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10 July 2015

Dear Sir or Madam,

Re: Second consultation on the Draft regulatory technical standards on risk mitigation techniques for OTC derivative contracts not cleared by a CCP

Thank you for the opportunity to comment on the second consultation on the Draft regulatory technical standards ("RTS") for margining of uncleared derivatives. We welcome many of the changes made from the first consultation paper issued in April 2014. In particular, we welcome the revised treatment of non-EU NFC-s.

We also have comments on the new standards. As previously, these focus primarily on the cross-border aspects of the rules, and on trading in emerging markets in particular. Our primary concern is around exchanging margin with counterparties in non-netting jurisdictions. While the second RTS give guidance on situations where netting and collateral enforceability are disputable, we do not believe they offer a practicable solution, particularly as EU firms are now required to post margin as well as collect it. The 'alternative arrangements' suggested in the RTS as a way of eliminating the legal uncertainty around enforcement, netting and segregation – for example, posting margin to international custodians - cannot in all cases create a framework under which collateral exchange can be safely enacted. The insolvency regime of the jurisdiction in which the counterparty is located remains relevant, regardless of the law selected to govern the contract or how collateral is held. The risk that collateral will not be available in a timely manner as the RTS require, or that it can be clawed back by the local liquidator, remains - we explain this in more detail in our response to Question 5.

If margin has to be exchanged with in-scope counterparties from non-netting jurisdictions such as China or the Middle East, the risk to the bank in question and to the system as a whole is going to increase. Alternatively, if the ultimate sanction is to stop trading, EU firms will be shut out of some markets altogether, and EU firms put at a competitive disadvantage compared to their non-EU peers. We would therefore urge ESAs to consider alternative ways of risk mitigation for those transactions and consider setting thresholds below which margin does not have to be exchanged or granting transitional relief for a limited period of time.

We are also concerned that no further clarity has been given on how the RTS should apply when an EU firm is trading with counterparties from jurisdictions which have their own margin rules. In this scenario, both firms may be required to collect and post margin according to their own regime, so would effectively be subject to duplicative requirements. If jurisdictional equivalence is granted as envisaged in Article 13 of EMIR, a regulatory deference to a third country regime would allow counterparties to agree which of the two sets of rules they would trade under. If there is no equivalence, however, they would have to find a way of being compliant with both sets of provisions. This would be challenging, both from an operational and a legal documentation perspective, and would take time to operationalise.

Equivalence determinations are also relevant for intra-group exemptions. Without them, firms with non-EU group entities will not be able to make use of the exemptions even if all the other conditions in Articles 3 and 11 of EMIR are met. We would propose that the final RTS consider the approach likely to be adopted in the final RTS on mandatory clearing, and grant temporary equivalence to all non-EU jurisdictions in this context. This would give time for at least some of the other Working Group on Margin Requirements ("WGMR") jurisdictions to finalise their own rules.

For both of these reasons, it is crucial that the European Commission starts the process of granting equivalence as soon as possible, and that the issue continues to be discussed at WGMR level.

If you have any questions or wish to discuss further, please do not hesitate to contact us.

Yours faithfully,

Keith Macdonald

Chief Operating Officer, Financial Markets

Q1 Respondents are invited to comment on the proposal in this section concerning the treatment of non-financial counterparties domiciled outside the EU.

We agree with the revised treatment of non-EU NFC-s in the RTS. This was our primary concern in the first consultation and we are therefore pleased that the requirement to collect margin from non-EU NFC-s has been removed. The parity of treatment between EU and non-EU firms is fundamental – as the European Supervisory Authorities ("ESAs") point out, their risk profile is the same, and the exclusion of all non-systemic non-financial firms was one of the key tenets of the BCBS IOSCO final standards.

We do, however, have some concerns with Article 3 GEN, which has been included to clarify that margin has to be exchanged (rather than collected) with counterparties outside the EU who would be subject to the RTS if they were established in the EU.

First, it is not clear what the requirement to 'maintain' collateral in accordance with EMIR means in practice. It would be helpful if ESAs clarified that 'maintained and protected' refers to RTS Articles 1 SEG and 1 REU.

Second, without equivalence, the requirement to exchange margin with all non-EU in-scope counterparties would create conflicts and/or duplication with third-country margin regimes. For example, when trading with some counterparties from the US, both the EU and the US counterparty would be obliged to collect and post under their respective margin regimes.

There are inherent problems with this duplication of obligations. While the regimes are broadly similar, there are some substantial differences – in terms of counterparty and product scope, thresholds, eligible collateral, concentration limits, haircuts, and so on. Even if there is a further attempt at global harmonisation, some of these differences are likely to remain because they stem from the statute of each jurisdiction and cannot be changed.

In situations where both counterparties are subject to the requirement to collect and post under their own regime, they would need to define a common set of obligations that would allow both to be compliant. This has practical implications of legal and operational nature. Counterparties may need to provide for each of the different sets of rules in their legal agreements, calculate the overall margin requirements accordingly (i.e. multiple times), and then proceed on the basis of the most conservative result. Alternatively, they could try and define *ex ante* and on a rule-by-rule basis what the strictest rule is, and create a 'superset' of rules to be used between them. Either way, one party would be 'over-compliant' with someone else's regime. For example, a US Covered Swap Entity when trading with an EU FCs would have to observe EMIR-prescribed concentration limits, despite the fact that their own rules do not mandate specific percentages. EU FCs would have to restrict the variation margin ("VM") collateral to cash in major currencies only, as the US draft rules currently require.

While it may be possible to define what amounts to the 'strictest' rule, it would lead firms to change their behaviour in response to what best fits their business priorities and may be difficult to agree in practice. For example, an EU fund manager may choose not to trade with US firms if all they could exchange for VM is cash. Alternatively, if an EU bank has to collect margin from a large US corporate that would be an NFC+ if it were established in the EU and a US CSE doesn't, it is likely that US corporates would choose to trade with US CSEs instead.

Although Article 13 determinations are not within the ESAs' mandate and are dependent on the European Commission's work, we would urge the EU regulators to start considering equivalence as soon as possible. If it is not granted ahead of implementation start date/s, the legal documentation and operational build that needs to be put in place by firms has to take multiple rules into account, and this could take a significant amount of time to develop. For example, the new rules-compliant legal documentation would have to include all the detail of different jurisdictions' rules. This would make it difficult to update the existing agreements by way of an ISDA protocol, and parties may need to revert to bilateral negotiations which usually take much longer to complete. In-house collateral management systems would need to be able to process a greater number of data points, and potentially calculate margin multiple times. Again, this would take time to develop, even in larger firms.

We understand that Article 13 of EMIR is currently not a priority for the European Commission, in part because the EU and other jurisdictions' margin rules are not yet final. There is, however, no reason why at least the principles behind equivalence determinations cannot be agreed ahead of the final rules. For example, the Commission could clarify that Article 13 allows EU counterparties a choice of regulatory regime, to be agreed commercially between the two counterparties. The European Commission could also signal whether equivalence can be granted on a piecemeal basis – for example, a jurisdiction can deemed equivalent for clearing but not for margining, or vice versa. Finally, it could indicate which jurisdictions it plans to assess first, in what timeframes, and whether any transitional provisions may be available.

The European Commission and ESAs should also continue to discuss cross-border compliance with their peers from other jurisdictions in the context of WGMR, particularly with the US and Japan, which currently have draft rules. Finding the solution to making cross-border trading succeed in practice is an issue that can only be solved in an international context.

Q2 Respondents are invited to comment on the proposal in this section concerning the timing of calculation, call and delivery of initial and variation margin.

We are concerned that the RTS do not allow enough time for collection of either initial margin ("IM") or VM. The draft rules do not seem to take into account the operational complexity behind margin calculation and collection. Calculation is currently done the day after the trade, and a margin call made at the same time. Collateral is then collected in accordance with the standard settlement cycles for particular securities, and within a business day in the case of cash.

It would be helpful if the RTS defined trade, calculation and collection dates separately, and clarified the time limits applicable to each. The calculation date should be the date on which calculations are completed and the call is made. If two counterparties complete their calculations on different dates due to time zone differences, the calculation date should be the later of the dates on which the calculation is completed. Collection should then be mandated as no later than 2 business days after, for both initial and variation margin. Allowing for time zone differences is particularly important for European firms that trade with Asian counterparties - it would not always be possible for the calculation to be completed by both counterparties on the same business day. It is also the case that in some jurisdictions the standard settlement cycle for securities like bonds is longer than T+1.

Finally, mandating the collection of IM on a shorter timeframe that for VM does not seem logical – IM calculation will be more time-consuming, due to complex modelling and trade reconciliations. In addition, IM is more likely to involve securities (rather than cash) which will take longer to settle. This is especially critical for EU firms that have global trading operations with offices in different jurisdictions and different time zones - because IM thresholds are calculated on a group basis, all of counterparty's books must be closed in order for the calculation to be correct.

ESAs may also wish to consider introducing a provision on the satisfaction of collecting and posting requirements, similar to that included in the US Prudential regulators draft rules in ∞ _5 (b). This would clarify that the EU FCs or NFC+s would not be in breach of the rules if they have made the necessary efforts to collect or post the required margin, in the event its counterparty has refused or failed to provide or accept it.

Q3 Respondents are invited to provide comments on whether the draft RTS might produce unintended consequence concerning the design or the implementation of initial margin models.

The drafting in Article 4 MRM on assigning trades to specific asset classes rather than calculating sensitivities to the relevant risk factors should be made clearer. If products/trades must be mapped to specific asset classes, and IM calculated on the set of trades mapped to each, this may lead to a greater degree of mismatch between the potential future variation in net portfolio value suggested by the IM model and the behaviour of the future netted PV across all trades. The use of asset class product bucketing does not fully take into account hedging and diversification of risks within the counterparty netting set. Legal netting upon counterparty default, where applicable, will apply cross-asset rather than only within each asset class sub-grouping as defined in the RTS.

The fundamental objective of mandatory margining is to reduce systemic risks due to shock from large derivatives revaluations being passed between counterparties. A risk-sensitive IM algorithm should be aligned to real-world risk management practice. Where firms hedge risks within the counterparty netting set as a whole, this should result in lower systemic risk and should be incentivised through lower IM requirements. This objective would be more difficult to achieve should product to asset class bucketing be imposed.

Q4 Respondents are invited to comment on whether the requirements of this section concerns the concentration limits address the concerns expressed on the previous proposal.

We support the changes made to the provisions on concentration limits on sovereign debt in Article 7 LEC. As explained in our response to the first consultation paper, the requirement to diversify collateral would have been especially problematic for counterparties in emerging markets, where markets do not allow efficient mobilisation of collateral and/or where the sovereign issuer is the only realistic source of non-cash collateral.

However, it would be helpful if the drafting in Article 7 LEC was aligned with what we believe was the policy intent behind the proposal (as explained at the EBA open hearing on 18 June and in the slides used on the day). This would clarify that the reference to 'collateral collected in excess of EUR 1bn' in Article 7 LEC (2) refers to collateral collected from a single counterparty in respect of all their uncleared in-scope trades. The same applies to Article 7 LEC 3 (c), which should refer to total amount of initial margin collected from an individual counterparty, rather than from counterparties belonging to the same group.

A group-wide threshold in Article 7 LEC (3) would be very difficult to monitor in practice: we would not ordinarily know if the counterparty we are trading with belongs to a group which has to collect more than EUR 1bn in IM. Also, the IM collected may fall below or above the threshold over time, and the rules do not specify how frequently the calculations would have to be performed. The point about monitoring IM collection amounts on a group basis is especially problematic for EU firms trading with non-EU entities. A non-EU firm will not itself be under any direct obligation to perform these calculations and disclose whether it is over or under the threshold, assuming its own rules do not introduce a similar requirement - which seems unlikely, based on the US and Japanese rules. More generally, this issue of 'self-certification' for non-EU firms has been one of the main problems throughout the implementation EMIR, and should be considered in the context of the European Commission's review of the Regulation.

In terms of entities caught by Art 7 LEC (3), as there is currently no list of G-SIIs and O-SIIs in Europe, a centrally held and updated list would be of benefit for both the EU and the non-EU firms that may have to transact under the EU rules. We would urge the ESAs to mandate the creation of such a list.

It would also be helpful if ESAs clarified whether the concentration limits apply to *all* collateral collected from an individual counterparty that meets the conditions in Art 7 LEC 2 and 3, or only to the portion of collateral above EUR 1bn. Although the wording suggests it is the latter ('in excess of'), we would be grateful if this was confirmed in the final RTS. If the requirements were to be applied to the whole amount, substantial collateral substitutions may need to be performed in a short period of time, which would be difficult to do in stressed market conditions.

Q5 Respondents are invited to highlight their concerns on the requirements on trading relationship documentation.

We appreciate the removal of the requirement to agree not to exchange margin with the counterparties not in scope of the regulation. This would have posed an operational burden on firms without providing commensurate benefits. We also appreciate the more granular definition of the material terms that need to be included in the trading documentation.

Independent legal opinions

We have concerns with the new Article 2 OPD (2). Many – though not all - firms subject to the margin rules are already required to comply with the Capital Requirements Regulation ("CRR") Article 296 on the recognition of contractual netting agreements. It requires CRR firms to have written and reasoned legal opinions on the validity and enforceability of the netting agreements, specifying in Art 296.2 (b) the applicable laws that need to be considered. Similarly, the RTS require counterparties to perform an independent legal review on at least an annual basis in order to verify the legal enforceability of the bilateral netting arrangements. It therefore appears that for some counterparties, Article 2 OPD 2 duplicates the CRR provisions, with the same policy rationale and purpose, but with an increased frequency of legal reviews. It is not clear why this is necessary.

The RTS should instead be aligned to the CRR provisions, and clarify that firms already subject to that Regulation can rely on their existing policies and procedures for legal reviews. For firms not subject to CRR, the RTS should introduce an analogous requirement, and clarify that an 'independent' review can be performed by an independent internal legal department, rather than necessarily by an external counsel. The requirement for an annual review should be removed: it is too frequent, and would be overly burdensome for smaller FCs and NFC+s for whom this might be a new process, and for firms operating in a large number of jurisdictions which would all need to be assessed.

Non-netting

The requirement for firms to perform independent reviews of netting enforceability highlights the issue we raised in our first response of trading with counterparties from jurisdictions where there are no clean netting or collateral opinions.

Recital (8) clarifies that counterparties remain subject to the obligation of assessing the legal enforceability of the bilateral agreements and the effectiveness of the segregation agreements. When such assessment highlights the potential for the non-compliance with the RTS, European counterparties are required to identify alternative processes to post collateral, such as relying on third-party banks or custodians domiciled in jurisdictions where those requirements can be guaranteed. In effect, where there are issues of enforceability, the RTS asks EU firms to create a legal framework under which collateral exchange can be safely enacted. If this cannot be achieved, presumably the alternative is not to trade at all - ESAs clarified at the open hearing that they believe EMIR mandates the exchange of collateral for all in-scope counterparties, without exceptions. This is in contrast to the CRR provisions outlined above, which do not prohibit firms from entering into trades where netting agreements are not valid: it merely states that they will not be recognised as risk reducing. It allows EU banks to continue to transact without 'clean' legal opinions.

Nothing will change in this respect when margin rules come into force: as now, it will not always be possible to get opinions to satisfy ourselves that netting and collateral will be enforceable, for example, in China or the Middle East. "Enforceability" in this context comprises of two elements: enforceability as a matter of contract law under the governing law of the contract (typically English law or New York law); and consistency with the bankruptcy laws of the jurisdiction where the counterparty is located. The latter is critical since, in many jurisdictions, regardless of the law selected to govern the contract, local insolvency law will prevail in the event of an insolvency.

Requiring EU firms to exchange collateral with counterparties in these jurisdictions will increase risk rather than reduce it – both to the firm in question and to the system as a whole. Alternatively, if we have to stop trading altogether, EU firms will be shut out from financial markets in a large number of jurisdictions in Asia, Africa, the Middle East and South America, putting them at a significant competitive disadvantage to many non-EU firms.

The RTS provisions on 'alternative arrangements' are somewhat misleading: they focus solely on the posting and segregation of margin. Although posting margin exacerbates the problem significantly, it applies to both collection and posting, and to IM and VM. As we described in our response to the first RTS, the EU counterparty cannot always successfully isolate the collateral arrangement from the laws of the jurisdiction of its counterparty. Whatever the governing law of the documentation or location of the collateral (e.g. English or New York law ISDA Master Agreements), the jurisdiction of the posting counterparty remains relevant, even when using a third party custodian. If collateral is taken in Europe, absent a 'clean' legal opinion or legal certainty covering the posting counterparty's jurisdiction, there remains a risk that collateral will not be available in a timely manner as the RTS require, or that it can be clawed back by a liquidator. If a counterparty defaults, we may not be able to liquidate their collateral quickly if enforcement stays are imposed under the local law (speed of liquidation being one of main reasons for collecting margin in the first place). Alternatively, we may be prevented from retaining the collateral posted to us at all, because an insolvency official or other third party may be able to enforce a claim to it.

The exchange of collateral may be subject to challenge by the local liquidator of an insolvent counterparty, and the chosen method of margining could be subject to censure in local courts. Such risks exist if there are restrictions on insolvency set-off or netting in the collateral provider's home jurisdiction or if the relevant netting legislation in that jurisdiction imposes stays on the ability to pursue claims against the insolvent counterparty and to apply collateral posted by it. Not only would this delay the return of any collateral owed to us, but where we have an onshore presence through local offices, it may lead to other penalties such as fines or loss of local operating licences.

In addition, when posting collateral, we have a return risk on the foreign counterparty: should the counterparty become insolvent, where the CSA/CSD or netting are not recognised, a local liquidator may try and claim any excess collateral due to be returned to us for the collateral pool. Again, the EU firm could be subject to local sanctions through our onshore presence.

To a certain extent, we already face this risk by trading in non-netting jurisdictions. The key difference is that, at the moment, we are free to assess counterparty's credit risk, set internal limits accordingly, and choose whether to exchange collateral. We may trade without a CSA, taking a credit risk on the counterparty, or we may enter into a one-way CSA in our favour - though this is often not commercially viable and does not solve the problem as described above (the collateral collected is merely a 'nice to have' and there is no certainty we can keep it, nor is it taken into account for capital requirements). With the advent of mandatory margining, that choice no longer exists – we either have to satisfy ourselves that there is no risk to the arrangement, or not trade at all.

It may also be the case that other regulators would take a different approach to non-netting jurisdictions. Some, such as those with close proximity to those jurisdictions, may choose to exempt their counterparties from the obligation to exchange margin. We would urge the European Authorities to discuss these issues in the context of WGMR in order to agree a common approach. Any difference in treatment would mean some counterparties will be at a competitive disadvantage, creating an uneven playing field.

The enforceability of close out netting and collateral arrangements under the law of the jurisdiction of the counterparty is one of the first building blocks of prudent risk management for OTC derivatives. ISDA currently has more than 50 netting and collateral opinions respectively but this still leaves a substantial number of other jurisdictions with no netting or collateral opinions where the EU banks are active – most notably China and the Middle East - where local laws place restrictions on a creditor's ability to implement the close-out netting process.

We understand that some jurisdictions are choosing to amend their laws to recognise close-out netting. Indeed, we are seeing progress in Malaysia and the Dubai International Financial Centre (DIFC). It is also hoped that the increased prevalence of margining for uncleared derivatives, together with the growth of local capital markets, mean that more jurisdictions will enact legislation in order to achieve the statutory recognition of the netting process and commit to collateral law reform.

As an alternative to the current draft rules, we would suggest that ESAs consider granting an exemption from margining in non-netting jurisdictions. This would mean that EU FCs and NFC+s should be exempt from margining trades with counterparties in non-netting jurisdictions if their total outstanding notional amount for those transactions is below 5% of their overall notional amount of their uncleared OTC derivatives.

If this is not possible then we would urge ESAs to consider introducing transitional provisions, which could be combined with a *de minimis* threshold so that it is only valid if transactions with counterparties in non-netting jurisdictions do not exceed a pre-determined threshold. A transitional period would allow time for other jurisdictions to change their legal systems to allow netting and to provide for legal certainty in terms of the enforceability of collateral arrangements pursuant to the ISDA suite of credit support documents, while not unduly penalising EU firms.

It is also worth noting that there are additional enforceability issues for some products such as Islamic derivatives. For example, the legal documentation for exchanging margin on products such as deliverable FX forwards is in the process of being developed but there is as yet no industry standard. As these jurisdictions are also non-netting, a transitional would allow time for it to be developed.

Q6 Respondents are invited to comment on the requirements of this section concerning the legal basis for compliance.

We appreciate the removal of a requirement for a legal review, and the drafting change to allow the margin to be available in a timely manner rather than immediately. As above, and for the avoidance of doubt, it should be clarified that the ‘independent’ legal review can refer to a review undertaken by an independent internal function. We believe the ESAs clarified their policy intent at the open hearing on 18 June.

We do not believe an annual review of segregation arrangements is necessary. It would be costly and time-consuming to perform reviews so frequently, particularly for firms that operate in many jurisdictions and/or where external legal opinions may be sought as there is not sufficient expertise in-house. Instead, firms should be left to determine how frequently the reviews ought to be performed and define the parameters that would lead to a more or less frequent reassessment.

We comment further on the provisions of Art 1 SEG (1) in our response to Q7 below.

Q7 Does this approach address the concerns on the use of cash for initial margin?

While we appreciate that the provision on cash IM reinvestment in Art 1 REU (2) is an attempt to deal with the inherent difficulties of segregating cash collateral, the requirements are neither practicable nor proportionate.

It is not possible to protect the cash IM from the default or insolvency of the custodian (or a third party holder) in the manner required by Art 1 SEG (1). While it is possible to segregate cash from the assets of the collecting party, a custodian will always hold cash as a banker and the return of that cash will always be dependent on their solvency.

The reinvestments of cash may seem simple but it is in fact operationally so complex that it will deter counterparties from using cash for IM. The posting counterparty would have to agree its reinvestment choices with the custodian, and these would have to comply with the collateral eligibility, haircuts and concentration limits. It is not clear how quickly a custodian would have to perform the reinvestment (and any substitutions, should the collateral at some point fail to meet the eligibility criteria), or who would be tasked with monitoring compliance with the RTS on an ongoing basis. The collecting party would have to bear the operational and possibly regulatory risk of being in charge of a reinvestment process. Moreover, some cash would likely always be present – e.g. as a direct result of reinvestment strategy in the form of interest or dividends, or to meet small changes in the value of collateral. It is not obvious how this residual cash should be treated, or how quickly it would need to be reinvested.

The RTS should allow cash to be used as IM, without a specific requirement for it to be protected from custodian default or subject to segregation constraints. It is not always possible to eliminate all counterparty credit risk in its entirety, and the risk of a custodian defaulting should not preclude counterparties from using good quality and liquid collateral such as cash. The margin rules were conceived as a way of protecting the two parties trading derivatives from each other's insolvency. It does not seem feasible to also expect them to deal with the failure of market intermediaries. Those risks are better dealt with via the global regulators' ongoing work on recovery and resolution of financial markets infrastructures such as clearing houses and central securities depositories.

At the open hearing, ESAs stated that they believed the exchange of IM in cash would be uncommon, so the issue is likely to be immaterial in practice. While this may be true in some jurisdictions, it is not necessarily the case everywhere: in some markets, it is difficult to mobilise other types of collateral, and cash may be the only option available. For example, in some Asian jurisdictions, posting bonds offshore is subject to restrictions, so counterparties may insist on cash. Also, if the collection timing for IM remains T+1 as in the draft RTS, as explained in our response to Q2, standard settlement cycles in some jurisdictions may not allow for non-cash assets to be posted.

Q8 Respondents are invited to comment on the requirements of this section concerning treatment of FX mismatch between collateral and OTC derivatives.

We fully agree with the proposal to remove the FX mismatch haircut of 8% on the collateral posted as cash in any currency, for both IM and VM. Although recital (11) and provisions in Annex II state this, for the avoidance of any doubt it would nevertheless be helpful to clarify in drafting of Annex II (3) that the haircut only applies to the market value of assets other than cash.

The second consultation also introduces the concepts of transfer and termination currencies, without defining them further. We would urge ESAs to include in the final RTS a detailed description of each, their policy rationale for mandating a single currency to be agreed, and a clarification of whether each party can specify its own currency. This would help counterparties understand and apply the concepts properly when conducting commercial negotiations with their counterparties

Other issues

Intra-group margining

EMIR Article 3 defines the conditions for trades to be treated as intra-group. In the case of group entities established outside the EU, that definition is in part based on there being jurisdictional equivalence under EMIR Article 13. No country has so far been deemed equivalent by the European Commission, as described in our response to Q2. Without equivalence, firms which have a number of non-EU group entities will not be able to make use of the exemptions available, even if all the other conditions in Articles 3 and 11 are met.

This would be a major concern for international financial, non-financial and mixed groups who wish to be able to continue to invest in Europe and to prudently manage related business risks. Requiring the clearing and margining of such transactions executed within groups (and not with external counterparties) is not justified in counterparty risk terms, and it may actually be damaging in terms of creating new risks – for example, because so many group entities would be forced to deal with clearing houses.

We would propose that the final RTS replicate the approach likely to be adopted in the final RTS on mandatory clearing, and grant temporary equivalence to all non-EU jurisdictions. This would give time for at least some of the other WGMR jurisdictions to finalise their own rules, and for the European Commission to undertake equivalence assessments. There seems to be no policy reason for a different approach to be taken for clearing and for margining.

ESAs should also clarify in the final RTS how the exchange of initial margin between group entities is meant to work in practice. It is currently not clear, for example, how EUR 50m IM threshold is meant to be used between group entities. The exemption from IM should be available even where the conditions specified under Art 3 and Art 11(5) to (10) of EMIR have not been met. Imposing a requirement for VM should be sufficient mitigation of risk on intra-group transactions where those conditions are not satisfied.