Comments

of the Association of German Banks on the Consultation Paper “Draft Technical Standards for the regulation on OTC Derivatives, CCPs and Trade Repositories”

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A. Introductory Comments

The explanations set out in the consultation paper are commented upon in connection with the relevant provisions in the draft provisions.

Any reference to the regulation is to be understood as a reference to the Regulation (EU) No. 648/2012 of the European Parliament and of the Council of July 4 2012 on OTC derivatives, central counterparties and trade repositories.

Any reference to a draft delegated regulation is to be understood as a reference to the relevant draft delegated regulation setting out the regulatory or implementing technical standards proposed in the consultation paper.

B. General Comments

- We note that every proposed delegated regulation has its own set of definitions although a number of these defined terms are used in more than one draft delegated regulation. This may cause uncertainties over the interpretation of such terms as it is unclear whether these have to be construed autonomously or whether the definition in a separate delegated regulation is also meant to apply to another. E.g. we wonder why “confirmation” is defined in annex V while not defined in annex II. The same applies to the six classes of derivatives (equity, credit…). We deem it very advantageous to consolidate these definitions into one set.

- In view of the international nature of the derivative markets close coordination between the regulatory authorities in respect of the future international regulatory framework, in particular the recognition of CCPs and trade repositories as well as the classification of counterparties as being subject to a clearing obligation, is of utmost importance. We understand that ESMA and its international counterparts are currently engaged in discussions with a view to ensuring coherence between the regulatory frameworks, including the issue of the recognition of equivalent regulatory provisions. In particular, the question of the recognition of a regulatory framework or parts thereof as equivalent will have far reaching practical implications. Market participants are therefore highly interested in obtaining information on the progress of these discussions. The issue is of such importance that it may merit a separate hearing or at least further communication.

C. Comments on and queries in respect of individual sections / provisions

I. Annex II – Commission delegated regulation regarding regulatory technical standards on OTC derivatives

1. Indirect Clearing Arrangements (Art. 1 to 4 ICA of the draft delegated regulation)

1.1 Art. 2 ICA para. (1)

To avoid uncertainties and in order to ensure an adequate regulatory framework for any client offering indirect clearing services, it should be considered to specify the regulated entities which are considered to be subject to appropriate regulation for the purposes of indirect clearing services. Presumably this will include credit institutions within the meaning of directive 2006/49/EC but not necessarily all other counterparties qualifying as financial counterparties under the regulation.

1.2 Art. 2 ICA para. (2)

Indirect clearing necessarily involves a number of parties on different levels, namely the CCP, clearing members of that CCP, clients of that clearing member and their clients (indirect clients) which do not always have direct contractual relations. Thus, the legal framework for indirect clearing will necessarily be based on a series of bilateral contractual arrangements between the different parties. Each of these arrangements can only govern the relation between the two contractual parties and cannot set out or appear to set out obligations on or extend rights to a third party.

This is currently not sufficiently reflected in Art. 2 ICA para. 2: Sentence 1 appears to imply that the client shall have the sole discretion in determining the contractual framework required to enable indirect clearing. Under sentence 2 the contract between the client and the indirect client governing the terms and conditions under which transactions are to be entered into the clearing system of a CCP via a clearing member would have to include a contractual term obligating that clearing member accepting the transactions to “honour any obligations” agreed between the client and indirect client in the event of a default of the client. This is at least misleading, as a contractual arrangement between the client and the indirect client cannot be binding upon the clearing member.

Furthermore, contractual terms concerning the consequences of a default of one of the parties to that contract may not be enforceable or effective under applicable insolvency law in the event of such default. The contractual agreement between the indirect client and client can therefore only contain provisions requiring the client to ensure that it enters or has entered into a contractual agreement with the relevant clearing member and that this arrangement between the client and

its clearing member addresses the consequences of a default of the client on the indirect client and the relevant transaction (or representations to this effect).

Whether and, if so, to what extent these contractual provisions and obligations agreed as between the indirect client and client on the one hand and the client and the clearing member on the other hand remain applicable or enforceable is ultimately a matter of the applicable insolvency law. The risk that these national insolvency laws override what has been contractually agreed between client and indirect client as well as between client and clearing member, can only be averted by further harmonisation of insolvency laws of the member states and the introduction of special provision protecting the position of the indirect client in this specific situation. This needs to be recognised when defining or interpreting any requirements to provide for protection of positions by purely contractual means.

The same issue arises in connection with the requirements to protect the client positions in the event of the default of a clearing member and is at least recognised in recital 64 of the regulation and repeated in recital 4 of the draft delegated regulation. However the language in the recitals is not sufficient to override existing insolvency laws.

1.3 Art. 3 ICA para. (1)

The meaning, intent and purpose of sentence 1 ("*shall not be subject to business practice by the CCP which act…*") is not clear, the sentence should therefore be deleted.

The comments regarding Art 2 ICA para (2) apply correspondingly to sentence 2: The indirect clearing arrangement cannot subject the CCP to any legal obligations as it is not a party to this agreement.

1.4 Art. 3 ICA para. (2) sentence 2

Sentence 2 concerns the obligations of and requirements to be met by CCPs and thus should be addressed in the draft regulatory technical standards on requirements for CCPs.

1.5 Art. 4 ICA para. (1)

Para. (1) appears to imply that any clearing member will be offering client clearing services and is also able to do so. This, however, is not be the case: Many clearing members will have valid reasons not to offer client clearing services, in particular considering the need to manage the additional risks arising from such indirect transactions.

The choice whether and, if so, to what extent and under what terms a clearing member is willing to provide clearing services which may involve indirect clearing, cannot be restricted in any way. Likewise, where a clearing member offers client clearing services, it must be able to set the

terms applying to client clearing in order to ensure that it will be able to manage the risks involved and that it complies with existing regulatory or legal requirements in respect of its clients.

We therefore suggest to amend Art. 4 ICA para. (1) as follows:

> "*In order to ensure transparency and effective competition, where a clearing member offers its clients indirect clearing services, it shall publicly disclose the terms and conditions applicable. This shall apply correspondingly to the relevant client offering indirect clearing services to their clients*".

1.6 Art. 4 ICA para. (2)

In order to ensure a consistent framework and level playing field it should be clarified that the provisions in the requirements and obligations to be met by clearing members in respect of their clients apply mutatis mutandis to clients offering indirect clearing services (the comments on Art. 4 ICA para. (3) regarding the limits of what can be achieved by contractual means would of course apply correspondingly).

1.7 Art. 4 ICA para (3)

Art. 4 ICA para. (3) refers to Art. 39 (9) of the regulation to define the requirements that need to be met with regard to the obligation to distinguish in accounts with the clearing member the assets held for indirect clients. One of these requirements becoming applicable by way of this reference is the obligation to ensure that the positions recorded in an account "are not exposed to losses". In practice, this will primarily concern collateral posted by the indirect client (specifically, the initial margin) and passed on to the CCP.

As long as there are no harmonised special provisions in the EU requiring national laws to protect client positions in view of the specific circumstances of client clearing against the consequences of an insolvency of the account holder, national insolvency laws will always override any contractual arrangement. It will therefore not be possible to ensure complete protection by contractual means alone.

With contractual means, a certain level of protection can be achieved by agreeing on the posting of collateral by way of a pledge (or other similar rights by which an asset becomes security interest of a third party without affecting legal title of the original owner). The use of pledging as a means to ensure greater protection in this specific context is, however, restricted in two ways:

For one, posting of collateral by way of pledge only makes sense in connection with pledged securities and not in connection with cash: Cash can never be distinguished in a legally effective

manner from other assets of the party receiving the cash. This is because the cash itself is necessarily always intermingled with the assets of the recipient. The party transferring the cash only retains a right to demand repayment from the recipient and only this right can be subject to a pledge. The use of custodian accounts would not materially improve the level of protection: Even if cash is deposited with a third party instead of the secured party, this would not extinguish a credit risk exposure. Rather, the risk exposure to the secured party would only be exchanged with that of the third party.

Two, collateral in the form pledged securities (instead of a full title transfer of securities or cash) can only serve as initial margin. Any collateral to be posted as variation margin needs to be posted by way of full title transfer securities or cash. This is because the collateral serving as variation margin is subject to constant adjustments in view of the constant changes of the market value. Such constant adjustments of the variation margin cannot be effected in the requisite timeframe and accuracy if the collateral is posted in the form of pledged securities.

Thus, Art. 39 (9) of the regulation and any similar requirements requiring a certain level of protection by way of contractual means need to be interpreted and applied in such a way that the above described factual limitations to any attempt to ensure full legal protection of the positions by contractual means is taken into account. Otherwise, the regulatory requirements defined by the regulation and the delegated regulations could be incompatible with the legal reality.

1.8 Art. 4 ICA para. 6

The requirement for the clearing member to take on positions and assets of indirect clients in the event of a default of the client raises a number of serious concerns: For one, such obligation exposes the clearing members to considerable risks and thus would give rise to contingent obligations. These obligations could in effect raise capital requirements (CRR). The obligation would not only make indirect clearing arrangements more expensive but it could also prove counterproductive as it would clearly disincentivise clearing members to offer client clearing services, which may include indirect clearing services. Two, such a requirement cannot result in the clearing member having to take on parties as clients it would not have accepted in view of the specific risk profile or under its client acceptance /KYC policy as its own client. Thus, the clearing member must have the right to reject clients.

2. Criteria for the Determination of Classes of OTC Derivative Contracts Subject to the Clearing Obligation (Art. 1 CRI of the draft delegated regulation)

As a general comment, we would like to point out the importance of defining classes of derivatives. While too much granularity gives rise to the potential problem of leaving certain derivatives out of a class unintended, a too broad understanding will almost certainly require

some derivatives to be CCP cleared even though these are not eligible. We realise that the task is as difficult as it is important. Our first estimate would be something in the range of 50-80 classes.

In this context we would like to point out the following regarding the understanding of the definition of derivatives in Art. 2 (5) of the regulation:

Under this definition, only financial instruments within the meaning of points (4) to (10) of Section C of Annex I to Directive 2004/39/EC as implemented by Articles 38 and 39 of Regulation (EC) No. 1287/2006 are to be understood as derivatives for the purposes of the regulation. Consequently, financial instruments within the meaning of meaning of point (1) of Section C of Annex I to Directive 2004/39/EC as implemented by Articles 38 and 39 of Regulation (EC) No. 1287/2006, that is financial instruments in the form of transferable securities, including structured notes/certificates, do not fall within the scope of the definition.

Likewise, for the purposes of the regulation, spot contracts and commercial foreign exchange forwards are not covered by the definition of derivatives.

2.1 Art. 1 CRI – FX

Recital 19 of the regulation would appear to grant the mandate to permit a clearly circumscribed exemption from the clearing obligation for FX transactions. In particular in view to aligning the EU regulatory framework with corresponding international regulatory frameworks, we would highly welcome the introduction of such an exemption.

2.2 Art. 1 CRI – covered bonds

Under recital 16 of the regulation, ESMA is asked to take into account the specific nature of OTC derivative contracts which are concluded with covered bond issuers or with cover pools for covered bonds in connection with the determination of the classes of derivative contracts to be subjected to the clearing obligation. Consequently, the regulation appears to grant ESMA the mandate to define criteria under which OTC derivative contracts concluded with covered bond issuers or with cover pools for covered bonds may be classified as not eligible for CCP clearing.

This specific issue is, however, not addressed in the present draft delegated regulation. Does this mean that ESMA intends to address this particular question in another context, i.e. when determining the individual classes of derivative contracts subject to the clearing obligation?

2.3 Art. 1 CRI para. 3 b.

We welcome the approach to take into consideration the potential development of market size and depth over time. There are a number of derivatives that start with high liquidity, but this

liquidity will deteriorate considerably over the lifetime of the contract (e.g. off the run index CDS). This fact is reflected in the Commission's proposal for MiFIR which allows that derivatives are deemed not eligible for the platform requirement if liquidity drains away.

3. Public register (Art. 1 PR of the draft delegated regulation)

Art. 1 PR para. 4

The practical implementation of the clearing obligation will be very challenging. Market participants thus need sufficient time to adjust their processes. The clearing obligation therefore needs to be phased in over a sufficient period of time. The draft proposal allows for such a phase-in, however, it appears to limit the possibility to structure such phase-in solely by categories of counterparties. This will almost certainly be too restrictive. The manner in which a phase-in is to occur should be defined on a case by case basis, allowing a significant degree of flexibility, including the flexibility to structure the phase-in on the basis of other categories than counterparties (i.e. sub-categories of products).

4. Liquidity Fragmentation (Art 1 LF of the draft delegated regulation)

Art. 1 LF para. (2)

We deem the definition in Art. 1 LF para. (2) to be a rather theoretical and very binary definition of liquidity fragmentation. ESMA should consider allowing a greater level of differentiation than "fragmented" or "not fragmented". A strict binary approach would impede the development of an effective and competitive market.

5. Non-Financial Counterparties (Art. 1 and 2 NFC of the draft delegated regulation)

Market participants are not in any position to determine by themselves whether a non-financial counterparty is subject to the clearing obligation or not. In the interest of legal certainty and also in order to prevent a distortion of competition, they need to be able to rely on publicly available, official information. One possible solution could be that the LEI reference data encompasses the information if the legal entity is required to clear. Another option may be a requirement to register all non-financial counterparties becoming subject to the clearing obligation in the public register maintained by ESMA.

Otherwise, counterparties would be forced to rely solely on the statements of their counterparties on their respective status (without any means to verify such statements by the other party).

6. Risk Mitigation techniques for bilateral transactions (Art. 1 to 8 RM)

6.1 Art. 1 RM para. (2) – timely confirmation

We concur with the time limits proposed and the general concept regarding the confirmation of transactions. However, this is based on the understanding that “confirmation” in this context interpreted in line with current practice as the (first) confirmation of the key terms by one of the counterparties and not any response to such confirmation from the other counterparty. We also assume that it is not expected that such confirmation covers all aspects of the transaction in minute detail but focusses on the key terms.

The present draft delegated regulation currently lacks a definition of the term “confirmation”. The term “confirmation” is, however, defined in Art. 2 (4) of the draft delegated regulation in Annex V. It is, however, not clear, whether the definition in that delegated regulation is to apply directly or indirectly to Art 1 RM. Moreover, the definition in Art. 2 (4) of the draft delegated regulation in Annex V is not compatible with the function and understanding of “confirmation” as currently applied in practice (in particular in the context covered by Art. 1 RM), see also comment to Annex V below. To avoid any uncertainty over the understanding of the term “confirmation”, we suggest that it is defined in line with the above described understanding and also uniformly for the purposes of all delegated regulations (ideally in single section on definitions applicable to all delegated regulations to avoid uncertainties, see general comments under item B above as well as in respect of Annex V Art. 2 (4) below).

The words “which is not cleared by a CCP” are misleading and should be replaced by “which are not to be cleared”: The clearing of a transaction (that is its entering into the clearing system of a CCP) follows after the conclusion of the contract.

The term “electronic means” needs to be defined more clearly.

Likewise, it will be necessary to define what is to be understood under “where available”. The implementation and maintenance of electronic systems can only be expected from market participants where the trade volume is comparatively high and where the operational advantages of such a system clearly outweigh the considerable cost associated with the maintenance and introduction of such systems.

6.2 Art. 1 RM para. (3) – timely confirmation

To avoid uncertainties we suggest introducing a definition for the terms “business day” and “local time”. In both cases this should be the day and time at the place where the confirming party is situated.

6.3 Art. 2 RM para. 4 lit a. and b. – thresholds for portfolio reconciliation

Reconciliation should not be required where the consistency of the respective information is already ensured by other means, for example, as a consequence of the use of matching services etc.

6.4 Art. 3 RM – threshold for portfolio compression

Under the current proposal the counterparties would be required to prepare “a reasonable and valid explanation” to be presented to the competent authority (if so requested) in the event the counterparties deem a compression exercise inappropriate.

Portfolio compression can only cover certain of the relevant counterparties’ own positions, never the complete portfolio. For example, positions required for specific hedging purposes need to be maintained. Therefore, the total number of transactions which may be eligible for compression may be significantly lower than the total number of transactions outstanding between two counterparties. The conclusion that a compression exercise is not appropriate may therefore be not an exceptional but rather common occurrence. The total number of transactions between counterparties may therefore be an inadequate indicator for determining whether compressions should be considered or not. It would be more appropriate to set the threshold based on the number of transactions eligible for compression instead.

6.5 Entry into force/phase-in

The obligations under Art. 11 of the regulation regarding risk mitigation techniques for transactions not cleared by a CCP (bilateral transactions) will cause significant and far reaching changes to operational processes. Market participants will not be able to implement the new requirements immediately. Recital 93 of the regulation already clarifies that obligations arising under the regulation which are further developed by implementing acts, in particular technical standards, will only apply as of the date the relevant implementing acts defining these obligations come into force.

While this at least clarifies that the obligations regarding risk mitigation techniques for bilateral transactions do not become applicable before the technical standards defining the actual content of the obligations come into force, this will still not resolve the problem that the implementation of the new requirements can only be initiated on the basis of the final technical standards. Thus, the addressees of these requirements need a certain period of time following the finalisation of the technical standards to adjust their processes to these new requirements.

Although the regulation does not explicitly provide for the introduction of an implementation/transition period as part of the relevant technical standards, we strongly believe that such transition period is necessary. We therefore expressly welcome that that ESMA has

been consulting with the European Commission whether it will be possible to introduce such transition period.

6.6 Art. 4 RM para. (2) – procedures and processes for dispute resolution

In respect of the proposed obligation to agree on “detailed procedures and processes” it should be taken into account that counterparties must retain the requisite level of flexibility to agree on standards and terms corresponding to their specific needs and legal background. In particular non-financial counterparties need simple and robust procedures and would have difficulty in subjecting themselves to highly complex dispute resolution mechanism or dispute resolution mechanisms resulting in the application of the laws of another jurisdiction. Consequently, any requirements to be defined cannot follow one specific model solution.

6.7 Art. 4 RM para. (3) – obligation to report unresolved disputes

The reporting obligation in para. (3) regarding any disputes in respect of transactions exceeding a certain minimum value remaining unresolved after a certain period of time apparently intends to address the issue of potential risk arising out of unresolved disputes. Similar potential risks are also addressed in the current draft capital requirements regulation (Art. 279 para. 3), which sets out a requirement to adjust the margin period of risk in the case of two margin call disputes in connection with the same netting set lasting longer than the applicable margin period of risk (not less than 20 business days). In view of the interconnectedness of these two provisions, it should be considered to align the triggers for the reporting obligation with the periods applicable under the relevant provision of the capital requirements directive.

6.8 Art. 7 RM – definition intra-group transactions

The term group is defined in Art. 2 (16) of the regulation by reference to certain other legislative instruments. The relation between this definition and Art. 3 of the regulation may not be entirely clear since the requirements in Art. 3 defining the scope and meaning of “intra-group transaction” and “same group”, replicate elements of similar requirements set out in the legislative instruments to which the definition in Art. 2 (16) refers to. Considering that Art. 3 is the more specific and detailed provision, we would assume that where these two provisions may not be entirely aligned, the definition of the “same group” in Art. 3 prevails over Art. 2 (16) of the regulation.

II. Annex III – Commission delegated regulation regarding regulatory technical standards on requirements for central counterparties

The regulatory standard ESMA has to draft shall specify (only) the information that the applicant CCP has to provide. Nonetheless we understand that none of Art. 25 of the regulation will apply until this standard is adopted. This follows directly from the wording of Art 25 para. 8 of the

regulation which references to the Article as such and not to certain paragraphs. Otherwise no third country CCP could offer services in the EU after August 16th.

Furthermore the Commission or ESMA should specify, e.g. via guidelines, that only after a third country CCP can apply and after this application (submitted without undue delay at the earliest time possible) has been refused should the permission to offer services in the EU and for EU entities be revoked. Because otherwise it would be possible that third country CCPs are restricted from offering services even though they fulfil all necessary criteria.

1. Art. 1 3C (page 91)

Whilst we agree that a third country seeking recognition should fulfil all the criteria mentioned under para. 1, we are doubtful that requiring the CCP to supply all this information to ESMA would be appropriate. Since Art. 25 para. 2 (EMIR) is a minimum condition for recognition, some of the information required under Art. 1 3C will be submitted twice. While this would not hinder the recognition process per se it might prove counterproductive in establishing a seamless recognition process vis-à-vis other jurisdictions. For example recognition may need more time than necessary and leaves market participants uncertain. Without recognition transactions between EU institutions and institutions from other jurisdictions in derivatives with a clearing obligation may be impossible. Because of this the recognition process should run without undue delay.

2. Art. 1 MAR (page 105)

We do not agree that OTC derivatives demand per se a higher confidence interval than other financial instruments. Derivatives can be more liquid than other instruments and therefore are easier to liquidate. Whether it's necessary to better capture "tail risks" is a question of the underlying and not on whether the contract is traded on regulated market, MTF or OTF (or correspondent concepts in other jurisdictions). The IOSCO-Basel Consultation Paper on "Margin requirements for non-centrally-cleared derivatives" of July 2012 specifies a 99% confidence level for OTC derivatives.

3. Art. 1 COL (page 111)

We urge ESMA not to overly limit the scope of eligible collateral. EMIR, as well as CRD IV, are both intended to become binding rules as of the beginning of 2013. This can have the effect that a great number of market participants will be attempting to get a hold of the same type of assets not only for the LCR but also to cover collateral needs with CCPs or for bilateral trades (among other developments raising the need for collateral). Given that the total amount of eligible assets is limited, this demand may result in significant market distortions and serious unforeseeable consequences. Figures are hard to find, but an estimate just for additional needs for initial margins of bilateral trade is in the range of USD 7 trillion (Source: Risk Magazine)

With regard to financial instruments, the condition under Art. 1 para 3 subsection (b) (i) should include a threshold above which the assets would always be considered as having a low credit risk without further need to demonstrate this by the CCP. This threshold could e.g. be based on the credit rating of the financial instrument so any instrument with certain minimum rating would fulfill the condition of entailing low credit risk.

4. Coming into force of requirements for clearing members

The requirements to be met by clearing members in respect of their clients under the regulation (e.g. under Art. 39 para. (4)) will largely not be further defined by technical standards so that recital 93 does not apply directly. However, as these obligations on the clearing members are directly tied to the clearing obligation and only make sense if applied in conjunction with a clearing obligation, we believe that it would be clearly unreasonable and also run contrary to the purpose and meaning underlying these provisions if they were to be considered as being applicable independently from the coming into effect of the clearing obligation.

III. Annex V

1. General remarks – reporting obligation

1.1 Details to be reported (Art. 3, Art. 6 and Table 1 / 2)

Art. 3 and 6 together with Tables 1 and 2 set out an obligation to report the market value (changes in comparison to the last evaluation) and the amount of collateral posted in view of every single transaction to be reported. The reporting obligation is thereby turned into an obligation to constantly evaluate and report the market valuation of each transaction including its collateralisation.

There is, however, no legal basis for such an extensive and constant reporting obligation in the regulation and the regulation does also not provide for a mandate to regulate such far reaching and onerous obligations by way of technical standards. Art. 9 para. 1 (EMIR) requires reporting on any conclusion, modification or termination of the contract. The market value (and the collateral posted in this connection) and/or changes thereto are neither an element of the conclusion, nor of the modification nor of the termination of the contract. Consequently, the relevant provisions in the draft delegated regulations are without any legal footing and clearly exceed the mandate granted under the regulation. ESMA seems to be aware of this lack of mandate as it adds a fourth amendment “other” in field 63 (only annex v, in annex vi “other” is missing). The requirement to report “other” events is not covered by the mandate of Art. 9 para. 6 EMIR since the technical standards should define details of format and frequency and not add new requirements regarding the content.

In addition, the requirement to report market and collateral values are also conflicting and inconsistent with the regulation itself and other European regulatory requirements. They indirectly subject counterparties to obligations they are exempted from under the regulation and they conflict with legal concepts accepted and encouraged under other legislative instruments:

One, under Art. 11 (2) of the regulation the obligation to assess the market value of a transaction is expressly limited to financial counterparties and qualified non-financial counterparties (those exceeding the threshold). The reporting obligation as foreseen would, however, subject all counterparties to report market values. This would effectively require them to obtain market valuations. At least it should be clarified that non-financial counterparties below the threshold should not be required to report market values.

Two, the requirement to generally demand the reporting of the level of collateralisation on transaction basis ignores the fact that collateralisation generally occurs on a net basis as a consequence of the risk reducing effect of netting agreements. This practice is accepted and actively encouraged by other regulatory rules, including the present and future legal framework for the capital requirements (capital requirements regulation/directive) and the financial collateral directive. Art. 6 of the draft delegated regulation appears to address this fact to some extent. However, in view of the fact that collateralisation on a net basis (portfolio basis) is the norm and not the exception, Art. 6 and the relevant sections in table 2 need to be revised.

Three, market valuations of positions/collateral to be reported by counterparties will never perfectly match. The information received will thus be conflicting (if both parties report) or inconclusive (if one party reports following a delegation of this obligations).

1.2 Double reporting

We acknowledge that it is probably not possible to prevent a double reporting requirement (MiFID I and EMIR) after EMIR will come into force and before MiFID II/MiFIR will do so. Furthermore a wide range of market participants will be obliged to report under EMIR as well as under Dodd-Frank. While it is not so much of a problem to submit the same report to different addressees, sending different reports (content, format) to one or different addresses will have negative ramifications for the reporting as well as for the receiving parties. For reporting parties it is more costly and a potential source of operational risk, for receivers it will be more difficult to consolidate the data to derive meaningful information. We therefore welcome the close cooperation of ESMA with other jurisdictions and urge ESMA and other European rulesetters to continue these efforts.

2. Art. 1

As to the understanding of the term “derivatives”, we refer to our comments on Annex II, Art 1 CRI above.

3. Art. 2 – definitions

3.1 Art. 2 (1) – “counterparties”

The regulation distinguishes between obligations which have to be met by financial counterparties and non-financial counterparties on the one hand and obligations to be met by all counterparties (and thus perhaps even those not falling within the scope of the definition of financial or non-financial counterparty) on the other hand.

By defining the term “counterparty”, at least for the purposes of the reporting obligation as being limited to financial and non-financial counterparties, the scope of the addressees of the reporting obligation will not include

- any party to the contract established or living outside the EU (third country entities, including entities equivalent to financial counterparties) and
- any counterparty (regardless whether established in the EU or outside the EU) not operating as an undertaking.

Consequently, all third country entities as well as EU based individuals, and all other EU based entities not qualifying as undertakings would be excluded. The term undertaking is a clearly defined legal term under European law (in particular by decisions concerning Art. 101 of TFEU) and is generally understood as any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. It thus would, inter alia, not cover entities such as non-profit associations, municipalities and regional public bodies (while performing their public functions). These entities would thus be effectively exempted from the reporting obligation.

As this has a number of practical implications, it would be helpful to know whether this restrictive understanding of “counterparty” is to be applied only in the context of the reporting obligation or generally (see also our comments regarding the proposal to have a uniform list of definitions). The latter could have far reaching consequences: To give one concrete example, with this narrow definition of counterparty Art. 4 para. 1 (EMIR) would be ill-conceived. Only counterparties shall clear (first three words), but “entities” (Art. 4 para. 1 letter a (iv) and (v) EMIR) are no counterparties following ESMA’s definition. A narrow definition of counterparties could also affect the scope of Art. 3 of the regulation (intragroup transactions), which concerns transactions entered with “another counterparty”.

We propose to clarify the definition of “counterparties” and to make it consistent within the full scope of EMIR.

3.2 Art. 2 (4) – “confirmation”

The definition of “confirmation” is inconsistent with the understanding and function of a confirmation as applied in practice. The confirmation is not the act of agreement on the terms of a contract (the legal conclusion of the agreement). Rather it means a separate act whereby one of the parties forwards a notice which intends to confirm what has already been legally agreed. The confirmation thus follows the legal conclusion of an agreement and only serves to provide a record of what has been agreed and enable the parties to detect potential inconsistencies. The confirmation thus only covers key aspects/elements and does not settle or cover the agreement in minute detail.

The definition should thus be revised to reflect this function. As the term is also relevant in other connections, we would also suggest to use a uniform definition (see also our comments on Annex II Art 1 RM above).

3.3 Art. 2 (6) to (11) – definition of derivative classes

There are many instruments that do not clearly belong to only one of the buckets. Counterparties should have the necessary freedom to allocate these instruments. This is very important for non-financials, because otherwise they needed to define all these as “other derivatives” and would breach the threshold earlier than necessary.

To mitigate these concerns, it should be clarified whether and under which conditions convertibles are covered by the definition of “equity derivatives”.

Options, forwards and futures on bonds, notes or other debt instruments should be covered by the term “interest rate derivatives”.

Underlyings such as emission certificates, freight, inflation or capacity rights should be assigned to the commodity bucket. Article 8 (page 141) implies that allocation to assets class should occur in accordance with the “most closely resembles” principle. The fact that the assets mentioned above are very often traded by the institution’s commodity desks would justify their consolidation.

The term “hybrid derivative” should be defined as a contract where the underlying consists of two or more asset classes (e.g., a basket of equity, interest and currency). Hybrids should be allocated to the asset class that constitutes the majority of assets within such basket. The same principle should be applied to units of mutual funds where a look-through approach can be applied.

4. Art. 3 para. 1

We propose a cross reference to the implementing technical standard defining the format of the reporting.

5. Art. 3 para. 4

It should be clarified that the reporting party, when reporting on behalf of both counterparties, (i) may not complete fields 15 and 16 of Table 1 and field 22 of Table 2 or, if those fields are completed, (ii) does not accept any responsibility for the correctness of such data.

6. Art. 5

Since “novation” can have different meanings, we urge ESMA to define the meaning. The term should be defined as the mechanism by which the central counterparty imposes itself between the counterparties to the contract (as defined in Article 2(1) EMIR). Any other change in counterparty, which may occur prior to the clearing of the contract (and which may be achieved by a give-up or novation and assumption agreement) should be dealt with as a modification of the contract. It would help the users if ESMA would illustrate Article 5 and its barriers by examples or case studies.

7. Art. 6 para. 1

“pledge” is not a specific type of asset used as collateral but rather a certain legal form by which a security interest is vested in a certain asset. We therefore suggest to delete the word “pledge”.

8. Art 6 para 3.

As to our general concerns regarding the obligation to report collateral in respect of a transaction, we refer to our comments above. Ina addition, we would like to point out the following:

Table 1 of Annex V as well as table 1 of Annex VI are lacking a data field to report the specific contracts over which collateral has been exchanged. This field would need to accommodate up to many hundreds identification of contracts. It is very likely that there is no technical way to store all the data for all contracts concluded between the counterparties (e.g. trade IDs). Therefore, Art. 6 para. 3 should be deleted.

IV. Table 2 – Common Data

We would seek clarification how ESMA intends to incorporate equity and credit derivatives. So far they are missing individual data fields and formats. For ease of reference this should be reconsidered. We also doubt that fields of other products can cover all needs of credit and equity.

For ease of reference and since the fields in tables 1 and 2 in Annex V and VI are identical, we consolidated all comments on the tables in the following remarks.

1. Field 5

If the two counterparties are required to agree on a unique trade ID this should be dealt with by the front office as soon as possible. This would effectively mitigate all potential problems along the chain of processing the derivative.

2. Field 18

The master agreement type is not relevant for the terms and conditions agreed for a contract since, in principle, any type of transaction can be executed on the basis of different types master agreements. It should therefore be considered to delete this field.

3. Field 19

The date to be entered in this filed is presumably the date a master agreement has been entered into. Since information on the master agreement the transaction is based on is of little practical relevance (see comments immediately above) this also applies to the date the agreement has been entered into.

Should the date to be entered not refer to the date the master agreement has been entered into but rather the version of the master agreement (that is, the date the relevant master agreement has been published), it has to be taken into account that the date of the version is of even less practical relevance. In addition, not all master agreements in use are identified by or carry a date indicating the version. Furthermore, such date indicating the version is irrelevant in the case of bespoke or individually adjusted versions of master agreements.

4. Field 27-36

We refer to our general comments specifying the serious concerns in respect of such a requirement to report information on collateral.

In addition, we doubt that the data fields 27 to 36 are adequate to report any useful information on collateral. The information to be entered is too generic and one dimensional. The date to be entered would therefore not provide any meaningful information. One practical example would be the case that collateral is posted in different currencies.

5. Field 29

We refer to our general comments specifying the serious concerns in respect of such a requirement to report information on collateral. In addition, it is unclear whether the counterparties are expected to enter only one of the possible four letters in order to classify the collateral or a combination thereof. Furthermore,

there is an “S” missing before “securities” and it should be considered to replace the word “securities” with “shares”.

6. Field 30

In view of our comments on field 29 it is also not entirely clear under what circumstances the counterparties are expected to enter data into field 30. Presumably, this field is only to be completed if “O” is entered into field 29. .

7. Field 31

We refer to our general comments specifying the serious concerns in respect of such a requirement to report information on collateral.

In addition it should be pointed out that the current proposal does not appear to take into account that collateral may be posted as initial and/or variation margin as well as the fact that the manner in which collateral will be posted may differ considerably, inter alia, depending on whether the transaction is to be cleared via a CCP or will remain bilateral (and whether the counterparty is a client of a clearing member or a clearing member).

8. Field 32

It should read “Currency of collateral amount” (see page 173). It should be clarified that ESMA expects only one currency to be reported (even where like under the Standard CSA multiple currencies are used for margining) and that field 33 is only used if the currency is “O” (Other), i.e. not EUR, GBP or USD.

9. Field 34

As far as exchange traded derivatives are concerned, the field should show the current closing price of the exchange (and not just the difference). A “closing price” does not exist for OTC derivatives. For OTC derivatives market values should be reported and, if cleared, the market values determined by the clearing house which after novation to the CCP are legally relevant for the client relationship.

If mark to market should be reported by both counterparties delegation of reporting is hardly possible. Mark to market will practically never perfectly match. In consequence, either the reporting party knows the mark to market value of the counterparty (implausible) or the counterparty has to report it to the reporting party leaving the delegation useless.

10. Field 63

It should be specified whether a correction of data is reported as “cancel” and “new” or as “modify”.

In addition, the value “O” (Other) is missing.

V. Annnex VI

1. Art. 3 para. (1)

The text under lit. a. should be reviewed . Furthermore, considering that not all counterparties qualifying as “undertakings” may be “legal entities” it should be clarified what type of information is to be provided instead/in place of the LEI.?

2. Art. para.4(2)

The questions raised with respect to Article 2 of the draft regulatory technical standard on minimum details of the data to be reported to trade repositories (Annex V) are relevant for the UPI too (where is the asset class “bond” assigned to?). The derivative types missing are “cap”, “floor” and “collar”. It is also unclear whether a credit default swap is to be reported as “swap” or “option” and whether a total return swap falls under the category “swap”. The term “futures” should be replaced with “futures/forwards” to indicate that both types (exchange traded and OTC) are covered.

For our specific remarks on individual data fields please see our comments to Annex V.