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## WHITE PAPER

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### The European Securitisation Regulation: The Countdown Continues....

#### **ESMA Consultation Paper—Draft Technical Standards on Securitisation Repositories**

Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (“Regulation”) came into force on 18 January 2018 and will apply to European credit institutions, insurance companies and pension funds as well as alternative investment fund managers from 1 January 2019 onward. The Regulation tasks the three European supervisory authorities with developing regulatory technical standards and implementation technical standards for a number of key areas addressed in the Regulation.

This Jones Day *White Paper* summarizes the draft technical standards on operational standards for securitisation repositories data collection, data aggregation and comparison, data access, and procedures to verify completeness and consistency of information as proposed by ESMA in its Consultation Paper of 19 December 2017.

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Regulation (EU) 2017/2402, which lays down a general framework for securitisation and creates a specific framework for simple, transparent and standardised securitisation (“Regulation”), came into force on 18 January 2018. It promotes two purposes: first, the harmonisation and consolidation of certain key elements in the European securitisation market across the financial industries, and second, the creation of a specific legal framework for simple, transparent and standardised (“STS”) securitisations. The concept of STS securitisations was introduced following the strong request of market participants for a recalibrated risk-weighting regime that distinguishes between “normal” securitisations and securitisations that meet certain quality standards. The Regulation will apply to credit institutions, insurance companies and pension funds as well as alternative investment fund managers from 1 January 2019 onward.

The Regulation tasks the three European supervisory authorities—the European Securities and Markets Authority (“ESMA”), the European Banking Authority (“EBA”) and the European Insurance and Occupational Pensions Authority (“EIOPA”)—with developing regulatory technical standards and implementation technical standards for a number of key areas.

In a series of Jones Day *White Papers*, we will provide an overview of the various consultation papers and the status of the draft technical standards published by the mandated European supervisory authorities. In the previous Jones Day *White Paper*, we focused on the draft technical standards on disclosure requirements to be fulfilled by originators, sponsors and securitisation special purpose entities in securitisations.<sup>1</sup>

This Jones Day *White Paper* focuses on ESMA’s consultation paper (ESMA Consultation Paper of 19 December 2017—ESMA33-128-107) on operational standards for securitisation repositories data collection, data aggregation and comparison, data access, and procedures to verify completeness and consistency of information (“Consultation Paper”).

## LEGAL BACKGROUND AND TIMETABLE

The Regulation contains two main reference points for regulatory technical standards relating to the collection and verification of data by securitisation repositories, namely Article 17(2) and Article 10(7). With the draft regulatory technical standards

(“Draft RTS”), ESMA has chosen a joint approach combining proposals for:

- the “timely, structured and comprehensive” collection of data by securitisation repositories;
- the procedures for securitisation repositories to verify the completeness and consistency of reported information; and
- the terms and conditions of the access by the relevant users to such data.

At this point, it should be noted that the Draft RTS are not relevant for so-called “private securitisations”, which are securitisations for which no prospectus has to be prepared in compliance with Directive 2003/71/EC.<sup>2</sup> This means that securitisations where the securities are not listed on a stock exchange, such as ABCP securitisations, do not require the involvement of a securitisation repository and, therefore, are not subject to the Draft RTS.

The deadline for the submission of the final Draft RTS to the European Commission is 18 January 2019. The feedback period for the Consultation Paper ends on 19 March 2018.

## TIMELY, STRUCTURED AND COMPREHENSIVE DATA COLLECTION

### Item Codes

To facilitate the timely, structured and comprehensive data collection by the securitisation repository, as well as the subsequent verification (tick-the-box) of such data, ESMA proposes the introduction of a set of item codes set forth in a table format (annexed as Table 2 to the Draft RTS). The proposed table lists a total of 24 item codes for items that must be made available by the originator, the sponsor and the securitisation special purpose entity of a securitisation (each defined in the draft RTS as a “reporting entity”) according to Article 7(1) of the Regulation, where these items exist for the securitisation.

Given the responsibility of the securitisation repository to collect the relevant data of a securitisation and the suggested timing for feedback (see further below), the proposed table and itemized approach is certainly welcome, since the provision of the documents and information to be provided can

be quickly scanned and confirmed. Item codes 18 to 22, however, do not appear to add value to the table, as these items are already covered by item codes 4 to 8. Further, item code 23 refers to a written confirmation that the documentation is “complete” and “correct”. Given that the securitisation repository will not have the time, expertise and resources to review the information submitted to it, the securitisation repository should be able to rely on a corresponding confirmation from the reporting entities.

### Reporting Format

To avoid discrepancies in the data format and based on the (negative) experience under EMIR,<sup>3</sup> the Draft RTS require the use of XML-format templates based on the ISO 20022 methodology as a common format in connection with the transmission of data to and from securitisation repositories. The ISO 20022 format is already employed in the respective MiFID II,<sup>4</sup> EMIR and SFTR<sup>5</sup> delegated acts (as well as being used in SEPA and the T2S settlements system) and has been used by many market participants. The use of a common data format and ISO standard ensures that all information to be collected and distributed by securitisation repositories will be made available on a daily basis and in real time.

## AGGREGATION AND COMPARISON OF DATA ACROSS SEVERAL SECURITISATION REPOSITORIES

### Securitisation Identifiers

To allow the collection, retrieval and comparability of securitisation data distributed across various securitisation repositories, Article 2 of the RTS mandates the securitisation repositories to assign a unique identifier to each securitisation reported to them. Each identifier will be assigned to the securitisation as such (and not to an individual tranche or the underlying exposures of the securitisation) throughout its lifetime (without being changed if the securitisation is being restructured).

### End-of-Day Reports

To facilitate the timely, structured and comprehensive aggregation and comparison of data across securitisation repositories, Article 3 of the Draft RTS provides for end-of-day reports to be produced by the securitisation repositories which capture the key features of all securitisations reported to the securitisation repositories.

According to ESMA, the information set out in the end-of-day report prepared by a securitisation repository is meant to benefit:

- the entities referred to in Article 17(1) of the Regulation, i.e., investors and potential investors, as well as ESMA, EBA, EIOPA, the European Systemic Risk Board, the European System of Central Banks (including the ECB), national supervisory/competent authorities, national resolution authorities, and the Single Resolution B (together referred to as “Users”) in obtaining a swift overview of the securitisation market across the European Union,
- potential investors in examining and comparing the performance of specific securitisations; and
- competent regulatory authorities in monitoring the compliance of securitisations with reporting obligations and data completeness.

Article 3(1) of the Draft RTS requires an aggregate end-of-day report to be made available by 19.00 Coordinated Universal Time and sets out the information to be contained in an end-of-day report.

### Data Queries

In addition to the end-of-day reports and other information to be made available by securitisation repositories, the high degree of standardised information and the technical challenges of combining template fields raise a demand for the possibility of Users to make individual data requests in the form of queries. ESMA distinguishes between periodic queries (which would include the contents of the end-of-day report) and ad-hoc queries. Given the substantial amount of available data and the proposed response time (see below), ESMA proposes to permit queries based on specific fields of information and to apply a set of nine filter criteria reflecting the anticipated needs of Users. Based on these criteria, the securitisation repository will then have to scan the previously reported data and provide a response.

For responses by the relevant securitisation repository, the Draft RTS currently provide for a two-step approach. The validation of a request by a User should be confirmed by the securitisation repository within 60 minutes of receipt (to enable the requesting party to correct its request). Depending on whether the query relates to historical or current information, a response should be provided within the following deadlines (in line with the approaches developed under EMIR and SFTR):

- requests relating to securitisations that have either not yet been priced, have not yet fully matured or have fully matured in the past year should be answered by no later than 12 noon Coordinated Universal Time on the day following the day of submission;
- requests relating to securitisations that have fully matured more than one year ago should be answered within three working days following submission of the specific request; and
- requests relating to a combination of both types of securitisations should be answered within three working days following the submission of the specific request.

The proposed response times appear extremely tight and burdensome for the securitisation repositories. However, the response time needs to be balanced against the intended purpose of Article 17 of the Regulation, which is to allow (potential) investors to make a swift investment decision and regulatory authorities to fulfil their supervisory responsibilities in a timely manner. On the other hand, it has to be borne in mind that securitisation repositories will be provided with a huge amount of data on a daily basis. Hence, it needs to be seen whether potential securitisation repositories will have the operational and technical resources to respond to ad hoc queries within the proposed timelines.

In order to fully satisfy the legislative requirement of direct and immediate access to data held by securitisation repositories, ESMA is of the view that the submission and validation of queries and the provision of output reports should be automated and processed on a 24/7 basis without the need for query submissions and responses to be made during the opening hours of a securitisation repository. Hence, much will depend on the technical implementation of the reporting, collection and distribution process. In this context, new technologies, such as the blockchain technology (also known as distributed ledger technology) could be of use to expedite the quick and automatic distribution of data to all Users.

## **PROCEDURES TO VERIFY THE COMPLETENESS AND CONSISTENCY OF REPORTED INFORMATION**

Article 10(7)(a) of the Regulation refers to procedures “which are to be applied by securitisation repositories in order to

verify the completeness and consistency of the information made available to them under Article 7(1)”. Since Article 7(1) contains a variety of information to be made available to securitisation repositories ESMA distinguishes between two verification obligations:

- data completeness and data consistency; and
- completeness and consistency of documentation.

### **Data Completeness and Data Consistency**

Assuming that not all data fields in the reporting templates will be completed (because some fields may be relevant or the information not available), ESMA takes the view that the “No Data options” fields (ND1 to ND5) submitted by the reporting entity are an important indicator of the “completeness” of the reported information (i.e., important is what is missing, and not what is available), because it provides evidence of the depth and quality of information on which the monitoring is based.

To determine securitisation data “completeness” arising from the use of “No Data options”, securitisation repositories are to calculate a data completeness score. The data completeness score approach is aligned to the score used by the ECB in its ABS loan-level criteria used to set thresholds for ABSs seeking eligibility as collateral in ECB financings. According to ESMA, all reporting entities should strive toward achieving the A1 score, and if an A1 score cannot be achieved, the national competent authority tasked with supervising the reporting entity’s compliance with the Regulation is mandated to discuss the reasons for the A1 score not being achieved and to decide on remedial measures.

Further, the Draft RTS require securitisation repositories to perform certain minimum consistency checks between the underlying exposure and the completed investor report templates, such as checking for manifest errors in the data fields, confirming compliance with the required technical format (XML) and confirming the correct use of the value “ND5” (not relevant). The list of examples provided by ESMA in the Consultation Paper is not meant to be exhaustive, and ESMA argues that a multitude of consistency checks can be made in an automated manner.

### **Documentation Completeness and Consistency**

According to ESMA, in order to confirm the completeness and consistency of the documentation, a full legal review and due diligence of the submitted documentation would have to be

conducted, and this task should be performed by others (such as investors or third-party firms offering STS verification services). Therefore, to comply with their obligation to have procedures in place to verify the “completeness” of the submitted documentation, securitisation repositories should request from the reporting entities written confirmation that: (i) all relevant securitisation documents (as listed in the disclosure table) are available and reported to the relevant securitisation repository; and (ii) the submitted documentation is “consistent”. Such confirmation must be given by the reporting entity at the time when the documentation is submitted and must be repeated at least once a year.

Since the completeness and consistency check requires detailed knowledge of the documentation and cannot be performed in an automated manner, ESMA’s approach to request a corresponding confirmation from the reporting entity reflects the allocation of responsibilities in a securitisation and is therefore welcome.

### **Feedback to Reporting Entities**

The Draft RTS require the securitisation repository to provide to the reporting entity feedback on the submitted documents.<sup>6</sup> The feedback must include information on the results of the data validations and whether the data submission has been accepted or rejected and, if rejected, the reason for the rejection. For example, a submission will have to be rejected if it fails to comply with the data validation checks (including data inconsistency and noncompliance with the template structures, such as missing columns or incorrect ordering of columns), but it will have to be admitted if there is missing information (which means that the submission does not achieve a data completeness score of A1). ESMA proposes a feedback time of 60 minutes after receipt of the data submission. As indicated above, this requires that the data validation checks must be made on an automated basis (tick-the-box) and do not require additional verification or due diligence.

### **Terms and Conditions of Access to Information**

Establishing a diligent system of collection and validation procedures is of little use if the information collected and held by securitisation repositories cannot be shared with the relevant end users in an efficient and timely manner. Therefore, Article 17(2) of the Regulation mandates ESMA to develop technical standards specifying:

- the details of the information to which Users are to have access (always considering the scope of their mandate); and
- terms and conditions under which Users are to have direct and immediate access.

In respect of the proposed operational and technical arrangements for access to securitisation data, ESMA draws on the existing operational standards and infrastructure under the EMIR regime<sup>7</sup> and proposes similar arrangements where this appears desirable, feasible and cost-effective. Article 9 of the Draft RTS sets out ESMA’s proposal for access conditions.

### **Scope of Access and Details of Information**

As regards the information to which Users will have access, taking into account their mandate and specific needs, ESMA considers that all Users should have access, free of charge, to: (i) the information delivered by the reporting entity to the securitisation repositories pursuant to Article 7(1) of the Regulation; (ii) the information produced by the securitisation repositories, including unique securitisation identifiers, end-of-day reports, data completeness scores, item codes, written confirmations of documentation completeness and consistency and data quality checks; and (iii) the formulae used by securitisation repositories to produce the information in (ii) above.

Accordingly, the technical specifications in Article 9 of the Draft RTS do not distinguish between various types of Users. Instead, all Users have the same access rights and are subject to the same access conditions and restrictions.

### **Access Conditions for Users and Reporting Entities**

To define specific access conditions for specific Users would require two things: first, a decision about which entity is entitled to receive which part of the reported information and, second, the technical and operational distillation of the relevant information from the overall reporting package. This would inevitably result in incomplete and fragmented pieces of information and, as a consequence, in additional follow-up queries for “missing” information (which may have already been reported) or, even worse, wrong decisions at the level of the Users based on information gaps. As transparency is a key to the success of a stable and trustworthy securitisation market, Article 9 of the Draft RTS does not distinguish between various User groups and provides a common set of access conditions for all Users.

Similarly, access should be granted to the reporting entities to allow them to correct information that has been submitted. Therefore, Article 9(7) of the Draft RTS explicitly states that, where factual errors have been observed and demonstrated, a securitisation repository must allow the reporting entities to access and correct the information on that securitisation in a timely manner. As part of this arrangement, the securitisation repository should treat any corrections made as a new data submission to be made available.

### “Direct and Immediate” Access

According to ESMA, no distinction is necessary between “direct and immediate” access to information and “general” access to information. Securitisation instruments contain a substantial amount of information that can be quickly checked by securitisation repositories by applying automated verification procedures and, thereafter, distributed to Users.

The proposed access conditions in Article 9(5) of the Draft RTS are supposed to provide for a sufficiently short turnaround time for obtaining the necessary information rapidly. Accordingly, information access requests relating to: (i) securitisations that have either not yet been priced, have not yet fully matured or have fully matured in the past year should be granted by no later than 12 noon Coordinated Universal Time on the day following the day on which the access request is submitted; (ii) securitisations that have fully matured more than one year ago should be granted within three working days following the submission of the access request; and (iii) a combination of both types of securitisations should be granted within three working days following the submission of the access request.

It is noted that the access times correspond to the response time for data queries (see above).

In the following Jones Day *White Paper*, we will have a close look at ESMA’s Consultation Paper regarding the draft regulatory technical standards and draft implementing technical standards on content and format of the STS notification under the Regulation.<sup>8</sup>

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

### Ulf Kreppel

Frankfurt  
+49.69.9726.3939  
[ukreppel@jonesday.com](mailto:ukreppel@jonesday.com)

### Vinicio Trombetti

Milan  
+39.02.7645.4001  
[vtrombetti@jonesday.com](mailto:vtrombetti@jonesday.com)

### Andrés Lorrio

Madrid  
+34.91.520.3945  
[alorrio@jonesday.com](mailto:alorrio@jonesday.com)

### Christine Van Gallebaert

Paris  
+33.1.56.59.39.39  
[cvangallebaert@jonesday.com](mailto:cvangallebaert@jonesday.com)

### Michelle Taylor

Hong Kong  
+852.3189.7347  
[mtaylor@jonesday.com](mailto:mtaylor@jonesday.com)

### Nick Wittek

Frankfurt  
+49.69.9726.3917  
[nwittek@jonesday.com](mailto:nwittek@jonesday.com)

## ENDNOTES

- 1 ESMA Consultation Paper of 19 December 2017—ESMA33-128-107, see “[The European Securitisation Regulation: The Countdown has Begun...](#)”
- 2 Also known as the Prospectus Directive.
- 3 European Market Infrastructure Regulation (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).
- 4 Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast).
- 5 Securities Financing Transactions Regulation.
- 6 Article 7(5) of the Draft RTS.
- 7 See Article 81(3) and (5) EMIR.
- 8 ESMA Consultation Paper of 19 December 2017 (ESMA33-128-33).

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