EUROPEAN
COMMISSION

Brussels, 7.7.2023
C(2023) 1563 final

COMMISSION DELEGATED REGULATION (EU) …/...

of 7.7.2023

supplementing Regulation (EU) 2017/2402 of the European Parliament and of the Council with regard to regulatory technical standards specifying in greater detail the risk retention requirements for originators, sponsors, original lenders, and servicers

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 6 (7) of Regulation (EU) 2017/2402 ('the Regulation') as amended by the Regulation (EU) 2021/557 empowers the Commission to adopt, following submission of draft standards by the European Banking Authority (EBA), and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010, delegated acts specifying the requirements related to the retention of a material net economic interest in the securitisation by the originator, sponsor, original lender or servicer in accordance with points (a) to (g) of the first subparagraph of paragraph 7 of Article 6 of the Regulation.

In accordance with Article 10(1) of Regulation (EU) No 1093/2010 establishing the EBA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1093/2010, the EBA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 6 (7) of Regulation (EU) 2017/2402 ('the Regulation') as amended by the Regulation (EU) 2021/557. A consultation paper was published on the EBA internet site on 30 June 2021, and the consultation closed on 30 September 2021. Moreover, the EBA worked in close cooperation with the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) and requested the Banking Stakeholder Group set up in accordance with Article 37 of Regulation (EU) No 1093/2010 to provide advice on them. Together with the draft technical standards, the EBA has submitted an explanation on how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1093/2010, the EBA has submitted its impact assessment, including its analysis of the costs and benefits, related to the draft technical standards submitted to the Commission. This analysis is available at https://www.eba.europa.eu/regulation-and-policy/securitisation-and-covered-bonds/regulatory-technical-standards-requirements-originators-sponsors-original-lenders-and-servicers , pages 24-26 of the Final Report on the draft technical standards.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The final draft technical standards, in accordance with Article 6 (7) of the Regulation, specify the risk retention requirements and, in particular: i) requirements on the modalities of retaining risk, ii) the measurement of the level of retention, iii) the prohibition of hedging or selling the retained interest, iv) the conditions for retention on a consolidated basis, v) the conditions for exempting transactions based on a clear, transparent and accessible index, vi) the modalities of retaining risk in case of traditional securitisations of non-performing exposures, and vii) the impact of fees paid to the retainer on the effective material net economic interest.

COMMISSION DELEGATED REGULATION (EU) …/...

of 7.7.2023

supplementing Regulation (EU) 2017/2402 of the European Parliament and of the Council with regard to regulatory technical standards specifying in greater detail the risk retention requirements for originators, sponsors, original lenders, and servicers

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2017/2402 of the European Parliament and of the Council[1], and in particular Article 6(7), third subparagraph thereof,

Whereas:

(1) To ensure that investors and supervisors understand how a synthetic or contingent form of retention is equivalent to one of the retention options set out in Article 6(3) of Regulation (EU) 2017/2402, the use of such form of retention and the details thereof should be disclosed in the final offering document, prospectus, transaction summary or overview of the main features of the securitisation.

(2) Article 6(3), points (a) to (e), of Regulation (EU) 2017/2402 lay down various modalities to fulfil the risk retention requirement laid down in Article 6(1) of that Regulation. To harmonise the application of the risk retention requirement and achieve an equivalent retention of a material net economic interest in a securitisation, it is necessary to specify further those modalities, including the fulfilment through a synthetic or contingent form of retention. In an ABCP programme, a liquidity facility that covers 100 % of the credit risk of each of the securitised exposures, or that constitutes a first loss position in relation to the securitisation, is equivalent to retaining a net economic interest in the securitisation. Therefore, such ABCP programmes should be considered to be compliant with the risk retention requirement in accordance with Article 6(3), point (a) and (d), of Regulation (EU) 2017/2402.

(3) The synthetic excess spread is defined in Article 2, point (29), of Regulation (EU) 2017/2402 as an amount contractually designated by the originator to absorb losses. Consequently, the synthetic excess spread gives rise to an exposure value that should be taken into account in the measurement of the material net economic interest at origination. Therefore, the synthetic excess spread should be recognised as a possible form of compliance by the originator of a synthetic securitisation with the risk retention requirement where that synthetic excess spread meets the conditions set out in Article 6(1) of Regulation (EU) 2017/2402 and where that synthetic excess spread

[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).

is subject to a capital requirement in accordance with the applicable prudential regulation.

(4) Synthetic excess spreads can be designated in two different ways. One way is through providing credit enhancement to the senior or the mezzanine tranche. A second way is through providing credit enhancement to all the tranches, including the first loss tranche. Where the synthetic excess spread provides credit enhancement to the senior or mezzanine tranches only, it cannot be treated as a first loss tranche. The retainer should therefore retain at least a minimum amount in all the tranches to comply with Article 6(3), point (a), of Regulation (EU) 2017/2402. Where the synthetic excess spread provides credit enhancement to all the tranches, the synthetic excess spread should be equivalent to a first loss tranche of the synthetic securitisation, and, thus, be deemed to comply with Article 6(3), point (d), of Regulation (EU) 2017/2402.

(5) It is necessary to specify the economic interest that is to be retained when the underlying exposures of a securitisation include drawn and undrawn amounts of credit facilities. Because the credit risk is determined on the basis of the drawn amounts, the net economic interest should be measured taking into account those amounts only.

(6) In order to ensure the ongoing fulfilment of the retention requirement where the net economic interest is retained by the consolidated group and the retainer belonging to the group is no longer included in the scope of supervision on a consolidated basis, it is necessary to lay down that one or more of the remaining entities included in the scope of supervision on a consolidated basis should assume an exposure to the securitisation.

(7) Article 6(1), first subparagraph, of Regulation (EU) 2017/2402 prohibits selling or hedging the retained economic interest as doing so would remove the retainer's exposure to the credit risk of the retained securitisation positions or exposures. Therefore, hedging should only be allowed where it hedges the retainer against risks other than the credit risk of the retained securitisation positions or exposures. Hedging should, however, also be allowed where it is undertaken prior to the securitisation as a legitimate and prudent element of credit granting or risk management and does not create a differentiation for the retainer's benefit between the credit risk of the retained securitisation positions or exposures and the securitisation positions or exposures transferred to investors. Furthermore, in securitisations where the retainer commits to retaining more than the minimum material net economic interest of 5 %, hedging should not be prohibited for any retained interest in excess of that percentage, provided that those circumstances are disclosed in the final offering document, prospectus, transaction summary or overview of the main features of the securitisation.

(8) In order to ensure the ongoing retention of the material net economic interest, retainers should ensure that there is no embedded mechanism in the securitisation structure by which the retained material net economic interest measured at origination declines faster than the interest transferred. For the same reason, the retained material net economic interest should not be prioritised in terms of cash flows to preferentially benefit from being repaid or amortised in a way that would decrease that retained material net economic interest below 5 % of the ongoing nominal value of the tranches sold or transferred to investors or of the exposures securitised, or below the 5 % net value in the case of non-performing exposures of traditional NPE securitisations. Moreover, the credit enhancement provided to the investor assuming exposure to a securitisation position should not decline disproportionately to the rate of repayment on the underlying exposures. That requirement should not prevent the retainer from

being remunerated on a priority basis for services rendered to the securitisation's special purpose entity, provided that the remuneration's amount is set on an arm's length basis and that the structure of such remuneration does not undermine the retention requirement.

(9) Where the principal obligor has full alignment of interest with the investor, including in the situation where the securitisation comprises exclusively own-issued covered bonds or other own-issued debt instruments, the entity that securitises those instruments should not be obliged to take any further action to comply with the risk retention requirement.

(10) Article 8 of Regulation (EU) 2017/2402 provides for certain exceptions on the ban on resecuritisations. Because the retention requirements apply to the two levels of the transactions involved in a resecuritisation, it is necessary to specify how those transactions are to comply with the retention requirement. As a general rule, the first securitisations of exposures and the second 'repackaged' level of the transaction should be treated as separate for the purposes of meeting the risk retention requirement. There should therefore be an obligation to retain a material net economic interest at each of those levels. The same should apply for transactions with more than one underlying securitisation, such as ABCP programmes other than those referred to in Article 8(4) of Regulation (EU) 2017/2402. It is, however, possible that the securitisation's originator acting as retainer securitises positions that it had retained in excess of the minimum retention requirement at the first level of a securitisation. In that case, that originator should not be required to retain an additional interest at the level of the resecuritisation, provided that no other exposures or positions are added to the resecuritisation's underlying pool. In those cases, the resecuritisation should merely be regarded as the second leg of the same transaction that would not significantly change the economic basis of the securitisation. The original retention at the level of the securitisation should thus suffice to meet the purpose of the risk retention requirement. Lastly, the mere retranching by the securitisation's originator of a securitisation position into contiguous tranches should not be considered a resecuritisation for the purposes of the retention requirement.

(11) The asset selection requirements laid down in Article 6(2) of Regulation (EU) 2017/2402 are an integral part of the risk retention framework. If originators were able to cherry pick assets to securitise portfolios of worse credit quality, and in particular without the investors' or potential investors' knowledge, the purpose and effectiveness of risk retention to align the interests of originators and investors would be severely undermined. In that scenario, while the originator would be using the securitisation to offload risky assets, investors would be misled to rely on the originator's retaining a slice of the risk as evidence of a proper alignment of interests. To avoid such a scenario and to provide for legal certainty and security, it is necessary to lay down criteria that originators may rely on to ensure compliance with Article 6(2) of Regulation (EU) 2017/2402. Furthermore, criteria for the determination of "comparable assets" should also be provided. Securitisations where the comparison referred to in Article 6(2) of Regulation (EU) 2017/2402 is not possible because all the comparable assets were transferred to the SSPE should be considered as meeting the requirements of that paragraph, provided that the fact that such comparison is not possible is disclosed in the final offering document, prospectus, transaction summary or overview of the main features of the securitisation.

(12) Where insolvency proceedings have been commenced in respect of the retainer, or where the retainer is unable to continue acting in that capacity for reasons beyond its

control or the control of its shareholders, it should be possible for the remaining retained material net economic interest to be retained by another legal entity complying with Article 6 of Regulation (EU) 2017/2402, so that the alignment of interest continues to occur.

(13) Pursuant to Article 6(1), fourth subparagraph, of Regulation (EU) 2017/2402, only servicers that can demonstrate expertise in the servicing of exposures of similar nature to the securitised exposures may act as retainers in a traditional NPE securitisation. It is therefore appropriate to set out the criteria that servicers should meet to be able to demonstrate that they have the required expertise in servicing exposures that are similar to those securitised.

(14) Commission Delegated Regulation (EU) No 625/2014[2] supplements risk retention provisions laid down in Article 405 of Regulation (EU) No 575/2013 of the European Parliament and of the Council[3] for credit institutions and investment firms. Regulation (EU) 2017/2401 of the European Parliament and of the Council[4] amended Regulation (EU) No 575/2013 by deleting Part Five, and thus Article 405, of that Regulation. The requirements on risk retention that were laid down in Article 405 of Regulation (EU) No 575/2013 are now laid down in Article 6 of Regulation (EU) 2017/2402. It is therefore appropriate to repeal Delegated Regulation (EU) No 625/2014, without prejudice to Article 43(6) of Regulation (EU) 2017/2402.

(15) This Regulation is based on the draft regulatory technical standards developed in close cooperation with the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority, and submitted to the Commission by the European Banking Authority.

(16) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council[5],

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation, the following definitions shall apply:

---

2 Commission Delegated Regulation (EU) No 625/2014 of 13 March 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council by way of regulatory technical standards specifying the requirements for investor, sponsor, original lenders and originator institutions relating to exposures to transferred credit risk (OJ L 174, 13.06.2014, p. 16).

3 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).

4 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).

5 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

(a) ‘synthetic form of retention’ means the retention of a material net economic interest through the use of derivative instruments;

(b) ‘contingent form of retention’ means the retention of a material net economic interest through the use of credit support that ensures an immediate enforcement of the retention, including by guarantees, letters of credit, or similar forms of credit support.

Article 2

Retainers of a material net economic interest

1. The requirement laid down in Article 6(1), first subparagraph, of Regulation (EU) 2017/2402, which states that the retained material net economic interest shall not be split amongst different types of retainers, shall be fulfilled by any of the following:

(a) the originator or originators;

(b) the sponsor or sponsors;

(c) the original lender or original lenders;

(d) the servicer or servicers in a traditional NPE securitisation, provided that they meet the requirement on expertise set out in Article 19 of this Regulation.

2. Where more than one originator is eligible to fulfil the retention requirement, each originator shall fulfil that requirement on a pro rata basis by reference to the securitised exposures for which it is the originator.

3. Where more than one original lender is eligible to fulfil the retention requirement, each original lender shall fulfil that requirement on a pro rata basis by reference to the securitised exposures for which it is the original lender.

4. By way of derogation from paragraphs 2 and 3, the retention requirement may be fulfilled in full by a single originator or original lender provided that one of the following conditions is met:

(a) the originator or original lender has established and is managing the asset-backed commercial paper (ABCP) programme or other securitisation;

(b) the originator or original lender has established the ABCP programme or other securitisation and has contributed more than 50 % of the total securitised exposures measured by nominal value at origination.

5. Where more than one sponsor is eligible to fulfil the retention requirement, the retention requirement shall be fulfilled by either:

(a) the sponsor whose economic interest is most closely aligned with the investor’s interest as agreed by all involved sponsors on the basis of objective criteria, including all of the following:

(i) the transaction’s fee structure;

(ii) the sponsor’s involvement in the establishment and management of the ABCP programme or other securitisation; and

(iii) the exposure to the credit risk of the securitisations; or

(b) each sponsor in proportion to the total number of sponsors.

6. Where more than one servicer is eligible to fulfil the retention requirement, the retention requirement shall be fulfilled by either:

(a) the servicer with the predominant economic interest in the successful workout of the exposures of the traditional NPE securitisation, as agreed by all servicers involved on the basis of objective criteria, including the transaction's fee structure and the servicer's available resources and expertise to manage the exposures' workout process; or

(b) each servicer on a pro rata basis by reference to the securitised exposures that it manages, which shall be calculated as the sum of the net value of the securitised exposures that qualify as non-performing exposures and of the nominal value of the performing securitised exposures.

7. An entity shall not be considered to have been established or to operate for the sole purpose of securitising exposures as referred to in Article 6(1), second subparagraph, of Regulation (EU) 2017/2402 where all of the following applies:

(a) the entity has a strategy and the capacity to meet payment obligations consistent with a broader business model that involves material support from capital, assets, fees or other sources of income, by virtue of which the entity does not rely on the exposures to be securitised, on any interests retained or proposed to be retained in accordance with Article 6 of Regulation (EU) 2017/2402, or on any corresponding income from such exposures and interests, as its sole or predominant source of revenue;

(b) the members of the management body have the necessary experience to enable the entity to pursue the established business strategy, as well as adequate corporate governance arrangements.

Article 3

Fulfilment of the retention requirement through a synthetic or contingent form of retention

1. The fulfilment of the retention requirement in a manner equivalent to one of the options set out in Article 6(3) of Regulation (EU) 2017/2402 through a synthetic or contingent form of retention shall meet all of the following conditions:

(a) the amount retained is at least equal to the amount required under the option which the synthetic or contingent form of retention corresponds to;

(b) the retainer has explicitly disclosed in the final offering document, prospectus, transaction summary or overview of the main features of the securitisation that it will retain a material net economic interest in the securitisation through a synthetic or contingent form on an ongoing basis.

For the purposes of point (b), the retainer shall disclose in the final offering document, prospectus, transaction summary or overview of the main features of the securitisation all the details on the applicable synthetic or contingent form of retention, including the methodology used in the determination of the material net interest retained and an explanation to which of the options set out in Article 6(3), points (a) to (e), of Regulation (EU) 2017/2402 the retention is equivalent.

2. Where an entity other than an institution as defined in Article 4(1), point (3), of Regulation (EU) No 575/2013 and other than an insurance or reinsurance undertaking as defined in Article 13, points (1) and (4), of Directive 2009/138/EC, retains an economic interest through a synthetic or contingent form of retention, that retained interest shall be fully collateralised in cash and be held under arrangements

as referred to in Article 16(9) of Directive 2014/65/EU of the European Parliament and of the Council[6].

Article 4

Retention equivalent to not less than 5% of the nominal value of each of the tranches sold or transferred to investors

The retention referred to in Article 6(3), point (a), of Regulation (EU) 2017/2402 (vertical slice) shall be fulfilled by any of the following methods:

(a) direct retention of not less than 5% of the nominal value of each of the tranches sold or transferred to investors;

(b) the retention of an exposure which exposes its holder to the credit risk of each issued tranche of a securitisation transaction on a pro-rata basis of not less than 5 % of the total nominal value of each of the issued tranches;

(c) the retention of not less than 5 % of the nominal value of each of the securitised exposures, provided that the retained credit risk ranks pari passu with or is subordinated to the credit risk securitised in relation to the same exposures;

(d) the provision, in the context of an ABCP programme, of a liquidity facility, provided that all of the following conditions are met:

(i) the liquidity facility covers 100 % of the share of the credit risk of the securitised exposures of the securitisation transaction that is funded by the ABCP programme;

(ii) the liquidity facility covers the credit risk for as long as the retainer has to retain the material net economic interest;

(iii) the liquidity facility is provided by the originator, sponsor or original lender in the securitisation transaction;

(iv) the investors have been given access to information within the initial disclosure that enables them to verify that points (i), (ii) and (iii) are complied with.

Article 5

Retention of the originator's interest in a revolving securitisation or securitisation of revolving exposures

The retention of the originator's interest of not less than 5 % of the nominal value of each of the securitised exposures as referred to in Article 6(3), point (b), of Regulation (EU) 2017/2402 shall only be considered fulfilled where the retained credit risk of such exposures ranks *pari passu* with, or is subordinated to, the credit risk securitised in relation to the same exposures.

[6] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

Article 6

Retention of randomly selected exposures equivalent to no less than 5% of the nominal value of the securitised exposures

1. The pool of at least 100 potentially securitised exposures from which retained non-securitised and securitised exposures are to be randomly selected, as referred to in Article 6(3), point (c), of Regulation (EU) 2017/2402, shall be sufficiently diverse to avoid an excessive concentration of the retained interest.

2. When selecting the exposures referred to in paragraph 1, retainers shall take into account quantitative and qualitative factors that are appropriate for the type of securitised exposures to ensure that the distinction between retained non-securitised and securitised exposures is random. For that purpose, and where relevant, retainers shall take into consideration the following factors when selecting exposures:

(a) the time of origination of the loan (vintage);

(b) the type of securitised exposures;

(c) the geographical location;

(d) the origination date;

(e) the maturity date;

(f) the loan to value ratio;

(g) the collateral type;

(h) the industry sector;

(i) the outstanding loan balance;

(j) any other factor deemed relevant by the retainer.

3. Retainers shall not select different individual exposures at different points in time, except where that may be necessary to fulfil the retention requirement in relation to a securitisation in which the securitised exposures fluctuate over time, either due to new exposures being added to the securitisation or to changes in the level of the individual securitised exposures.

4. Where the retainer is the securitisation's servicer, the selection conducted in accordance with this Article shall not lead to a deterioration in the servicing standards applied by the retainer on the transferred exposures relative to the retained exposures.

Article 7

Retention of the first loss tranche

1. The retention of the first loss tranche referred to in Article 6(3), point (d), of Regulation (EU) 2017/2402 shall be fulfilled by any of the following methods:

(a) holding either on-balance sheet or off-balance sheet positions;

(b) holding an exposure by means of a provision of a contingent form of retention or of a liquidity facility in the context of an ABCP programme, which fulfils all of the following criteria:

(i) the exposure covers at least 5 % of the nominal value of the securitised exposures;

(ii) the exposure constitutes a first loss position in relation to the securitisation;

(iii) the exposure covers the credit risk for the entire duration of the retention commitment;

(iv) the exposure is provided by the retainer;

(v) the investors have been given access within the initial disclosure to all information necessary to verify that points (i) to (iv) are complied with;

(c) overcollateralisation, as defined in Article 242, point (9), of Regulation (EU) No 575/2013, if that overcollateralisation operates as a 'first loss' position of not less than 5 % of the nominal value of the securitised exposures.

2. Where the first loss tranche exceeds 5 % of the nominal value of the securitised exposures, the retainer may choose to retain a pro-rata portion of such first loss tranche only, provided that that portion is equivalent to at least 5 % of the nominal value of the securitised exposures.

Article 8

Retention of a first loss exposure of not less than 5% of every securitised exposure

1. The retention of a first loss exposure at the level of every securitised exposure as referred to in Article 6(3), point (e), of Regulation (EU) 2017/2402 shall only be considered to be fulfilled where the retained credit risk is subordinated to the credit risk securitised in relation to the same exposures.

2. By way of derogation from paragraph 1, the retention of a first loss exposure at the level of every securitised exposure as referred to in Article 6(3), point (e), of Regulation (EU) 2017/2402 may also be fulfilled through the sale by the originator or original lender of the underlying exposures at a discounted value where each of the following conditions is met:

(a) the amount of the discount is not less than 5 % of the nominal value of each exposure;

(b) the discounted sale amount is refundable to the originator or original lender only if that discounted sale amount is not absorbed by losses related to the credit risk associated to the securitised exposures.

Article 9

Application of the retention options on traditional NPE securitisations

1. In the case of NPE securitisations as referred to in Article 6(3a) of Regulation (EU) 2017/2402, for the purpose of applying Article 4, point (a), and Articles 5 to 8 of this Regulation to the share of non-performing exposures in the pool of underlying exposures of a securitisation, any reference to the nominal value of the securitised exposures shall be construed as a reference to the net value of the non-performing exposures.

2. For the purposes of Article 6 of this Regulation, the net value of the retained non-performing exposures shall be calculated using the same amount of the non-refundable purchase price discount that would have been applied had the retained non-performing exposures been securitised.

3. For the purposes of Article 4, point (a), Article 5 and Article 8 of this Regulation, the net value of the retained part of the non-performing exposures shall be calculated using the same percentage of the non-refundable purchase price discount that applies to the part that is not retained.

4. Where the non-refundable purchase price discount as referred to in Article 6(3a), second subparagraph, of Regulation (EU) 2017/2402 has been agreed at the level of the pool of underlying non-performing exposures or at sub-pool level, the net value of individual securitised non-performing exposures included in the pool or sub-pool, as applicable, shall be calculated by applying a corresponding share of the non-refundable purchase price discount to each of the non-performing securitised exposures in proportion to their nominal value or, where applicable, their outstanding value at the time of origination.

5. Where the non-refundable purchase price discount includes the difference between the nominal amount of one tranche or several tranches of an NPE securitisation underwritten by the originator for subsequent sale and the price at which that tranche or those tranches are first sold to unrelated third parties as referred to in Article 6(3a), second subparagraph, of Regulation (EU) 2017/2402, that difference shall be taken into account in the calculation of the net value of individual securitised non-performing exposures by applying a corresponding share of the difference to each of the non-performing securitised exposures in proportion to their nominal value.

Article 10

Measurement of the level of retention

1. When measuring the level of retention of the net economic interest, the following criteria shall be applied:

(a) the origination shall be the time at which the exposures were first securitised, which shall be one of the following:

  (i) the date of the issuance of securities;

  (ii) the date of the signature of the credit protection agreement;

  (iii) the date of the agreement on a refundable purchase price discount;

(b) where the calculation of the level of retention is based on nominal values, the acquisition price of assets shall not be taken into account for the purpose of that calculation;

(c) the finance charge collections and other fee income received in respect of the securitised exposures in a traditional securitisation net of costs and expenses (traditional excess spread) shall not be taken into account when measuring the retainer's net economic interest;

(d) where the originator acts as the securitisation's retainer and applies the retention option referred to in Article 6(3), point (d), of Regulation (EU) 2017/2402, and where the exposure value of the synthetic excess spread that provides credit enhancement to all the tranches of the synthetic securitisation and serves as a first loss protection is subject to capital requirements in accordance with the prudential regulation applicable to the originator, the originator may take the exposure value of the synthetic excess spread into account when calculating the material net economic interest in accordance with Article 7 of this Regulation by treating the exposure value

of the synthetic excess spread as retention of the first loss tranche, in addition to any actual retention of the first loss tranche;

(e) the retention option and methodology used to calculate the net economic interest shall not be changed during the life of a securitisation, unless exceptional circumstances require a change and that change is not used as a means to reduce the amount of the retained interest.

2. The retainer shall not be required to constantly replenish or readjust its retained interest to at least 5 % when losses are realised on its retained exposures or allocated to its retained positions.

Article 11

Measurement of the material net economic interest to be retained for exposures in the form of drawn and undrawn amounts of credit facilities

The calculation of the net economic interest to be retained for credit facilities, including credit cards, shall be based on amounts already drawn, realised or received only and shall be adjusted in accordance with changes to those amounts.

Article 12

Prohibition of hedging or selling the retained interest

1. The obligation laid down in Article 6(1), first subparagraph, of Regulation (EU) 2017/2402 to retain on an ongoing basis a material net economic interest in the securitisation shall be deemed to have been met only where, taking into account the economic substance of the transaction, both of the following conditions are met:

(a) the retained material net economic interest is not subject to any credit risk mitigation or hedging of either the retained securitisation positions or the retained exposures,

(b) the retainer does not sell, transfer or otherwise surrender all or part of the rights, benefits or obligations arising from the retained net economic interest.

By way of derogation from point (a), the retainer may hedge the net economic interest where the hedge is not against the credit risk of either the retained securitisation positions or the retained exposures.

2. The retainer may use retained exposures or securitisation positions as collateral for secured funding purposes including, where relevant, funding arrangements that involve a sale, transfer or other surrender of all or part of the rights, benefits or obligations arising from the retained net economic interest, provided that such use as collateral does not transfer the exposure to the credit risk of those retained exposures or securitisation positions to a third party.

3. Paragraph 1, point (b), shall not apply in any of the following events:

(a) in the event of the insolvency of the retainer;

(b) where the retainer, for legal reasons beyond its control and beyond the control of its shareholders, is unable to continue acting as a retainer;

(c) in the case of retention on a consolidated basis as referred to in Article 14.

Article 13

Transactions for which the retention requirement does not apply, as referred to Article 6(6) of Regulation (EU) 2017/2402

Transactions for which the retention requirement does not apply, as referred to in Article 6(6) of Regulation (EU) 2017/2402, shall include securitisation positions in the correlation trading portfolio which are either reference instruments as referred to in Article 338(1), point (b), of Regulation (EU) No 575/2013 or which are eligible for inclusion in the correlation trading portfolio.

Article 14

Retention on a consolidated basis

Mixed financial holding companies as defined in Article 2, point (15), of Directive 2002/87/EC of the European Parliament and of the Council[7], parent institutions, or financial holding companies, that are established in the Union and that satisfy the requirements referred to in Article 6(1) of Regulation (EU) 2017/2402 on the basis of their consolidated situation in accordance with paragraph 4 of that Article shall, where the retainer is no longer included in the scope of supervision on a consolidated basis, ensure that one or more of the remaining entities included in the scope of supervision on a consolidated basis fulfils the retention requirement.

Article 15

Requirements on the allocation of cash flows and losses to the retained interest and on fees payable to the retainer

1. Retainers shall not use arrangements or embedded mechanisms in the securitisation by virtue of which the retained interest at origination would decline faster than the interest transferred. In the allocation of cash flows, the retained interest shall not be prioritised to preferentially benefit from being repaid or amortised ahead of the transferred interest.

The amortisation of the retained interest via cash flow allocation in accordance with the first subparagraph or through the allocation of losses that, in effect, reduces the level of retention over time, shall be allowed.

2. For the purposes of paragraph 1, arrangements on any fees, either fixed or contingent on the volume or the performance of the securitised exposures or the evolution of relevant market benchmarks, payable to the retainer on a priority basis to remunerate that retainer for any services provided to the securitisation shall only be deemed consistent with the requirements on the retained interest laid down in that paragraph where all of the following conditions are met:

(a) the amount of the fees is set on an arm's length basis having regard to comparable transactions in the market;

[7] Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

(b) the fees are structured as a consideration for the provision of the service and do not create a preferential claim in the securitisation cash flows that effectively declines the retained interest faster than the transferred interest.

For the purposes of point (a), in the absence of comparable transactions in the relevant market, the amount of the fees shall comply with the requirement that those fees are set on an arm's length basis where those fees are set by reference to fees payable in similar transactions in other markets, or are set by using valuation metrics that appropriately take into account the type of securitisation and the service being provided.

The conditions in the first subparagraph, points (a) and (b), shall not be considered to be met when the fees are guaranteed or payable up-front in any form, in full or in part in advance of the service being provided post-closing, and the effective material net economic interest after deducting the fees is lower than the minimum net economic interest required under the retention option chosen from the options laid down in Article 6(3), points (a) to (e), of Regulation (EU) 2017/2402.

Article 16

Fulfilment of the retention requirement in securitisations of own issued debt instruments

Where an entity securitises its own issued debt instruments, including covered bonds as defined in Article 3, point (1), of Directive (EU) 2019/2162 of the European Parliament and of the Council[8], and the underlying exposures of the securitisation comprise exclusively those own-issued debt instruments, the retention requirement in Article 6(1) of Regulation (EU) 2017/2402 shall be considered complied with.

Article 17

Retention requirement in resecuritisations

1. For resecuritisations permitted by Article 8 of Regulation (EU) 2017/2402, a retainer shall retain the material net economic interest in relation to each of the respective transaction levels.

2. By way of derogation from paragraph 1, the originator of a resecuritisation shall not be obliged to retain a material net economic interest at the transaction level of the resecuritisation where all of the following conditions are met:

(a) the originator of the resecuritisation is also the originator and the retainer of the underlying securitisation;

(b) the resecuritisation is backed by a pool of exposures comprising solely exposures or positions which were retained by the originator in the underlying securitisation in excess of the required minimum net economic interest prior to the date of origination of the resecuritisation;

(c) there is no maturity mismatch between the underlying securitisation positions or exposures and the resecuritisation.

3. For the purposes of paragraph 1 and 2, retranching by the securitisation's originator of an issued tranche into contiguous tranches shall not constitute a resecuritisation.

[8] Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending Directives 2009/65/EC and 2014/59/EU (OJ L 328, 18.12.2019, p. 29).

Article 18

Assets transferred to the SSPE

1. For the purposes of Article 6(2) of Regulation (EU) 2017/2402, assets held on the balance sheet of the originator that according to the documentation of the securitisation meet the eligibility criteria, shall be deemed to be comparable to the assets to be transferred to the SSPE where, at the time of the selection of the assets, both of the following conditions are met:

(a) the expected performance of both the assets to be further held on the balance sheet and the assets to be transferred is determined by similar factors;

(b) on the basis of indications, including past performance and applicable models, it can be reasonably expected that the performance of the assets to be further held on the balance sheet will not be significantly better during the time period referred to in Article 6(2) of Regulation (EU) 2017/2402 than the performance of the assets to be transferred.

2. The assessment whether the originator has complied with Article 6(2) of Regulation (EU) 2017/2402 shall take into account whether the originator has taken any actions to comply with that Article, and in particular whether the originator has put in place any internal policies, procedures and controls to prevent the systematic or intentional selection for securitisation purposes of assets of a worse average credit quality than comparable assets retained on its balance sheet.

3. An originator shall be deemed to have complied with Article 6(2) of Regulation (EU) 2017/2402 where, after the securitisation, there are no exposures left on the originator's balance sheet that are comparable to the securitised exposures, other than the exposures which the originator is already contractually committed to securitise, and provided that that fact has been clearly communicated to investors.

Article 19

Expertise requirement on the servicer of traditional NPE securitisations

1. In the case of traditional NPE securitisations, servicers shall be deemed to have expertise in servicing exposures of a similar nature to those securitised, as referred to in Article 6(1), fourth subparagraph, of Regulation (EU) 2017/2402 where one of the following conditions is fulfilled:

(a) the members of the management body of the servicer and the senior staff, other than the members of the management body, responsible for servicing exposures of a similar nature to those securitised have adequate knowledge and skills in the servicing of such exposures;

(b) the business of the servicer, or of its consolidated group for accounting or prudential purposes, has included the servicing of exposures of a similar nature to those securitised for at least five years prior to the date of the securitisation;

(c) all of the following points are complied with:

(i) at least two of the members of the servicer's management body have relevant professional experience in the servicing of exposures of a similar nature to those securitised, on a personal level, of at least five years;

(ii) senior staff, other than the members of the management body, who are responsible for managing the servicing by the servicer of non-performing

exposures have relevant professional experience in the servicing of such exposures, on a personal level, of at least five years;

(iii) the servicing function of the servicer is backed up by a back-up servicer that complies with point (b).

2. Servicers shall substantiate and disclose their professional experience in sufficient detail to enable institutional investors to comply with their due diligence obligations laid down in Article 5 of Regulation (EU) 2017/2402, while respecting the applicable confidentiality requirements.

Article 20

Repeal

Delegated Regulation (EU) No 625/2014 is repealed, without prejudice to Article 43(6) of Regulation (EU) 2017/2402.

Article 21

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, 7.7.2023

For the Commission
The President
Ursula VON DER LEYEN