German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

Joint consultation on draft regulatory standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP (JC/CP/2014/03)

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,200 banks.

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Comments – Joint Consultation on draft RTS on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP (JC/CP/2014/03) dated 11 July 2014

A. Structure of our response/terminology

Our key observations and concerns are summarised in **Section B.I**. Our responses to the questions classified as mandatory in the response section for the Consultation have already been directly entered in the relevant fields – we have nevertheless included them in this document in **Section B.II** for the sake of completeness.

Section B.III contains comments on individual provisions of the draft RTS and the Annexes.

Terms used hereinafter which are defined in EMIR shall have the meaning ascribed to them under EMIR. One exception is the term "counterparty/ies" which – for the purposes of our comments – is intended to mean any party to a transaction, regardless of its status under EMIR (thus covering financial counterparties, non-financial counterparties (subject or not subject to the clearing obligation), third country counterparties equivalent to financial or non-financial counterparties and parties which do not qualify as non-financial counterparties because they are not an undertaking).

B. Comments

I. Introduction and summary of key observations and concerns

The German banking industry welcomes the opportunity to comment on the Consultation Paper of European Supervisory Authorities (Consultation Paper) on draft regulatory standards (draft RTS) on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11 (15) of regulation (EU) No. 648/2012 (EMIR) with draft regulatory technical standards (draft RTS).

We continue to support the central objective of the draft RTS, namely to extend the use of margining as means of risk mitigation, including mandatory margining in certain circumstances for certain types of counterparties. This ultimately reflects the developments in the derivative markets over the past few years: The reciprocal collateralisation, usually on the basis of standard collateral annexes to the various master agreements for derivative transactions,[1] has already become more and more prevalent in the market.

We also fully agree with the approach to base the future regime for margining requirements under EMIR on the international minimum standards for margining requirements in respect of non-centrally cleared derivative transactions as defined by the BCBS-IOSCO framework: In view of the international nature of the markets it will be of paramount importance to have margining regimes in the various jurisdictions which are as closely aligned as possible in order to ensure safe and functioning financial markets and to prevent diverging or even conflicting regimes. In addition, only consistent and non-conflicting margining regimes prevent competitive disadvantages and regulatory arbitrage. Of course, in this context close co-ordination between regulatory authorities with a view to a consistent implementation of the standards will be as important as the regulatory rules implemented.

We further very much welcome that the draft RTS follow the general timeline proposed by the BCBS-IOSCO framework for a gradual introduction of margining requirements beginning from December 2015.

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[1] For example the Collateral Support Annex to the ISDA Master Agreements or the Collateral Addendum (Besicherungsanhang) to the German Master Agreement for Financial Derivative Transactions (Deutscher Rahmenvertrag für Finanztermingeschäfte).

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Having said this, it needs to be pointed out that the introduction of mandatory margining requirements will be extremely challenging for all market participants for a number of reasons:

- The new rules will affect a significant section of the market, if not all market participants, regardless of their status under EMIR; the latter will be the case if the current approach requiring a formal opt-out by contractual agreement to benefit from exemptions is not reconsidered, see also below. Many of the affected market participants have – up to now – little or no experience with the margining of bilateral transactions, and in particular, variation and initial margining.

- The new requirements regarding the segregation of initial margins will require fundamental changes to established collateral management procedures and to the contractual documentation currently in use for margining. These changes will be extremely challenging and time consuming: It is to be expected that the timeline foreseen for the implementation will be met only with great difficulty. Less formalistic requirements, see immediately below, would significantly reduce these time constraints.

Against this background, we are concerned that some of proposed provisions go beyond the requirements set by the BCBS-IOSCO framework and/or set out requirements that are unnecessary formalistic, would result in unreasonable burdens for all market participants and make the timeline for the introduction of the new requirements more challenging than necessary.

In addition, the manner in which the provisions setting out the obligations and some of the definitions are currently structured may result in uncertainties over the personal scope of certain requirements.

In particular the following provisions or issues raise serious concerns:

- **Contractual opt-out requirement for exemptions/phase-in** – **Art. 2 GEN (1) to (4) and Art. 1 FP (3):** The provisions requiring a formal opt-out by way of a contractual agreement in order to benefit from certain exemptions or in order to avoid that the new margin regime becomes immediately effective.

- **Legal opinions and legal verification requirements – Art. 1 SEG (5) / Art. 6 MRM (2):** The requirement to obtain a legal opinion before each transaction combined with a requirement to update these annually and the similar requirement to annually verify the legal enforceability of netting agreements.

- **Criteria for adequacy of segregation arrangements – Art. 1 SEG (4):** The criteria regarding the adequacy of segregation arrangements (in particular the requirement to both ensure immediate access of the secured party in the event of the default of the securing party on the one hand and protection of the securing party from the default of the secured party on the other): depending on the understanding of immediacy and protection in this context and taking into account the legal constraints existing under applicable laws governing collateralisation and insolvency proceedings, these may be mutually exclusive objectives.

- **Legal impediments for asset transfer – Art. 3 IGT (1)**: The provision defining the legal impediments which would prevent application of the intragroup exemption: the relevant provision could be construed in such a way that it would effectively be impossible to rely on the intragroup exemption.

- **Third country counterparties:** The proposed extension of the margin requirements to transactions with **all** third country counterparties – page 7, third paragraph of the Consultation Paper: This extraterritorial extension of the margin requirements goes beyond what the BCBS-IOSCO framework recommends. It also goes further than the personal scope of the other risk mitigation requirements under EMIR. Such a far reaching extraterritorial extension of the EMIR requirements is also not mandated by EMIR. As third country counterparties are not subject to EMIR, they have no obligation to implement these requirements and would have no reason to accept contractual terms implementing these requirements. This extension of the regulatory reach of EMIR is particularly difficult to justify if it indeed is intended (as proposed on page 7, third paragraph of the Consultation Paper) to affect not only third country counterparties which are equivalent to financial counterparties or non-financial counterparties exceeding the clearing threshold (equivalent third country counterparties). This is exacerbated by the fact there are currently no clear rules setting out how the margin requirements and the exemptions thereto are to be applied in relation to third country counterparties.

- **Personal scope – Art. 1 DEF in conjunction with Art. 2 GEN and Art. 1 FP (3):** Uncertainty over the personal scope of the provisions providing for exceptions/exemptions in connection with counterparties, which do not qualify as non-financial counterparties ("non-undertakings").

- **Overlap/potential discrepancies with similar requirements under CRR**: Many obligations under the draft RTS address very similar obligations existing under the CRR. However, it is unclear whether the requirements under the draft RTS which correspond to CRR requirements are intended to be understood and applied in the same manner. Not least because a significant portion of the counterparties which will be affected by the margin requirements will also be subject to the CRR, it would greatly help to reduce complexities and avoid operational difficulties if such corresponding obligations would be fully aligned to avoid unnecessary uncertainties, conflicts or redundancies.

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II. Responses to questions marked as mandatory

Question 1. What costs will the proposed collateral requirements create for small or medium-sized entities, particular types of counterparties and particular jurisdictions? Is it possible to quantify these costs? How could the costs be reduced without compromising the objective of sound risk management and keeping the proposal aligned with international standards

We have identified the following aspects/provisions in the draft RTS as resulting in exceptionally and unnecessarily burdensome obligations; in all instances the burdens could be significantly reduced without compromising the original purpose by implementing the changes or alternatives set out below:

1. Contractual opt-out requirements regarding exceptions from margining requirements and postponement of margining requirements – Art. 2 GEN paras. (1) to (4) and Art. 1 FP (3)

Both Art. 2 GEN (addressing the exceptions from mandatory margining requirements or possibility to agree on thresholds) and Art. 1 FP (3) (with the provisions on the phase-in and the threshold based exemption from the initial margin requirement) require a formal/written opt-out by way of contractual agreement in order to allow counterparties to benefit from exceptions.

This approach is unnecessary cumbersome and formalistic and would impose unreasonable burdens on market participants, in particular, on counterparties which are not subject to the clearing obligation, a great many of which will be small and medium sized corporates (which were always intended to be exempted from the requirements under Art. 11 (3) EMIR).

Credit institutions would be required to confront all customers engaged in derivative transactions with a demand to enter into such a formal opt-out agreement. As many customers will have relations with more than one bank, they will have to deal with different versions of such arrangements.

The process of negotiating and entering into opt-out agreements with each customer will be extremely time consuming, bind resources to a very considerable degree and, of course, be very costly for both sides: The possibility to rely on "equivalent permanent electronic means" in this context will only help to reduce the burdens to a limited degree and only for a limited circle of market participants: The majority of the counterparties, in particular non-financial counterparties, will not have access to technical platforms supporting such a process. Likewise, the protocol-system used by ISDA for certain types of changes to contractual arrangements cannot be applied in all situations and in relation to all counterparties. It is also not available for other – widely used – types of master agreements and especially smaller and medium sized counterparties will in any event often not be prepared to adhere to such a system as it would subject them to the courts and laws of a different jurisdiction. Furthermore, the issues to be addressed necessarily require some degree of individualisation and thus direct negotiations.

Based on the experience with the introduction of the risk mitigation requirements under Commission Delegated Regulation 149/2013 concerning timely confirmation, portfolio reconciliation by entering into contractual relationships via the so called EMIR-Addendum to the German Master Agreement[2],

[2] In the case of ISDA Master Agreements these requirements were implemented by adherence to the various EMIR protocols, or where the protocol approach was not possible, by contractually agreeing on the relevant terms.

the number of affected counterparties in Germany alone will surpass 50,000 (not counting the cases where master agreements other than a German Master Agreement are in place).

The proposed contractual opt-out approach is not necessary to ensure that counterparties are able to determine whether their counterparty qualifies for certain exemptions in respect of the margin requirements or during the phase in period:

- Where these exemptions depend on the status of the counterparty as financial counterparty (FC), non-financial counterparty exceeding the clearing threshold (NFC+), non-financial counterparty not exceeding the clearing threshold (NFC-) or equivalent third-country counterparty (respectively, as counterparty subject to the clearing obligation or not), the relevant information is already available: The status of counterparties was already determined for the purpose of implementing the risk mitigation requirements under Commission Delegated Regulation 149/2013 which already required such classification. These classifications can now be directly applied in order to establish whether a counterparty qualifies for the exemption addressed in Art. 2 GEN (4) (b) and (c). A further contractual agreement to this end is therefore not necessary.

- In all other cases, where the eligibility for an exception is based on factors other than the clearing status of the counterparty (e. g. transaction volume or average notional amount as in the case of the initial margin exemption under Art. 1 FP (3) (e)), eligibility can be ascertained as effectively and in a less cumbersome manner: for example by imposing a duty on counterparties to inform their respective counterparties when they breach the relevant thresholds. Counterparties could also be entitled to demand a confirmation/representation from the other counterparty that the relevant thresholds have not been breached (and the relevant counterparties would be under a duty to provide this information if requested).

In order to simplify the operational challenges for all market participants but in particular for smaller and medium sized counterparties, the exemptions should therefore be designed as directly applicable exemptions (not requiring an opt-out) and counterparties should be entitled to request the relevant declarations/representations from their counterparties on their status (or information on the relevant factors which permit the determination of the status). The relevant counterparties should in turn be under a duty to provide the relevant information upon such request.

Proposed Alternative: Replacement of the provisions requiring contractual agreements in order benefit from exemptions by provisions directly exempting transactions with the relevant counterparties from margin requirements combined with a right to request representations or declarations from counterparties regarding their status, where the status has not already been determined.

2. Requirement to obtain legal opinions regarding segregation arrangements – Art. 1 SEG

The requirement set out in Art. 1 SEG (5) of the draft RTS to obtain a "satisfactory legal opinion(s)", in particular in the manner it is currently drafted, would result in very considerable operational challenges and burdens (even taking into account the interpretations provided by the EBA in the Single Rulebook Q & A process on legal opinions in view of Art. 194 CRR – Question ID 2013_23 – which we assume to apply correspondingly to the opinion requirement under the draft RTS)[3].

As currently drafted, the obligation is also considerably more rigid and formalistic than comparable obligations concerning the need to assess and monitor legal risks under the CRR, or in fact the corresponding obligations regarding segregation in the case of CCP clearing under Art. 39 EMIR.

The relevant obligation should therefore be replaced by a general obligation to implement adequate measures/procedures safeguarding the legal effectiveness of a segregation arrangement chosen by the counterparties.

If, however, formal legal opinions (still assuming the interpretations in the EBA response in the Rulebook Q & A process – Question ID 2013_23 continue to apply) are nevertheless seen to constitute a necessary element, the relevant obligation should at least be modelled more closely on existing similar opinion requirements under the CRR. At the very least, the following should be ensured to avoid unnecessary and also unreasonable effects and unnecessary burdens:

- The provision as currently drafted can be understood to require a new legal opinion for each transaction. This would be impossible to implement and is presumably not intended. It should therefore be clarified that counterparties are required to make a legal assessment regarding the effectiveness of a segregation arrangement prior to entering into such arrangement based on the most recent legal opinion (allowing for the possibility to rely on existing opinions in respect of standard collateral arrangements).

- The rigid timeframe for updates of legal opinions should be replaced by more flexible approach: for example, counterparties could instead be required to regularly review whether existing legal opinions can still be relied upon (that is, whether there have been any material changes in the law indicating a need to update the relevant opinion).

- If, however, in contrast to all existing legal opinion requirements under the CRR, a rigid timeframe for updates is considered to be necessary, the relevant timeframe should at least be expanded to permit counterparties to coordinate timing of the opinions on segregation arrangements with other existing opinion requirements (it is likely that opinions on segregation arrangements interact with or will be based on opinions obtained for the purposes of the CRR) and also in order to avoid the situation that updates become due although it is already foreseeable that legal changes are upcoming. An expansion of the timeframe to at least three years would already alleviate many of the operational problems. In this context it should be taken into account that the legal structures and areas of the law which would be analysed in the legal opinions on segregation

[3] If this were not the case, the challenges posed by this requirement would be even more demanding, in particular for smaller Market participants and market participants which have , up to now, no experience with opinion requirements. We further assume that the term "legal opinion" is to be interpreted for the purposes of European law in such a way that it is compatible with legal concepts of continental law jurisdictions and common law (so that legal opinions for the purposes of European regulatory law are not subject to the very strict formal requirements and traditions existing in relation to legal opinions as understood under Common Law).

arrangements are well-known, well established and are rarely subject to fundamental/material changes affecting their effectiveness and are usually standard structures used for collateralisation in general. In addition, it should also be clarified that the relevant legal opinions need only address the legal question of whether the arrangement reviewed safeguards that the assets provided as initial margin are returned to the securing party in the event the secured party becomes insolvent and there is no security event under the relevant security arrangement. Questions of non-legal nature, in particular those which require a general, experience based risk-assessment (such as whether the protection is "sufficient" or whether access to the assets posted as initial margin is sufficiently "immediate" in the event of a default of the securing party), cannot be answered by a legal opinion.

Proposed Alternatives:

- Replacement of the obligation to obtain legal opinion by an obligation to implement procedures to verify that the segregation arrangements used are legally effective and enforceable in all relevant jurisdictions.
- If a requirement to obtain legal opinions is nevertheless seen to be necessary, the rigid requirement to update such opinion annually should be deleted or at least replaced by a significantly longer period.
- In addition it should be clarified that the legal opinion only needs to address the effects of an insolvency of the secured party.

3. Requirement to annually verify the enforceability of netting agreements – Art. 6 MRM (2)

The consideration above regarding legal opinions regarding segregation arrangements apply to some extent also to the requirement set out in Art. 6 MRM (2) of the draft RTS: Since it is current practice to verify the legal effectiveness and enforceability of netting agreements on the basis of legal opinions, the relevant provision can also be understood to require annual updates of these legal opinions on netting agreements. Such opinions are currently obtained by industry associations in relation to the master agreement documentation they have developed. The relevant opinions are usually updated on a regular, but not necessarily always on an annual basis for a number of valid reasons: The process to obtain an update of an opinion may, for example, take slightly longer because certain legal questions require a more detailed review or the impact of recent or upcoming developments have to be analysed more closely. In this case, a too rigid update requirement would actually be counter-productive as it would force counterparties to place speed over thoroughness. In many cases, it will already follow from other opinions obtained on other types of netting agreements for the same jurisdiction that there have not been any developments in the relevant jurisdiction which merit an immediate update. Under these circumstances an update would be an unnecessary formalism.

Proposed Alternative:

Replacement by a general obligation to implement processes (to be documented) in order to verify the legal effectiveness of netting agreements used.

4. Insolvency, resolution or similar regimes as legal impediment

Art. 3 IGT (1) (a) and (b) mention "regulatory restrictions" and "insolvency, resolution or similar regimes" as one of the legal impediments to the prompt transfer of own funds which would prevent reliance on the intragroup exemption. As the relevant provision expressly addresses not only to "current" but also "anticipated restrictions" it appears that already the existence of a potential future impediment would be sufficient to prevent reliance on the intragroup exemption.

However, many regulatory regimes (including the EU) and all insolvency, resolution or similar other legal regimes, by their nature, contain provisions which can affect the ability of the regulated or insolvent party or the party under resolution to effect payments or transfer assets. Thus, unless Art. 1 IGT (1) (b) is intended to mean that such impediment is only deemed to exist upon initiation of such proceedings but not before, the relevant requirement would effectively invalidate the effects of the exemption for intragroup transactions. This cannot be the intention: The intragroup exemption is essential to minimise the adverse effects of and challenges posed by the application of mandatory margining to transactions between members of the same group. If it would factually not possible to rely on this exemption, the negative consequences for groups would be very considerable. The relevant events should therefore not be seen as automatically indicating an impediment within the meaning of Art. 11 (5) to (10) EMIR. Instead, it could be considered to require counterparties to identify and assess any potential adverse effects of such events on the transfer of own funds within a group in advance and implement processes in order to minimise these adverse effects.

Proposed Alternative:

- Deletion of the words "or anticipated" in Art. 3 IGT (1) first sentence.
- Clarification that the mere existence of the mentioned concepts/legal provisions in a certain jurisdiction does not as such indicate an impediment within the meaning of Art. 11 (5) to (10) EMIR.
- Introduction of a requirement to identify and assess any potential adverse effects of such events on the transfer of own funds within a group in advance and implement processes in order to minimise these adverse effects.

5. Third country counterparties – extraterritorial reach of margin requirements

According to the explanations on the rationale laid out on page 7, third paragraph, of the Consultation Paper, the margin requirements would have to be applied by counterparties established or regulated in the EU in relation to **all** of their third-country counterparties. This appears to imply not only that the requirements have an extraterritorial reach but also that the exemptions provided for counterparties depending on the classification as non-financial entity not exceeding the threshold (NFC-) would not necessarily apply to any third country counterparties. As the definition of "counterparty" under Art. 1 DEF (1) (a) only covers counterparties established in/supervised by a EU member state and since the proposed provisions currently do not specifically set out provisions if, and if so, how these are to be applied to third-country counterparties, it is not clear whether this is indeed the intention. An extension of the margin requirements to transactions with third country counterparties

would go beyond what the BCBS-IOSCO framework recommends. It may, depending on the understanding, even conflict with the personal scope of the other risk mitigation requirements under EMIR. Such a far reaching extraterritorial extension of regulatory requirements is not required under EMIR and could significantly affect the ability of European credit institutions to operate and compete internationally: Third country counterparties (affiliates of European companies) are not subject to EMIR. They thus have no obligation to implement these requirements and have no reason to accept contractual terms from their European counterparties requiring them to subject themselves to contractual obligations which would require them to post collateral.

The proposed extension of the regulatory reach of EMIR in respect of margin requirements is particularly difficult to justify if it is intended to affect not only third country counterparties which are equivalent to financial counterparties or non-financial counterparties exceeding the clearing threshold (equivalent third country counterparties) but any third country entity, including those which are equivalent to EU counterparties which are exempted from EMIR.

In any event, it should be considered to specify the extent to which the obligations do exist or do not exist in relation to third country counterparties in order to avoid uncertainties.

Proposed Alternative:

- Clarification that the obligation to collect variation and initial margin does not apply in relation to third country counterparties, or at the very least, not in relation to third country counterparties which are not equivalent to FC and NFC+ (all exemptions applying correspondingly).
- Introduction of a provision specifically addressing what/how the obligations apply in relation to third country counterparties.

Question 2. Are there particular aspects, for instance of an operational nature, that are not addressed in an appropriate manner? If yes, please provide the rationale for the concerns and potential solutions?

The issues addressed under Question 1, in particular the proposed contractual-opt out requirements and the rigid requirements concerning the assessment of the effectiveness of netting and segregation agreements have an operational dimension which affects both financial and non-financial counterparties alike, we therefore refer to our response to Question 1 above.

Proposed Alternative:

See alternatives proposed in the response to Question 1 above.

In addition, the following aspects of a primary operational nature should be reviewed in order to prevent unreasonable effects or minimise the operational burdens:

1. New Minimum Transfer Amount Concept (cross-margin type):

Art. 2 GEN (4) (a) and (6) demands that minimum transfer amount (MTA) is calculated as the total amount of all initial margins and variation margins to be posted, that is, without differentiating be-

tween variation and initial margin. This concept of the MTA differs significantly from the understanding of the MTA and the function it performs in current practice.

The operational implementation of this new MTA concept would be very challenging since it would require the implementation of new allocation and monitoring systems permitting the calculation of the MTA across initial and variation margin.

These challenges are acerbated by the requirement to exchange the total collateral amount owed once the MTA-threshold is exceeded, regardless of the amounts involved and without any operational de minimis transfer amount. In effect this means that, as of this point, the MTA effectively turns into a zero threshold. As a consequence, the number of margin calls between counterparties will increase significantly.

Electronic processing can reduce these challenges only to a limited degree and, is in any event, not an option in relation to those counterparties, which have no access to such electronic processing (in particular smaller and medium sized counterparties where the introduction of electronic processing systems is commercially not justified). In this context, it should be taken into account that the risk exposure of credit institutions would be limited, and in any way, be addressed by existing capital requirements under the CRR.

The above described negative effects could be minimised by introducing

- two separate total MTAs, one for variation margins and another for initial margins and
- an additional operational de minimis threshold (to be agreed between the parties but not exceeding a maximum amount of 50,000 €) which would apply once the MTA-threshold of 500,000 € has been exceeded for the first time, thereby triggering the first exchange of collateral.

The MTA and this additional de minims threshold would, in practice, operate as follows:

Where the amount of collateral calculated exceeds the MTA of 500,000 € for the first time, the full amount of collateral as calculated would need to be exchanged. If, subsequently, the absolute difference of already exchanged collateral and the new total collateral amount does not exceed the de-minimis threshold (that is, an additional collateral amount of less than 50,000 € in the event the parties agreed on a de minimis threshold of 50,000 €), no additional collateral would need to be exchanged. If, however, the new total collateral amount calculated should exceed the previous total collateral amount by the agreed de minimis amount (or more), the new total amount of collateral as calculated would need to be posted.

In any event, the exact function and understanding of the MTA (and any de-minimis threshold to be introduced) will need to be defined as clearly as possible to avoid any misconception and misunderstandings between counterparties.

Proposed Alternative:

- Introduction of two separate total MTAs, one for variation margins and another for initial margins.
- Introduction of an additional operational de minimis threshold for any subsequent margin call, to be agreed between the counterparties but not exceeding an amount of 50,000 €).

2. Concentration limits

The provisions on concentration limits as currently designed would also result in considerable and unnecessary operational burdens. As this issue is, however, addressed in more detail in our response to Question 5 below, we refer to our response to this question.

3. Overlap with/duplication of CRR requirements:

A further issue of an operational nature specifically affecting credit institutions is the relationship of certain obligations under the draft RTS which are very similar if not identical to obligations existing under Regulation No. 575/2013 (capital requirements regulation – CRR). Cases in point are the requirements under

- Art. 6 MRM (2) (corresponding provisions: Art. 295 and 296 CRR),
- Art. 1 SEG (5) (corresponding provisions: Art. 194 CRR),
- Art 3 IGT (corresponding provisions: Art. 113 (6) and (7) CRR).

Conflicting or unnecessary duplications of largely similar procedures should clearly be avoided. This could be ensured by either clarifying that the relevant obligations are to be understood and implemented as under the CRR or, alternatively, by replacing the relevant provisions setting out the requirements by references to the corresponding CRR provisions.

Proposed Alternative:

Clarification that the relevant obligations are to be understood and implemented as under the CRR or, alternatively, inclusion of references to the corresponding CRR provisions.

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Question 3. Does the proposal adequately address the risks and concerns of counterparties to derivatives in cover pools or should the requirements be further tightened? Are the requirements, such as the use of the CRR instead of a UCITS definition of covered bonds, necessary ones to address the risks adequately? Is the market-based solution as outlined in the cost-benefit analysis section, e. g. where a third party would post the collateral on behalf of the covered bond issuer/cover pool, an adequate and feasible alternative for covered bonds which do not meet the conditions mentioned in the proposed technical standards?

We support the idea of using an EU-harmonised classification of covered bonds, because it is a rational way to provide for adequate and equal privileges for this class of financial instruments. However, we would prefer to link the conditions to covered bonds issued in accordance with Art. 52 (4) of the Directive 2009/65/EC (UCITS) and not to covered bonds issued in accordance with Art. 129 of Regulation 2013/574/EC (CRR). Covered bond programs which meet the requirements of Art. 52 (4) UCITS are for example also exempted from the bail-in regulations in accordance with the Bank Recovery and Resolution Directive (BRRD). In addition, the use of the CRR definition of covered bonds would establish an unequal treatment of covered programs, which until now, in accordance with the UCITS definition of covered bonds, are considered as safe enough. For example German Aircraft Pfandbriefe, which actually are not in the scope of Art. 129 CRR, would not be exempt from the obligation to post collateral in accordance with Art. 11 (3) EMIR. The issuance of Aircraft Pfandbriefe is based on the German Pfandbrief Act (Pfandbriefgesetz) and the only difference to Mortgage/Public/Ship Pfandbriefe is, that the former are covered by registered liens in accordance with section 1 of the Law on Rights in Aircraft (LuftFzRG) or by foreign aircraft mortgages. In order to prevent a further fragmentation of the covered bond market in Europe, we therefore suggest to rely on the UCITS definition of covered bonds.

Question 4. In respect of the use of a counterparty IRB model, are the counterparties confident that they will be able to access sufficient information to ensure appropriate transparency and to allow them to demonstrate an adequate understanding to their supervisory authority?

We believe that the introduction of a uniform internal model, developed by the industry, will address these issues. This, however, presupposes that such standard model is accepted uniformly by all relevant regulatory authorities.

Question 5. How would the introduction of concentration limits impact the management of collateral (please provide if possible quantitative information)? Are there arguments for exempting specific securities from concentration limits and how could negative effects be mitigated? What are the pros and cons of exempting securities issued by the governments or central banks of the same jurisdiction? Should proportionality requirements be introduced, if yes, how should these be calibrated to prevent liquidation issues under stressed market conditions?

The concentration limits introduced by Art. 7 LEC will require fundamental changes to existing collateral management systems and procedures as they differ significantly from current practice. This is further exacerbated by the fact that the proposed requirements differ from and conflict with similar requirements under the CRR. Thus, unless the requirements are not aligned, credit institutions would have to operate and coordinate very different processes and systems to implement and monitor concentration limits. The

operational implementation of these requirements will therefore be extremely challenging, requiring a very extensive adjustment of existing systems or introduction of completely new systems which may have to be operated in parallel to procedures and systems implemented to comply with CRR requirements.

In particular the requirement to apply the concentration limits in relation to each individual counterparty increases the complexity and thus the operational challenges unnecessarily. Such counterparty-based concentration limits will also be challenging for the relevant counterparties, in particular small and medium, sized counterparties and are not necessary to avoid concentration risks:

The purpose of concentration limits is served just as effectively but with significantly less complexity by permitting the collateralised counterparty to apply these in relation to all counterparties, that is in relation to its total exposure. This would not only reduce the operational complexity for the collateralised party. It would also prevent that collateralising counterparties are effectively denied access to the market simply because they are unable to diversify the collateral they have at their disposal.

Moreover, in some cases the concentration limits may actually be counterproductive as they might force counterparties to replace collateral of a very high grade by collateral of a lesser grade simply because the concentration limits have been breached. This applies in particular to debt securities issued by sovereigns.

The above described adverse effects could be best avoided or at least alleviated by replacing the current proposed provision by a requirement to apply the concentration limits under the CRR correspondingly (if these are not already directly applicable as in the case of credit institutions).

Alternatively, at least the following should be considered:

- Amendment to the effect that the concentration limits can be applied by the collateralised party in relation to the overall exposure/all counterparties (and not in relation to each individual counterparty).

- Introduction of a de minimis threshold (proposal: 50 million EUR).

- Introduction of a significantly higher concentration limit for debt securities issued by sovereigns.

> Proposed Alternative:
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> Replacement of the current proposed provision by a requirement to apply the concentration limits under the CRR correspondingly.
>
> Alternatively, at least the following should be considered:
>
> - Amendment to the effect that the concentration limits can be applied by the collateralised party in relation to the overall exposure/all counterparties (and not in relation to each individual counterparty).
> - Introduction of a de minimis threshold (proposal: 50 million EUR).

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- Introduction of a significantly higher concentration limit for debt securities issued by sovereigns.

Question 6. How will market participants be able to ensure the fulfilment of all the conditions for the reuse of initial margins as required in the BCBS-IOSCO framework? Can the respondents identify which companies in the EU would require reuse or re-hypothecation of collateral as an essential component of their business models?

The terms re-hypothecation, re-pledge and re-use are undefined terms which are sometimes used interchangeably and sometimes used to describe very different legal concepts with very different legal risks. In particular the term re-hypothecation is a term originating in US law and thus difficult to transpose into continental law.

The Recommendations adopted by the Financial Stability Board addressing risk associated with securities lending and repo transactions (Policy Framework for Addressing Shadow Banking Risks in Securities Lending and Repos – 29th of August 2013) clearly distinguish between re-hypothecation on the one hand and re-use on the other. Re-hypothecation is understood by the FSB to mean the re-use of client assets (that is assets which up to the point in time where the re-use occurs, are still owned by the client).

Re-hypothecation also needs to be clearly distinguished from full-title transfer transactions where the collateral provider expressly relinquishes title for the purpose of providing collateral (full title transfer being the standard/most prevalent form in which collateral is currently provided for margining purposes, specifically variation margin). Where the receiving party obtains full title any further "use" of the assets acquired should clearly be unrestricted (as this is the central purpose of acquiring full title). In particular, there cannot be any restrictions which, in any way, could affect the legal rights of any third party subsequently acquiring title to these assets (otherwise the whole concept of transfer of title would be put into question).

Furthermore, a clear distinction will presumably have to be made between cash collateral and securities since certain restrictions on re-use only make sense in respect of securities and cannot be implemented in the same manner in relation to cash collateral.

A further issue in this context is the need for consistency and coordination with parallel regulatory developments: The issue of re-use/re-hypothecation/re-pledge of collateral or protection of client assets against re-use is currently being addressed in the context of at least two other parallel legislative initiatives on European level (SFT-Regulation and also MiFID). The scope of practices to be covered by these initiatives varies or is sometimes not yet clearly defined. Against this background, we see a need to define the scope of practices to be covered by a prohibition of re-use (including re-hypothecation and re-pledge) as clearly as possible and to coordinate the various initiatives in order to prevent conflicts or inconsistencies.

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III. Comments on individual provisions of the draft RTS

1. Art. 1 DEF (1) (a) Definition of "counterparties"

Art. 1 DEF (a): The definition of "counterparties" for the purpose of the present draft RTS covers financial counterparties within the meaning of EMIR (FC) and non-financial counterparties exceeding the clearing threshold (NFC+), that is, effectively, only counterparties subject to the clearing obligation and only those, which are established in the EU (thus excluding any third country counterparty).

The term "counterparty", however, is also used in other RTS but has a different meaning (covering financial and non-financial counterparties, including non-financial counterparties which are not subject to the clearing obligation – NFC-). In order to achieve a greater degree of consistency between the various RTS, it could be considered to use a different term to define the types of counterparties which are to be captured by the margining requirements. Possible alternatives may be "qualified" or "covered" counterparties or "counterparties subject to the clearing obligation".

In addition, we believe that it would be helpful to introduce a definition for third country counterparties which are equivalent to FC and NFC+ which would permit the introduction of a provision setting out more clearly the obligations in relation to such third-country counterparties.

As to the need to address counterparties which do not qualify as non-financial counterparties ("non-undertakings"), see below.

2. Art. 1 GEN (1) – Clarification of the personal scope of the margin requirements/voluntary collateralisation

The margin requirements set out in Art. 1 GEN (1) and (3) are, in principle, designed as non-reciprocal (unilateral) obligations. This follows from the fact that they only require the collection of collateral by the addressees of the obligation and, in principle, not the exchange thereof. Addressees of the obligation are only counterparties which either qualify as financial counterparty (FC) or as non-financial counterparty exceeding the clearing threshold (NFC+). This reflects the fact that all other types of counterparties which are neither FC nor NFC+ are not subject to the obligations resulting from Art. 11 (3) EMIR or not subject to EMIR as such.

There are three basic categories of counterparties which are not subject to Art. 11 (3) EMIR or EMIR:

- "Non-undertakings", which do not qualify as non-financial counterparties and thus do not fall under EMIR as such.
- Counterparties falling under Art. 1 (4) and (5) EMIR which are exempted from all EMIR-obligations with the single exception of the reporting obligation.
- Non-financial counterparties not exceeding the clearing threshold (NFC-).
- Third-country counterparties which do not fall under EMIR since EMIR does not impose regulatory obligations with extraterritorial effect except where expressly provided for in special circumstances (e. g. Art. 10 (12) EMIR)

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These counterparties cannot and are not intended to be directly obligated to post and collect margins (variation and/or initial, as the case may be). Yet, if we understand the draft RTS correctly, counterparties qualifying as NFC-, counterparties falling under Art. 1 (4) and (5) EMIR and third country counterparties are, however, to be affected indirectly by the margin requirements where they are the counterparty to an FC or NFC+ unless one of the exemptions provided under Art. 2 GEN and Art. 1 FP (3) (e) applies: In these cases, the FC or NFC+ in question may be obligated to collect variation and/or initial margin (as the case may be and to the extent prescribed) and thus would require the relevant counterparty to post margins.

Having said this, Art. 2 GEN (3) to (5) setting out exemptions speaks of an exchange of collateral/or initial/variation margin. This may give the impression that certain obligations – despite the above – are generally meant to apply reciprocally. As the provisions of the draft RTS also do not expressly address the issue of counterparties which qualify neither as financial nor as non-financial counterparty, it can only be inferred from the purpose of the provisions and the fact that these counterparties do not fall under EMIR as such that they are not to be affected by the margin requirements.

Likewise, it only follows from the structure of the obligations that NFC-, the counterparties falling under Art. 1 (4) and (5) EMIR and (equivalent) third country counterparties are not under any direct regulatory obligation to collect or post margins but may be contractually required by their counterparties (where these qualify as FC or NFC+) to do so, unless an exemption applies.

Against this background and in view of the importance of having a clear, unambiguous understanding of the personal scope of the margin requirements and the exemptions thereto, it should be considered to set out the precise nature of the obligations and their personal scope and/or the personal scope of any exemptions as clearly as possible and detailed as necessary, taking into account the above described different categories of counterparties. Specifically, it should be clarified that NFC-, counterparties falling under Art. 1 (4) and (5) EMIR and "non-undertakings" are not required to post or collect variation and/or initial margin and are thus exempted from the margin requirements. As to the need for such an outright exemption instead of a contractual opt-out option as currently proposed under Art. 2 GEN (4), see also our comments on Art. 2 GEN (1) to (4) below. As to our fundamental concerns over the intended extension of the regulatory reach of margin requirements to third country counterparties, see our response to Question 1, item 5 above and also below, comments on Art. 2 GEN (1) to (4).

Furthermore, in view of the fact that counterparties may elect collateralisation even where exemptions apply, it should also be clarified that where counterparties agree on collateralisation despite the fact that one of the counterparties may be exempted from the margin requirements under the RTS (voluntary collateralisation), they are entitled to divert from the standards set by the RTS by agreeing on different and less strict rules.

Conversely, in case the margin requirements under the RTS apply, the parties should be entitled to agree on stricter requirements, including the right to request additional collateral exceeding the amounts calculated in accordance with the rules set by the RTS. This would be consistent with margin requirements in cleared transactions which specifically accept that clearing members may require additional collateral.

3. Art. 1 GEN (3) (a) – reference to "netting"

Art. 1 GEN (3) (a) refers to "netting" of the initial margin. The objective of the provision is to ensure that initial margins are posted on a "gross" basis that is, that the initial margins posted by each counterparty are not set off against each other. The term "netting" is, however, primarily associated with the legal technique by which the reciprocal claims of counterparties in the case of an event of default (in particular insolvency) of a counterparty are netted (set-off) against each other in such a way that they result in a single net obligation of one of the counterparties. Such netting always includes any collateral posted (including initial margins). The draft RTS do, of course, not intend to limit this right to net initial margins in the event of a default/insolvency. However, to avoid any misconception, it could be considered to replace the term "netting" in the context of Art. 1 GEN (3) (a) by another term (i. e.: "setting off").

4. Art. 2 GEN (1) to (4) – contractual opt-out requirements

Art. 2 GEN addresses the following, very different, types of exemptions from mandatory margining requirements (that is, the instances, where mandatory margin requirements do not apply or can be opted-out):

- Exemption in respect of certain products: physically settled foreign exchange forwards or exchange of principal under a currency swaps – Art. 2 GEN paras. (1) and (2).
- Exemption based on thresholds: initial margin threshold to be applied on group level (maximum amount: 50 million EUR) and minimum transfer amount of 500,000 EUR – Art. 2 GEN paras. (3) and (4) (a) (another similar and equally important threshold based exemption is addressed in Art. 1 FP (3) (e)).
- Exemption in relation to certain types of counterparties: Effectively, transactions where one of the counterparties is not subject to the clearing obligation – paras. 4 (c) and (d), as to the need to clarify the personal scope, see comments on Art. 2 GEN (4) below.

In each case, the current proposal would require a formal/written opt-out by way of contractual agreement; that is, a contractual agreement not to exchange/collect initial margin, not to exchange the full collateral amount, or not to exchange initial and variation margin (opt-out agreement).

This approach is unnecessarily cumbersome and formalistic and would impose unreasonable burdens on market participants, in particular, on counterparties which are not subject to the clearing obligation (and which were always intended to be exempted from the requirements under Art. 11 (3) EMIR). It would effectively require banks to confront all customers engaged in derivative transactions with a demand to enter into such a formal opt-out agreement. As customers will often have relations with more than one bank, the customers are likely to receive such demands based on different documents/arrangements from more than one bank.

The process to negotiate and enter into the relevant opt-out agreements with each bank (and from the perspective of the banks, with each customer) will be extremely time consuming, bind resources to a very considerable degree and, of course, be very costly for both sides. The possibility to achieve this via "equivalent permanent electronic means" will only help to reduce the burdens to a very limited degree and only for a limited circle of market participants: The majority of the counterparties, in

particular non-financial counterparties, will not have access to technical platforms supporting such a process. Likewise, the protocol-system used by ISDA for certain types of changes to contractual arrangements cannot be applied in all situations and in relation to all counterparties. It is also not available for other – widely used – types of contractual documentation and especially smaller and medium sized counterparties will be hesitant to rely on such a system for contractual arrangements which expose them to the laws and courts other than their home jurisdiction. Consequently, any requirement demanding a contractual agreement will necessarily require negotiating and entering to written agreements.

In Germany alone such an approach is likely to affect easily more than 50,000 customers of credit institutions[4], many of which will have no or very little experience with margin requirements and have no interest in collateralisation as prescribed by the RTS in view of the considerable operational and technical challenges associated therewith.

It would be clearly unreasonable to expose such a large section of the customer base with operational burdens and legal cost although they are eligible for exemptions. It should also be considered that such need to formally agree on opting-out of certain elements of the margining regime may also actually be confusing and misleading to customers: The need to contractually agree not to choose margining, may give customers the impression that they are waiving rights to opt for margining in the future. This is of course not the case and cannot be intended.

The proposed contractual opt-out approach is not required to ensure that counterparties are able to determine whether their counterparty qualifies for certain exemptions in respect of the margin requirements or the phase in period:

- Where these exemptions depend on the status of the counterparty as financial counterparty (FC), non-financial counterparty exceeding the clearing threshold (NFC+), non-financial counterparty not exceeding the clearing threshold (NFC-) or equivalent third-country counterparty (respectively as counterparty subject to the clearing obligation or not), the relevant information is already available: The status of counterparties was already determined for the purpose of implementing the risk mitigation requirements under Commission Delegated Regulation 149/2013. These classifications can now be directly applied in order to establish whether a counterparty qualifies for the exemption addressed in Art. 2 GEN (4) (b) and (c). A further contractual agreement to this end is therefore not necessary.

[4] This assessment is based on the experience with the introduction of the EMIR-Addendum to German Master Agreement, see above, response to question 1, item 2.

- In all other cases, where the eligibility for an exemption is based on factors other than the clearing status of the counterparty (e.g. transaction volume or average notional amounts as in the case of the initial margin exemption under Art. 1 FP (3) (e)), compliance with the requirements can be achieved as effectively and in a less cumbersome manner by way of declarations/representations obtained from counterparties (and an obligation to inform counterparties of any changes).

To the extent a further objective of such opt-out approach is to ensure that counterparties (i) have the option to agree on margining or stricter terms even if exceptions are available, and (ii) actively have to decide if/how to use margining as a risk mitigation tool, this could again be achieved just as effectively but with significantly less burdens for all market participants by requiring the counterparties which are the main addressees of the obligations (that is, the counterparties subject to the clearing obligation) to provide information on the options available (both relation to the manner and terms of margining as well as the timeline of the introduction of margining). Such duty to inform could be modelled on Art. 39 (7) EMIR.

In order to simplify the operational challenges for all market participants but in particular for smaller and medium sized counterparties, the exemptions should therefore be designed as directly applicable exemptions (not requiring an opt-out) and counterparties should be entitled to request the relevant declarations/representations from their counterparties on their status (or information on the relevant factors which permit the determination of the status). The relevant counterparties should in turn be under a duty to provide the relevant information upon such request.

See also our response to question 1, item 1.

5. Art. 2 GEN (1) to (4) – personal scope: third country entities/non-undertakings

- Third-country counterparties:

  There are currently no provisions defining to what extent third country entities which are equivalent to FC and NFC+ are to be affected by the margin requirements. This currently only follows indirectly from the individual provisions of the draft RTS. An express provision addressing this issue in more detail would help to avoid uncertainties and confusion over the personal scope of the obligations in case of transactions involving third country counterparties. As to the general concerns over the extraterritorial reach of the margin requirements, and the need to at least exclude non-equivalent third country counterparties from any margin requirements, see above response to Question 1 and comments on Art. 1 GEN.

- Non-undertakings:

  The provisions permitting the possibility not to exchange variation and initial margins with counterparties which are not subject to the clearing obligation do currently only expressly address non-financial counterparties (within the meaning of Art. 2 (9) EMIR) below the clearing threshold and the counterparties addressed in Art. 1 (4) and (5) EMIR. There is, however, no provision addressing counterparties which are neither financial nor non-financial counterparties because they do not qualify as undertakings. Examples for such non-undertakings are private individuals or

municipalities, where these do not carry out economic activities in the market (as addressed in the EMIR FAQ of the Commission under item II.14 and 15). Since these non-undertakings do not fall within the ambit of EMIR, they are of course also not subject to the margining obligations under the draft RTS. However, to avoid any uncertainty, this should be clarified. One solution may be to refer in the relevant provisions setting out the exemption to "counterparties which are not subject to the clearing obligation" as this would capture any type of counterparty other than financial and non-financial counterparties exceeding the clearing threshold (assuming that the definition of counterparties is adjusted, see above).

6. Art. 2 GEN (1) – FX-swaps and forwards (VM)

With regard to the exchange of variation margins for FX-swaps and FX-forwards we would propose to generally exempt such derivatives with a settlement period below three months.

Such exemption is merited as transaction with a settlement period of no more than three months do not constitute any significant risks and any risks associated with settlement are adequately mitigated by the payment-versus-payment settlement system (CLS).

Such an exemption would also align the European framework more closely with that of other regulatory frameworks, in particular the USA and Asian jurisdictions, and thus help to avoid the significant competitive disadvantages for European counterparties in FX transactions, which – by their nature – very often are cross-jurisdictional and thus particularly affected by regulatory differences.

7. Art. 2 GEN (3) – application of threshold at group level

Art. 2 GEN (3) sets out a threshold based exemption regarding the exchange of initial margin (which – as currently drafted would – only be available to FC, but not to NFC+). The threshold is to be applied on a group level without exception.

However, in some cases groups may have members which may also be systemically relevant by themselves and are also treated as individual market participants for risk management purposes and certain regulatory purposes, in particular for the purposes of the resolution planning (having to prepare their own recovery and resolution plan). Such group members are likely to have differing internal models or other members of the group may apply the standard method. In these specific circumstances a uniform calculation and monitoring of the exposure on a daily basis will be extremely challenging or even impossible. It should therefore be considered to permit the application of the threshold on a legal entity basis in respect of such group members which are treated as independent entities for risk management purposes, in particular resolution planning purposes.

The draft provision does currently not specify the consequences of a breach of such threshold by a counterparty. We assume that in this case, only the relevant counterparty belonging to the group which breached the threshold would be subject to the obligation to subsequently post initial margin, respectively, the other party would only be obligated to collect initial margin but would itself not be required to post initial margin (one-sided obligation).

Furthermore, the other counterparty will generally not be able to monitor the threshold of its counterparties. It thus must be able to rely on declarations/representations of its counterparties to this effect. In order to further underline that the primary obligation to monitor the threshold necessarily lies with the counterparties belonging to the relevant group and not the other counterparty (which is reflected in Art. 3 GEN (5) (c)), it could be considered to set out a corresponding duty to inform the other party of any relevant changes.

In addition, it should be clarified that only non-cleared derivatives which are subject to margin requirements are to be included in the calculation of the threshold (thus excluding those transactions which are exempted, such as intragroup and FX transactions).

8. Art. 2 GEN (3) – agreement to hold capital against exposure

In accordance with Art. 2 GEN (3) last sentence, the agreement to opt-out from an exchange of initial margin would have to include the assumption or imposition of an obligation to hold capital against the exposure. Such obligation cannot be monitored by the other counterparty and breaches against would be of a purely regulatory nature and should not in any way affect the contractual relationship of the counterparties. We therefore strongly believe that the question of such capital requirements should not be a matter of the contractual relationship between the parties but rather should exclusively be addressed as a regulatory obligation on the counterparties. In this context it would also need to be recognised that all counterparties subject to the CRR are already subject to capital requirements and that the draft RTS do not give rise to additional capital requirements.

We therefore suggest deleting the relevant provision.

9. Art. 2 GEN (4) (a) – minimum transfer amount

The minimum transfer amount (MTA) addressed in Art. 2 Gen (3) and (4) (a) is a key instrument to limit the operational complexities in connection with margin requirements. However, the manner in which the MTA is currently designed would diminish its function:

The provision on the minimum transfer amount (MTA) in Art. 2 GEN (4) (a), together with Art. 2 GEN (6) requires that the amount is calculated as the total amount of all initial margins and variation margins to be posted, that is without differentiating between variation and initial margin. This concept of the MTA differs significantly from the understanding of the MTA and the function it performs in current practice.

The operational implementation of this new MTA concept would be very challenging since it would require the implementation of new allocation and monitoring systems permitting the calculation of the MTA across initial and variation margin.

These challenges are exacerbated by the requirement to exchange the total collateral amount owed once the MTA-threshold is exceeded, regardless of the amounts involved and without any operational de minimis transfer amount. In effect this means that, as of this point, the MTA effectively turns into

a zero threshold. As a consequence, the number of margin calls between counterparties will increase significantly.

Electronic processing can reduce these challenges only to a limited degree and is, in any event, not an option in relation to those counterparties, which have no access to such electronic processing (in particular smaller and medium sized counterparties where the introduction of electronic processing systems is commercially not justified). In this context, it should be taken into account that the risk exposure of credit institutions would be limited, and in any way, be addressed by existing capital requirements under the CRR.

The above described negative effects could be minimised by introducing

- two separate total MTAs, one for variation margins and another for initial margins.
- an additional operational de minimis threshold (to be agreed between the parties but not exceeding a maximum amount of 50,000 €) which would apply once the MTA-threshold of 500,000 € has been exceeded for the first time, thereby triggering the first exchange of collateral.

The MTA and this additional de minims threshold would, in practice, operate as follows:

Where the amount of collateral calculated exceeds the MTA of 500,000 € for the first time, the full amount of collateral as calculated would need to be exchanged. If, subsequently, the absolute difference of already exchanged collateral and the new total collateral amount does not exceed the de-minimis threshold (that is, an additional collateral amount of less than 50,000 € in the event the parties agreed on a de minimis threshold of 50,000 €), no additional collateral would need to be exchanged. If, however, the new total collateral amount calculated should exceed the previous total collateral amount by the agreed de minimis amount (or more), the new total amount of collateral as calculated would need to be posted.

In any event, the exact function and understanding of the MTA (and any de-minimis threshold to be introduced) will need to be defined as clearly as possible to avoid any misconception and misunderstandings between counterparties.

10. Art. 2 GEN (4) (d) – indirect clearing

Art. 2 GEN (4) (d) provides for an exemption for indirectly cleared transactions. We believe that such an exemption is redundant as indirectly cleared transactions have to be considered as cleared transactions and thus fall outside the scope of Art. 11 EMIR.

We therefore suggest deleting lit. (d).

11. Art. 2 GEN - UCITS

In view of the fact that UCITS are already subject to very strict requirements regarding OTC derivatives under the Directive 2009/65/EC, in particular under Art. 51, which limit their counterparty risks effectively there is no need for a requirement to exchange initial margins in transactions involving

UCITS. Consequently, at least where the requirements set out in Art. 51 (3) of Directive 2009/65/EC are met, counterparties should be permitted not to collect and/or post initial margin.

12. Art. 3 GEN – covered bonds

See response to question 3.

13. Art. 1 VM (1) – daily collection of VM

Art. 1 VM (1) sets out an obligation to collect variation margin on a daily basis. This could be understood to mean that the collateral used for this purposes is actually received by or booked to the accounts of the receiving party within the same day. This will not always be possible because variation margin payments/adjustments can only be effected within the regular settlement periods (in many cases not on the same day but at the earliest on the following day). In addition, the counterparty which is calculated to receive the variation margin payment can of course only demand payment but not ensure that it actually receives the payment in time.

Consequently, we believe that the time limit for adjustments of the variation margin should be extended at least so that is aligned with the regular settlement cycles. In addition, it would be more appropriate to change the requirement into an obligation on the collecting party to make the relevant demand within the relevant timeframe.

14. Art. 1 EIM (2) – agreement on characteristics of used model

Model characteristics and data used for calibration are likely to change over time, for example due to back testing results requiring adjustments. Therefore, it should be clear, that the description of the method and characteristics in these written agreements are generic, without having to disclose a lot of details. Otherwise, when making use of an internal initial margin model, each model or calibration change would trigger the requirement for a new agreement with all counterparties which would be extremely burdensome and operationally challenging.

15. Art. 1 EIM (4) – recalculation requirement

Art. 1 EIM (4) includes an obligation to recalculate the initial margin amount on the occurrence of certain events and at least every ten days. The events listed triggering a recalculation is, however, to extensive to be practical. In particular, the event set out under lit. (c) – payments triggered under the contract could result in constant recalculations despite the fact that such payments do not necessarily have an impact on the risks the initial margin is supposed to mitigate and thus would unnecessarily trigger recalculations. In any event, constant recalculations of initial margins need to be avoided.

We therefore suggest limiting the obligation to a requirement to make recalculations within a certain minimum timeframe (as proposed in lit. (f)).

16. Art. 1 to 6 MRM

In view of the considerable challenges posed by IM models to be agreed and applied by both parties we believe that the requirements set out in Art. 1 to 6 MRM are too rigid and detailed. In order to grant the parties the necessary flexibility it should be considered to replace the requirements by more general minimum criteria. This would also greatly facilitate the development of uniform standard models.

17. Art. 1 MRM (1) and (4) – Agreement

The key challenge in view of agreeing on a model is of course that in many cases both parties will have regulatory approved models for the purposes of the CRR which can differ to a considerable degree. In such circumstance the counterparties will not be able to adopt the model of the other party (at least not without changing their exiting model and subject to approval by the relevant regulatory authority).

Art. 1 MRM (4) would require counterparties to switch to the standardised method where the initial margin model no longer complies with the requirements. This obligation may conflict with the obligations under the CRR in respect of the IRB.

Such a forced change from an internal model to the Standardised Method may also be very challenging for the other counterparty: The issue of whether the Standardised Method or an internal model applies will be a decisive factor in the decision to enter on to a transaction with a certain counterparty. A sudden change from internal model bases calculations to the standardised method during the lifetime of transactions would have direct impact on the other counterparty and may invalidate the original economic basis for the transaction.

We therefore propose to introduce at least a grace period allowing counterparties to adjust to the change or agree on another model. In addition, counterparties would need to be informed of such change.

18. Art. 3 MRM – recalibration: 25 % stressed data/recalibration every 6 months

Art. 3 MRM (2) and (4) require that 25 % of the data has to be representative of a period of financial stress. Depending on the data available and the specifics of the model such rigid requirement to include such a significant portion of stressed data may result in misrepresentative data. In addition, the corresponding requirements under CRR do not contain similar rigid or specific obligation regarding stressed data. We would therefore suggest reducing this minimum.

Art. 3 MRM (7) requires a recalibration at least every 6 months. This period is very short in would be operationally challenging to implement. A period of one year would appear to be more appropriate.

19. Art. 4 MRM

According to Art. 4 MRM (1) initial margin models shall assign a derivative contract to an underlying class based on its primary risk factor, defined in terms of sensitivity of the value of the contract to the market risk drivers. From our point of view, it should be sufficient to perform the assignment by primary risk factor based on qualitative substantiation without having to compute sensitivities for each derivative contract.

Furthermore, from an economic perspective it is not justified to only allow netting within asset classes (Art. 4 MRM (4), (5) and (6)) when a master agreement exists across all these asset classes.

20. Art. 5 MRM

A back testing frequency of at least every three months (Art. 5 MRM (i)) is too demanding as it is not possible to build up a sufficient data history in this timeframe. In addition, this frequency does not match the required recalibration frequency. We therefore believe that the time frame for back testing should be aligned with the recalibration frequency (see our comments above on the need to expand this period to one year) or at least expanded to 6 months .

21. Art. 6 MRM (1) – initial margin models

The Art. 6 MRM (1) it is not clear, how these requirements can be met, if one counterparty agrees to use the other counterparty's initial margin model or a third party developed model (or a future industry developed uniform internal model): In these cases the counterparty has limited ability assess the model in the required manner. Moreover, it would not be able to implement any adjustments by itself.

22. Art. 6 MRM (2) requirement to annually verify the enforceability of netting agreements – Art. 6 MRM (2)

Since it is current practice to verify the legal effectiveness and enforceability of netting agreements on the basis of legal opinions, the relevant provision can be understood to require legal opinions on netting agreements, which would then have to be updated on an annual basis. Such opinions are currently obtained by industry associations, in relation to the master agreement documentation they developed in view of the requirements under the CRR. These opinions are usually updated on a regular, but not necessarily always on an annual basis: An update of opinion may take longer than planned because certain legal questions which have arisen require a more thorough review or the impact of recent or upcoming developments have to be taken into account or need to be analysed in more detail. In other cases, it is clear that there have not been any material developments meriting an update. This may, for example, follow from other legal opinions obtained for similar agreements for the relevant jurisdiction. A too rigid/formal legal review requirement could be counterproductive as it would force counterparties to be less thorough in their legal analysis simply in the interest of conforming with the existing time limits.

Moreover, counterparties will have an interest in being able to rely on the monitoring and legal review procedures implemented in respect of the largely identical regulatory requirements (in particular CRR, which do not provide for similarly rigid time limits) for the purposes of EMIR, including the legal opinions obtained for CRR-purposes. As regards legal opinions, they should also be able to coordinate the various types of opinions they obtain since there may be interrelations. Such coordination requires a certain degree of flexibility regarding the timing of any updates.

We would therefore suggest modelling the requirements more closely on the corresponding obligations in the CRR. If, however, a minimum timeframe is seen to be necessity, this time frame should at least be expanded to grant the necessary degree of flexibility.

23. Art. 2 LEC (1) (d) – collateral management/access to sale/repurchase agreement market

The purpose of the requirements set out under Art. 2 LEC (1) (d) is to ensure that counterparties have procedures in place which enable them to liquidate collateral received in the form of securities in a timely manner. However, it will never be possible to ensure in advance that collateral can be liquidated with certainty upon an event of default. An access to the relevant market for securities is of course one relevant factor but there are many others which are of equal relevance.

It should therefore be considered to delete this – very specific – requirement or replace it by a more general requirement to have procedures in place to enable liquidation of collateral.

24. Art. 2 LEC (1) (e) – cash accounts

Art. 2 LEC (1) (3) appears to require the establishment of cash accounts for certain currencies with another party than the collateral provider. This would be exceptionally burdensome and the added complexity operationally very challenging as it would require the establishment of large numbers of accounts which would then have to be monitored. However, the benefits of such accounts would be very limited.

We therefore suggest deleting the relevant requirement.

25. Art. 6 LEC – wrong way risk

To avoid uncertainties it should be considered to set out criteria to identify cases constituting a wrong-way risk.

26. Art. 7 LEC – concentration limits

The concentration limits introduced by Art. 7 LEC would require fundamental changes to existing collateral management systems and procedures as they differ significantly from current practice. This is further exacerbated by the fact that the proposed requirements differ from and conflict with similar requirements under the CRR. Thus, unless the requirements are not aligned, credit institutions would

have to operate and coordinate very different processes and systems to implement and monitor concentration limits.

The operational implementation of these requirements will therefore be extremely challenging, requiring a very extensive adjustment of existing systems or introduction of completely new systems which may have to be operated in parallel to procedures and systems implemented to comply with CRR requirements.

In particular the requirement to apply the concentration limits in relation to each individual counterparty increases the complexity and thus the operational challenges unnecessarily. Such counterparty-based concentration limits will also be challenging for the relevant counterparties, in particular small and medium, sized counterparties:

The purpose of concentration limits is served just as effectively but with significantly less complexity by permitting the collateralised counterparty to apply these in relation to all counterparties, that is in relation to its total exposure. This would not only reduce the operational complexity for the collateralised party. It would also prevent that collateralising counterparties are effectively denied access to the market simply because they are unable to diversify the collateral they have at their disposal.

Moreover, in some cases the concentration limits as currently set may actually be counterproductive as they might force counterparties to replace collateral of a very high grade by collateral of a lesser grade simply because the concentration limits have been breached. This may apply in particular to debt securities issued by sovereigns.

The above described adverse effects could be best avoided or at least alleviated by replacing the current proposed provision by a requirement to apply the concentration limits under the CRR correspondingly (if these are not already directly applicable as in the case of credit institutions).

Alternatively, at least the following should be considered:

- Amendment to the effect that the concentration limits can be applied by the collateralised party in relation to all counterparties (and not in relation to each individual counterparty).
- Introduction of a de minimis threshold (proposal: 50 million EUR).
- A significantly higher concentration limit for debt securities issued by sovereigns.

27. Art. 1 OPE – operational procedures

Under Art. 1 OPE (1) (d) counterparties are obligated to enter into contractual agreements governing operational procedures. As the definition of counterparties only captures FC and NFC+, this obligation does not arise in relation to counterparties not qualifying as FC or NFC+.

Notwithstanding this limitation of the scope, we believe that the requirements as currently proposed are too detailed and rigid and should be deleted.

28. Art. 1 SEG (1) to (2) – segregation

The term segregation is not defined and is not a legal term (at least not in all jurisdictions). It, however, follows from Art. 1 SEG (4) (a) that it is intended to mean a legal arrangement which provides the party having delivered the assets as collateral (securing party) to be segregated with a certain level of legal protection in the event of an insolvency of the other party (secured party). There are however, no further indications on the type and scope of legal protection. Yet, in view of the purpose of the segregation requirement and taking into account the similar obligations in connection with transactions cleared by a CCP, segregation arrangements would have to ensure that the assets in question do not become part of assets of the insolvent secured party (or the insolvency estate), respectively, can be returned to the securing party despite the insolvency (unless, of course, there also having been an event of default on the part of the securing party).

Against this background, segregation arrangements will generally be based on established legal structures which in the relevant jurisdiction ensure that the assets used as collateral are clearly and legally separated from the other assets of the secured party. Such a clear legal separation will, however, necessarily have an impact on the ease at which the secured party can access the collateral in the case of a default of the securing party. Thus, segregation will always impede to some extent the immediacy of the access of the secured party (both in terms of timing and procedural steps to be taken) to these assets. No jurisdiction will be able to combine direct and completely unhindered access to collateral of the securing party with a requisite level of legal separation to avert the negative consequences of an insolvency of the secured party. See also comments below on Art. 1 SEG (4) (a).

29. Art. 1 SEG (3) – segregation of cash

Whether and to what extent cash collateral can be segregated in the same manner as securities is questionable: Cash credited to an account is always comingled with other cash positions (and becomes part of the assets of the bank where the account is held): the person providing the cash does not hold title over, nor is there a claim for return of specific monies. Any legal protection of cash credited to accounts will consequently not be comparable to securities pledged. At best, the person having posted cash collateral has a preferential claim for repayment.

30. Art. 1 SEG (2) – option to provide individual segregation

The provision currently only refers to "collateral" without specifying that it only addresses collateral posted as initial margin (in contrast to para. 1). For the sake of consistency, and in order to avoid any confusion, it could be considered to add the words "collected as initial margin" (although this follows from general context and the intent of the provision).

31. Art. 1 SEG (4) (a) – immediate availability of initial margin

Art. 1 SEG (4) (a) sets out a requirement that collateral posted as initial margin is to be immediately available to the secured party upon an event of default.

There are, however, no provisions addressing the question what is to be understood as qualifying as "immediate" in this context. As in any situation where collateral is realised, this can never be effected without complying with certain legal or procedural requirements resulting in a certain delay (this can only be avoided where collateral is provided by way of full title transfer). Consequently, "immediate" has to be understood in this context as to mean that there are no exceptional or extraordinary restrictions in place. Any other understanding would effectively prevent any form of legally safe segregation of collateral (such as by way of pledge etc.) where the collateral provider retains title and grants a security interest, or require reliance on legal structures which are significantly less safe.

To avoid any misconception in this respect it should be considered to avoid the words "immediately available" in this context. Instead the provision could be modelled on Art. 194 (4) CRR which addresses an identical issue, however, relies on the concept of liquidation in a "timely manner".

See also the general comments on Art. 1 SEG (1) and (2) above.

32. Art. 1 SEG (5) – legal opinions

Art. 1 SEG (5) of the draft RTS sets out a requirement to obtain a "satisfactory legal opinion(s)". In accordance with wording of the current proposal, such opinions would have to obtained "at the inception of the transaction" and would have to be updated at least annually. This requirement, in particular in the manner it is currently drafted, would result in very considerable challenges and burdens – even taking into account the interpretations provided by the EBA in the Single Rulebook Q & A process on legal opinions in view of Art. 194 CRR – Question ID 2013_23 (which we assume, apply correspondingly to the opinion requirement under the draft RTS). If these interpretations provided in respect of Art. 194 CRR would not apply correspondingly, the challenges posed by this requirement would be even more demanding, in particular for smaller market participants and market participants which have, up to now, no experience with opinion requirements[5].

As currently drafted, the obligation is also considerably more rigid and formalistic than similar obligations concerning the need to assess and monitor legal risks under the CRR[6], or, in fact the corresponding obligations regarding segregation in the case of CCP clearing under Art. 39 EMIR (which does not contain any comparable obligation to obtain legal opinions).

The relevant opinion requirements under the CRR differ significantly from the one proposed in the draft RTS. In particular, in contrast to the opinion requirement foreseen in the present draft RTS, opinion requirements under the CRR

- constitute one element within or part of a general requirement to implement measures/procedures to monitor/ensure the validity and enforceability of contractual arrangements used by an institution (in this context the opinion serves as one instrument to support these measures and procedures and is not the end in itself), and

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[5] We further assume that the term "legal opinion" is to be interpreted for the purposes of European law in such a way that it is compatible with legal concepts of continental law jurisdictions and common law (so that legal opinions for the purposes of European regulatory law are not subject to the very strict formal requirements and traditions existing in relation to legal opinions as understood under English/Common Law).

[6] Art. 194 (1) CRR and Art. 305 (2) CRR even address very similar legal issues; in the case of Art. 194 (1) CRR, the underlying legal issue may actually be identical to the one to be addressed in Art. 1 SEG (5).

- do not set out formal/rigid requirements regarding the point in time at which an opinion is obtained and when it is to be reviewed updated.

This ensures that the institutions subject to the opinion requirements have some degree of flexibility and, in particular, have various options how to address the requirements. For example, instead of updating opinions at certain rigid intervals, it would generally be possible to have a procedure in place (e. g. based on monitoring of legal developments) which ensures that existing opinions are reviewed where there is an indication that there have been relevant/material changes in the law (indication based review). In addition, the relevant opinion requirements in the CRR implicitly recognise that the usefulness of legal opinions as an instrument to mitigate legal risks faces natural constraints: For example, except in very exceptional cases, opinions can only cover standardised agreements and can only address clearly circumscribed legal questions: they cannot cover specifics and all legal issues related to each individual transaction (abstract/general opinions and use of assumptions).

In contrast to Art. 39 EMIR, and even in comparison with the opinion requirements under the CRR, the opinion requirement under Art. 1 SEG (5) of the draft RTS is unnecessarily formalistic and rigid.

The provision in its current form also sets out obligations which would result in very considerable (if not to some extent practically insurmountable) operational challenges and burdens for market participants and should therefore be reconsidered:

- No need for a legal opinion requirement:

  The central objective of Art. 1 SEG (5) should be the implementation of adequate measures/ procedures safeguarding the legal effectiveness of a segregation arrangement to be used for transactions by counterparties using them. This objective can be achieved with equal effect but less formality and less operational burdens by imposing an obligation to implement measures/procedures to this effect – without necessarily and always requiring a formal legal opinion: Counterparties will in many cases have the necessary experience to assess whether certain legal structures for the provision of collateral conform to existing requirements and are sufficiently effective (in particular, since other obligations under the CRR already require measures to address similar legal risks associated with collateralisation arrangements). In addition, segregation models will in most jurisdictions be based on well-know, long established and widely used legal structures (for example pledges). The legal framework for these structures has very rarely been subject to changes adversely affecting their effectiveness and legal risks in connection with these structures, if any, usually materialise in connection with the specifics of the individual case and matters which are outside the scope of a legal opinions. To require legal opinions on such structures would therefore primarily be formalism and not materially improve the overall legal risk management. The key obligation should therefore be the implementation of adequate procedure to assess and control effectiveness of collateral arrangements used and procedures, which ensure that only such arrangements are used. An obligation to this effect would be in line with similar obligations under the CRR (and thus allow an integration of this specific new obligation within the existing risk management systems) and avoid duplications. Moreover, such an approach would also underline the importance and consistency of the overall legal risk management while also countering a formalistic, tick-box approach to legal risk management (a legal opinion should not become an end in itself).

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- Necessary changes in order avoid the most burdensome and unreasonable consequences:

  If, however, formal legal opinions (however, still assuming the interpretations in the EBA response in the Rulebook Q & A process – Question ID 2013_23 continue to apply) are nevertheless – and in contrast to the approach taken under EMIR in respect of the largely similar issue of segregation in connection with CCP-clearing – seen to be necessary element of the general obligation to have procedures in place which ensure assessment of the legal effectiveness of segregation arrangements used, the provision should at least be modelled more closely on existing similar opinion requirements under the CRR.

  At the very least, the following issues would have to be addressed to avoid unnecessary and also unreasonable effects:

  - The provision as currently drafted can be understood to require a new legal opinion for each transaction. This would be next to impossible to ensure and is presumably not intended: It should therefore at least be clarified that counterparties are required to make a legal assessment regarding the effectiveness of a segregation arrangement prior to entering into such arrangement based on the most recent legal opinion (allowing for the possibility to rely on existing opinions in respect of standard arrangements).
  - The rigid timeframe for updates of legal opinions should be replaced by more flexible approach: For example, counterparties could instead be required to review whether existing legal opinions can still be relied upon and/or whether there have been any material changes in the law indicating a need to update the opinion on a regular basis without setting a strict timeframe (thus allowing for an indication based update approach instead of a rigid update cycle and more flexibility regarding timing of the reviews to be made).

  - If, however, in contrast to all existing legal opinion requirements under the CRR, a rigid timeframe for updates is considered to be necessary, the relevant timeframe should at least be expanded in order to permit counterparties to coordinate timing of the opinions on segregation arrangements and the manner in which they are obtained with other existing opinion requirements (it is likely that opinions on segregation arrangements interact with or will be based on opinions obtained for the purposes of the CRR – in order to allow a coordinate the various opinions). In addition, a greater degree of flexibility regarding timing would also avoid the situation that updates become due although it is already foreseeable that legal changes are upcoming in a certain jurisdiction. With such greater flexibility, the relevant update could be postponed until the relevant change in the law can be fully assessed (avoiding a further update shortly after the update prescribed by the rigid timeframe). An expansion of the timeframe to up to three years would already alleviate many of the described operational problems. In this context it should again be taken into account that the legal structures and areas of the law which would be analysed in the legal opinions on segregation arrangements are well-known, well established and are rarely subject to fundamental/material changes affecting their effectiveness and are usually standard structures used for collateralisation in general.

  - In addition, it should also be clarified that the relevant legal opinions need only address the legal question of whether the arrangement reviewed safeguards that the assets provided as initial margin are returned to the securing party in the event the secured party becomes insol-

vent and there is no security event under the relevant security arrangement. Questions of non-legal nature, in particular those which require a risk-assessment (such as whether the protection is "sufficient" or whether access to the assets posted as initial is sufficiently "immediate" in the event of a default of the securing party) cannot be answered by a legal opinion.

- Consequences of non-effectiveness of segregation arrangements under the laws of certain jurisdiction:

  The draft RTS do currently not address the question of the consequences in the event that it is not legally possible to establish segregation arrangements meeting the standards of the draft RTS under the laws of a certain jurisdiction (or where changes in the law render it ineffective).

  The vast majority of jurisdictions will of course have a legal framework for collateralisation that will permit effective segregation arrangements. However, in the exceptional cases where this may not be the case, the current draft RTS fail to provide any guidance on the consequences. In particular, as currently drafted, the obligation to collect initial margin would still continue to exist. This would be difficult to accept for the party posting the collateral.

  One possible manner to address this issue would be to provide for an exception from the obligation to collect initial margin in these circumstances (where the relevant party is able to demonstrate that the legal situation in the relevant jurisdictions does not support legally effective segregation arrangements).

See also our response to question 1 item 2 (proposal to revise the provision in order to prevent unnecessary burdensome obligations).

33. Art. 1 REU (1) – re-use

See our response to question 6.

34. Art. 3 IGT – intragroup transaction

Art. 3 IGT intends to set out criteria to define more clearly what would have to be considered as a practical or legal impediment to the prompt transfer of own funds and repayment of liabilities between the counterparties for the purposes of Art. 11 (5) to (10) EMIR. The transfers of funds and repayment of liabilities between legally separate entities is – under the laws of any jurisdiction – always subject to some procedural requirements or limitations or other restrictions. The existence of such restrictions as such can therefore not be an indication for an impediment within the meaning of Art. 11 (5) to (10) EMIR.

The criteria in questions thus would need to be indicators which would enable counterparties and the relevant regulators authorities to distinguish as clearly as possible and with sufficient legal certainty between normal or standard and thus acceptable restrictions and restrictions which are exceptional and thus not acceptable. This is of course very difficult to achieve, in particular in view of the fact

that the relevant indicators have to be applicable in various jurisdictions. We therefore understand that the provision chooses to address this difficulty by setting out a non-exhaustive list of examples.

However, the examples chosen are of a too general nature to serve their purpose. In particular we are concerned that these examples refer to legal or regulatory procedures and concepts which are normal features of any legal system. They thus fail to define any standards or conditions which would allow a determination, what quality or degree of interference by regulatory rules or insolvency/ resolution/similar regimes would have to be qualified as an unacceptable impediment for the purposes of Art. 3 IGT. This holds particularly true in the case of the examples set out under lit (a) ("regulatory restrictions") and lit. (b) ("insolvency, resolution or similar regimes"): Many regulatory regimes (including the EU with the recently adopted bank recovery and resolution directive – BRRD[7]) and all insolvency regimes, by their nature, contain provisions which can affect the ability to effect payments or transfer of assets by the regulated or insolvent party or the party under resolution.

Thus, unless Art. 3 IGT (1) (b) is intended to mean that such impediment is only deemed to exist upon/with the initiation of such proceedings but not before, the relevant requirement would effectively invalidate the effects of the exemption for intragroup transactions. This can, of course, not be the intention. The intragroup exemption is essential to minimise the adverse effects of and challenges posed by the application of mandatory margining to transactions between members of the same group. If it would factually not possible to rely on this exemption, the negative consequences for groups would be very considerable.

In any event, given that the relevant requirement in Art. 10 (5) to (10) EMIR corresponds – word-by-word – to the requirement set out in Art. 113 (6)(e) CRR, and that identical regulatory requirements should be interpreted and applied identically, it should be deemed that the requirements under Art. 10 (5) to (10) EMIR have been met in cases (and to the extent) where counterparties have obtained the relevant approval for the purposes of Art. 113 (6) or (7) CRR.

See also our response to question 1, item 3 above.

35. Art. 1 FP – requirement to opt-out of immediate margining as of 1 December 2015

The concerns raised in view of the approach to require formal opt-out agreements as foreseen by Art. 2 GEN (1) to (4) apply correspondingly to the requirement set out in Art. 1 FP of the draft RTS which also demand that counterparties would have to contractually agree on relying on any of the exceptions permitting a postponement of the margining requirements:

Most counterparties affected by the new margining regime will have to rely on these exceptions permitting gradual implementation and will thus have to enter into the relevant agreements. A simpler, less burdensome and equally effective approach would again be the requirement to inform the other counterparty of the options available and to demand confirmations/representations to the effect that the counterparties qualify for the relevant exemptions, again paired with a duty to provide such in-

[7] Directive 2014/59/EU of the European Parliament and of the Council of 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.

formation. As regards the calculation of the threshold, the comments on Art. 2 GEN (3) above (exclusion on exempted transactions) apply correspondingly.

See also our response to question 1, item 1.

In addition, in view of the fact that Art. 1 FP (3) (e) effectively sets out an exemption (exemption from initial margin collection where one of the counterparties belongs to group with an average of notional amount of non-cleared OTC-derivatives is below 8 billion €) which remains applicable after the phase-in period, it could be considered to place this provision in the general provisions together with other exemptions.

36. Annex II – Standard haircuts to the market value of collateral

The 8 % haircut in case of currency mismatches proposed under item 6 of the Annex should be reconsidered: It would in many instances be difficult to determine the additional amount corresponding to that haircut. We furthermore believe that such haircut could potentially entail severe disadvantages to European credit institutions in relation to their international, in particular US competitors. As most derivative contracts with US institutions are settled in USD, European credit institutions would be faced with having to post a haircut for each collateral asset denominated in EUR.

We accordingly propose for the haircut for currency mismatches to be either removed or restricted to illiquid currencies.