independent due diligence for STS securitisations, as they could falsely equate such third party certification with supervisory endorsement. Additionally, it would increase complexity and burden public resources, given the need to supervise such third parties separately. Moreover, it would also create systemic risk, as the invalidation of one or more STS certifications made by such a third party could raise concerns for all STS attestations made by them. Finally, such a regulated role is unnecessary to achieve the acknowledged potential benefits offered by such third parties, as they could simply contract with originators and sponsors to provide them with advice on compliance with STS criteria. Instead, the ECB considers that legal certainty for securitising parties should mainly be achieved by making the STS criteria sufficiently clear ([5]).

6.3 The STS notification process should ensure greater clarity for investors by explicitly documenting, in the summary of the prospectus or equivalent information memorandum, whether and, if so, how the STS criteria have been fulfilled. This would support investors' independent due diligence processes ([6]).

7. Effective cooperation between supervisory authorities

The consistent application and interpretation of the proposed securitisation regulation by the various supervisors, particularly in the context of STS securitisations, are key to the integrity of the framework, its adoption by market participants and, consequently, its overall effectiveness. The ECB therefore recommends enhancements to the cooperation procedures provided for in Article 21 between competent authorities and the EBA, ESMA and EIOPA to resolve more efficiently disagreements between two or more competent authorities, especially in cases when one or more of them decides that a securitisation should lose its STS status. For transparency and consistency reasons, ESMA should keep a centralised register of all remedial actions undertaken with respect to securitisations regulated under the proposed securitisation regulation.

([1]) See Amendment 42 introducing a new Article 10(5).

([2]) Under Article 8(9), securitisations dependent to some extent on collateral sale to ensure repayment, such as residual value auto lease ABS and certain commercial mortgage-backed securities, could potentially qualify.

([3]) See *Joint response from the Bank of England and the European Central Bank to the consultation document of the European Commission*: '*An EU framework for simple, transparent and standardised securitisation*', 27 March 2015.

([4]) See Articles 14(1a) and 14a of the Council compromise text, which permits third-party attestation in addition to self-attestation by securitising parties (2015/0226 (COD), 14537/15).

([5]) See the ECB's recommendation in paragraph 5.1.

([6]) See Amendment 56 introducing a new Article 13(9).

8. **Sanctions regime**

A robust framework for the Union securitisation market requires a credible and dissuasive regime for sanctioning infringements of the proposed securitisation regulation. However, there are several aspects of the proposed securitisation regulation which impose new obligations on market participants and require further definition, guidance and interpretation by competent authorities, the European Supervisory Authorities and market participants. Given these uncertainties, it is difficult to reconcile the imposition of heavy administrative and criminal sanctions on a strict liability basis with the well-established principle of legal certainty in criminal matters, or with the overall aim of encouraging market participants to use and apply the proposed securitisation regulation. These uncertainties and sanctions could in fact deter market participants from using the proposed securitisation framework. The ECB therefore strongly recommends a reduction in the types of administrative sanctions available by limiting the extent of fines, the removal of the possibility for Member States to impose criminal sanctions for infringements of the proposed securitisation regulation in Article 19, and the imposition of sanctions only in the event of negligence, including negligent omissions, rather than on a strict liability basis. This would alleviate concerns about the disproportionate nature of the penalties. The proposed removal of Article 19 would only preclude the establishment of a new regime of criminal liability specifically for infringements of the proposed securitisation regulation. However, it would be without prejudice to existing, more general provisions of national criminal law to which the activities of securitising parties are already subject. These may include provisions establishing criminal liability for fraudulent, reckless or other dishonest activities by financial institutions, their employees or directors under national law, which would naturally remain applicable.

9. **Ensuring robust supervision of third country STS securitisation**

The STS framework should be synonymous with prudent asset origination and securitisation structuring. This, in turn, is dependent on effective supervision to ensure that the STS standards are not diluted over time. The financial crisis showed that supervisory frameworks which rely solely on the self-attestation of the securitising parties, without ongoing and rigorous supervision, are vulnerable to abuse. The proposed securitisation regulation currently permits underlying assets of STS securitisations to be originated outside the Union and the originator, sponsor and/or SSPE to be located outside the Union. Nevertheless, there is currently no requirement relating to the supervision in third countries of STS securitisations ([1]). The ECB supports an STS securitisation framework that is open to accepting STS securitisations issued in third countries provided that such acceptance is complemented by a requirement that the third country originator, sponsor and SSPE taking part in such securitisation are subject to a robust supervisory framework in relation to their STS securitisation activities, which the European Commission has assessed as equivalent to the Union framework ([2]).

PART II: PROPOSED CRR AMENDMENT

10. **Capital treatment for STS securitisations**

10.1 The ECB strongly supports the incorporation of the STS criteria in the banking regulatory capital framework through the proposed CRR amendment, as an enhancement to the December 2014 revisions to the Basel securitisation framework. The STS criteria limit the two main sources of risk in STS securitisations: structural risk and asset credit risk. The lower risk profile of STS securitisations therefore warrants a relatively lower capital charge.

10.2 Both the calibration of capital charges and the hierarchy of approaches to calculating capital charges for STS securitisations are relevant to the effectiveness of the new framework in striking the right balance between reviving the Union securitisation market and preserving the prudential nature of the securitisation framework. The ECB considers that the calibration, which reduces capital charges for STS securitisations, in Articles 260, 262 and 264 is appropriate, considering their lower risk profile.

10.3 In relation to the hierarchy of approaches, the ECB considers the changes contained in Article 254(3) to be a positive first step towards a more equal regulatory treatment of STS securitisations issued in different Union jurisdictions. As drafted, it effectively permits credit institutions to cap capital charges under the securitisation external ratings-based approach (SEC-ERBA) at the level applicable under the securitisation standardised approach (SEC-SA), subject to certain conditions ([3]). The proposal means that there is more of a level playing field for

([1]) See also the explanatory memorandum to the proposed securitisation regulation 'Third country dimension'.

([2]) See Amendments 30 and 75 introducing new Articles 6(2) and 22a.

([3]) Article 254, as proposed, allows banks to use, subject to *ex-post* supervisory approval, SEC-SA instead of SEC-ERBA when the application of SEC-ERBA results in overly high capital charges that are not commensurate with the credit risk of the underlying assets.

securitisations issued in Union jurisdictions subject to the application of sovereign rating caps and to other restrictive rating methodologies that result in capital charges under SEC-ERBA significantly higher than under SEC-SA, despite the fact that using SEC-SA should ordinarily result in the highest capital charges. However, the proposal introduces arbitrage opportunities if banks selectively apply the SEC-SA cap for some, but not all, eligible securitisations. At the same time, equal treatment will not be effective if the cap is allowed in some jurisdictions while disallowed in others by virtue of national supervisory discretion to provide or withhold approval.

10.4 The ECB recommends disallowing the use of SEC-ERBA [1] for STS securitisations only. This would provide equality of treatment across Union STS securitisations and between Union STS securitisations and non-Union securitisations issued in jurisdictions where the use of external ratings and, consequently, the application of SEC-ERBA, is not permitted. At the same time, the prudential nature of the STS securitisation framework is preserved, as STS securitisations have lower structural and asset quality risk and, therefore, the application of the formula-based SEC-SA, instead of SEC-ERBA, can be justified. Moreover, the simplification of the STS hierarchy would eliminate the potential for arbitrage [2]. Competent authorities should nevertheless retain their discretion to impose capital charges higher than those resulting from the application of SEC-SA for STS securitisations (as for non-STS securitisations), where justified on a case-by-case basis, e.g. due to residual structural complexities or other relevant risk drivers not sufficiently captured in all cases under the standardised approach [3]. Importantly, the ECB's recommendation to disallow the application of SEC-ERBA is, however, contingent on the maintenance of high standards for asset quality and self-attestation [4].

11. Capital treatment for qualifying synthetic securitisations

11.1 The proposed CRR amendment introduces a differentiated capital treatment for senior tranches of synthetic securitisations meeting certain criteria [5]. Synthetic securitisations can support the overall aims of the proposed regulations, including providing funding for the real economy. However, from a prudential perspective, the arguments for reducing capital charges for certain synthetic securitisations are not as strong as for traditional STS securitisations. Notably there is currently limited data available on both the volume and performance of synthetic securitisations due to their private nature. The ECB therefore acknowledges the cautious approach taken by the Commission, whereby the preferential treatment is strictly limited to a subset of synthetic securitisation structures.

11.2 Moreover, the prudence of the framework for qualifying synthetic structures should be further strengthened by developing criteria specifically adapted to synthetic securitisations. The proposed application of the requirements for traditional STS securitisations to synthetic securitisations pursuant to Article 270(a) in the proposed CRR amendment is not appropriate in this regard, given the significantly different structural features of traditional and synthetic securitisations. At the same time, the introduction of criteria specific to synthetic securitisation transactions should not expand the narrow scope proposed by Article 270 [6].

12. Strengthening the SRT assessment

The ECB considers that the proposed CRR amendment should be used as an opportunity to both clarify and strengthen the current CRR provisions with regard to significant risk transfer and implicit support. First, the conditions for recognising SRT [7] in Articles 244 and 245 should be linked to the conditions for implicit support in

(1) See Amendment 103 introducing a new Article 254a.

(2) Article 254 of the proposed CRR amendment and of the Council's compromise text (2015/0225 (COD), 14536/15) permit banks, unless restricted by supervisors, to selectively use SEC-SA, i.e. banks can choose to cap the risk weights resulting from the application of SEC-ERBA only for those exposures where applying SEC-SA is more advantageous than SEC-ERBA. The hierarchy arbitrage would not be allowed under the ECB's proposal, as SEC-SA would need to be used at all times and a supervisory intervention, if any, can only increase capital charges applied.

(3) See Amendment 105 introducing a new Article 258a.

(4) See paragraphs 5.2 on asset quality and 6.2 on the attestation process.

(5) See Article 270.

(6) *The EBA Report on Synthetic Securitisation* of 18 December 2015 recommends, inter alia, introducing criteria specific to synthetic securitisations and the expansion of the scope of Article 270 to allow private investors to act as eligible credit protection providers.

(7) See Amendments 93 and 96 on Articles 244(4)(f) and 245(4)(e).

Article 250, as they address the same issues. In addition, the quantitative significant risk transfer tests provided in Articles 244(2) and 245(2) should be reviewed by the EBA [1] as they are insufficient and open to regulatory arbitrage in certain cases.

Where the ECB recommends that the proposed regulations are amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on the ECB's website.

Done at Frankfurt am Main, 11 March 2016.

The President of the ECB

Mario DRAGHI

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[1] See Amendments 94 and 97 on Articles 244(6) and 245(6).