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## PROPOSAL

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| From:            | Secretary-General of the European Commission,<br>signed by Mr Jordi AYET PUIGARNAU, Director  |
| date of receipt: | 12 March 2018   |
| To:              | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of<br>the European Union  |
| No. Cion doc.:   | COM(2018) 94 final  |
| Subject:         | Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF<br>THE COUNCIL on the issue of covered bonds and covered bond public<br>supervision and amending Directive 2009/65/EC and Directive 2014/59/EU |

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Delegations will find attached document COM(2018) 94 final.

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Encl.: COM(2018) 94 final



Brussels, 12.3.2018  
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2018/0043 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**on the issue of covered bonds and covered bond public supervision and amending**  
**Directive 2009/65/EC and Directive 2014/59/EU**

(Text with EEA relevance)

{SWD(2018) 50} - {SWD(2018) 51}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### • Reasons for and objectives of the proposal

The Commission has today adopted a package of measures to deepen the Capital Markets Union, together with the Communication "Completing Capital Markets Union by 2019 – time to accelerate delivery". The package includes this proposal, as well as a proposal to facilitate the cross-border distribution of investment funds, a proposal on the law applicable to the third-party effects of assignments of claims and a Communication on the applicable law to the proprietary effects of transactions in securities.

Covered bonds are debt obligations issued by credit institutions and secured against a ring-fenced pool of assets to which bondholders have direct recourse as preferred creditors. At the same time, bondholders remain entitled to claim against the issuing entity as ordinary creditors. This double claim against the cover pool and the issuer is referred to as the 'dual recourse' mechanism.

Covered bonds are issued by credit institutions and are as such an important and efficient source of funding for European banks. They facilitate the financing of mortgage and public sector loans, thereby supporting lending more broadly. A significant advantage of covered bonds compared with other kinds of bank funding sources such as asset-backed securities is the fact that banks retain the risk on their balance sheets and investors have claims directly with the bank. Therefore, covered bonds allow banks to lend not only more, but also more safely. Not least for that reason, covered bonds fared well during the financial crisis compared with other funding instruments. They proved to be a reliable and stable funding source for European banks at a time when other funding channels were drying up.

An enabling framework for covered bonds at EU level would enhance their use as a stable and cost-effective source of funding for credit institutions, especially where markets are less developed, in order to help finance the real economy in line with the objectives of the Capital Markets Union (CMU). The enabling framework would also provide investors with a wider and safer range of investment opportunities and would help preserve financial stability. Member States will have to transpose these rules, ensuring that national covered bond frameworks comply with the principles-based requirements set out in this proposal. All covered bonds across Europe will therefore have to respect the minimum harmonisation requirements as set out in this proposal.

The enabling framework for covered bonds is featured in the Commission Work Programme for 2018<sup>1</sup>. In the letter of intent following up his latest State of the Union speech, the President of the European Commission confirmed that an enabling framework for covered bonds should be launched or completed by end-2018 to ensure a deeper and fairer internal market.<sup>2</sup> The Commission confirmed this intention in the Mid-Term Review of the CMU Action Plan of June 2017<sup>3</sup>.

The development of covered bonds across the single market is uneven; they are very important in some Member States, less so in others. Furthermore, they are only partially addressed in Union law. While they benefit from preferential prudential and regulatory

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<sup>1</sup> COM(2017) 650.

<sup>2</sup> European Commission (2017). "State of the Union 2017: Letter of intent to President Antonio Tajani and to Prime Minister Jüri Ratas".

<sup>3</sup> COM(2017) 292.

treatment in various respects in the light of the lower risks (e.g. banks investing in them do not have to set aside as much regulatory capital as when they invest in other assets), Union law does not comprehensively address what actually constitutes a covered bond. Rather, preferential treatments are granted to covered bonds as defined in Directive 2009/65/EC<sup>4</sup>. However, that definition was drafted with a specific purpose in mind – limiting what undertakings for collective investment in transferable securities (UCITS) could invest in – and is not fit for the broader policy objectives of the CMU.

A Union legislative framework on covered bonds should expand the capacity of credit institutions to provide financing to the real economy and contribute to the development of covered bonds across the Union, particularly in Member States where no market for them currently exists.

The framework would also increase cross-border flows of capital and investment. It would thus contribute to the CMU and in particular to the further leveraging of credit institution's capacity to support the wider economy. In particular, it would ensure that banks have a broad range of safe and efficient funding tools at their disposal.

The framework consists of a Directive and a Regulation – the two instruments should be seen as a single package.

This proposed Directive will specify the core elements of covered bonds and provide a common definition as a consistent and sufficiently detailed point of reference for prudential regulation purposes, applicable across financial sectors. It will establish the structural features of the instrument, a covered bond specific public supervision, rules allowing use of the 'European Covered Bonds' label and competent authorities' publication obligations in the field of covered bonds.

The proposed Regulation will mainly amend Article 129 of Regulation (EU) No 575/2013 (Capital Requirements Regulation (CRR)). The amendments build on the current prudential treatment but add requirements on minimum overcollateralisation and substitution assets. They would strengthen the requirements for covered bonds being granted preferential capital treatment.

- **Consistency with existing policy provisions in the policy area**

The proposal is part of ongoing work to ensure that covered bonds are of sufficient quality to justify their continuing preferential treatment.

It builds on ongoing work by the European Banking Authority (EBA) to identify best practices as regards the issuance of covered bonds<sup>5</sup>. That work is a response to the European Systemic Risk Board (ESRB) recommendation that best practices be identified and monitored so as to ensure robust and consistent frameworks for covered bonds across the Union<sup>6</sup>.

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<sup>4</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

<sup>5</sup> *Report on EU covered bond frameworks and capital treatment*, EBA (2014); *Report on covered bonds — recommendations on harmonisation of covered bond frameworks in the EU*, EBA (2016).

<sup>6</sup> Recommendation of 20 December 2012 on the funding of credit institutions, European Systemic Risk Board (ESRB/2012/2) (2013/C 119/01).

- **Consistency with other Union policies**

One of the Commission's most important objectives is to stimulate investment and create jobs. The Commission has launched a number of initiatives to ensure that the financial system contributes fully in that respect. First among those is the CMU, which involves a series of initiatives to unlock funding for Europe's growth. Covered bonds should be seen in the context of the CMU, as bank financing is currently by far the most important funding channel in Europe and one of the CMU actions is to leverage banking capacity further in support of the wider economy. Covered bonds represent an efficient and stable funding tool for European banks. A legislative framework to harmonise covered bonds should be seen in this broader policy context.

Another important Commission objective in the realm of financial markets is to ensure that capital requirements for banks reflect the risks attached to the assets in their balance sheets. Accordingly, the CRR requirements ensure that covered bonds granted the most preferential treatment have a uniformly high level of investor protection. However, because Union law does not comprehensively address what actually constitutes a covered bond (see above), harmonisation is needed to ensure that covered bonds have similar structural characteristics across the Union that make them coherent with the relevant prudential requirements. The harmonisation of covered bonds is therefore in line with the Commission's aim of financial stability, as pursued in its regulation of financial markets.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

The Treaty on the Functioning of the European Union (TFEU) authorises the European institutions to lay down appropriate provisions that have as their objective the establishment and functioning of the internal market (Article 114 TFEU). This extends to legislation dealing with the functioning of covered bond markets as part of the general legislation on the functioning of financial markets.

- **Subsidiarity (for non-exclusive competence)**

Because the structural features of covered bonds are currently determined mainly at national level, their preferential treatment under Union law is effectively granted to different types of product. EU action is needed to establish a common framework for covered bonds across the Union, ensuring that their structural characteristics are aligned with the risk features justifying Union preferential treatment. EU action to establish a common framework is also necessary to develop covered bond markets across the Union and support cross-border investments in the light of the objectives of the CMU.

- **Proportionality**

As outlined in the accompanying impact assessment, the preferred option (minimum harmonisation based on national regimes) should make it possible to achieve most of the objectives of this initiative at reasonable cost. The option balances the flexibility necessary to accommodate Member States' specificities with the uniformity necessary for coherence at Union level. It will be effective in achieving the objectives, while at the same time minimising disruption and transition costs. A fundamental aim of the approach in this package is to avoid disrupting well-functioning and mature national markets while incentivising a wider use of covered bonds. The proposal includes provisions on the grandfathering of existing covered

bonds in order to smooth costs for their issuers and for markets. As the impact assessment shows, expected costs can be deemed proportionate in relation to expected benefits.

- **Choice of instrument**

A directive is an appropriate instrument to establish a harmonised legal framework for covered bonds at EU level. This Directive is principles-based, keeping detailed provisions to the minimum required to ensure that a set of common basic structural rules applies across the single market. Member States will have a degree of freedom in formulating their own laws to transpose the principles set out in the Directive.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Ex-post evaluations/fitness checks of existing legislation**

This initiative on covered bonds relates to an area which is largely not addressed by Union legislation currently.

#### **Stakeholder consultations**

The Commission consulted stakeholders at several points in the preparation of this proposal, in particular by means of:

- i) an open public consultation on covered bonds (September 2015 to 6 January 2016);
- ii) publication of an inception impact assessment (9 June 2017);
- iii) two meetings of the Expert Group on Banking, Payments and Insurance (EGBPI) and one meeting of the Financial Services Committee (FSC).

Under the CMU action plan, the purpose of the public consultation was to evaluate weaknesses and vulnerabilities in national covered bond markets and to assess the merits of a European framework. While respondents were concerned that harmonisation based on a ‘one size fits all’ approach could impair well-functioning markets and reduce flexibility and the range of products on offer, they also expressed cautious support for targeted EU action, provided that harmonisation is principles-based, builds on existing frameworks and takes account of the specificities of national markets. The results of the consultation were discussed at a public hearing on 1 February 2016<sup>7</sup>.

The Commission received four responses on the inception impact assessment, all of which supported the EU legislative initiative. The respondents addressed specific aspects of national frameworks (e.g. liquidity) and confirmed the general view in favour of harmonisation while not jeopardising well-functioning national systems.

At the first EGBPI meeting (9 June 2017), the majority of Member States expressed support for a Union covered bond framework based on the EBA’s 2016 advice, provided it remains principles-based. At the second meeting (28 September 2017), the discussion was more detailed, but in general Member States still supported a principles-based approach. Member States expressed similar views at the FSC meeting in July 2017.

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<sup>7</sup> The results of the public consultation can be found here: [http://ec.europa.eu/finance/consultations/2015/covered-bonds/index\\_en.htm](http://ec.europa.eu/finance/consultations/2015/covered-bonds/index_en.htm)

The proposal also builds on further meetings with stakeholders and EU institutions. In general (while tending to focus on the aspect most relevant for their situation), stakeholders concentrated on balancing the need to change the existing framework so as to address prudential concerns with the wish to avoid disrupting well-functioning national systems. Input focusing on prudential concerns relating to the preferential treatment of covered bonds came mainly from the ESRB, the EBA and the European Central Bank, and to some extent from the competent authorities in the Member States with well-developed covered bond markets and from rating agencies, while the focus on well-functioning national markets came mainly from Member States with well-developed covered bond markets, from issuers and from investors.

The European Parliament has also expressed support for action, calling for a European legislative framework on covered bonds<sup>8</sup>.

- **Collection and use of expertise**

On 1 July 2014, the EBA issued a report identifying best practices with a view to ensuring robust and consistent frameworks for covered bonds across the Union<sup>9</sup>. The report was in response to a December 2012 ESRB recommendation on the funding of credit institutions<sup>10</sup>. It also set out the EBA's opinion on the adequacy of the current prudential treatment of covered bonds, following the Commission's call for advice in December 2013 on the basis of Article 503 CRR<sup>11</sup>.

As a follow-up, the ESRB recommended that the EBA monitor the functioning of the covered bonds market by reference to the best practices it had identified and called on the EBA to recommend further action if necessary.

In response, the EBA issued a *Report on covered bonds — recommendations on the harmonisation of covered bond frameworks in the EU* in December 2016. This includes a comprehensive analysis of regulatory developments in covered bond frameworks in individual Member States, with a particular focus on the level of alignment with the best practices identified in the previous report. Building on the results of the analysis, the EBA called for legislative action to harmonise covered bonds at Union level.

This proposal builds on the EBA's analysis and advice. It deviates only in minor areas, e.g. as regards the level of detail concerning derivatives belonging to the cover pool; in the cover pool monitor not being mandatory; and, in the level of overcollateralisation.

In August 2016, the Commission had commissioned a study from ICF<sup>12</sup> to assess the performance of current covered bond markets and the costs and benefits of potential EU action. The study, which was published in May 2017, looked at the potential benefits and costs of the EBA's recommendations. Overall, it concluded that the potential benefits of a legislative initiative outweighed the potential costs and there was therefore a case for legislative action.

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<sup>8</sup> Resolution of 4 July 2017 on the report *Towards a pan-European covered bonds framework* (2017/2005(INI)).

<sup>9</sup> *Report on EU covered bond frameworks and capital treatment*, EBA (2014).

<sup>10</sup> Recommendation of 20 December 2012 on funding of credit institutions, European Systemic Risk Board (ESRB/2012/2) (2013/C 119/01).

<sup>11</sup> Call to EBA for advice on covered bonds capital requirements, ref. Ares(2013) 3780921 (20.12.2013).

<sup>12</sup> *Covered bonds in the European Union: harmonisation of legal frameworks and market behaviours*, ICF (2017).

In December 2017, the Basel Committee on Banking Supervision (BCBS) finalised the outstanding post-crisis regulatory reforms of the Basel III international regulatory framework for banks<sup>13</sup>. As part of the reforms, the BCBS revised the standardised approach on credit risk by including, *inter alia*, new standards on exposures to covered bonds. For the first time, the new standards largely replicate at international level the EU's approach in the CRR, allowing covered bond exposures to benefit from lower risk weights subject to certain conditions. It is thus recognised that the EU's treatment of covered bonds is prudentially viable and justified by the underlying characteristics of the instrument.

- **Impact assessment**

This proposal is accompanied by an impact assessment, which was submitted to the Regulatory Scrutiny Board (RSB) on 6 October 2017 and approved on 17 November 2017<sup>14</sup>.

The RSB commended the comprehensive and well-structured nature of the impact assessment and acknowledged that it applies its intervention logic systematically and contains a high degree of quantification to substantiate its findings. The RSB recommended that the report be improved in some limited respects:

- a) the reasons for considering a '29th regime' unattractive; and
- b) greater clarity on the main elements of the 'minimum harmonisation' approach, and whether (and how) they deviate from the EBA advice (Annex 6 has been added for this purpose).

The impact assessment has been amended accordingly, also addressing additional suggestions of the RSB:

- i) a more detailed explanation concerning the European secured note (ESN);
- ii) a more detailed reasoning of the advantages of issuing covered bonds;
- iii) a more thorough analysis of the impact of regulatory harmonisation on cross-border trade (issuance, investing) in covered bonds;
- iv) a discarded option restricted to adjusting the prudential treatment of covered bonds;
- v) a more comprehensive explanation of the 'pass-through effect' assessed in financial literature; and
- vi) a table showing the links between monitoring activity and the benchmark benefits.

The Commission considered a number of policy options for developing covered bond markets and addressing prudential concerns. These differ in terms of the degree of harmonisation, ranging from a non-regulatory option to options involving full harmonisation, as follows:

- Baseline: Do nothing;
- option 1: Non-regulatory option;
- option 2: Minimum harmonisation based on national regimes;
- option 3: Full harmonisation replacing national regimes; and
- option 4: '29th regime' operating in parallel with national regimes.

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<sup>13</sup> *Basel III: finalising post-crisis reforms*, Basel Committee on Banking Supervision (7.12.2017).

<sup>14</sup> SWD(2018) 51 and SWD(2018) 50



Option 1 (non-regulatory) was considered ineffective in achieving the objectives, as there is no guarantee that Member States would follow the best practices. Option 3 (full harmonisation) would probably achieve the objectives, but could disrupt existing well-functioning markets. Option 4 ('29th regime' meaning a fully integrated regime for issuers on a voluntary basis as an alternative to national laws on covered bonds, not requiring amendments to existing national laws) depends on industry take-up to be effective. Consultations suggest that such take-up is unlikely; this would undermine the chances of achieving the stated objectives. Also, a parallel regime would contribute to further fragmentation and duplication of costs.

The retained option is option 2 (minimum harmonisation based on national regimes). It builds on the recommendations in the 2016 EBA report, except for some limited deviations (in line with strong calls from stakeholders during the consultations, some provisions are less detailed than suggested in the report to leave more scope for protecting existing well-functioning national systems). The deviations do not affect the core structural features of covered bonds nor their supervision. The retained option achieves most of the objectives of the initiative at reasonable cost. It also balances the flexibility necessary to accommodate Member States' specificities with the uniformity necessary for coherence at Union level. It is likely to be the most effective in achieving the objectives, while at the same time being efficient and minimising disruption and transition costs. It is also one of the more ambitious options in regulatory terms, while enjoying the most support from stakeholders.

Implementing this option would stimulate the development of covered bond markets where they do not exist or are underdeveloped. It would also lower issuers' funding costs, help to diversify the investor base, facilitate cross-border investments and attract non-EU investors. Overall, it would reduce borrowing costs.

The option would address prudential concerns, including in relation to market innovation, and secure the prudential benefit of aligning the structural characteristics of the product with preferential prudential treatment at Union level. It would strengthen the protection of investors and its credit-enhancing features would reduce their due diligence costs.

One-off and recurrent direct administrative costs under the preferred option are expected to increase for issuers in low-cost jurisdictions (see impact assessment). Costs would also increase for supervisors. At the same time, issuers would benefit from lower funding costs and in turn citizens would enjoy lower borrowing costs. Costs would not increase for investors, given the lower due diligence costs.

- **Regulatory fitness and simplification**

The package on covered bonds, in particular this Directive, aims at harmonising an area currently regulated mainly at national level. The minimum harmonisation in the Directive will bring simplification in terms of basic alignment of core elements of national regimes.

- **Fundamental rights**

The EU is committed to high standards of protection of fundamental rights. In this context, the proposal is not likely to have a direct impact on those rights, as listed in the Charter of Fundamental Rights of the European Union.

#### 4. BUDGETARY IMPLICATIONS

The proposal will have no implications for the budget of the Union.

#### 5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Five years after the transposition deadline and in close cooperation with the EBA, the Commission is to carry out an evaluation of the Directive and report to the European Parliament, the Council and the European Economic and Social Committee on its main findings. The evaluation is to be conducted in line with the Commission's Better Regulation Guidelines.

Member States would regularly monitor application of the Directive on the basis of a number of indicators (e.g. type of issuer, number of permissions, type of eligible assets, level of overcollateralisation; issuance with extendable maturity structures).

- **Detailed explanation of the specific provisions of the proposal**

*Subject matter, scope and definitions*

The Directive defines covered bonds as debt obligations issued by credit institutions and secured against a ring-fenced pool of assets to which bondholders have direct recourse as preferred creditors. Covered bonds are traditionally issued by credit institutions. The Directive, in continuity with this tradition, only allows credit institutions to issue covered bonds. This is coherent with the inherent nature of the instrument which is to provide funding for loans, and granting loans on a large scale is a credit institution's business. In addition, credit institutions have the necessary knowledge and management capability of credit risk in relation to the loans in the cover pool and they are subject to sound capital requirements which contribute to underpin the investor protection as laid down in the dual recourse mechanism.

Issuers complying with this Directive may use the 'European covered bonds' label, which can be used together with specific national labels.

*Structural features of covered bonds*

This section envisages a more articulated series of structural requirements than those in the UCITS Directive and should help to improve the quality of EU covered bonds. More specifically:

- dual recourse gives investors a double claim on both the issuer of covered bonds and the assets in the cover pool;
- bankruptcy remoteness means that covered bonds' maturity cannot be shortened automatically upon the issuer's insolvency or resolution. It is important to ensure that investors are repaid in line with the contractual schedule even in the event of default. Bankruptcy remoteness is directly linked to the dual recourse mechanism and is a core feature of the covered bond framework;
- the Directive contains provisions to ensure the quality of the cover pool, in particular ensuring that only high-quality assets are used as collateral. There are related provisions on the segregation and location of cover assets, the uniformity of assets,

ensuring that assets located outside the EU present the same quality characteristics as those in the EU, ensuring that derivative contracts are used only for hedging purposes in relation to the cover pool, and the functioning of a cover pool monitor. Lastly, covered bond liabilities must be covered by cover assets at all times;

- as covered bonds are issued mainly by large banks, their benefits are often beyond the reach of smaller institutions. The Directive allows issuers to pool cover assets by several credit institutions under certain conditions. This is intended to encourage issuance by smaller institutions and give them access to covered bonds funding;
- market developments in the area of covered bonds include new liquidity structures to address liquidity and maturity mismatches. In view of the increased use of covered bonds allowing for extensions of the maturity and the fact that such structures mitigate default risk, the Directive regulates the structures to ensure they are not unnecessarily complex or opaque and do not change the structural characteristics of covered bonds, exposing investors to increased risks;
- to address liquidity risk, the Directive lays down requirements for a liquidity buffer specifically related to the cover pool, complementing the prudential liquidity requirements in other relevant pieces of EU financial legislation;
- the Directive frames the possibility for Member States to require a cover pool monitor. The existence of a cover pool monitor should be without prejudice of the responsibilities of the competent authorities as regards the performance of the specific public supervision set forth by this Directive; and
- the Directive contains transparency requirements that build on initiatives by national legislators and market participants to disclose information to covered bond investors. These will ensure a uniform level of disclosure and allow investors to assess the risk of covered bonds.

#### *Covered bond public supervision*

Covered bond public supervision is a core feature of many national covered bond frameworks and is specifically meant to protect investors. This Directive harmonises the components of such supervision and specifies the tasks and responsibilities of the national competent authorities performing it. Given the scope of this directive and considering that this specific covered bond supervision is a product supervision distinct from general supervision of e.g. prudential nature, Member States should be able to appoint different competent authorities. In such cases, the Directive requires that the competent authorities cooperate closely.

In order to guarantee compliance with the Directive, Member States are required to provide for administrative penalties and other administrative measures that are effective, proportionate and dissuasive, and enforced by competent authorities. The penalties and measures are subject to basic requirements as regards addressees, criteria to be taken into account in their application, publication, key powers to impose penalties, and penalty levels.

#### *Labelling*

Covered bonds are often marketed in the Union under national denominations and labels. This Directive allows credit institutions to use the specific 'European Covered Bonds' label when issuing covered bonds. The use of the label would make it easier for investors to assess the quality of the covered bonds. It should however be facultative and Member States should be able to keep their own national denominations and labelling framework in place in parallel to

the 'European Covered Bonds' label, provided that these comply with the requirements set out in this Directive.

#### *Relationship with the resolution framework*

This Directive is not intended to harmonise national insolvency regimes nor change the treatment of covered bonds in cases of resolution under Directive 2014/59/EU (Bank Recovery and Resolution Directive (BRRD))<sup>15</sup>. Rather, it establishes general principles governing the administration of covered bond programmes in cases of insolvency/resolution of the issuer. In the resolution of a credit institution, the BRRD allows the resolution authority to exercise control over the institution, in particular by managing and disposing of its assets and property, including its covered bond programme. Such tasks may be exercised directly by the resolution authority or indirectly by a special manager or by another person appointed by the resolution authority. This Directive does not change the treatment of covered bonds under BRRD which excludes covered bonds from the application of the bail-in tool up to the level of the collateral in the cover pool as laid down in third subparagraph of Article 44(2) of BRRD. Derivative contracts included in the cover pool also serve as collateral and cannot be terminated upon the issuer's insolvency or resolution in order to ensure that the cover pool remains unaffected, segregated and with enough funding. BRRD also includes safeguards to prevent the splitting of linked liabilities, rights and contracts and it restricts those practices that are related to contracts with the same counterparty covered by security arrangements, including covered bonds. Where the safeguard applies, resolution authorities should be bound to transfer all linked contracts within a protected arrangement, or leave them all with the residual failing institution.

#### *Third-country regime*

There is currently no general third-country regime for covered bonds in Union law. However, Commission Delegated Regulation (EU) 2015/61 (Delegated Regulation on Liquidity Coverage Requirement, LCR)<sup>16</sup> allows for the preferential treatment of foreign covered bonds complying with specific equivalence rules for the purpose of determining the liquidity buffer. The scope of the equivalence is very restricted, as it concerns the calculation of only a limited part of the liquidity buffer.

This Directive provides for the Commission, in close cooperation with the EBA, to assess whether a general equivalence regime for third-country covered bond issuers and investors is necessary or appropriate.

#### *Amendments of other Directives*

This Directive will replace the definition of covered bonds in Article 52(4) of the UCITS Directive and become the single point of reference for all Union legislation relating to covered bonds. The definition in the UCITS Directive should therefore be deleted and replaced with a reference to the definition in this Directive. Similarly, references in other

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<sup>15</sup> Directive 2014/59/EU of the European Parliament and of the Council of the 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

<sup>16</sup> Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to liquidity coverage requirement for Credit Institutions (OJ L 11, 17.1.2015, p. 1).

directives to the UCITS Directive's definition should be replaced with a reference to this Directive.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the issue of covered bonds and covered bond public supervision and amending  
Directive 2009/65/EC and Directive 2014/59/EU**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Article 52(4) of Directive 2009/65/EC of the European Parliament and of the Council<sup>3</sup> provides for very general requirements relating to the structural elements of covered bonds. Those requirements are limited to the need for covered bonds to be issued by a credit institution which has its registered office in a Member State and to be subject to a special public supervision as well as a dual recourse mechanism. National covered bond frameworks address these issues while regulating them in much greater detail. Those national frameworks also contain other structural provisions, in particular rules regarding the composition of the cover pool, the eligibility criteria of assets, the possibility to pool assets, the transparency and reporting obligations, and the rules on liquidity risk mitigation. Member State approaches to regulation also differ on substance. In several Member States, there is no dedicated national framework for covered bonds. As a consequence, the key structural elements that covered bonds issued in the Union are to comply with are not yet set out in Union law.
- (2) Article 129 of Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>4</sup> adds further conditions to those referred to in Article 52(4) of Directive 2009/65/EC in order to obtain preferential prudential treatment as regards capital requirements which allow credit institutions investing in covered bonds to hold less

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

<sup>3</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

<sup>4</sup> 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).

capital than when investing in other assets. Whereas those additional requirements increase the level of harmonisation of covered bonds within the Union, they serve the specific purpose to define the conditions to receive such preferential treatment for covered bond investors, and are not applicable outside the framework of Regulation (EU) No 575/2013.

- (3) Other pieces of Union law, including Commission Delegated Regulation (EU) 2015/61<sup>5</sup>, Commission Delegated Regulation (EU) 2015/35<sup>6</sup> and Directive 2014/59/EU of the European Parliament and of the Council<sup>7</sup>, also refer to the definition set out in Directive 2009/65/EC as a reference for identifying the covered bonds that may benefit from the preferential treatment those acts put in place for covered bond investors. However the wording of those acts differs according to their purposes and subject-matters and therefore there is no consistent use of the term 'covered bonds'.
- (4) The treatment of covered bonds can be considered as overall harmonised regarding the conditions for investing in covered bonds. There is however a lack of harmonisation across the Union regarding the conditions for the issue of covered bonds and this has several consequences. Firstly, preferential treatment is granted equally to instruments which can differ in nature and their level of risk and investor protection. Secondly, the existence of different national frameworks or the absence thereof, creates obstacles to the development of a truly integrated single market for covered bonds based on a commonly agreed definition which would ensure an appropriate level of investor protection. Thirdly, the differences in the safeguards provided by national rules can create risk to of financial stability where covered bonds, presenting different level of investor protection, can be purchased as such across the Union and can benefit from preferential prudential treatment under Regulation (EU) No 575/2013 and other Union legislation.
- (5) It is therefore necessary to harmonise national regimes in order to ensure a smooth and continuous development of well-functioning covered bond markets in the Union and to limit potential risks and vulnerabilities to financial stability. This principle-based harmonisation shall establish a common baseline for the issue of all covered bonds in the Union. Harmonisation requires all Member States to establish covered bond frameworks, which should also help facilitate the development of covered bonds markets in those Member States where there is not currently one. Such a market would provide a stable funding source for credit institutions that would on that basis be better placed to provide affordable mortgages for consumers and businesses and would make safer investments available to investors.

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<sup>5</sup> Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions (OJ L 11, 17.1.2015, p. 1).

<sup>6</sup> Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 12, 17.1.2015, p. 1).

<sup>7</sup> Directive 2014/59/EU of the European Parliament and of the Council of the 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

- (6) The European Systemic Risk Board ('ESRB') issued a recommendation<sup>8</sup> inviting national competent authorities and the European Banking Authority ('EBA') to identify best practices regarding covered bonds and to encourage harmonisation of national frameworks. It also recommends that EBA coordinates actions taken by national supervisory authorities, particularly in relation to the quality and segregation of cover pools, bankruptcy remoteness of covered bonds, the asset and liability risks affecting cover pools and disclosure of the composition of cover pools. The recommendation further calls on EBA to monitor the functioning of the market for covered bonds by reference to the best practices as identified by EBA for a period of two years, in order to assess the need for legislative action and to report such need to the ESRB and to the Commission.
- (7) The Commission issued a call for advice to EBA in accordance with Article 503(1) of Regulation (EU) No 575/2013 in December 2013.
- (8) In response to both the ESRB recommendation of 20 December 2012 and the call for advice from the Commission in December 2013, EBA issued a report on 1 July 2014<sup>9</sup>. That report recommends greater convergence of national legal, regulatory and supervisory covered bond frameworks, so as to further support the existence of a single preferential risk weight treatment to covered bonds in the Union.
- (9) As envisaged by the ESRB, EBA further monitored the functioning of the market for covered bonds by reference to the best practices set out in that recommendation for two years. On that basis, EBA delivered a second report on covered bonds to the ESRB, to the Council and to the Commission on 20 December 2016<sup>10</sup>. That report concluded that further harmonisation would be necessary to ensure more consistent definitions and regulatory treatment of covered bonds in the Union. The report further concluded that harmonisation should build on the existing well-functioning markets in some Member States.
- (10) Covered bonds are traditionally issued by credit institutions. The inherent nature of the instrument is to provide funding for loans and one of the core activities of credit institutions is to grant loans on a large scale. Accordingly, Union legislation granting preferential treatment to covered bonds requires them to be issued by credit institutions.
- (11) Reserving the issue of covered bonds to credit institutions ensures that the issuer has the necessary knowledge to manage the credit risk relating to the loans in the cover pool. It further ensures that the issuer is subject to capital requirements underpinning the investor protection of the dual recourse mechanism, which grants the investor a claim on both the covered bond issuer and the assets in the cover pool. Restricting the issue of covered bonds to credit institutions therefore ensures that covered bonds remain a safe and efficient funding tool, thereby contributing to investor protection and financial stability, which are important public policy objectives in the general interest. It would also be in line with the approach of well-functioning national markets that only allow credit institutions to issue covered bonds.
- (12) It is therefore appropriate that only credit institutions as defined in Article 4(1)(1) of Regulation (EU) No 575/2013 should be able to issue covered bonds under Union law.

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<sup>8</sup> Recommendation of the European Systemic Risk Board of 20 December 2012 on funding of credit institutions (ESRB/2012/2) (2013/C 119/01).

<sup>9</sup> *EBA Report on EU covered bond frameworks and capital treatment* (2014).

<sup>10</sup> *EBA Report on covered bonds - Recommendations on harmonisation of covered bond frameworks in the EU* (2016), EBA-Op-2016-23.



The main purpose of this Directive is to regulate the conditions under which those credit institutions can issue covered bonds as a financing tool by laying down the product requirements and specific product supervision they are subject to in order to ensure a high level of investor protection.

- (13) The existence of a dual recourse mechanism is an essential concept and element of many existing national covered bonds frameworks and is also a core element of covered bonds as referred to in Article 52(4) of Directive 2009/65/EC. It is therefore necessary to specify that concept so as to ensure that investors across the Union have a claim on both the covered bond issuer and the assets in the cover pool under harmonised conditions.
- (14) Bankruptcy remoteness should also be an essential feature of covered bonds to ensure that the covered bonds investors are repaid on the maturity of the bond. Automatic acceleration of repayment upon default of the issuer may disturb the ranking of those who have invested in covered bonds and therefore it is important to ensure that covered bonds investors be repaid in accordance with the contractual schedule and also in case of default. Bankruptcy remoteness is accordingly directly linked to the dual recourse mechanism and should therefore also be a core feature of the covered bond framework.
- (15) Another core feature of existing national covered bond frameworks is the fact that assets serving as collateral should be of very high quality in order to ensure the robustness of the cover pool. High quality assets are characterised by having specific features making them eligible to cover the claims attached to the covered bond. It is therefore appropriate to set out the general quality features that assets should respect in order to be eligible to serve as collateral. Assets listed in points (a) to (g) of Article 129(1) of Regulation (EU) No 575/2013 should be considered eligible to serve as collateral in the cover pool, within a covered bond framework, as should loans involving public undertakings as defined in Article 2(b) of Commission Directive 2006/111/EC but also other assets of a similar high quality could be considered eligible under the Directive, provided that it is possible to determine either their market value or mortgage lending value. Furthermore, the Directive should include rules to ensure that assets, including guaranteed loans, can be repossessed or called in through an enforceable protection agreement, whether in the form of a traditional mortgage or by a charge, lien or guarantee providing the same level of legal protection, and thus ensuring the same level of safety for investors. However, those provisions on the eligibility of assets should not prevent Member States from allowing other categories of assets to serve as collateral in their national frameworks provided the assets comply with Union law. Member States should also be free to exclude assets in their national frameworks.
- (16) Covered bonds have specific structural features that aim to protect investors at all times. Those features include the requirement that investors in covered bonds have a claim not only on the issuer but also on assets in a dedicated cover pool. To ensure that those assets are of good quality, specific requirements on the quality of assets that can be included in the pool should be laid down. Those structural product related requirements differ from the prudential requirements applicable to a credit institution issuing covered bonds. The former should not focus on ensuring the prudential health of the issuing institution, but rather aim at protecting investors by imposing specific requirements on the covered bond itself. In addition to the specific requirement to use high quality assets in the cover pool, it is also appropriate to regulate the general requirements of the features of the cover pool to further strengthen investor protection.

Those requirements should include specific rules aimed at protecting the cover pool, including rules on the segregation (including by means of a Special Purpose Vehicle, an SPV) and location of the assets in the cover pool to ensure the fulfilment of the investor's rights including in case of resolution or insolvency of the issuer. It is also important to regulate the composition of the cover pool to ensure its homogeneity and facilitate a fair risk assessment by the investor. Furthermore, requirements for coverage should be defined in this Directive, without prejudice to the right of Member States to allow different means of mitigating e.g. currency and interest rate risks. The calculation of the coverage and the conditions under which derivatives contracts can be included in the cover pool should also be defined to ensure that cover pools are subject to common high quality standards across the Union.

- (17) A number of Member States already require that a cover pool monitor performs specific tasks regarding the quality of eligible assets and ensures compliance with national coverage requirements. It is therefore important, in order to harmonise the treatment of covered bonds across the Union, that the tasks and responsibilities of the cover pool monitor, when one is required by the national framework, are clearly defined. The existence of a cover pool monitor does not obviate the responsibilities of national competent authorities as regards special public supervision.
- (18) Small credit institutions face difficulties when issuing covered bonds as the establishment of covered bond programmes often entails high upfront costs. Liquidity is also particularly important in covered bond markets and is largely determined by the volume of outstanding bonds. It is therefore appropriate to allow for joint funding by two or more credit institutions in order to enable the issue of covered bonds by smaller credit institutions. This would provide for the pooling of assets by several credit institutions as collateral for covered bonds issued by a single credit institution and would facilitate the issue of covered bonds in those Member States where there are not currently well-developed markets. It is important that the requirements for the use of joint funding agreements ensure that assets transferred to the issuing credit institutions meet the requirements of eligibility of assets and segregation of cover assets under Union law.
- (19) Article 129 of Regulation (EU) No 575/2013 sets out a number of conditions for covered bonds collateralised by securitisation entities to be met. One of these conditions concerns the extent to which this type of collateral that can be used and limits the use of such structures to 10 or 15% of the amount of the outstanding covered bonds. This condition may, in accordance with Regulation (EU) No 575/2013, be waived by competent authorities. The Commission's review<sup>11</sup> of the appropriateness of this waiver concluded that the possibility to use securitisation instruments or covered bonds as collateral for issuing covered bonds should only be allowed for other covered bonds ('intragroup pooled covered bond structures') but should be allowed without limits by reference to the amount of outstanding covered bonds. The ability to pool covered bonds from different issuers as cover assets for intragroup funding purposes would facilitate the development of the issue of covered bonds, also in emerging markets and therefore it would be appropriate to introduce a framework for the use of these structures in Union law.
- (20) Transparency of the cover pool securing the covered bond is an essential part of this type of financial instrument as it enhances comparability and allows investors perform

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<sup>11</sup> Report from the Commission to the European Parliament and the Council on Article 503 of Regulation (EU) No 575/2013 Capital requirement for covered bonds (COM/2015/0509 final).

the necessary risk evaluation. Directive 2003/71/EC<sup>12</sup> of the European Parliament and of the Council includes rules on the drawing up, the approval and the distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State. Several initiatives regarding the information to be disclosed to covered bond investors to supplement Directive 2003/71/EC have been developed over time by national legislators and market participants. It is however necessary to specify at Union level what the minimum common level of information investors should have access to prior to or when buying covered bonds. Member States should be allowed to supplement these minimum requirements with additional provisions.

- (21) A core element in ensuring the protection of covered bond investors is mitigating the instrument's liquidity risk. That is crucial for ensuring the timely repayment of liabilities attached to the covered bond. Therefore it is appropriate to introduce a cover pool liquidity buffer to address risks of liquidity shortage, such as mismatches in maturities and interest rates, payment interruptions, commingling risks, derivatives and other operational liabilities falling due within the covered bond programme. The liquidity buffer for the cover pool differs from the general liquidity requirements imposed on credit institutions in accordance with other acts of Union law in that the former is directly related to the cover pool and seeks to mitigate liquidity risks specific to it. To minimise regulatory burdens Member States should be able to allow an appropriate interaction with liquidity requirements established by other acts of Union or national law and serving different purposes than the cover pool liquidity buffer. Member States may therefore decide that the cover pool liquidity buffer requirement should only be applicable if no other liquidity requirement is imposed on the credit institution under Union or national law during the period covered by such other requirements.
- (22) In a number of Member States, innovative structures for maturity profiles have been developed in order to address potential liquidity risks, including maturity mismatches. These structures include the possibility to extend the scheduled maturity of the covered bond for a certain period of time or to allow the cash flows from the assets in the cover pool to pass directly to the covered bond holders. It is important in order to harmonise extendable maturity structures across the Union that the conditions under which Member States may allow these structures be defined to ensure that they are not too complex or expose investors to increased risks.
- (23) The existence of a special public supervision framework is an element defining covered bonds according to Article 52(4) of Directive 2009/65/EC. However, that Directive does not define the nature, content and authorities that should be responsible for performing such supervision. It is therefore essential that the constitutive elements of such covered bond public supervision are harmonised and that the tasks and responsibilities of the national competent authorities performing it are clearly set out.
- (24) As the covered bond public supervision is distinct from the supervision of credit institutions in the Union, Member States should be able to appoint different national competent authorities to perform these different supervisory roles than the one performing the general supervision of the credit institution. However in order to ensure consistency in the application of covered bond public supervision across the

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<sup>12</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64).

Union it is necessary to require that the competent authorities performing the covered bond public supervision cooperate closely with the competent authority performing the general supervision of credit institutions.

- (25) Covered bond public supervision should entail the granting of permission for credit institutions to issue covered bonds. As only credit institutions should be allowed to issue covered bonds, authorisation as a credit institution should be a prerequisite for that permission. This Directive should include provisions governing the conditions under which credit institutions authorised under Union law can obtain permission to pursue the activity of issuing covered bonds under a covered bond programme.
- (26) As regards the scope of permission, a covered bond programme means that one or more cover pools has been established for the inaugural covered bond issue. Different issuances (different International Securities Identification Numbers (ISINs)) of the same covered bond programme do not necessarily constitute separate covered bond programmes.
- (27) In order to ensure compliance with the obligations imposed on credit institutions issuing covered bonds and in order to ensure similar treatment and compliance across the Union, Member States should be required to provide for administrative penalties and other administrative measures which are effective, proportionate and dissuasive.
- (28) Those administrative penalties and other administrative measures laid down by Member States should satisfy certain essential requirements in relation to the addressees of those penalties or measures, the criteria to be taken into account in their application, the publication obligations of competent authorities performing the covered bond public supervision, the power to impose penalties and the level of administrative pecuniary penalties that may be imposed.
- (29) Member States should be required to ensure that the competent authorities performing the covered bond public supervision take into account all relevant circumstances in order to ensure a consistent application of administrative penalties or other administrative measures across Member States, when determining the type of administrative penalties or other administrative measures and the level of those penalties.
- (30) In order to detect potential breaches of the requirements relating to the issue and marketing of covered bonds, competent authorities performing the covered bond public supervision should have the necessary investigatory powers and effective mechanisms to encourage the reporting of potential or actual breaches. Those mechanisms should be without prejudice to the rights of defence of any person or entity adversely affected by the exercise of those powers and mechanisms.
- (31) Competent authorities performing the covered bond public supervision should also have the power to impose administrative penalties and adopt other administrative measures in order to ensure the greatest possible scope for action following a breach and to help prevent further breaches, irrespective of whether such measures are qualified as an administrative penalty or other administrative measure under national law. Member States should be able to provide for additional penalties to, and higher level of administrative pecuniary penalties than those provided for in this Directive.
- (32) Existing national laws on covered bonds are characterised by the fact that they are subject to detailed regulation on national level and a supervision of the covered bonds issues and programmes to ensure that the rights of the investors are upheld at all times in relation to issue of covered bonds. That supervision includes the ongoing

monitoring of the features of the programme, the coverage requirements and of the quality of the cover pool. An adequate level of investor information about the regulatory framework governing the issue of covered bonds is an essential element of investor protection. It is therefore appropriate to ensure that competent authorities publish regular information concerning their national measures transposing this Directive and on the way they perform their covered bond public supervision.

- (33) Covered bonds are currently marketed in the Union under national denominations and labels, some of which are well-established. In several Member States however such denominations or labels do not exist. It seems therefore necessary to allow credit institutions which issue covered bonds in the Union to use the specific 'European Covered Bonds' label when selling covered bonds to both Union and third countries' investors under the condition that those covered bonds comply with the requirements set out in Union law. It is necessary to establish such label in order to make it easier for those investors to assess the quality of the covered bonds and hence make them more attractive as an investment vehicle both inside and outside the Union. The use of that label should however be facultative and Member States should be able to keep their own national denominations and labelling framework in place in parallel to the 'European Covered Bonds' label.
- (34) In order to assess the application of this Directive the Commission should in close cooperation with EBA monitor the development of covered bonds in the Union and report to the European Parliament and the Council on the level of investor protection and the development of the covered bond markets. The report should also focus on the developments regarding the assets collateralising the issue of covered bonds, including the possibility for Member States to allow covered bonds to be issued in order to fund loans involving public undertakings.
- (35) There is currently no equivalence regime for the recognition of covered bonds issued by credit institutions in third countries by the Union except in a prudential context where preferential treatment regarding liquidity is granted to some third-country bonds under certain conditions. The Commission should therefore in close cooperation with EBA assess the need and relevance for an equivalence regime to be introduced for third-country issuers of and investors in covered bonds. The Commission should, no more than 3 years after the date from which Member States are to apply the provisions transposing this Directive, submit a report to the European Parliament and to the Council, together with a legislative proposal, if appropriate, on this issue.
- (36) Covered bonds are characterised as having a scheduled maturity of several years. It is therefore necessary to include transitional measures to ensure that covered bond already issued on the [OP: Please insert the date laid down in the second subparagraph of Article 32(1) of this Directive] are not affected.
- (37) As a consequence of laying down a uniform framework for covered bonds, the description of covered bonds in Article 52(4) of Directive 2009/65/EC should be modified. Directive 2014/59/EU defines covered bonds by referring to Article 52(4) of Directive 2009/65/EC and given that this description is modified, Directive 2014/59/EU should be modified as well. Furthermore, to avoid affecting covered bonds issued in accordance with Article 52(4) of Directive 2009/65/EC before [OP: Please insert the date laid down in the second subparagraph of Article 32(1) of this Directive], those covered bonds should continue to be referred to or defined as covered bonds until their maturity. Directive 2009/65/EC and 2014/59/EU should therefore be amended accordingly.

- (38) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents<sup>13</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (39) Since the objectives of this Directive cannot be sufficiently achieved by the Member States it is necessary to establish a common framework for covered bonds, ensuring that the structural characteristics of covered bonds across the Union are aligned with the risk features underlying Union preferential treatment, but can rather, by reason of the need to further develop covered bond markets across the Union and support cross-border investments, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (40) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>14</sup> and delivered an opinion on...<sup>15</sup>,

HAVE ADOPTED THIS DIRECTIVE:

## **TITLE I**

### **SUBJECT MATTER, SCOPE AND DEFINITIONS**

#### *Article 1* *Subject matter*

This Directive lays down the following investor protection rules concerning:

- (1) requirements for issuing covered bonds;
- (2) the structural features of covered bonds;
- (3) covered bond public supervision;
- (4) publication requirements for competent authorities in relation to covered bonds.

#### *Article 2* *Scope*

This Directive applies to covered bonds issued by credit institutions established in the Union.

#### *Article 3* *Definitions*

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

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<sup>13</sup> OJ C 369, 17.12.2011, p. 14.

<sup>14</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p.1).

<sup>15</sup> [OJ C (...).]

- (1) 'covered bond' means a debt obligation issued by a credit institution and secured by a cover pool of assets which covered bond investors have direct recourse to as preferred creditors;
- (2) 'covered bond programme' means the assets and liabilities as referred to in Article 15 as well as activities of the credit institution related to the issuing of covered bonds under one permission granted in accordance with Article 19;
- (3) 'cover pool' means the assets that constitute the collateral for the covered bonds and that are segregated from other assets held by the credit institution issuing covered bonds;
- (4) 'credit institution' means credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013;
- (5) 'specialised mortgage credit institution' means a credit institution which funds loans solely through the issue of covered bonds, which is permitted by law to carry out mortgage and public sector lending only and which is not permitted to take deposits but can take other repayable funds from the public;
- (6) 'acceleration of a covered bond' means a situation in which a covered bond is declared by the credit institution which issued the covered bond or the credit institution's representative to be immediately due and payable and in respect of which the payments to the covered bond investors are to be repaid earlier than the original maturity date;
- (7) 'market value' means, for the purposes of immovable property, market value as defined in point (76) of Article 4(1) of Regulation (EU) No 575/2013;
- (8) 'mortgage lending value' means, for the purposes of immovable property, the mortgage lending value as defined in point (74) of Article 4(1) of Regulation (EU) No 575/2013;
- (9) 'residential property' means residential property as defined in point (75) of Article 4(1) of Regulation (EU) No 575/2013;
- (10) 'primary asset' means a dominant asset in the cover pool determining the nature of the cover pool;
- (11) 'substitution asset' means an asset contributing to the coverage requirements, other than the primary assets;
- (12) 'overcollateralisation' means the statutory or contractual level of collateral exceeding the coverage requirement as set out in Article 15;
- (13) 'match funding requirement' means rules requiring that the cash flows between liabilities and assets falling due be matched by ensuring that payments from borrowers be received prior to making payments to covered bond investors and that the amounts received from the borrowers are at least equivalent in value to the payments to be made to the covered bond investors;
- (14) 'net liquidity outflow' means all liabilities, including principal and interest payments and payments under derivative contracts of the covered bond programme after having deducted the inflows derived from the assets in the cover pool;
- (15) 'extendable maturity structure' means a mechanism providing for the possibility to extend the scheduled maturity of covered bonds for a certain period of time and in the event that a specific trigger occurs;

- (16) 'covered bond public supervision' means the supervision of covered bonds programmes ensuring compliance with and enforcement of the requirements applicable to the issue of covered bonds;
- (17) 'special administrator' means the person or entity appointed to administrate a covered bond programme in the event of insolvency of the credit institution issuing covered bonds under that programme.

## **TITLE II**

### **STRUCTURAL FEATURES OF COVERED BONDS**

#### **Chapter 1**

#### **Dual recourse and bankruptcy remoteness**

##### *Article 4*

##### *Dual recourse*

1. Member States shall lay down rules entitling the covered bonds investors to the following claims:
  - (a) a claim on the credit institution issuing covered bonds;
  - (b) in case of insolvency or resolution of the credit institution issuing covered bonds, a priority claim on the principal and any accrued interest from assets included in the cover pool;
  - (c) in case of insolvency of the credit institution issuing covered bonds and in the event that the priority claim as referred to in point (b) cannot be fully satisfied, a claim on the insolvency estate of that credit institution, which ranks *pari passu* with the claims of the credit institution's ordinary unsecured creditors determined in accordance with the national laws governing the ranking in normal insolvency procedures.
2. The claims referred to in paragraph 1 shall be limited to the full payment obligations attached to the covered bonds.
3. For the purposes of point (c) of paragraph 1, in the case of insolvency of a specialised mortgage credit institution, Member States may lay down rules granting the covered bond investors a claim that ranks senior to the claim of that specialised mortgage credit institution's ordinary unsecured creditors determined in accordance with the national laws governing the ranking of creditors in normal insolvency procedures, but junior to any other preferred creditors.

##### *Article 5*

##### *Bankruptcy remoteness of the covered bonds*

Member States shall ensure that the payment obligations attached to the covered bonds are not subject to automatic acceleration upon the insolvency or resolution of the credit institution issuing covered bonds.



## Chapter 2 Cover pool and coverage

### SECTION I ELIGIBLE ASSETS

#### *Article 6 Eligible assets*

1. Member States shall ensure investor protection by requiring that covered bonds are at all times collateralised by high quality assets referred to in points (a) to (g) of Article 129(1) of Regulation (EU) No 575/2013 or by other high quality assets that meet at least the following requirements:
  - (a) either the market value or mortgage lending value of the assets can be determined;
  - (b) a mortgage, charge, lien or other guarantee on the asset is enforceable;
  - (c) all legal requirements for establishing the mortgage, charge, lien or guarantee on the asset have been fulfilled;
  - (d) the mortgage, charge, lien or guarantee securing the asset enable the credit institution issuing covered bonds to realise the value of the asset without undue delay.

For the purposes of point (a), Member States shall lay down rules on valuation of assets.

For the purposes of point (b), Member States shall lay down rules ensuring the prompt filing and registration of mortgages, charges, liens or guarantee on assets in the cover pool.

For the purposes of points (b) and (d), Member States shall ensure that credit institutions issuing covered bonds assess the enforceability of assets before including such assets in the cover pool.

2. Member States shall ensure investor protection by requiring that credit institutions issuing covered bonds have in place procedures to monitor that the assets used as collateral are adequately insured against the risk of damage.
3. For the purposes of paragraphs 1 and 2, Member States shall require credit institutions issuing covered bonds to document the assets used as collateral and their lending policies regarding their compliance with those paragraphs.

#### *Article 7 Assets located outside of the Union*

1. Subject to the provision in paragraph 2, Member States may allow credit institutions issuing covered bonds to include assets located outside of the Union in the cover pool.
2. Where Member States allow for the inclusion referred to in paragraph 1, they shall ensure investor protection by verifying whether the assets located outside of the Union meet all the requirements set out in Article 6 and that the realisation of such assets is legally enforceable in a way similar to assets located within the Union.

*Article 8*  
*Intragroup pooled covered bond structures*

Member States may lay down rules regarding the use, by way of an intragroup transaction, of covered bonds issued by a credit institution belonging to a group ('internally issued covered bonds') as collateral for the external issue of covered bonds by another credit institution 'belonging to the same group ('externally issued covered bonds'). Member States shall ensure investor protection by including at least the following requirements in those rules:

- (a) the internally issued covered bonds, which are used as collateral for the externally issued covered bonds, are recorded on the balance sheet of the credit institution which issues the externally issued covered bonds;
- (b) the credit institution issuing the externally issued covered bond has a claim on the credit institution issuing the internally issued covered bonds, which is secured by the internally issued covered bonds;
- (c) the externally issued covered bonds are sold to covered bond investors outside the group;
- (d) both the internally and the externally issued covered bonds qualify for credit quality step 1 as referred to in Part Three, Title II, Chapter 2 of Regulation (EU) No 575/2013 and are collateralised by residential or commercial property mortgages.

*Article 9*  
*Joint funding*

1. Subject to the provisions in paragraph 2, Member States shall allow the use of loans collateralised by residential or commercial property mortgages, charges, liens or other comparable security rights granted by a credit institution as assets in the cover pool for the issue of covered bonds by another credit institution.
2. Member States shall ensure investor protection by laying down rules regulating the transfer of loans and mortgages, charges, liens or other comparable security rights from the credit institution which issued them to the credit institution issuing covered bonds. Those rules shall ensure that all requirements laid down in Articles 6 and 12 are met.

*Article 10*  
*Composition of the cover pool*

Member States shall ensure investor protection by providing for a sufficient level of homogeneity of the assets in the cover pool so that they shall be of a similar nature in terms of structural features, lifetime of assets or risk profile.

*Article 11*  
*Derivative contracts in the cover pool*

1. Member States shall ensure investor protection by allowing derivative contracts to be included in the cover pool only where at least the following requirements are met:
  - (a) the derivative contracts are included in the cover pool exclusively for risk hedging purposes;
  - (b) the derivative contracts are sufficiently documented;

- (c) the derivative contracts are segregated in accordance with Article 12;
  - (d) the derivative contracts cannot be terminated upon the insolvency or resolution of the credit institution issuing covered bonds;
  - (e) the derivative contracts comply with the rules laid down in accordance with paragraph 2.
2. For the purposes of ensuring compliance with the requirements listed in paragraph 1, Member States shall lay down rules for cover pool derivative contracts including at least:
- (a) the eligibility criteria for the hedging counterparties;
  - (b) the limits on the amount of derivative contracts in the cover pool;
  - (c) the necessary documentation to be provided in relation to derivative contracts.

#### *Article 12*

##### *Segregation of assets in the cover pool*

1. Member States shall ensure investor protection by requiring that the segregation of assets in the cover pool complies with at least the following requirements:
- (a) all assets in the cover pool are identifiable by the credit institution issuing covered bonds;
  - (b) all assets in the cover pool are subject to legally binding and enforceable separation by the credit institution issuing covered bonds;
  - (c) all assets in the cover pool are protected from any third party claims and do not form part of the insolvency estate of the credit institution issuing covered bonds.

For the purposes of the first subparagraph, the assets in the cover pool shall include any collateral received in connection with derivative contract positions.

2. The segregation of assets in the cover pool referred to in paragraph 1 shall also apply in the case of insolvency or resolution of the credit institution issuing covered bonds.

#### *Article 13*

##### *Cover pool monitor*

1. Member States may require that credit institutions issuing covered bonds appoint a cover pool monitor to perform ongoing monitoring of the cover pool with regard to the requirements set out in Articles 6 to 12 and Articles 14 to 17.
2. Where Member States use the option provided for in paragraph 1, they shall lay down rules at least on the following aspects:
- (a) the appointment and dismissal of the cover pool monitor;
  - (b) any eligibility criteria for the cover pool monitor;
  - (c) the role and duties of the cover pool monitor, including in the case of insolvency or resolution of the credit institution issuing covered bonds;
  - (d) the obligation to report to the competent authority designated pursuant to Article 18(2);

- (e) the right of access to necessary information for the performance of the cover pool monitor's duties.
3. A cover pool monitor shall be separate and independent from the credit institution issuing covered bonds and from that credit institution's auditor.
4. Where Member States use the option provided for in paragraph 1, they shall notify EBA.

*Article 14*  
*Investor information*

1. Member States shall ensure that the credit institution issuing covered bonds provides information on covered bond programmes that is sufficiently detailed to allow investors to assess the profile and risks of that programme and to carry out their due diligence.
2. For the purposes of paragraph 1, Member States shall ensure that the information is provided to investors at least on a quarterly basis and includes the following minimum portfolio information:
  - (a) the value of the cover pool and outstanding covered bonds;
  - (b) the geographical distribution and type of assets in the cover pool, their loan size and valuation method;
  - (c) details as to risks in relation to interest rates, currency, credit, market and liquidity;
  - (d) the maturity structure of assets in the cover pool and covered bonds;
  - (e) the levels of required coverage, contractual and voluntary overcollateralisation;
  - (f) the percentage of loans that are more than ninety days past due.

Member States shall ensure that the information is provided to investors on an aggregated basis. Member States may also require the information to be provided on a loan-by-loan basis.

3. Member States shall ensure investor protection by requiring credit institutions issuing covered bonds to publish on their website the information made available to investors in accordance with paragraphs 1 and 2.

**SECTION II**  
**COVERAGE AND LIQUIDITY REQUIREMENTS**

*Article 15*  
*Requirements for coverage*

1. Member State shall ensure investor protection by requiring covered bond programmes to comply at all times with at least the following coverage requirements:
  - (a) all liabilities of the covered bonds, including the obligations for the payment of principal and any accrued interest of outstanding covered bonds and costs related to maintenance and administration of a covered bond programme, are covered by the assets in the cover pool;
  - (b) the calculation of the level of coverage required ensures that the total nominal amount of all assets in the cover pool are at least of the same value as the total nominal amount of outstanding covered bonds ('nominal principle');

- (c) the following assets in the cover pool contribute to the coverage requirement:
  - (i) primary assets;
  - (ii) substitution assets;
  - (iii) liquid assets held in accordance with Article 16;
  - (iv) derivative contracts held in accordance with Article 11;
  - (v) statutory overcollateralisation;
- (d) uncollateralised claims where a default is considered to have occurred in accordance with Article 178 of Regulation (EU) No 575/2013 do not contribute to the cover pool.

For the purposes of point (b) of the first subparagraph, Member States may allow for other principles of calculation provided they do not result in a lower level of coverage than that calculated under the nominal principle.

2. Member States shall ensure that the calculation of coverage and the calculation of liabilities is based on the same methodology.

#### *Article 16*

##### *Requirement for a cover pool liquidity buffer*

1. Member States shall ensure investor protection by requiring that the cover pool includes at all times a liquidity buffer composed of liquid assets available to cover the net liquidity outflow of the covered bond programme.
2. The cover pool liquidity buffer shall cover the net liquidity outflow for 180 calendar days.
3. Member States shall ensure that the cover pool liquidity buffer referred to in paragraph 1 consists of the following types of assets:
  - (a) assets qualifying as level 1, level 2A and level 2B assets pursuant to Articles 10, 11 and 12 of Delegated Regulation (EU) 2015/61, valued in accordance with Article 9 of that Delegated Regulation and segregated in accordance with Article 13 of this Directive;
  - (b) exposures to credit institutions that qualify for the credit quality step 1, in accordance with Article 129(1)(c) of Regulation (EU) No 575/2013.

For the purposes of point (b) of the first subparagraph, Member States shall ensure that uncollateralised claims from defaulted exposures in accordance with Article 178 of Regulation (EU) No 575/2013 cannot contribute to the cover pool liquidity buffer.

4. Where the credit institution issuing covered bonds is subject to liquidity requirements set out in other acts of Union law, Member States may decide that the national rules transposing paragraphs 1, 2 and 3 do not apply throughout the period foreseen in those acts of Union law.
5. Member States may allow for the calculation of the principal for extendable maturity structures to be based on the final maturity date of the covered bond.
6. Member States shall ensure that the requirements set out in in paragraph 1 do not apply to covered bonds that are subject to match funding requirements.

*Article 17*  
*Conditions for extendable maturity structures*

1. Member States may allow for the issue of covered bonds with extendable maturity structures where investor protection is ensured by at least the following:
  - (a) the maturity extension triggers are specified in contract or statute;
  - (b) the maturity extension is not triggered at the discretion of the credit institution issuing covered bonds;
  - (c) the information provided to the investor about the maturity structure is sufficient to enable them to determine the risk of the covered bond, and includes a detailed description of:
    - (i) the maturity extensions trigger;
    - (ii) the consequences for the maturity extensions in the case of insolvency or resolution of the credit institution issuing covered bonds;
    - (iii) the role of the competent authority designated pursuant to Article 18(2) and of the special administrator with regard to the maturity extension, where relevant;
  - (d) the final maturity date of the covered bond can at all times be determined;
  - (e) the maturity extension does not affect the ranking of covered bond investors;
  - (f) the maturity extension does not change the structural features of the covered bonds regarding dual recourse as referred to in Article 4 and bankruptcy remoteness as referred to in Article 5.
2. Member States which allow the issue of covered bonds with extendable maturity structures shall notify EBA of their decision.

**TITLE III**  
**COVERED BOND PUBLIC SUPERVISION**

*Article 18*  
*Covered bond public supervision*

1. Member States shall ensure investor protection by providing that the issue of covered bonds is subject to a covered bond public supervision.
2. For the purposes of the covered bond public supervision referred to in paragraph 1, Member States shall designate one or more competent authorities. They shall inform the Commission and EBA of those designated authorities and shall indicate any division of functions and duties.
3. Member States shall ensure that the competent authorities designated pursuant to paragraph 2 monitor the issue of covered bonds so as to assess compliance with the requirements laid down in the national provisions transposing this Directive.
4. Member States shall ensure that credit institutions issuing covered bonds register all their transactions in relation to the covered bond programme and have in place adequate and appropriate documentation systems and processes.
5. Member States shall further ensure that appropriate measures are in place to enable the competent authorities designated pursuant to paragraph 2 to obtain the

information needed in order to assess the compliance with the requirements laid down in the national provisions transposing this Directive, investigate possible breaches of those requirements, and impose administrative penalties and remedial measures in accordance with the national provisions transposing Article 23.

6. Member States shall ensure that the competent authorities designated pursuant to paragraph 2, have the expertise, resources, operational capacity, powers and independence necessary to carry out the functions relating to covered bond public supervision.

#### *Article 19*

##### *Permission for covered bond programmes*

1. Member States shall ensure investor protection by requiring permission for a covered bond programme to be obtained before issuing covered bonds under that programme. Member States shall confer the power to grant such permissions upon the competent authorities designated pursuant to Article 18(2).
2. Member States shall lay down the requirements for the permission referred to in paragraph 1, including at least the following:
  - (a) an adequate programme of operations setting out the issue of covered bonds;
  - (b) adequate policies, processes and methodologies aimed at investor protection for the approval, amendment, renewal and refinance of loans included in the cover pool;
  - (c) management and staff dedicated to the covered bond programme which have adequate qualifications and knowledge regarding the issue of covered bonds and the administration of the covered bond programme;
  - (d) an administrative set-up of the cover pool that meets the applicable requirements laid down in the national provisions transposing this Directive.

#### *Article 20*

##### *Covered bond public supervision in insolvency or resolution*

1. Competent authorities designated pursuant to Article 18(2) shall cooperate with the resolution authority in the event of the resolution of a credit institution issuing covered bonds in order to ensure that the rights and interests of the covered bond investors are preserved, including at least by verifying the continuous management of the covered bond programme during the period of the resolution process.
2. Member States may provide for a special administrator to be appointed in the case of the insolvency of a credit institution issuing covered bonds to ensure that the rights and interests of the covered bond investors are preserved, including at least by verifying the continuous management of the covered bond programme during the period of the insolvency process.

Where Member States use that option, they shall require that the competent authorities designated pursuant to Article 18(2) be consulted regarding the appointment and dismissal of the special administrator.

3. Where Member States provide for the appointment of a special administrator in accordance with paragraph 2, they shall adopt rules laying down the tasks and responsibilities of that special administrator at least in relation to:

- (a) discharging the liabilities attached to the covered bonds;
  - (b) managing and realising assets in the cover pool, including their transfer together with covered bond liabilities to another credit institution issuing covered bonds;
  - (c) carrying out legal transactions necessary for the proper administration of the cover pool, for the on-going monitoring of the coverage of the liabilities attached to the covered bonds, to initiate proceedings in order to recover assets in the cover pool and to transfer those remaining assets after all covered bond liabilities are met to the insolvency estate of the credit institution which issued the covered bonds.
4. Member States shall ensure the coordination and exchange of information for the purposes of the insolvency or resolution process between the competent authorities designated pursuant to Article 18(2), the special administrator where such an administrator has been appointed and the resolution authority.

#### *Article 21*

##### *Reporting to the competent authorities*

1. Member States shall ensure investor protection by requiring credit institutions issuing covered bonds to report the information set out in paragraph 2 on covered bond programmes to competent authorities designated pursuant to Article 18(2). The reporting shall be on a regular basis and upon request. Member States shall lay down rules on the frequency of the reporting on a regular basis.
2. The reporting obligations to be laid down pursuant to paragraph 1 shall require the information to be provided at least on the following requirements of the covered bond programme:
  - (a) dual recourse in accordance with Article 4;
  - (b) bankruptcy remoteness of the covered bond in accordance with Article 5;
  - (c) the eligibility of assets and cover pool requirements in accordance with Articles 6 to 11;
  - (d) the segregation of assets in the cover pool in accordance with Article 12;
  - (e) the functioning of the cover pool monitor in accordance with Article 13;
  - (f) the investor information requirements in accordance with Article 14;
  - (g) the coverage requirements in accordance with Article 15;
  - (h) the cover pool liquidity buffer in accordance with Article 16;
  - (i) the conditions for extendable maturity structures in accordance with Article 17.
3. Member States shall provide for rules on the reporting on the requirements set out in paragraph 2 by the credit institutions issuing covered bonds to the competent authority designated pursuant to Article 18(2) in the event of insolvency or resolution of a credit institution issuing covered bonds.



## *Article 22*

### *Powers of competent authorities for the purposes of covered bonds public supervision*

1. Member States shall ensure investor protection by giving competent authorities designated pursuant to Article 18(2) all supervisory, investigatory and sanctioning powers that are necessary to perform the task of covered bond public supervision.
2. The powers referred to in the paragraph 1 shall include the following:
  - (a) the power to grant or refuse permissions pursuant to Article 19;
  - (b) the power to regularly review the covered bond programme in order to assess compliance with this Directive;
  - (c) the power to carry out on-site and off-site inspections;
  - (d) the power to impose administrative sanctions or penalties and remedial measures in accordance with the national provisions transposing Article 23;
  - (e) the power to adopt and implement supervisory guidelines relating to the issue of covered bonds.

## *Article 23*

### *Administrative penalties and remedial measures*

1. Member States shall lay down rules establishing appropriate administrative penalties and remedial measures applicable at least in the following situations:
  - (a) a credit institution has acquired a permission to issue covered bonds through false statements or other irregular means;
  - (b) a credit institution no longer fulfils the conditions under which a permission was given;
  - (c) a credit institution issues covered bonds without obtaining the permission in accordance with the provisions transposing Article 19;
  - (d) a credit institution issuing covered bonds fails to meet the requirements set out in the provisions transposing Article 4;
  - (e) a credit institution issuing covered bonds issues covered bonds not complying with the requirements set out in the provisions transposing Article 5;
  - (f) a credit institution issuing covered bonds issues covered bonds not collateralised in accordance with the provisions transposing Article 6;
  - (g) a credit institution issuing covered bonds issues covered bonds collateralised by assets located outside the Union in breach of the requirements laid down in the provisions transposing Article 7;
  - (h) a credit institution issuing covered bonds collateralises covered bonds in an intragroup pooled covered bonds structure in breach of the requirements laid down in the provisions transposing Article 8;
  - (i) a credit institution issuing covered bonds fails to fulfil the conditions for joint funding laid down in the provisions transposing Article 9;
  - (j) a credit institution issuing covered bonds fails to meet the requirements of composition of the cover pool laid down in the provisions transposing Article 10;

- (k) a credit institution issuing covered bonds includes derivative contracts in the cover pool other than for hedging purposes or fails to meet the requirements laid down in the provisions transposing Article 11;
  - (l) the credit institution issuing covered bonds fails to comply with the requirements of segregation of assets in the cover pool in accordance with the provisions transposing Article 12;
  - (m) a credit institution issuing covered bonds fails to report information or provides incomplete or inaccurate information in breach of the provisions transposing Article 14;
  - (n) a credit institution issuing covered bonds repeatedly or persistently fails to maintain a cover pool liquidity buffer in breach of the provisions transposing Article 16;
  - (o) a credit institution issuing covered bonds fails to fulfil the conditions for extendable maturity structures laid down in the provisions transposing Article 17;
  - (p) a credit institution issuing covered bonds fails to report information or provides incomplete or inaccurate information on the obligations in breach of the provisions transposing points (a) to (i) of Article 21(2).
2. The penalties and measures referred to in paragraph 1 shall be effective, proportionate and dissuasive and shall include at least the following:
- (a) a withdrawal of permission to issue covered bonds;
  - (b) a public statement, which indicates the identity of the natural or legal person and the nature of the breach in accordance with Article 24;
  - (c) an order requiring the natural or legal person to cease the conduct and to desist from a repetition of that conduct;
  - (d) administrative pecuniary penalties.
3. Member States shall also ensure that administrative penalties and remedial measures are effectively implemented.
4. Member States shall ensure that when determining the type of administrative penalties or other remedial measures and the amount of those administrative pecuniary penalties, that competent authorities take into account all the following circumstances, where relevant:
- (a) the gravity and the duration of the breach;
  - (b) the degree of responsibility of the natural or legal person responsible for the breach;
  - (c) the financial strength of the natural or legal person responsible for the breach, including by reference to the total turnover of a legal person or the annual income of a natural person;
  - (d) the importance of profits gained or losses avoided because of the breach by the natural or legal person responsible for the breach, insofar as they can be determined;
  - (e) the losses caused to third parties by the breach, insofar as those losses can be determined;

- (f) the level of cooperation by the natural or legal person responsible for the breach with the competent authority;
  - (g) previous breaches by the natural or legal person responsible for the breach;
  - (h) any actual or potential systemic consequences of the breach.
5. Where the provisions referred to in paragraph 1 apply to legal persons, Member States shall also ensure that competent authorities designated pursuant to Article 18(2) apply the administrative penalties and remedial measures set out in paragraph 2 of this Article, to members of the management body, and to other individuals who under national law are responsible for the breach.
  6. Member States shall ensure that before taking any decision imposing administrative penalties or remedial measures as set out in paragraph 2, the competent authorities designated pursuant to Article 18(2), give the natural or legal person concerned the opportunity to be heard.
  7. Member States shall ensure that any decision imposing administrative sanctions or remedial measures as set out in paragraph 2 is properly reasoned and is subject to the right of appeal.

#### *Article 24*

##### *Publication of administrative sanctions and remedial measures*

1. Member States shall ensure that the provisions transposing this Directive include rules requiring that administrative sanctions and remedial measures be published without undue delay on the official website of the competent authorities designated pursuant to Article 18(2).
2. The rules adopted pursuant to paragraph 1 shall require at a minimum the publication of any decision from which no appeal lies and which is imposed for breach of the provisions transposing this Directive.
3. Member States shall ensure that such a publication includes information on the type and nature of the breach and the identity of the natural or legal person on whom the penalty is imposed. They shall further ensure that such information is published without undue delay after that person is informed of those penalties and subject to paragraph 4.
4. Where Member States permit publication of penalties against which an appeal lies, competent authorities designated pursuant to Article 18(2) shall, without undue delay, also publish on their official website information the status of the appeal and the outcome thereof.
5. Member States shall ensure that competent authorities designated pursuant to Article 18(2) publish the penalties on an anonymous basis and in a manner in accordance with national law, in any of the following circumstances:
  - (a) where the penalty is imposed on a natural person and the publication of personal data is found to be disproportionate;
  - (b) where publication would jeopardise the stability of financial markets or an ongoing criminal investigation;
  - (c) where publication would cause, insofar as it can be determined, disproportionate damage to the institutions or the natural persons involved.

6. In the case of a decision to publish a sanction or measure on an anonymous basis, Member States may allow for the publication of the relevant data to be postponed.
7. Member States shall ensure that any final court ruling annulling a decision imposing an administrative sanction or a remedial measure be also published.
8. Member States shall ensure that any publication referred to in paragraphs 2 to 6 remains on the official website of the competent authority designated pursuant to Article 18(2) for at least five years after its publication. Personal data contained in the publication shall only be kept on the official website for the period which is necessary and in accordance with the applicable personal data protection rules.
9. Competent authorities designated pursuant to Article 18(2) shall inform EBA of any administrative sanctions and remedial measures imposed, including, where appropriate, any appeal in relation thereto and the outcome thereof. Member States shall ensure that competent authorities receive information and details of the final judgement in relation to any criminal sanction imposed which they shall also submit to EBA.
10. EBA shall maintain a central database of administrative sanctions and remedial measures communicated to them. That database shall be only accessible to competent authorities and shall be updated on the basis of the information provided by the competent authorities in accordance with paragraph 9.

*Article 25*  
*Cooperation obligations*

1. Member States shall ensure that competent authorities designated pursuant to Article 18(2) cooperate closely with the competent authority performing the general supervision of credit institutions in accordance with relevant Union law applicable to those institutions.
2. Member States shall further ensure that competent authorities designated pursuant to Article 18(2) cooperate closely with each other. That cooperation shall include providing one another with any information which is relevant for the exercise of the other authorities' supervisory tasks under the national provisions transposing this Directive.
3. For the purposes of the second sentence of paragraph 2, Member States shall ensure that the competent authorities designated pursuant to Article 18(2) carry out the following:
  - (a) communicate all relevant information upon request from another such competent authority;
  - (b) communicate on their own initiative any essential information to other competent authorities in other Member States.
4. Member States shall also ensure that the competent authorities referred to in paragraph 1 cooperate with EBA for the purposes of this Directive.
5. For the purposes of this Article, information shall be regarded as essential if it could materially influence the assessment of the issue of covered bonds in another Member State.

*Article 26*  
*Disclosure requirements*

1. Member States shall ensure that the following information is published by the competent authorities designated pursuant to Article 18(2) on their official website:
  - (a) the texts of their national laws, regulations, administrative rules and general guidance adopted in relation to the issue of covered bonds;
  - (b) the list of credit institutions permitted to issue covered bonds;
  - (c) the list of covered bonds allowed to use the European Covered Bonds label.
2. The information published in accordance with paragraph 1 shall be sufficient to enable a meaningful comparison of the approaches adopted by the competent authorities of the different Member States. This information shall be updated to take account of any changes.
3. For the purposes of points (b) and (c) of paragraph 1, competent authorities designated pursuant to Article 18(2) shall on an annual basis notify EBA of the lists of credit institutions and covered bonds.

**TITLE IV**  
**LABELLING**

*Article 27*  
*Labelling*

Member States shall allow credit institutions to use the label European Covered Bonds in respect of covered bonds which meet the requirements laid down in the provisions transposing this Directive.

**TITLE V**  
**AMENDMENTS TO OTHER DIRECTIVES**

*Article 28*  
*Amendment to Directive 2009/65/EC*

Article 52(4) of Directive 2009/65/EC is amended as follows:

- (1) the first subparagraph is replaced by the following:

"Member States may raise the 5 % limit laid down in the first subparagraph of paragraph 1 to a maximum of 25 % where bonds were issued before [OP: please insert the date laid down in the second subparagraph of Article 32(1) of this Directive + 1 day] and met the requirements set out in this paragraph, in the version applicable on the date of their issue, or where bonds fall under the definition of covered bonds in accordance with point (1) of Article 3 of Directive (EU) 20XX/XX of the European Parliament and of the Council\*.

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\* [OP: Please insert reference to Directive (EU) .../... of the European Parliament and of the Council of ... on the issue of covered bonds and covered bond public supervision and amending Directive 2009/65/EU and Directive 2014/59/EU (OJ C [...], [...], p. [...]).";

- (2) the third subparagraph is deleted.

*Article 29*  
*Amendment to Directive 2014/59/EU*

In Article 2(1) of Directive 2014/59/EU, point 96 is replaced by the following:

"(96) ‘covered bond’ means an instrument as referred to in Article 52(4) of Directive 2009/65/EC of the European Parliament and of the Council\*, in the version applicable on the date of its issue, and issued before [OP: please insert the date laid down in the second subparagraph of Article 32(1) of this Directive + 1 day] or a covered bond as defined in point (1) of Article 3 of Directive (EU) 20XX/XX of the European Parliament and of the Council\*\*;

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\* Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

\*\* [OP: Please insert reference to Directive (EU) .../... of the European Parliament and of the Council of ... on the issue of covered bonds and covered bond public supervision and amending Directive 2009/65/EU and Directive 2014/59/EU (OJ C [...], [...], p. [...])]."

## **TITLE VI** **FINAL PROVISIONS**

*Article 30*  
*Transitional measures*

Member States shall ensure that covered bonds issued before XX [OP: please insert the date laid down in the second subparagraph of Article 32(1) of this Directive + 1 day"] and complying with the requirements laid down in Article 52(4) of Directive 2009/65/EC, in the version applicable on the date of their issue, are not subject to the requirements set out in Articles 5 to 12 and Articles 15, 16, 17 and 19 of this Directive, but may continue to be referred to as covered bonds in accordance with this Directive until their maturity.

*Article 31*  
*Reviews and reports*

1. By XX [OP: please insert the date laid down in the second subparagraph of Article 32(1) of this Directive + 3 years], the Commission shall, in close cooperation with EBA, submit a report to the European Parliament and to the Council whether an equivalence regime could be introduced for third-country credit institutions issuing covered bonds and for investors in covered bonds, taking into consideration international developments in the area of covered bonds, in particular the development of legislative frameworks in third countries.
2. By XX [OP: please insert the date laid down in the second subparagraph of Article 32(1) of this Directive + 3 years], the Commission shall, in close cooperation with EBA, submit a report to the European Parliament and to the Council, on the implementation of this Directive with regard to the level of investor protection and the developments regarding the issue of covered bonds in the Union, including:
  - (a) developments regarding the number of permissions to issue covered bonds;

- (b) developments regarding the number of covered bonds issued in compliance with the provisions transposing this Directive and with Article 129 of Regulation (EU) No 575/2013;
  - (c) developments regarding the assets collateralising the issue of covered bonds;
  - (d) developments regarding the level of overcollateralisation;
  - (e) cross border investments in covered bonds, including inward and outward investment from and to third countries;
  - (f) developments regarding the issue of covered bonds with extendable maturity structures
3. For the purposes of paragraph 2 by XX [OP: please insert the date laid down in the second subparagraph of Article 32(1) of this Directive + 2 years] Member States shall transmit information on points (a) to (f) to the Commission.

### *Article 32*

#### *Transposition*

1. Member States shall adopt and publish, by [to be inserted – entry into force + 1 year] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from [to be inserted – same as first subparagraph + 1 day].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

### *Article 33*

#### *Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

### *Article 34*

#### *Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*