



EBA/CP/2015/04

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Consultation Paper

Draft Regulatory Technical Standard on a minimum set of the information on financial contracts that should be contained in the detailed records and the circumstances in which the requirement should be imposed (Article 71(8) BRRD)

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1. Responding to this Consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 06.06.2015. Please note that comments submitted after this deadline, or submitted via other means, may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

2. Executive Summary

Directive 2014/59/EU (BRRD) mandates the EBA (Article 71(8)) to develop draft Regulatory Technical Standards (RTS) specifying the following elements for the purposes of the Article 71(7):

- a minimum set of the information on financial contracts that should be contained in the detailed records; and
- the circumstances in which the requirement to maintain detailed financial records should be imposed on institutions and relevant entities¹.

In accordance with this mandate the draft RTS specifies the circumstances in which the requirement to maintain detailed records shall be imposed (Article 2) and lists the information which should be kept at a minimum in the detailed records (Article 3 and the Annex).

The approach set out in the draft RTS ensures that the necessary information is collected in advance for institutions and relevant entities which, in accordance with the resolution plans, are likely to be subject to an application of the resolution actions. This information shall be made available to the competent and resolution authorities on request. Conversely, institutions and relevant entities that are likely to be placed into an insolvency procedure are not automatically subject to the requirement to maintain detailed records of financial contracts, in line with proportionality principle.

The draft RTS specifies only a minimum list of information which should be contained in the detailed records of financial contracts. This approach is intended to strike a balance between the need to achieve an appropriate level of convergence in record keeping whilst allowing competent authorities and resolution authorities to impose additional requirements where considered appropriate for the purposes of ensuring that the resolution powers can be applied effectively with regard to the institution concerned.

The common framework prescribed in the RTS is expected to achieve a consistent and systemic approach ensuring that, if needed, competent authorities and resolution authorities are able quickly and directly to collect relevant information from the institutions and relevant entities to support the application of resolution powers or resolution tools. It is also expected to facilitate cooperation and common understanding among authorities, in particular as regards institutions and entities with cross-border operations.

This Consultation Paper includes the EBA's proposal for the draft RTS and explains the approach the EBA has taken in relation to the proposal.

¹ Referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU.

3. Background and rationale

Bank resolution can be a complex process necessitating as much advanced preparation as possible in order to ensure the effective application of resolution tools and resolution powers. These powers include the power for resolution authorities to suspend temporarily the termination rights of any party to a contract with an institution under resolution (Article 71(1) of the BRRD).

To support the application of this power Article 71(7) of the BRRD specifies that competent authorities or resolution authorities may require an institution or relevant entity² to maintain detailed records of financial contracts.

Article 71(8) of the BRRD requires the EBA to develop draft regulatory technical standards (RTS) specifying for the purposes of the Article 71(7) a minimum set of the information on financial contracts³ that should be contained in the detailed records and the circumstances in which the requirement should be imposed.

In accordance with this mandate the draft RTS consists of two main parts:

- Article 2: circumstances for requiring detailed records of financial contracts to be maintained;
- Article 3 and the Annex: the minimum set of information on financial contracts which should be kept in the detailed records.

Article 2: the circumstances for requiring detailed records of financial contracts to be maintained

The draft RTS specifies that an institution or relevant entity shall be required to maintain detailed records of financial contracts where, pursuant to the applicable resolution plan or the group resolution plan, it is foreseen that resolution actions would be applied to the institution or entity concerned should the relevant conditions for resolution be satisfied.

This approach ensures that the necessary information is collected in advance for institutions likely to be subject to an application of the resolution powers and made available to the competent authorities and resolution authorities if needed. At the same time this approach ensures that institutions or entities that are likely to be placed into an insolvency procedure (rather than subject to resolution actions) are not automatically subject to the requirement to maintain detailed records of financial contracts.

However, it is important to note that nothing in the RTS would preclude competent authorities or resolution authorities from imposing the same or similar requirements on other institutions (e.g.

² As referred to in point (b), (c) and (d) of Article 1(1) of the BRRD.

³ Point (100) of Article 2(1) of the BRRD defines 'financial contract'. Thus EBA is given mandate to specify a minimum set of the information only on those financial contracts which are defined in Article 2(100) of the BRRD (for more details please see part 'A minimum set of the information on financial contracts').

in line with the approach adopted to the application of simplified obligations pursuant to Article 4 of the BRRD).

Article 3 and the Annex: the minimum set of information on financial contracts which should be kept in the detailed records

Consistent with the mandate under Article 71(8) of the BRRD, it is proposed that the RTS prescribe only a minimum set (rather than an exhaustive list) of information on financial contracts that should be contained in the detailed records.

This approach is intended to strike a balance between the need to achieve an appropriate level of convergence in record keeping whilst ensuring that differences in institutions or relevant entities can be taken into account by the competent authorities and resolution authorities through the specification of additional information fields if necessary to achieve the policy goal of ensuring that the resolution powers can be applied effectively institutions with different types of business.

Fields specified in the Annex to the draft RTS were introduced after assessing which information about financial contracts (e.g. details on parties to the financial contract, details on the transaction) could be important for the effective application of resolution powers and resolution tools. Thus it is proposed that institutions should be required to keep such details on financial contracts as: whether or not a contractual recognition clause (concerning the cross-border recognition of resolution actions in relation to contracts governed by the law of a third country) is included, information on value and valuation, collateral, termination conditions and rights, maturity, whether the financial contract is subject to netting agreement etc. Furthermore, in order to ensure consistency between different legal acts and reduce the burden for the institutions which are reporting relevant information to the trade repositories, in the draft RTS, where possible, the same language and structure is used as in the Commission's delegated regulation (EU) No 148/2013 and likely upcoming amendments to it.

The minimum list of information on financial contracts provided in the Annex to the draft RTS could also serve as a basis for the competent authorities and resolution authorities when exercising their discretion to impose a requirement to keep detailed records of financial contracts under Article 5(8) (recovery plans) and Article 10(8) (resolution plans) of the BRRD.

The draft RTS does not require the information to be maintained or provided to the competent authorities or resolution authorities in a specific template. Instead information should be kept in central location on a relational database e.g. capable of being interrogated by the authorities or from which information can be provided easily to the authorities. Furthermore, the draft RTS does not introduce an additional reporting burden for institutions or entities, as it just requires institutions and entities to maintain information in detailed records and make it available to the competent authorities and resolution authorities if requested.

Finally it is noted that the requirement will not have the effect of increasing the burden on institutions and relevant entities that are already collecting, and in some cases reporting, similar information to relevant authorities or trade repositories, because of reporting requirements

arising from other EU legal acts such as Regulation (EU) No 648/2012 (EMIR) or from institutions' internal procedures.

4. Draft regulatory technical standard on a minimum set of the information on financial contracts that should be contained in the detailed records and the circumstances in which the requirement should be imposed

In between the text of the draft RTS that follows questions can be found on specific aspects of the proposed text, which respondents to the public consultation should consider in their responses.

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards for a minimum set of the information on financial contracts that should be contained in the detailed records and the circumstances in which the requirement should be imposed

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2015 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,⁴ and in particular Article 71(8) thereof,
Whereas:

⁴ OJ L173, 12.6.2014, p.190.

- (1) Directive 2014/59/EU requires Member States to confer on the resolution authorities the power to suspend temporarily the termination rights of any party to a contract with an institution under resolution.
- (2) In order to ensure that such power is applied effectively Article 71(7) of Directive 2014/59/EU provides that competent authorities and resolution authorities may require an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU to maintain detailed records of all kind of financial contracts referred to in Article 2(1)(100) of Directive 2014/59/EU.
- (3) Pursuant to Article 71(8) of Directive 2014/59/EU, the EBA is required to develop draft regulatory technical standards in order to specify a minimum set of information on financial contracts that should be contained in the detailed records and the circumstances in which such requirement should be imposed.
- (4) This Regulation specifies that an institution or entity referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU should be required to maintain detailed records of financial contracts where the applicable resolution plan or the group resolution plan foresees that resolution actions would be taken in relation to the institution or entity concerned. This is without prejudice, however, to the possibility of competent authorities or resolution authorities to impose the same or similar requirements on other institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU.
- (5) This Regulation lays down the minimum set of information to be kept in the detailed records on an ongoing basis to be made available to the competent authorities and resolution authorities on request. However it does not preclude competent authorities and resolution authorities from requiring additional information to be kept in the detailed records.
- (6) This Regulation does not prescribe a template in which the minimum set of information should be collected and transmitted to the competent authorities and resolution authorities. Rather, it should be kept in central location on relational database capable of being accessed by the competent and resolution authorities or from which information can be extracted readily and transmitted to the relevant authority.
- (7) Competent authorities and resolution authorities if needed may request necessary information from trade repositories in accordance with Article 81 of Regulation (EU) No 648/2012 and Article 71(7) of Directive 2014/59/EU.
- (8) Under Article 5(8) and Article 10(8) of Directive 2014/59/EU competent authorities and resolution authorities should be empowered to require an institution and an entity referred to in (b), (c) or (d) of Article 1(1) to maintain detailed records of financial contracts, for that purpose the minimum list of information laid down in the Annex to this Regulation could be used as the basis to for such requirements.
- (9) In line with good practices institutions and entities referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU should identify and notify to the competent authorities and resolution authorities the member of the management body responsible for maintaining the detailed records.
- (10) This Regulation is based on the draft regulatory technical standards submitted by the EBA to the Commission.
- (11) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and

benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010,⁵

HAS ADOPTED THIS REGULATION:

Article 1 – Definitions

For the purposes of this Regulation the definitions in Article 2 of Directive 2014/59/EU and the following definitions shall apply:

- (1) ‘reporting counterparty’ means an institution or entity referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU which is required to maintain detailed records of financial contracts;
- (2) ‘other counterparty’ means any counterparty to a contract other than the reporting counterparty.

Article 2 - Circumstances for requiring detailed records of financial contracts to be maintained

An institution or entity referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU shall be required by the competent authority or by the resolution authority to maintain detailed records of financial contracts where the resolution plan or the group resolution plan foresee the taking of resolution actions in relation to the institution or entity concerned in the event the conditions for resolution are met.

Q1. Do you agree with the circumstances in which the requirement to maintain detailed records shall be imposed?

Q2. If the answer is no. What alternative approach could be used to define the circumstances in which the requirement should be imposed in order to ensure proportionality relative to the aim pursued?

Article 3 - Minimum set of information on financial contracts which should be kept in the detailed records

An institution or entity referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU to which the requirement to maintain detailed records of financial contracts applies shall keep the minimum set of information laid down in the Annex for each financial contract.

Q3. Do you agree with the list of information set out in the Annex which it is proposed shall be required to be maintained in the detailed records?

Q4. If no. What kind of other information would be useful to maintain in detailed record of financial contracts?

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

Article 3 - Entry into force

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position]

ANNEX

The minimum set of the information on financial contracts that should be contained in the detailed records

	Field	Description of information to be maintained in detailed records of financial contracts
Section 1 – Parties to the financial contract		
1	Counterparty ID	Unique code (Legal Entity Identifier (LEI), where available) identifying the reporting counterparty. In the case of an individual, a client code shall be used.
2	ID of the other counterparty	Unique code (Legal Entity Identifier (LEI), where available) identifying the other counterparty of the contract. This field shall be filled from the perspective of the reporting counterparty. In the case of an individual, a client code shall be used.
3	Name of the counterparty	Corporate name of the reporting counterparty. This field can be left blank where the counterparty ID already contains this information.
4	Domicile of the counterparty	Information on the registered office, consisting of full address, city and country of the reporting counterparty. This field can be left blank where the counterparty ID already contains this information.
5	Corporate sector of the counterparty	Nature of the reporting counterparty's company activities (bank, insurance company, etc.). This field can be left blank in case the counterparty ID already contains this information.
6	Financial or non-financial nature of the counterparty	Indicate whether the reporting counterparty is a financial or non-financial counterparty in accordance with points 8 and 9 of Article 2 of Regulation (EU) No 648/2012.
7	Group undertaking	Indicate parent, subsidiary or other.
8	Contract with non-EEA counterparty	Indicate whether the other counterparty is domiciled outside the EEA.
9	Governing law	Identify governing law of the financial contract.
10	Contractual recognition - Write-down and conversion (third country-governed contracts only)	The contract includes term by which the creditor or party to the agreement creating the liability recognises that liability may be subject to the write-down and conversion powers by any reduce of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority in compliance with the requirement set out in Article 55(1) of the BRRD.
11	Contractual recognition - Resolution (third country-governed contracts only)	The contract includes a term by which the creditor or party to the agreement creating the liability recognises that the contract may be affected by an application of the resolution powers by a Member State resolution authority and agrees to be bound by the effects of the application of such powers. Where not all but only some resolution powers are recognised, specify which are recognised.
12	Financial contract relates to core business lines	Identify which core business line it relates to.
13	Value of contract	Mark to market valuation of the contract, or mark to model valuation where applicable under Article 11(2) of Regulation (EU) No 648/2012. The CCP's valuation to be used for a cleared trade.
14	Currency of the value	The currency used for the valuation of the contract.

15	Valuation date	Date of the last mark to market or mark to model valuation.
16	Valuation time	Time of the last mark to market or mark to model valuation.
17	Valuation type	Indicate whether valuation was performed mark to market or mark to model or provided by the CCP.
18	Trade exposure	As defined in Article 4(1)(91) of Regulation (EU) No 575/2013.
19	Collateralisation	Whether collateralisation was performed.
20	Composition of the collateral	List of instruments posted as collateral by the reporting counterparty to the other counterparty, and collected by the reporting counterparty from the other counterparty.
21	Collateral portfolio	Whether the collateralisation was performed on a portfolio basis. Portfolio means the collateral calculated on the basis of net positions resulting from a set of contracts, rather than per trade.
22	Collateral portfolio code	If collateral is reported on a portfolio basis, the portfolio should be identified by a unique code determined by the reporting counterparty.
23	Initial margin posted	Value of each of the instruments posted as initial margin by the reporting counterparty to the other counterparty.
24	Initial margin received	Value of each of the instruments collected as initial margin by the reporting counterparty to the other counterparty.
25	Variation margin posted	Value of the each of the instruments posted as variation margin posted, including cash settled, by the reporting counterparty to the other counterparty.
26	Variation margin collected	Value of each of the instruments collected as variation margin posted, including cash settled, by the reporting counterparty from the other counterparty.
27	Currency of the collateral value	Specify the value of the collateral for fields 23 to 27.
Section 2a – Financial contract type		
28	Type of the financial contract	a) Securities contract; b) Commodities contract; c) Future and forward contracts; d) Swap agreements; e) Inter-bank borrowing agreement (where the term of the borrowing is three months or less).
29	Product ID 1	The contract shall be identified by using a product identifier: Product Identifier (UPI, endorsed in Europe), ISIN or derivative class (Commodity, Credit, Currency, Equity, Interest Rate, Other).
30	Product ID 2	The contract shall be identified by using a product identifier: CFI or derivative type (Contracts for difference, Forward rate agreements, Futures, Forwards, Option, Swap, Other)
Section 2b – Details on the transaction		
31	Effective date	Date when obligations under the contract come into effect.
32	Maturity date	Original date of expiry of the reported contract. An early termination shall not be reported in this field.
33	Termination date	Termination date of the reported contract. If not different from maturity date, this field shall be left blank.
34	Termination conditions	Termination conditions of the reported contract, if different from maturity date.
35	Termination right	Whether the termination right under the reported contract is based solely on the insolvency or financial condition of the institution under resolution.
36	Master Agreement type	Reference to the name of the relevant master agreement, if used for

		the reported contract (e.g. ISDA Master Agreement; Master Power Purchase and Sale Agreement; International ForEx Master Agreement; European Master Agreement or any local Master Agreements).
37	Master Agreement version	Reference to the year of the master agreement version used for the reported trade, if applicable (e.g. 1992, 2002, etc.).
38	Netting arrangement	Name of the netting arrangement governing the contract.
Section 2d - Clearing		
39	Cleared	Indicates whether clearing has taken place.
40	Intragroup	Indicates whether the contract was entered into as an intragroup transaction, defined in Article 3 of Regulation (EU) No 648/2012.
41	Type of liability/claim	Indicates if an eligible liability or a secured liability.
42	Value of liability/claim	Including on a net basis per master agreement or other applicable netting agreement.

Q5. Do you agree that in the Annex to the draft RTS the same structure as in Commission's delegated regulation (EU) no 148/2013 should be kept?

Q6. Considering the question above do you think it would be possible and helpful to define expressly in the RTS which data points should be collected at a "per trade" level, and which should be collected at a "per counterparty" level?

5. Accompanying documents

5.1 Draft Cost-Benefit Analysis / Impact Assessment

Introduction

Article 71(8) of the BRRD requires the EBA to develop draft regulatory technical standards (RTS) specifying the following elements for the purposes of Article 71(7):

- a. a minimum set of the information on financial contracts⁶ that should be contained in the detailed records; and
- b. the circumstances in which the requirement should be imposed.

Article 71(7) of the BRRD specifies that competent authorities or resolution authorities may require an institution or relevant entity⁷ to maintain detailed records of financial contracts.

As per Article 10(1) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any draft RTS developed by the EBA shall be accompanied by a cost and benefit analysis. Such annex shall provide the reader with an overview of the findings as regards the problem identification, the options identified to remove the problem and their potential impacts.

Problem definition and baseline scenario

Most Member States are currently preparing information collection and reporting procedures for the purposes of their bank recovery and resolution frameworks. Although an increased level of convergence is expected under the BRRD framework, variations may arise between Member States as regards requirements relating to the circumstances in which institutions and relevant entities shall be required to maintain detailed financial records and the information to be maintained in detailed records. This may create a lack of common understanding among authorities and consequently some difficulties in promptly obtaining relevant information for the purposes of the application of the resolution powers and/or resolution tools to institutions or entities, in particular as regards those with cross-border operations.

⁶ Article 2(100) of the BRRD defines 'financial contract'. Thus EBA is given mandate to specify a minimum set of the information only on those financial contracts which are defined in Article 2(100) of the BRRD (for more details please see part '*A minimum set of the information on financial contracts*').

⁷ As referred to in point (b), (c) and (d) of Article 1(1) of the BRRD.

Objectives

The ultimate aim of the RTS is to promote the effective and efficient application of the resolution tools and resolution powers. The central element in establishing such a harmonised framework is the specification of a common set of minimum information on financial contracts that should be contained in the detailed records and the circumstances in which the requirement should be imposed. A common framework is expected to achieve a consistent and systemic approach ensuring that, if needed, competent authorities and resolution authorities are able quickly and directly to collect relevant information from the institutions and relevant entities to support the application of resolution powers or resolution tools. In order to ensure proportionality and avoid unnecessary additional burdens the requirement to maintain detailed records of financial contracts shall be imposed automatically only on institutions or entities which are likely to be resolved under the resolution plans. RTS is also expected to facilitate cooperation and common understanding among authorities, in particular as regards institutions and entities with cross-border operations.

Assessment of the technical options

This sub-section of the IA will discuss the advantages and the disadvantages of a set of technical options for the identification of the institutions to which the requirement to maintained detailed records of financial contracts should be imposed

The assessment considers the following options:

- a. **Option 1:** The requirement to keep detailed records should apply, on a standing basis, to all institutions and relevant entities within the scope of the BRRD.
- b. **Option 2:** The requirement to keep detailed records should apply on an ad hoc basis for all institutions and relevant entities (i.e. no standing requirements as in Option 1).
- c. **Option 3:** The requirement should apply on a standing basis for some institutions and relevant entities (e.g. those which, in accordance with the resolution plan, would always be resolved using a resolution tool and would never be dealt with under a normal insolvency procedure) and on an ad hoc basis for others (e.g. it is not envisaged that institutions subject to a waiver under Article 4(8) of the BRRD need maintain detailed records of financial contracts).

Under Option 1, the requirement to keep detailed records should apply, on a standing basis, to all institutions and relevant entities within the scope of the BRRD. This option would ensure that at any time competent authorities or resolution authorities will have relevant detailed records of financial contracts. The Relevant IT systems should be developed in advance in a way to facilitate the collection of the relevant information on an ongoing basis. Furthermore, such preparation would allow to avoid an excessive workload in collating information where this is needed promptly (e.g. at the point of resolution) and systems had not been put in place to collect this information in advance.

However, Option 1 encompasses some disadvantages. A general requirement for all institutions to keep detailed records of financial contracts would be disproportionate as: i) some institutions (e.g. those with little interconnectedness and complexity) are less likely to be resolved and will be permitted to go into a normal insolvency procedure. Thus the collection of information in relation to the financial contracts of such institutions would not be of practical use to the authorities (as the resolution plans for such institutions will foresee insolvency rather than an application of the resolution tools), but would create additional burden for institutions; ii) costs of transformation of IT systems could be high - and in light of point (i) - unnecessary for such institutions and disproportionate to the benefits which the overall effort implies.

Under Option 2 the requirement to keep detailed records could apply on an ad hoc basis for all institutions and relevant entities (i.e. no standing requirements). Meaning that sound and viable institutions/those that are not likely to be resolved using a resolution tool, would not be subject to the burden of collecting information. Already existing triggers (e.g. application of early intervention measures, failing or likely to fail trigger, material changes to resolvability or resolution plans etc.) could be used to activate the requirement.

Nevertheless, Option 2 has also disadvantages. Under this option the information will not be readily available on day to day basis and, in crisis situations it may be impossible to gather the data needed in order for the authorities to take fully informed decisions about the application of powers (e.g. due to the volume of financial contracts/complexity of gathering such information) especially in cases of big and more complex institutions thereby potentially undermining the effective application of the resolution tools at the point of failure.

Under Option 3, the requirement should apply on a standing basis for some institutions and relevant entities (e.g. those which, in accordance with the resolution plan, would always be resolved using a resolution tool and would never be dealt with under a normal insolvency procedure) and on an ad hoc basis for other institutions (e.g. it is not envisaged that institutions subject to a waiver under Article 4(8) of the BRRD need maintain detailed records of financial contracts). This approach aims to strike a fair balance between the institutions which are more likely to be resolved and those which are less likely to be resolved and more likely to be dealt under normal insolvency proceedings as regards information collection requirements. Information would be collected in advance from the institutions which are more likely to be resolved.

However, Option 3 has some disadvantages as well. If the institution which was identified to be subject to insolvency proceedings is put under resolution, the authorities may not be able to get relevant information on financial contracts within reasonable time. Nevertheless, this possibility is not high enough as to include these institutions under requirement to maintained detailed records of financial contracts while the cost of doing so would be disproportionate to the benefits that such inclusion would bring.

Taking into account the above considerations the following conclusions could be made. Option 1 would not be proportionate as it would create an unnecessary burden for institutions which are

not or are highly unlikely to be resolved. Option 2 would not be sufficient to ensure that the authorities have the information they need to prepare in advance for the resolution of the institutions that, in the event of failure, would be likely to be resolution through an application of the resolution powers. Collection of information near the point of resolution is unlikely to be feasible in practice for complex institutions with a great number of financial contracts. Option 3 is the most proportionate as it achieves the aim of ensuring that the relevant authorities can access readily the information they may need in connection with a resolution whilst ensuring that those institutions that are less likely to be resolved are not subject to requirements to maintain detailed information about their financial contracts. In any event it does not preclude the competent authorities and resolution authorities from requiring other institutions and relevant entities to maintain detailed records about financial contracts nor does it preclude the authorities from requiring additional information to be recorded in the detailed records.

As regards the Annex to the draft RTS identifying a minimum set of the information on financial contracts that should be contained in the detailed records two options were considered:

- a. **Option 1:** Requiring to maintain in detailed records only that relevant information on financial contracts which is not covered by the Commission's delegated regulation (EU) No 148/2013 (ESMA RTS on EMIR) and is important for the BRRD purposes.
- b. **Option 2:** Requiring to maintain in detailed records relevant information which might be covered by ESMA RTS on EMIR and new fields which are particularly important for BRRD purposes.

At first glance Option 1 could appear to reduce the burden of information collection for the institutions subject to the requirement to maintain detailed records of financial contracts as regards information which is already reported to trade repositories under the ESMA RTS on EMIR. However, this is incorrect.

As a starting point, the objective of the RTS is to ensure that competent authorities and resolution authorities can access relevant information for purposes relating to the BRRD. Importantly the definition of 'financial contract' extends beyond derivatives contracts to which the ESMA RTS on EMIR relates. Therefore the requirements as to the information to be maintained in the detailed records must extend beyond derivatives contracts.

What is more, requirement to maintain detailed records of financial contracts should not increase the burden on institutions already maintaining this information in their detailed records as a result of the ESMA RTS on EMIR or other requirements as this RTS does not specify the format in which the information is to be maintained in the detailed record. Therefore if institutions are already maintaining the information they can continue to do so in accordance with their existing practices.

Option 2 keeps the position that the Annex to the draft RTS should be aligned as much as possible with the ESMA RTS on EMIR (taking into account likely upcoming amendments) and introduces new fields of information to be maintained in the detailed records which are particularly important for BRRD purposes. This approach would ensure that at any time competent

authorities and resolution authorities would be able to request and access quickly information from institutions or relevant entities or trade repositories for instance where this is important for applications of resolution powers and resolution tools. With regard to the additional burden for institutions which are already covered by reporting requirement arising from other legal acts, it should not create significant additional burden as these institutions are already doing this, thus only minor adjustment should be introduced in order to comply with the 11 new fields provided in Annex to the draft RTS. Finally, the institutions or entities will be required to provide information to the competent authorities and resolution authorities only if requested, meaning that no additional reporting requirement will be created.

5.2 Overview of questions for Consultation

Respondents are invited to comment in particular the following questions.

Questions:

1. Do you agree with the circumstances in which the requirement to maintain detailed records shall be imposed?
2. If the answer is no. What alternative trigger could be used?
3. Do you agree with the list of information set out in the Annex to the draft RTS which it is proposed shall be required to be maintained in the detailed records?
4. If the answer is no. What alternative approach could be used to define the circumstances in which the requirement should be imposed in order to ensure proportionality relative to the aim pursued?
5. Do you agree that in the Annex to the draft RTS the same structure as in Commission's delegated regulation (EU) no 148/2013 should be kept?
6. Considering the question above do you think it would be possible and helpful to define expressly in the RTS which data points should be collected at a "per trade" level, and which should be collected at a "per counterparty" level?