SwissFinanceCouncil
Fostering International Dialogue

Rt. Hon. Lord Hill of Oareford, CBE
European Commission,
Rue de la Loi 200,
1040 Brussels, Belgium

Swiss Finance Council
23 Square de Meeuse
Brussels,
29th January 2016

Dear Commissioner Hill,

Call for Evidence on EU regulatory framework for financial services

We welcome the opportunity to respond to the European Commission's 'Call for Evidence' on the impact of the broad range of legislative measures the European Union has put in place since the financial crisis and are pleased that such an important initiative has been included as part of the Capital Markets Union (CMU) Action Plan. The Swiss Finance Council (SFC) has submitted its response electronically via the dedicated EC questionnaire, and we have annexed, for your convenience, our detailed answers to this letter.

We recognise that in the post-crisis environment, the development of the new regulatory framework, including many of the global, European, and national initiatives, has been necessary and welcomed. However, we find that the sheer volume, detail and diverging timelines of regulation has made predicting the effectiveness of individual rules difficult, while identifying their cumulative impact, and the potential for unintended or counterproductive outcomes, is extremely challenging. The time is right to assess the interactions and potential overlaps of financial reforms and then calibrate them to strike the right balance between growth and stability.

Furthermore, as the Commission notes, many rules have not yet been fully implemented, and much of the detail remains to be finalized, also at the international level. Accordingly, the request for data and empirical evidence at this stage in the implementation process may not fully highlight the extent of the risks to financial market efficiency and stability that some of the regulation, whether in isolation or in accumulation, is creating. As such, we hope that this initiative is a first step in a continual process of consultation with market stakeholders to help refine and improve the regulatory process, to ensure the successful alignment of the EU and global rules, and to define the overarching policy priorities for any future reforms and reviews.

We strongly support this review and believe that it is an important opportunity to:

- *evaluate the interaction of EU and international rules;*
- *critically assess rules affecting the ability of the economy to finance itself and grow*;
- *consider further measures needed to facilitate job creation*;
- *enhance consumer investment experience, including through new technologies*, and
- *improve Europe's competitiveness*.

Interaction of the measures and international rules

Following the crisis, the regulatory response has been fast and covered nearly all aspects of banking and capital market activities, and both are unequivocally safer versus pre-crisis. Effective capital requirements for large banks, for example, increased 7x – 11x based on Bank of England estimates. However, the lack of consistency and coordination between regulators remain one of the major challenges for global banks.

The FSB's first annual report on the implementation and effects of the G20 reform programme, published in November 2015, showed that the EU members of the G20 have in place almost all elements of the post-crisis reform programme[1]. However, at the same time, there are a number of further prudential reforms still under development by the BCBS, including on: (i) calibration for simple, transparent and comparable securitisations, (ii) capital floors framework based on revised standardised approaches, (iii) new market risk modelling rules, (iv) interest rate risk in the banking book; and (v) regulatory treatment of sovereign risk.

It is not yet clear how this combined package will interact with the existing EU rules and whether it will amount to a new 'Basel IV'. Any change to the RWA metric as a result of the above, will have an immediate knock-on impact on risk weighted capital ratios, including MREL/TLAC. As such, we urge the Commission to take these upcoming changes into account.

The impact of regulatory change on the ability of the economy to finance itself and grow

We fully support the CMU as an integral part of the Juncker Commission's overarching strategy to boost growth and jobs. In financial services, that means striking the right balance between stability and growth, enabling the sector to contribute to the still fragile recovery through activities such as market-making, traditional lending, and investment facilitation. It is important for the Commission to consider the impact of these changes, including those yet to come, to understand properly the impact on growth.

While we support CMU's objective to boost the role of capital markets in financing in the EU, it is equally important that banks can continue to support the financing in the real economy. In order to maintain a diverse set of financing mechanisms in the EU, we need to ensure that other counter-productive measures are not put in place, such as an EU FTT and Bank Structural Reform Regulation that would undermine the ability of banks to finance the real economy.

In this context we would particularly like to highlight the issue of market liquidity, which we consider essential for the efficient functioning of capital markets and a key component in strengthening the link between all market participants and economic growth.

While many of the post-crisis measures were necessary to increase financial stability and reduce systemic risk, when assessed in aggregate, they are disproportionate to the risks they seek to address. For instance, although the current reform programme has served to increase the quantity and quality of capital, we have concerns about the impact of layered conservatism on market liquidity, and the way in which many different regulations each target the same underlying issue.

Furthermore, the impact on growth cannot be understood without assessing the impact of anticipated as well as existing changes. It is also crucial that future change is signalled early and that legislative timetables allow adequate time for implementation: regulators and financial institutions need a long lead-time to plan and adjust business and operating models for regulatory change.

Facilitating jobs-creating investment from abroad

We believe the call for evidence is a key opportunity to remove barriers to investment from outside the EU. The flow of capital around the world is an important source of job creation, providing capital for investment and offsetting cyclical effects between regions. The European Union has been a major beneficiary of this process, receiving, for example, a stock of over half a trillion euros in FDI from Switzerland alone as of 2013, second only to the US.

We were initially heartened by the references to the international dimension in the original CMU Green Paper, but then disappointed by the apparent lack of specific references to this in the subsequent Action Plan. There has been a trend in recent years towards what at best can be described as an overly risk averse approach to non-EU markets, and we still hope that you will take the opportunity to restore some balance.

[1] See http://www.financialstabilityboard.org/wp-content/uploads/Report-on-implementation-and-effects-of-reforms-final.pdf

We understand measures are required to prevent the importation of unnecessary risk from outside, but these have to be proportionate and minimise the opportunity cost to the EU.

In this respect, we support a new approach to third country equivalence, as called for also by the European Parliament and as outlined in our response.

Enhancing consumer investment experience, including through harnessing the role of technology

We believe that policy makers, both at the national and international levels, should collaborate to help the private sector, as well as the wider economy, to harness the value potential from using new big data technology. Technology-enabled innovation can have positive effects not only for consumers, but also on financial stability, for example, by risk diversification and helping to better spread risk across a range of factors in the financial system. While digitalisation is global, regulation is local, and the EU needs to take greater account of this when legislating. For European consumers to benefit from technological innovations, financial institutions must be able to take advantage of new technologies to facilitate the rollout of digital solutions across borders. At present regulation is national, and implementing different solutions in different jurisdictions creates unnecessary barriers to innovation.

Another way this review can serve the customer is to address the often overlapping and duplicative information requirements required to be provided to consumers and investors. It's important that customers receive clear and concise information in an easily digestible format. Providing too much information is unlikely to add value in terms of helping customers make a more informed choice and can, on the contrary, rather obfuscate the key messages leading to less well informed choices.

In addition, there needs to be an increased awareness that the industry cannot absorb the cost of all regulatory change and will to varying degrees have to pass on such costs to customers, potentially reducing the numbers of individuals and small businesses who can benefit from financial services.

Improving the competitiveness of Europe's financial sector

Underpinning all of this is the competitiveness of Europe's financial sector. A competitive industry works more effectively for consumers, can better facilitate the movement of job-creating capital, and boosts growth by enhancing productivity. The scale of regulatory change seen in the past few years has been enormous for all firms, but for institutions competing on a global level, the burden of regulation has been even more significant.

The implementation of the G20 commitments has differed in each jurisdiction, while the situation has been compounded by extra-territorial approaches. The result has been an un-level playing field and increased costs as firms create similar but different infrastructure several times over. We support a level playing field and a consistent set of requirements and operating conditions for all investment firms, and strongly believe the EU has an important role to play in supporting that effort internationally. We need Europe to speak with a more coherent and firm voice to strengthen its influence in international fora including the BCBS, the FSB and IOSCO to ensure a proportionate calibration of international standards that can support the growth and jobs agenda of the EU.

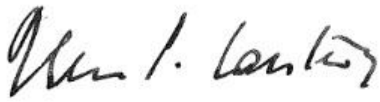
Similarly, we believe the EU indtitutiond play an important role in boosting competitiveness and levelling the playing field within the EU. We hope the Commission will be mindful of this and the points below in taking forward the conclusions of this review:

- Firstly, ensuring EU consumers can benefit from a fair access to financial services provided by firms from third countries.
- Secondly, bearing in mind that while the ramifications of large institutions failing are often systemic, those institutions are not automatically prone to difficulties. Size and diversification are frequently a source of strength, too. Equally, as the failure of mono-line institutions during the crisis demonstrated, it is not the case that smaller firms are never systemic.

- Finally, creating a level playing field across the EU, including between the Banking Union member jurisdictions and the rest of the EU.

On behalf of our members, we would like to thank the Commission for undertaking this important assessment, and continue to support the development and effective application of globally compatible EU financial regulation.

Yours sincerely,



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2015

SFC Response to the European Commission consultation: "Call for evidence: EU regulatory framework for financial services"

SWISS FINANCE COUNCIL

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For your consideration

The Commission is looking for empirical evidence and concrete feedback on:

A. Rules affecting the ability of the economy to finance itself and growth;
B. Unnecessary regulatory burdens;
C. Interactions, inconsistencies and gaps;
D. Rules giving rise to unintended consequences.

It is expected that the outcome of this consultation will provide a clearer understanding of the interaction of the individual rules and cumulative impact of the legislation as a whole including potential overlaps, inconsistencies and gaps. It will also help inform the individual reviews and provide a basis for concrete and coherent action where required.

Evidence is sought on the impacts of the EU financial legislation but also on the impacts of national implementation (e.g. gold-plating) and enforcement.

Feedback provided should be supported by relevant and verifiable empirical evidence and concrete examples. Any underlying assumption should be clearly set out.

Feedback should be provided only on rules adopted by co-legislators to date.

Response

In this section you can provide evidence on the 15 issues set out in the consultation paper. You can give up to 5 examples for each issue. The issues are divided in four themes (A-D).

*Fields marked with * are mandatory.*

Theme A. Rules affecting the ability of the economy to finance itself and grow

Issue 1 – Unnecessary regulatory constraints on financing

*The Commission launched a consultation in July on the impact of the Capital Requirements Regulation on bank financing of the economy. In addition to the feedback provided to that consultation, please identify undue obstacles to the ability of the wider financial sector to finance the economy, with a particular focus on **SME financing, long-term innovation** and **infrastructure projects** and **climate finance**. Where possible, please provide quantitative estimates to support your assessment.*

Example 1 for Issue 1 (Unnecessary regulatory constraints on financing)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, article 510. Net Stable Funding Ratio, lack of recognition of interdependent securities financing transactions (SFTs).

Please provide us with an executive/succinct summary of your example: *

The Net Stable Funding Ratio (NSFR) will have a major impact on the cost of fixed income and equity market making, due to the lack of recognition of interdependent securities financing transactions (SFTs), which increases funding costs for short-term pass-through trades.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

End-users such as pension funds and asset managers rely on equity, bond and derivative markets to manage and hedge future liabilities and risks. Liquid securities financing markets (e.g. repo/reverse repo and securities lending) are critical to the functioning of those cash markets as they allow banks and broker dealers to make markets without carrying inventory in every security (too costly under leverage ratio rules).

The Net Stable Funding Ratio (NSFR) would have a major impact on the cost of fixed income and equity market making, due to the lack of recognition of interdependent securities financing transactions (SFTs), which increases funding costs for short-term pass-through trades.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

This issue can be remedied via a more flexible transposition of paragraph 45 of Basel's NSFR standard to extend 0% ASF and RSF treatments for linked transactions to these market making & client facilitation activities. The absence of an amendment here would impair capital market functioning, and increase costs for both market makers and important end-users. The additional prudential rationale comes from the fact that many interlinked SFTs are self-funding (liabilities effectively fund the assets) meaning that the effective liquidity risk is very low.

Example 2 for Issue 1 (Unnecessary regulatory constraints on financing)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012,

article 510. Net Stable Funding Ratio, rule introducing positive mark-to-market balances on derivatives exposures.

Please provide us with an executive/succinct summary of your example: *

The NSFR introduces a new rule that requires long term funding of positive mark-to-market balances on derivatives exposures where securities are posted as collateral by the pension fund. The net effect is that pension funds will face significant higher capital and trading costs for hedging via derivatives.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

Pension funds use interest rate and inflation swaps to hedge the discount rate on their liabilities. They use derivatives to manage the cash flow payments of their underlying pension schemes allowing them to stay invested in assets such as equities, property and fixed income bonds, to grow their assets over the life of the scheme and fund their liabilities. This bilateral derivative hedging is done via ISDA's underlying Credit Support Agreements (CSAs) that typically have both cash and government bonds as eligible collateral. The NSFR introduces a new rule that requires long term funding of positive mark-to-market balances on derivatives exposures where securities are posted as collateral by the pension fund. The net effect is that pension funds will face significant higher capital and trading costs for hedging via derivatives. They will also have funding issues in terms of a shortage of cash, so they will need to transform their securities into cash and run significant cash buffers. This will result in less long-dated government bond assets being held against their liabilities. Pension funds' cash collateral deficit is one of the reasons they were exempted from mandatory clearing.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

A change to the NSFR rules to recognise non-cash High Quality Liquid Assets (HQLA) as eligible collateral is recommended.

Example 3 for Issue 1 (Unnecessary regulatory constraints on financing)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, Article 511, treatment of client clearing positions in the Leverage Ratio.

Please provide us with an executive/succinct summary of your example: *

The current Leverage Ratio treatment of banks' client clearing positions disregards clients' segregated margin in measuring the potential future exposure of the service provider, leading to inaccuracies in measurement of potential bank leveraging from such services.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

We are concerned by the impact of the Basel III/CRR leverage ratio. Specifically, we strongly believe that, in the context of a bank exposure created by a cleared derivatives transaction, the Basel III leverage ratio should recognise the exposure-reducing effect of margin that is segregated, because segregated margin cannot be used to increase the bank's leverage.

It is important that the denominator of the leverage ratio accurately captures the actual off-balance sheet exposures that a bank has to its counterparties, including exposures arising out of centrally cleared derivatives transactions. We are concerned about the fact that the leverage ratio currently fails to recognise the exposure-reducing effect of segregated margin in the context of centrally cleared derivatives transactions (whether executed over-the-counter or through an exchange). Unlike margin posted in many uncleared derivatives transactions, margin that is segregated (as it is very often the case for cleared derivatives transactions) may not be leveraged by a bank. As a result, such segregated margin is solely exposure-reducing with respect to a bank's cleared derivatives exposure, and accordingly, we strongly believe that the leverage ratio's total leverage exposure ought to recognise that reduction. A failure to recognize the exposure-reducing effect of segregated margin will have materially adverse consequences on cleared derivatives markets, end users and market participants.

Moreover, the leverage ratio's inappropriate treatment of segregated margin in cleared transactions is compounded where such margin is posted in the form of cash, rather than securities, as it is often the case. The accounting rules of some jurisdictions require such segregated cash margin to be treated as an on-balance sheet asset of the receiving bank, and as such, the segregated cash is included as a separate leverage exposure in the denominator of the bank's leverage ratio. In these circumstances, the bank is subject to a double leverage ratio penalty: (i) the segregated cash margin received may not be used to reduce a cleared derivatives exposure in the denominator of the bank's leverage ratio, and (ii) because such segregated cash margin is treated as an on-balance sheet asset, it must be separately added as an exposure to that denominator as well.

We believe the failure to recognize the exposure-reducing effect of segregated margin for leverage ratio purposes will substantially and unnecessarily increase the amount of required capital that will need to be allocated to clearing activity.

Such a significant increase in required capital will also significantly increase costs for end users that rely on derivatives for risk management purposes, Further, banks may be less likely to take on new clients for derivatives clearing. As a result, some market participants may not gain access to clearing services and not be in a position to hedge their underlying risks.

In addition, the liquidity and portability of cleared derivatives markets could be significantly impaired, which would substantially increase systemic risk. That is, in times of market stress, when banks' capital may decline to levels that make the leverage ratio a truly binding limit, the ability of such banks to purchase portfolios of cleared derivatives from other banks will be severely constrained.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We encourage the Commission to discuss with the BCBS the potential to amend the Basel III leverage ratio so that exposures should be reduced by segregated margin for cleared derivatives transactions.

We support ongoing work to consider using an unmodified version of SA-CCR versus CEM for the calculation of the leverage ratio exposure. These changes should then be introduced in CRR as soon as possible.

Example 4 for Issue 1 (Unnecessary regulatory constraints on financing)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, article 395.

Please provide us with an executive/succinct summary of your example: *

The cap on exposures to 'shadow banks' undermines attempts to shift credit intermediation in the EU from banks to market-based alternatives, which is a key focus of the CMU.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The CRR includes a requirement for banks to cap their exposures to the so-called shadow banks. This is an aggregate exposure cap to an industry group vs. single names, which is novel and a departure from the existing and well-functioning large exposure regime currently in place. The risk from shadow banks is both addressed directly in other sectoral legislations, and worth noting that banks' interaction with shadow banks are constrained via the increasing regulatory burdens on SFTs.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We recommend an approach based on enhanced disclosure and reporting before any new binding restriction is introduced.

Example 5 for Issue 1 (Unnecessary regulatory constraints on financing)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, Article 429.

Please provide us with an executive/succinct summary of your example: *

The higher capital charges on banks' repo exposures will decrease liquidity in repo markets.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The new rules will affect liquidity in repo markets. Among other functions, banks use repo markets to finance trading and market making activities. Therefore, a decrease in liquidity in repo markets is likely to lead to a reduction in liquidity across other capital markets as they are more expensive or difficult to fund. Repos were traditionally assigned low risk weights, because they are normally fully collateralized with high quality collateral, so banks only needed to allocate limited capital to repo positions. However, banks now face higher capital charges to account for counterparty credit risk from repo exposures.

The situation is exacerbated because the new leverage ratio requirements mean banks can no longer net their repo exposures (i.e. reducing the number of repos that currently offset each other). Repo transactions must now be separately collateralised or haircut on a trade-by-trade basis. In general, shifts in risk-weighted capital could be exacerbated by the increasing emergence of the leverage ratio as the binding constraint in banks' capital management. As a non-risk-sensitive measure, adherence to the leverage ratio provides for further significant capital increases for the least risky transactions.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

The EU implementation of the leverage ratio should permit the netting of repo exposures.

Issue 2 – Market liquidity

Please specify whether, and to what extent, the regulatory framework has had any major positive or negative impacts on market liquidity. Please elaborate on the relative significance of such impact in comparison with the impact caused by macroeconomic or other underlying factors.

Example 1 for Issue 2 (Market liquidity)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (MiFID II)

Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR)

Please provide us with an executive/succinct summary of your example: *

The MiFID II Level 1 pre-trade transparency requirements do not include an appropriate treatment of "packaged transactions" which could result in such transactions being subject to inappropriate levels of transparency.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

We stress the need for an appropriate MiFID II treatment of "packaged transactions" which we would define as transactions where (1) the package has two or more components that are priced as a package with simultaneous execution of all components and (2) the execution of each component is contingent on the execution of the other components. A package is designed to provide desired risk-return characteristics effectively in the form of a single transaction with efficiencies in execution cost and reduction in risk (market and operational) achieved through concurrent execution.

Simultaneous execution of a package with a single counterparty using a single execution method alleviates the timing and mechanical risks and lowers bid/offer costs to those of the intended risk of the package. Inappropriate application of certain requirements, particularly Pre- and Post-Trade Transparency requirements, will jeopardise the ability of market participants to execute the entire package (primarily because exposure of an order in one transaction gives rise to the possibility of another party unrelated to the intended package to trade that component transaction).

Inability to execute packages will result in significantly increased costs and risks to market participants. These costs and risks arise primarily from three sources: (1) separately trading of the components of a packaged transaction incurs the possibility of the market moving between executions of each component because such executions cannot be precisely time-matched, (2) there are likely to be differences in contract specifications, mode of execution, clearing/settlement workflows and relative liquidity when components of a packaged transaction are executed separately and/or on different venues, and (3) accessing different sources of liquidity for the various components when traded across different venues or over-the-counter incurs additional bid/offer spreads.

We are concerned that MiFID II applies a transparency regime to packages under which packages containing illiquid or large components cannot qualify for waivers in a manner consistent with those provided when trading those components on a standalone basis. This could result in liquidity providers being unwilling to provide liquidity in packages in future. As a consequence, end users will be prevented from executing the package and will be forced to transact the components of the package separately.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

In general, we recommend that the application of the various requirements of MiFID II / MiFIR to the trading of components as a package transaction should be considered separately from the application of the requirements to those same instruments when traded on a standalone basis. This is particularly important for the application of the Pre- and Post-Trade Transparency requirements.

We recommend that each transaction comprising a package must be considered liquid in order for the package to be subject to the transparency rules or the derivatives trading obligation. The presence of illiquid instruments in the package should permit the package to benefit from waivers for Pre-Trade Transparency and Deferrals for Post-Trade Transparency. In this regard we support ESMA's proposed deferred publication approach for post-trade transparency for packages as well as the proposal to allow packages to be scoped out of the trading obligation under certain conditions. However, ESMA believes it does not have the remit under Level 1 to make available a waiver from pre-trade transparency requirements for packages. We therefore urge the Commission to amend Level 1 to ensure the availability of a pre-trade transparency waiver for packages, conditional on relevant criteria being met.

Example 2 for Issue 2 (Market liquidity)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), Art. 46 Regulation (EU) No 909/2014 of 23 July 2014 ('CSDR')

Please provide us with an executive/succinct summary of your example: *

The cumulative impact of regulatory reforms on liquid collateral is of significant concern because it could give rise to a collateral squeeze, undermining financial stability. Collateral supply and demand impact of regulatory reforms is of significant concern because an imbalance could give rise to a collateral shortage and thus inadvertently trigger a systemic crisis. An adequate supply of serviceable collateral plays a central role in market-based credit intermediation, is central to the functioning of the global financial system, and is critical to the success of the CMU. Limits to capital re-use, such as those under the proposed rules for derivatives margining, can undermine securities markets and lead to funding stresses that reverberate across financial markets. Helpful measures in the context of CMU would be to clarify appropriate levels of permissible re-hypothecation, transparent collateral ownership, and focus on the removal of barriers to cross-border collateral use.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

An adequate supply of serviceable collateral plays a central role in market-based credit intermediation, it is central to the functioning of the global financial system, and it is critical to the success of the Capital Markets Union. Limits to capital re-use, such as those under the ESAs proposed rules for non-cleared OTC derivatives margining, could undermine securities markets and lead to funding stresses that reverberate across financial markets. Regarding limitations on capital re-use, regulators should act to clarify appropriate levels of permissible re-hypothecation, transparent collateral ownership, and co-operate to remove barriers to cross-border collateral use.

One of the largest problems in European markets at the moment is settlement location of the CSDs and no interoperability, e.g. Italian government bonds settle domestically in Montetitoli, French government bonds in Euroclear France. Additionally, financial institutions may, at the same time, have client trades in these asset classes settling into one of the ICSDs e.g. Clearstream. This inadvertently results in banks shuffling securities around between different custodians to settle different trades – thus the settlement efficiency rates are much lower than they could be – and thus collateral velocity ends up being slower. We understand that T2S is supposed to be the main solution for this problem – providing a single platform to settle securities – the roll out of this however has been very slow and scheduled across many waves over 2015 to 2017.

Moreover, only after most countries and CSDs are "plugged in" will they then start working on cross border settlement and mirroring of positions. The ultimate outcome would be to allow for the settlement of all bonds in one place and the 'cross border' movements will happen under the hood where institutions are not concerned about these.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Existing regulation, including recent regulation, should be screened for measures that have, inadvertently or otherwise, undermined capital flows within the EU or between it and partner countries.

Priorities for review with cross-border impact should include:

- The single largest downside risk from regulation with material unintended consequences is the cumulative impact of prudential and securities rules on the supply/demand for liquid collateral.
- Collateral supply and demand impact of regulatory reforms is of significant concern because an imbalance could give rise to a collateral shortage and thus inadvertently trigger a systemic crisis. An adequate supply of serviceable collateral plays a central role in market-based credit intermediation, is central to the functioning of the global financial system, and is critical to the success of the CMU. Limits to capital re-use, such as those under the proposed rules for derivatives margining, can undermine securities markets and lead to funding stresses that reverberate across financial markets. Helpful measures in the context of CMU would be to clarify appropriate levels of permissible re-hypothecation, transparent collateral ownership, and focus on the removal of barriers to cross-border collateral use.

We note with significant concern the cumulative effects of the various prudential and securities regulatory reforms on the supply and demand for liquid collateral. While the ECB and IMF have conducted studies on capital and derivatives reforms affecting collateral demand, no policy body has yet conducted a full and comprehensive analysis of all of the reforms across the prudential and securities areas. In particular, the shadow banking reforms limiting reuse and re-hypothecation for collateral which will restrict the collateral supply side, have not been factored in at all to previous studies. The implementation timing of many of these reforms is within a three year time span. We wish to ensure that reforms do not limit collateral to a dangerous degree. There is little doubt that collateral will become a more valuable resource, and the way that it moves around the financial system will change, with implications for the way that collateral underpins the global securities markets, including but not limited to the fixed income markets.

Given the experience of collateral problems and their knock on effects during the financial crisis, we believe this area merits further significant study by public policy bodies that are equipped with the data and independence to conduct a full analysis. We attach Credit Suisse research reports, "When Collateral is King" and " The Money Market Under Government Control" for further reference regarding the key role of collateral in the financial system, and how it has evolved prior to and following the financial crisis. The first report's analysis concludes that liquid and safe collateral is the main form of money for large firms, asset managers, and financial institutions. Unsecured bank deposits can never play that role. A globalized economy has large liquidity needs, which can only be met by a collateral-based financial system. The efficiency advantages of a collateral-based financial system include its adaptability and reduced need for costly relationship-based lending. Examining the shadow banking system and role of collateral allows one to see more clearly the role of the public sector and the central banks in enabling the private sector to deleverage "safely", as well as the risk that misdirected re-regulation could perversely undermine that process. The second report points out the impact of US Federal Reserve Bank Quantitative Easing, Basel III and other financial regulatory reforms on excess

reserve balances and money market flows, and the changing role of the central banks, banks and shadow banks.

Example 3 for Issue 2 (Market liquidity)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Fundamental Review of the Trading Book, introducing varying liquidity horizons in the market risk metric.

Please provide us with an executive/succinct summary of your example: *

The introduction of the liquidity horizon for banks' exposures to certain instruments within the FRTB may be overly conservative, with the risk of creating a 'cliff effect' on the capital charge for some risk factors. As a result, banks may be less willing to underwrite new issues or may reduce market-making activity. Moreover, the introduction of increased capital charges for less liquid instruments may exacerbate the bifurcation of liquidity currently observable in the market.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

While the final version of the FRTB published by the Basel Committee on 14th January reduces the liquidity horizons for some categories of risk as compared to earlier drafts, there is still a significant risk that the proposed changes could create a cliff effect on the capital charge for some products. Moreover, the increase in the multiplier applied to the shortfall risk to determine the final capital charge from 1% to 1.5% more than offsets the benefit of the reduced liquidity horizons for banks using the internal model.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

While we accept that liquidity horizons were too short for many risk factor categories during the crisis, addressing this in a way that avoids significant cliff effects would be more appropriate. When applying the formula, care should be taken to soften the impact of migrating from one category to another.

Example 4 for Issue 2 (Market liquidity)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), Article 11 and the related regulatory technical standards which still need to be published by the ESAs.

Please provide us with an executive/succinct summary of your example: *

The EMIR non-cleared derivative requirements for two-way posting of the full amount of IM on a gross basis with full IM segregation and without the possibility to re-hypothecate or re-use the collateral posted will have a highly significant liquidity impact. It is important that the liquidity impact is mitigated to some degree by ensuring reasonable time for implementation and appropriate intra-group exemptions.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

Large sectors of the OTC derivatives markets are not currently clearable and some might never be appropriate for central clearing. A study published in 2012 by ISDA following the publication of the BCBS/IOSCO proposals for margin requirements for non-centrally cleared derivatives, showed that the amount of margin that will be required under the rules even in 'normal' market conditions is very significant, even with all firms using internal initial margin (IM) models.

The requirement for two-way posting of the full amount of IM on a gross basis for non-cleared derivatives that is proposed under EMIR is likely to have a number of considerable impacts: (i) a significant legal impact resulting from the need to renegotiate existing legal contracts; (ii) an operational impact resulting from parties who currently do have to post or receive margin having to develop the processes and infrastructure to do so and (iii) a highly significant liquidity impact resulting from the need to collateralise considerably higher margin requirements than are currently required.

The liquidity impact is likely to be further exacerbated by the proposed mandatory full IM segregation without the possibility to re-hypothecate or re-use the collateral posted as well as by the restrictions on collateral eligibility which will create a situation where significant amounts of high quality collateral is tied up and is not available for other uses. We are concerned that these requirements, coupled with the proposed Basel III /CRD IV liquidity requirements, will require banks to have significant levels of liquid assets and will contribute to a global liquidity drain.

Even with all firms using internal IM models, the amount of margin needed in normal market conditions presents a very significant challenge for the industry. Similarly, banks do not hold cash liquidity in excess of targets specifically designed to meet future funding needs through a cycle. To meet new margin requirements, banks will either need to (i) generate incremental funding through the capital markets, or; (ii) divert funding from other activities (such as lending or market making), or; (iii) decrease or cease activity in non-cleared OTC markets. Individual banks and the global system would be challenged to generate incremental financing through the capital markets of IM funding requirement. The average amount of IM required to be posted by each bank in the ISDA study is in the range of $23bn (with €50mm thresholds) to $49bn (with no thresholds). Financing requirements of this scale would present significant challenges to the industry. Diverting funding from other activities to finance IM will be harmful to those activities and harmful to the broader economy. At the individual bank level, the IM would be segregated and could not be used for any other purpose; funds used for IM could otherwise have been put to use by the bank in the economy, through lending and other activities. Reduction or cessation of trading activity in non-cleared OTC markets could have an adverse effect on critical economic sectors, including housing and corporate funding.

So, whilst the systemic risk resulting from counterparty credit risk is likely to be materially reduced by the IM proposals, we believe the corresponding increase in liquidity and operational risk could offset

this, with the overall impact on systemic risk being ambiguous. We also believe this could materially undermine the ability of the banking sector to provide funding to the real economy.

Regarding intra-group non-cleared transactions, we are also concerned that the absence of a positive equivalence decision for a given third country from the date of application of the RTS would result in intragroup trades involving an entity from that third country being subject to full exchange of IM and VM. We do not consider this appropriate as derivative transactions between entities within the same consolidation group do not pose systemic risks as they do not create additional counterparty exposure outside of the group and do not increase interconnectedness between third parties. Rather, intragroup trades allow institutions to manage and reduce risks and to increase the scope of netting with individual counterparties by allowing counterparties to transact with a single group entity across a broad range of underlying asset classes. This flexibility would be undermined when imposing IM requirements on intragroup transactions. The amount of collateral tied-up would reduce firms' ability to manage risk on a centralized basis and would increase, rather than decrease, the level of risk within the financial system. Losses incurred by one group entity should be completely offset by gains to the other group entity so the group exposure is flat.

We are particularly concerned that there have been delays to the timetable for the European Commission taking decisions on the equivalence of certain third countries with the provisions of EMIR in accordance with the mechanism to avoid duplicative or conflicting rules as set out in Article 13 of EMIR. Should a decision not have been reached for any given jurisdiction by 1 September 2016, we believe an intragroup transaction involving a counterparty from the third country jurisdiction in question should still be able to benefit from the intragroup exemption.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:*

- **Application date:** We are very concerned that non-cleared derivative margin requirements are scheduled to go live in the EU from 1 September 2016 but the final non-cleared derivative margin RTS have not yet been published by the European Supervisory Authorities (ESAs). Given the respective endorsement periods of the Commission and then the Council and European Parliament, the final rules may not be available until Q2 2016. This would leave an extremely short period for implementation. We believe that a sufficiently long phase-in period is required as the proposals not only will likely require firms to renegotiate all legal documentation but to undertake changes to their infrastructure due to the fact that many financial entities do not currently collect or sometimes pledge IM and will be required to do so should the exchange of two-way bilateral IM be mandated. Some entities will be also required to establish relationships with third party custodians. Furthermore, we anticipate material practical issues in getting portfolio margin models signed off by relevant supervisors in a timely manner which would need to be factored in when determining an appropriate phase-in period for the implementation of margining requirements. We therefore consider that the non-cleared derivative margin requirements should not apply until 12 months after the RTS are published in the EU Official Journal.
- **Intragroup-exemption:** We believe the most appropriate approach to ensure that intra-group trades are not subject to the margin requirements would be to replicate, in the non-cleared derivative margin rules, the 3 year "deemed equivalence" approach that has been included in the RTS for the clearing obligation for G4-currency interest rate swaps. In our view, in the case of an EU group entity to non-EU group entity trade, it does not make sense that you could be exempted

from central clearing due to the 3 year intragroup transitional exemption but then still have to apply the margin rules to the same trade because the exemptions were not aligned.

Issue 3 – Investor and consumer protection

Please specify whether, and to what extent, the regulatory framework has had any major positive or negative impacts on investor and consumer protection and confidence.

Example 1 for Issue 3 (Investor and consumer protection)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (MiFID II), Article 42

Please provide us with an executive/succinct summary of your example: *

Another important example of existing legislation that limits the potential contribution of investors to CMU is the very broad scope of the Retail Client category in MiFID I and MiFID II. Provisions for third country retail investors disproportionately deny access to all non-regulated sectors, defining them as retail. This should not be the case for sophisticated and experienced individual investors with the capacity to make significant investment in capital markets.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The very broad scope of the Retail Client category includes clients with very different levels of market expertise, experience, and knowledge. These range from basic bank account customers (who need the highest level of protection) to very experienced and sophisticated clients with assets suitable for investment in capital markets, and who have corresponding risk appetites. MiFID client classification rules inappropriately prevent such experienced investors from being treated as professional clients, constraining the choice of instruments they may invest in (e.g. restrictions on access to complex products), the way they can be serviced by investment firms, and their ability to geographically diversify due to restrictive rules on using third-country firms. In the same vein, the new MiFID II third-country regime will treat retail clients and those retail clients who have opted for the Professional Client status (elective professionals) similarly, should a Member State require third-country firms to establish a branch to provide investment services. All these restrictions prevent such experienced investors from contributing to the success of the Capital Markets Union, and thus clearly go against the CMU objectives of improving access to financing, increasing cross-border investment, and fostering connections with global capital markets.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Consideration should thus be given to reviewing (1) the broad and catch-all class of 'Retail Clients'; (2) the unduly high and inflexible thresholds for undertakings to be classified as professional clients; (3)

the conditions to benefit from the elective professional status, and (4) the treatment of elective professionals under the MiFID II third-country regime. Doing so will enable these experienced high risk-bearing investors to contribute to the success of the CMU.

Example 2 for Issue 3 (Investor and consumer protection)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation of the European Parliament and of the Council on European Long-term Investment Funds

Please provide us with an executive/succinct summary of your example: *

Obstacles to cross-border cooperation of European Long-Term Investment Funds (ELTIFs) reduce investment opportunities because of overly restrictive consumer protection measures.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

Examples include the inability of funds to originate loans (need for a banking licence), restrictions on the availability of credit data, and different tax treatments (withholding tax on interest).

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

The European Commission should encourage Member States not to introduce unfavourable tax treatment for investments in ELTIFs. Additionally, the ease with which to invest in European infrastructure as an asset class (and investment in such assets through an ELTIF structure) needs to be improved.

Issue 4 – Proportionality / preserving diversity in the EU financial sector

Are EU rules adequately suited to the diversity of financial institutions in the EU? Are these rules adapted to the emergence of new business models and the participation of non-financial actors in the market place? Is further adaptation needed and justified from a risk perspective? If so, which, and how?

Example 1 for Issue 4 (Proportionality / preserving diversity in the EU financial sector)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, Article 510 Credit Valuation Adjustment (CVA)

Please provide us with an executive/succinct summary of your example: *

The application of the Credit Valuation Adjustment risk charge for intragroup transactions is disproportionate and penalises capital flows without any corresponding benefit in better risk management.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

To satisfy the overarching CMU objective to ensure increased intra-EU and extra-EU inward capital flows, ensure effective risk management, and facilitate Single Point of Entry resolution strategies, we suggest the treatment of intercompany exposures is reviewed to ensure these existing and new objectives are all met. Well managed inter-affiliate lending is inherently low risk. We believe it is inappropriate to levy an intragroup CVA risk charge for transactions between affiliates in the same banking group. Where both affiliates are guaranteed by the same parent, the counterparty credit risk is negligible. The charge penalises cross-border intragroup capital flows (to the detriment of the CMU project), and it also disincentivizes effective risk management practices whereby risk is aggregated and managed centrally in the locations with the appropriate infrastructure, expertise and CCP connectivity.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We recommend the continuance of the EU exemption from CVA for intragroup transactions, both intra-EU and internationally, as per the current text. We do not think Pillar 2 charges are necessary to capitalise this risk, as currently contemplated by the EBA in their draft Guidelines on CVA SREP. Therefore any Pillar 2 requirements introduced to address un-capitalised CVA risk should not apply to intra-group transactions.

Example 2 for Issue 4 (Proportionality / preserving diversity in the EU financial sector)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012,

article 113.

Please provide us with an executive/succinct summary of your example: *

The eligibility criteria for the 0 per cent risk weight intragroup exposures are too narrow.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The CRR allows for a 0 per cent risk weight intragroup exposures, but the eligibility criteria lack flexibility and result in a too narrow scope. We suggest that article 113 is amended to remove some subjective criteria, and in order to more appropriately recognise the increased integration of banking in the EU (and Banking Union), and the cross-border objectives of the CMU.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Suggest amending the CRR thus:
- Article 113, (6d): "the counterparty is established in the same Member State as the institution, **or is established in a jurisdiction deemed equivalent;"**
- Article 113, (6e): "there is no current or foreseen material ~~practical or~~ legal impediment to the ~~prompt~~ transfer of own funds or repayment of liabilities from the counterparty to the institution."

Example 3 for Issue 4 (Proportionality / preserving diversity in the EU financial sector)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (MiFID II), Article 24 and related Delegated Acts in respect of payment for investment research

Please provide us with an executive/succinct summary of your example: *

The proposed MiFID II Level 2 framework for payment for investment research can be expected to reduce the availability of information for equity and fixed income investors.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The SFC believes that there is a high risk that the proposed MiFID II Level 2 framework for payment for investment research will reduce the availability of information to equity and fixed income investors. Whilst we support some aspects of ESMA's framework for payment for research, we believe that the current Level 2 drafts, which require broker-dealers that provide execution and other services to price these services separately through a separate charge, will limit the availability of research, particularly in respect of SMEs, which will undermine the willingness of investors to invest in such firms. The proposals will also likely make EU asset managers less competitive than those based outside the EU.

Regarding FICC research, we are concerned that the proposals are inconsistent with the structure of the FICC markets where investment managers and their clients generally do not pay for research and where trades are executed on a principal basis via request-for-quote (RFQ) so that research does not influence the location of execution.

The production of FICC research is financed by banks active in the sector and is seen as one of the costs of participating in FICC business. However, it does not follow that the cost of production of research is incorporated in the bid-ask spread. On the contrary, a large number of academic studies have been conducted on the determinants of bid-ask spreads. They consistently report that bid-ask spreads are determined by market structure, liquidity,[1] internal funding costs[2] and the cost of capital, which may vary according to the counterparty. In this regard, it is clear that even though the cost of producing research may be charged back to a trading desk, that cost does not affect the bid-ask spreads available in the market. ESMA proposals will require investors to face an additional new charge for FICC research, which will increase their costs for no appreciable benefit.

These provisions would have particular impact for research on SMEs, further reducing the availability of information on SMEs and consequently reduce the willingness of capital market investors to provide funding to SMEs. Non-bank investors currently lack information on SMEs which materially undermines their willingness to invest. Investment research can play a crucial role in providing information and analysis to investors regarding SMEs to enable potential investors to better appraise investment risk. This should increase their willingness to invest as investors cannot be expected to invest in products they do not understand.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

New rules on inducements will bring welcome transparency and discipline to the way equity research is purchased, but application of the same rules to markets where there is no commission and no payment, implicit or explicit, for research, e.g. FICC, risks significantly reducing the information available to investors and increasing their costs, as well as potentially reducing liquidity and increasing financing costs for issuers for no tangible benefit. It is therefore crucial that sufficient time and care are taken to tailor the rules to different markets.

It is essential that a proportionate approach is taken under MiFID II and that no regulatory burden is imposed where there is no mischief or damage to investors and markets. We believe that FICC research should be scoped out of the inducement restrictions and the research purchase requirements for asset managers because:

- the costs of FICC research do not affect spreads;
- the provision of FICC research does not affect execution choices; while
- the imposition of an artificial new charge for FICC research would increase investor costs, thereby directly diminishing investor returns; and
- decreased availability of FICC research would likely have an adverse impact on liquidity and therefore on financing costs for European corporate and sovereign issuers.

[1] See for example http://www.newyorkfed.org/research/epr/03v09n3/0309flem.pdf (table 11 on page 97)
[2] https://www.princeton.edu/~markus/research/papers/liquidity.pdf

Example 4 for Issue 4 (Proportionality / preserving diversity in the EU financial sector)

To which Directive(s) and/or Regulation(s) do you refer in your example? *

(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council, Article 243 and 244

Please provide us with an executive/succinct summary of your example: *

Inconsistent application of the rules on 'significant risk transfer' across Member States reduces the incentives for originators to securitise assets as frequently it is not possible to take capital relief that is commensurate with the amount of risk transfer to third parties that is achieved.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *

(Please give references to concrete examples, reports, literature references, data, etc.)

Securitisations are generally more expensive to issue than many other alternative sources of funding, but securitisation results in risk transfer which other funding instruments, including covered bonds, do not. Material recognition of risk transfer from an accounting and a regulatory capital perspective is essential to incentivise issuers to consider securitisation over other alternative sources of funding. Whilst the CRD IV securitisation regime explicitly provides for originators to achieve 'significant risk transfer' and take capital relief where certain criteria are met, we believe the application of the rules is inconsistent across the EU.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

The EBA guidelines on Significant Risk Transfer should in theory increase harmonisation but we believe there needs to be increased willingness on behalf of supervisors to allow capital benefit for transactions that genuinely transfer risks from a bank's balance sheet to third party investors. Without this capital benefit, the incentives for securitisation over other forms of financing will be weak.

As part of the current discussions on introducing an STS securitisation regime and amending the capital requirements for securitisations in the EU, we encourage the Commission to work with the EBA to ensure that a key element of the new securitisation capital regime is a consistent, robust and genuinely risk based approach to significant risk transfer that ensures capital requirements for originators appropriately reflect the level of risk remaining on the originator's balance sheet and gives capital credit for risk transferred to third parties.

Theme B. Unnecessary regulatory burdens

Issue 5 – Excessive compliance costs and complexity

In response to some of the practices seen in the run-up to the crisis, EU rules have necessarily become more prescriptive. This will help to ensure that firms are held to account, but it can also increase costs and complexity, and weaken a sense of individual responsibility. Please identify and justify such burdens that, in your view, do not meet the objectives set out above efficiently and effectively. Please provide quantitative estimates to support your assessment and distinguish between direct and indirect impacts, and between one-off and recurring costs. Please identify areas where they could be simplified, to achieve more efficiently the intended regulatory objective.

Example 1 for Issue 5 (Excessive compliance costs and complexity)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)

Please provide us with an executive/succinct summary of your example: *

Disproportionate application of Key Information Document (KID).

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The PRIIPs Regulation grants no exemptions for investors, and even in case the investor is obviously well informed and experienced, the provision of a PRIIPs KID is required. For example, an investor who sets up his or her own private label fund very likely needs advice, but a disclosure document like the PRIIPs KID may not be appropriate in such a case. Experienced investors who trade large investment sums should also not be affected by the regulation.

Some products are not designed by the issuer for the retail market, but are in principle available to retail investors, for example on an execution-only basis.

It is important that when new rules are introduced, firms are given enough time to prepare for compliance. In the context of PRIIPs, the time for implementation is too short, especially given the delay in finalising the Level 2 measures and the considerable complexity resulting from the requirement to make the documentation available in several different languages.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

As the regulation targets small investors, an exemption for transaction amounts that exceed a certain threshold, e.g. € 50.000, should be considered.

Example 2 for Issue 5 (Excessive compliance costs and complexity)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council Text with EEA relevance, Article 55

Please provide us with an executive/succinct summary of your example: *

The BRRD requires banks to renegotiate the contracts of bail-inable 3rd country law liabilities to reference BRRD bail-in powers. Given that there are potentially thousands of counterparties to such contracts, this is impossible to achieve in the required timeframe, and so a delay should be introduced.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

Article 55 requires banks to include bail-in clauses in a broad range of bail-inable contracts governed by non-EU law (both new contracts and existing contracts where liabilities could be created after 1 January 2016). The requirement to include contractual recognition of EU bail-in powers extends to every bail-inable non-EU contractual liability entered into by an EU bank. The scope creates very significant legal and operational complexity, while adding minimal loss absorbency in addition to MREL/TLAC. Furthermore, compliance with this rule is not fully in the control of the bank, given renegotiation and counterparty consent is required from both parties. Complying with this requirement is proving highly challenging for banks either because it involves renegotiating with thousands of counterparties, or because the type of contract makes it impossible to insert the clause (because in practice the liability will not be bailed-in), or because non-EU local authorities are reluctant, or due to the 1 January 2016 deadline.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Implementation of Article 55 should be delayed in cases where compliance is impracticable, and the planned MREL review should be used to reconsider the scope of the contractual recognition requirement, ideally limiting it to debt instruments in line with the FSB's guidance.

Issue 6 – Reporting and disclosure obligations

The EU has put in place a range of rules designed to increase transparency and provide more information to regulators, investors and the public in general. The information contained in these requirements is necessary to improve oversight and confidence and will ultimately improve the functioning of markets. In some areas, however, the same or similar information may be required to be reported more than once, or requirements may result in information reported in a way which is not useful to provide effective oversight or added value for investors.

Please identify the reporting provisions, either publicly or to supervisory authorities, which in your view either do not meet sufficiently the objectives above or where streamlining/clarifying the obligations would improve quality, effectiveness and coherence. If applicable, please provide specific proposals.

Specifically for investors and competent authorities, please provide an assessment whether the current reporting and disclosure obligations are fit for the purpose of public oversight and ensuring transparency. If applicable, please provide specific examples of missing reporting or disclosure obligations or existing obligations without clear added value.

Example 1 for Issue 6 (Reporting and disclosure obligations)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR)

Regulation (EU) 2015/2365 of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)(MiFID II)

Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR)

Please provide us with an executive/succinct summary of your example: *

Reporting under Dodd-Frank (one-sided) and reporting under EMIR (two-sided) is very different. A more cost effective and holistic solution would be for a body like IOSCO to have been entrusted with the task to ensure consistent reporting standards and attributes. If a trade is reported under EMIR, there is no additional reporting under REMIT. This sharing and cooperation of data between regulators is to be encouraged. Reporting of ETDs should be proportionate to the nature of the product. ETDs should be reported at a position level only because transactions are netted into a position at the end of day on T, and reporting occurs at a T+1 basis.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

1) EMIR reporting obligation currently requires for ETDs to report new trades, compressions and positions. This generates a heavy obligation on regulators to manage this unnecessary volume of data when their focus should be on the position reports only.

2) For ETDs reporting should be single sided to avoid unnecessary burden on the smaller counterparts. CCPs should report for the clearing member, clearing member should report for their direct clients, and so on down the chain for a larger party reporting for the smaller party.

3) Product identifiers should be reported on a consistent basis regardless whether the product is listed on an EU-listed trading venue or outside the EU.

4) Duplicative obligations can also result from diverging requirements between the EU and non-EU jurisdictions. This is typically the case for EMIR trade reporting to trade repositories when one counterparty is located in the EU and the other one outside the EU. The EU counterparty may be required to report twice (to one trade repository in the EU and to one trade repository outside the EU).

5) Finally, we have concerns with regard to the MiFID2 best execution reporting requirements arising from ESMA's proposed RTS 27 of September 2015. Initial analysis of the data to be produced by execution venues and consumed by firms that execute orders for clients, including, for example, investment managers, shows that the nature, volume and complexity of data will not assist firms in determining which venues should be made available in their order execution policy.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We would suggest using an international body like IOSCO to establish global reporting standards.

Example 2 for Issue 6 (Reporting and disclosure obligations)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), Article 9

Please provide us with an executive/succinct summary of your example: *

The trade reporting obligations in EMIR go beyond the scope of the G20 requirements and their application to exchange traded derivatives is very problematic as many of the reporting fields are designed with OTC derivatives in mind. The requirement for reporting historical trades ("backloading" obligation) is highly burdensome and will not provide useful information for the monitoring of systemic risk.

EMIR reporting obligation requires to pair and match trades that have already matured. As ETD trades are matched on an exchange on the trade date and OTC trades are subject to confirmation and reconciliation, we consider this pairing and matching for non-live trades is unnecessary.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *

(Please give references to concrete examples, reports, literature references, data, etc.)

Reporting of ETDs: The scope of the reporting requirements in EMIR Article 9 applies to both OTC and ETD, whereas the reporting requirements in other key jurisdictions are limited to OTC derivatives. We note that the 2009 Pittsburgh G20 Commitments did not cover ETD reporting and the ETD reporting rules in EMIR therefore go beyond the global commitment. Furthermore, the EMIR reporting requirements were primarily designed with OTC derivatives in mind which has made the application of the rules to ETD extremely difficult. The amount of ESMA Q&A that have been necessary for ETD reporting highlights the lack of clarity and suitability of the rules, and whilst the Q&A are helpful, many ETD reporting issues remain outstanding.

We therefore believe ETDs should be removed from the EMIR reporting regime to align with the G20 commitment and create a global level playing field. We note in this regard that information on ETDs is still available to regulators directly from the exchanges and CCPs on which ETDs are executed and cleared. Regulated Markets are required under MiFID I to monitor the open interest in each of their contracts and providing this position data to regulators at the level of each trading member should not be that that onerous.

The reporting "backloading" requirement: EMIR Article 9(1) applies the trade reporting obligation to all trades that were outstanding on, or entered into after, 16 August 2012. This means all trades that were outstanding, but that had expired before the reporting start date of 12 February 2014, will have to be reported to a trade repository. Implementing Regulation EU 1247/2012 states that such trades shall be reported to a trade repository within 3 years of the reporting start date for a particular derivative class.

We believe complying with this requirement is a significant undertaking for counterparties who will be required to retrieve and source such data. Also, the value of these reports is likely to be very limited as many trades will be unmatched as they will be reported without UTIs, which were not used at the time of trade execution. Given the cost and resource required to report these trades, and the low additional benefit in terms of systemic risk monitoring, we believe this requirement is not justified from a cost benefit analysis perspective and should be removed.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Reporting of ETDs: ETDs should be removed from the EMIR reporting regime to align with the G20 commitment and create a global level playing field.

Should removing ETDs from the scope of the EMIR reporting requirement not be acceptable to the Commission, as a second best option, we would support changes to the existing ETD reporting regime. Specifically, we propose that:

(i) Reporting should be amended to be on a position rather than transaction basis. This is because ETDs are managed and valued at a position level and using transaction data to recreate position data is very difficult to achieve. We also believe aggregation of transactions by regulators to recreate a position is unnecessary when position data is readily available from CCPs.

(ii) For ETDs, reporting should be single sided to avoid unnecessary burden on the smaller counterparts. CCPs should report for the clearing member, clearing member should report for their direct clients, and so on down the chain for a larger party reporting for the smaller party.

Reporting "backloading": given the cost and resource required to report these trades, and the low additional benefit in terms of systemic risk monitoring, we believe this requirement is not justified from a cost benefit analysis perspective and should be removed.

Example 3 for Issue 6 (Reporting and disclosure obligations)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (MiFID II)

Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR)

ESMA Final Draft MiFID II / MiFIR RTS 27 and RTS 28

Please provide us with an executive/succinct summary of your example: *

We are very concerned that the ESMA RTS in respect of best execution reporting will require an extremely high amount of information to be published. We believe this amount of information will be disproportionate, cannot be justified in cost benefit terms, and will be of limited use to investors as it will be less timely and clear than real time information on execution that will be available for all financial instruments – including non-equity instruments – under the new MIFID2 trade transparency regime.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

We do not believe that the best execution reporting requirements, as currently proposed in the draft RTS 27, will materially improve the ability of investment firms to assess whether they are achieving best execution for their clients. Investment firms assess, on a dynamic basis, and typically using real-time data, which venues will provide the best option for executing trades. The best execution data required under MiFID II however will not be real time and will be out of date and thus far less relevant to execution decisions than the data investment firms already have and will have access to. Requiring sell side firms to produce potentially billions of best execution data items under MiFID2 therefore cannot be justified in terms of the potential benefits to the quality of execution.

We do not believe unexecuted orders and requests for quotes (RFQ) should be included within the scope of the best execution reporting requirements. If firms are required to capture every RFQ from a client, including any amendment or cancelation of an RFQ and also any amendment or cancelation of an order, voice traders would be significantly impacted to the extent the efficient operation of the market would be undermined. Moreover, the reporting of quotes that were never meant for execution will not provide information on the likelihood of execution, instead provide misleading information on the amount of liquidity or trading interest available.

We are also concerned that the quarterly execution quality reports under draft RTS 27 - which involves the disclosure of Systematic Internalisers' identity (while this disclosure requirement has been removed in relation to SIs' post-trade transparency requirements) will expose SIs to undue risk by making public commercially sensitive information such as SIs' risk positions remaining in their inventory. This concern was formally recognised by ESMA in its September 2015 Final Report (ESMA/2015/1464; p.399, para 5). However, the steps taken by ESMA so far to address this issue are not sufficient, in particular for illiquid non-equity instruments.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

In terms of the overall volume of information, we consider it essential that a robust cost benefit analysis is undertaken before the requirements are introduced. This should in particular consider the buy-side's views as to how useful the information will be to making their execution decisions.

With respect to orders and RFQs, we believe unexecuted orders and request for quotes should be carved out of the requirements entirely.

ESMA's proposal to exclude trades above the size specific to the financial instrument (SSTI) from the scope of RTS 27 Article 4 does not go far enough. To avoid exposing SIs as well as liquidity providers and market makers to this undue risk, we would recommend that, in respect of non-equity instruments, they should only be required to compile RTS 27 execution quality reports as follows:

- Trades above SSTI should not need to be reported whether they are liquid or illiquid;
- Trades below SSTI should only be reported if liquid;
- Trades below SSTI that are Illiquid should not need to be reported.

Example 4 for Issue 6 (Reporting and disclosure obligations)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)(MiFID II), Article 58(3), new commodity position reporting regime

Please provide us with an executive/succinct summary of your example: *

Article 58(3) of MiFID II requires that 'In order to enable monitoring of compliance with Article 57(1), Member States shall require members or participants of regulated markets, MTFs and clients of OTFs to report to the investment firm or market operator operating that trading venue the details of their own positions held through contracts traded on that trading venue at least on a daily basis, as well as those of their clients and the clients of those clients until the end client is reached.'

The is problematic as a) firms may not have visibility of the client's client, b) firms are therefore reliant therefore on data from a third party who may/ may not be subject to MiFID II and c) there may be data protection concerns related to passing on the data.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *

(Please give references to concrete examples, reports, literature references, data, etc.)

Regarding the confidentiality issues, each EU investment firm will need to take steps to ensure that its disclosure of client positions (its clients and the client of its clients) does not conflict with client confidentiality requirements. We believe this will be very difficult, and likely impossible, to ensure.

We note that ESMA has confirmed that it is aware of the potential confidentiality issues, but believes it does not have a mandate to amend the Level 1 requirement.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We consider it necessary to remove the Level 1 requirement to report until the end client is reached. The reporting requirement should be limited to the firms trades with own their clients. An alternative would be to require reporting to the level of the end client on a "best efforts" basis where the requirement could be disapplied if it conflicts with client confidentiality / data privacy requirements.

We note that the US CFTC approach has a workable approach to end client reporting where an investment firm will identify its client, and the relevant competent authority will then require that client (or its underlying client) to provide the relevant report. This would allow competent authorities to receive the information they require without the intermediation of the investment firm, although there may be cases in which the client or its underlying client is unable to provide the necessary information.

In all cases, ESMA should ensure that any information published by ESMA, the competent authorities, or individual trading venues does not reveal the positions of individual market participants. This is a particular concern in physical commodity markets where contracts based on specific delivery points may be used by a small number of market participants. Even though position information for such contracts may be nominally anonymous, the identity of individual traders may still be discernible in markets with low volume or liquidity. Without adequate safeguards, reporting parties will be forced to share position information in a way that could reduce competition and frustrate beneficial risk management activities.

Finally, irrespective of the method adopted by ESMA to obtain information on clients and their underlying clients, investment firms should not be prohibited from dealing with clients who are unable to provide the required information (either in relation to themselves or in relation to their underlying clients) as a result of data protection laws in third country jurisdictions, as this is likely to result in significant barriers to market access for end clients.

Issue 7 – Contractual documentation

Standardised documentation is often necessary to ensure that market participants are subject to the same set of rules throughout the EU in order to facilitate the cross-border provision of services and ensure free movement of capital. When rules change, clients and counterparties are often faced with new contractual documentation. This may add costs and might not always provide greater customer/ investor protection. Please identify specific situations where contractual or regulatory documents need to be updated with unnecessary frequency or are required to contain information that does not adequately meet the objectives above. Please indicate where digitalisation and digital standards could help to simplify and make contractual documentation less costly, and, if applicable, identify any obstacles to this happening.

Example 1 for Issue 7 (Contractual documentation)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Please provide us with an executive/succinct summary of your example: *

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Issue 8 – Rules outdated due to technological change

Please specify where the effectiveness of rules could be enhanced to respond to increasingly online-based services and the development of financial technology solutions for the financial services sector.

Example 1 for Issue 8 (Rules outdated due to technological change)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive on payment services in the internal market and amending Directive 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC (PSD2)

EU Data Protection Regulation

Please provide us with an executive/succinct summary of your example: *

The digitalisation of the economy has been particularly visible in the payment area. In this respect, the upcoming implementation of PSD2 will enhance EU-wide e-commerce, thus contributing to improve services to customers and boosting the EU's growth potential. Appropriate standardization and regulatory frameworks are however needed to enable cross-border transactions and contractual

agreements through non-physical channels. As a consequence, the Directive should also be upgraded in order to enable the EU to become cyber-resilient.

We believe an overlap exists between the 15 December compromise text of GDPR, and the specific data protection of AML IV and the 28 September compromise text of PSD II – these apply different rules to the use of personal data. Under GDPR, and consistent with existing requirements under the 1995 Data Protection Directive, personal data may be collected and processed for multiple purposes: Article 5 (1) (b) of GDPR states "[personal data must not be] collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with these purposes".

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

As consumers use digital more and more, they will expect to be able to transact fully online, and eIDs and eSignatures are a critical part of this. These systems must be secure to provide the best possible experience for the customer. The ability to digitally verify the identity of banks' clients before accepting money and making investments would significantly speed-up the on-boarding process. However the lack of means to digitally prove identity in the EU makes it difficult to progress in this area. In addition, differing data protection laws globally limit the development of global biometric and digital identity solutions, such as digital signature, video identity verification, database identity verification, anti-money laundering background information (see example 2 below), bank account ownership verification.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We welcome the PSD2 to enhance EU wide e-commerce and a pan-EU instant e-/m- payments system under a common standard, including with non-EU partner countries. However, the Commission should clarify several issues on the access to customers' accounts and data information by third-party providers via bank's infrastructure. Clearer EU guidelines on interpretation of crypto-currency (how they are treated in terms of regulation and taxes across different jurisdictions) are also needed to keep the momentum of digitalisation.

The Commission should examine where these regulations can be harmonised to ensure that the rules relating to the use of personal data are consistently applied in a manner compatible with the 1995 Data Protection Directive and other existing directives and regulations.

Example 2 for Issue 8 (Rules outdated due to technological change)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive (EU) 2015/849 of 20 May 2015 on the prevention and the use of the financial system for the purposes of money laundering or terrorist financing (4th AMLD), e.g. Articles 25 to 29

Please provide us with an executive/succinct summary of your example: *

The new digital environment, for instance in the payment area (see example 1), has also an impact on AML rules and procedures, e.g. regarding the background verification. The revised AML Directive would therefore need to be updated to reflect this new environment and the Commission should also examine where AML, GDPR and PSD2 regulations can be harmonised.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The current processes to identify customers ('Know Your Customers' rules) are outdated for the transformation of financial services to digital, and cross border regulation limits the usability of peer-to-peer mobile payment functionalities across different countries. For instance, the solution developed by UBS in Switzerland (Paymit) can only be used within Switzerland by customers with a Swiss bank account and phone number and cannot be used by customers with a Swiss bank account but a phone number outside of Switzerland. Although this is a Swiss example, it illustrates the restrictions on international or cross-border payments limiting the solutions non-EU banks can offer to their clients and non-clients.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We would welcome the ability to partially leverage on the due diligence checks performed by a linked third party retail bank account when providing digital and mobile solutions.

Example 3 for Issue 8 (Rules outdated due to technological change)

To which Directive(s) and/or Regulation(s) do you refer in your example? *

Directives and regulations covering retail financial and other services, and, where appropriate, aspects of the EU Company Law framework

Please provide us with an executive/succinct summary of your example: *

Appropriate digital and biometric identity verification standardisation (e.g. for e-IDs and e-Signatures) and regulatory frameworks are needed to enable cross-border transactions and contractual agreements through non-physical channels.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

Consumers increasingly transact business online, meaning e-IDs and e-Signatures are becoming more and more critical to the economy. These systems need to be secure to provide the best possible experience for users, particularly financial services customers. The ability to verify digitally the identity of clients before accepting money and making investments would significantly speed-up the online processes. However, the lack of digital means to prove identity, even within the EU let alone internationally makes it difficult to make progress in this area. This is to the detriment of the consumer experience, and innovation in the industry.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Existing and forthcoming legislation (e.g. as a result of the retail financial services Green Paper) could address the following cross cutting issues:

- Digital signature: ability to legally accept signatures on smartphones or tablets as if they were "wet signatures" provided they are captured and stored securely.
- Video identity verification: ability to verify the identity of clients via video call (e.g. face and ID both visible to a camera,) or via an automatic optical character recognition technology.
- Database identity verification: ability to cross-reference pieces of client information (e.g. name, date of birth, address etc.) against electoral rolls and official databases through certified identity providers.
- Bank account ownership verification: ability to verify the ownership of a third party retail bank account through methods such as sending a low value payment and asking the client to confirm the transaction reference.

Example 4 for Issue 8 (Rules outdated due to technological change)

To which Directive(s) and/or Regulation(s) do you refer in your example? *

Directives and regulations covering retail financial and other services, and, where appropriate, aspects of the EU Company Law framework

Please provide us with an executive/succinct summary of your example: *

Need for better clarity on existing regulations and removing regulatory inconsistencies on the treatment of technological developments.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The market place is constantly evolving, and no single piece of EU legislation is ever going to be truly up to date in terms of coping with developments in the digital provision of services. The Commission needs to proactively review legislation on an ongoing basis, to ensure consumers and service providers are best able to take advantage of customer experience enhancing developments as a result of digital change.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

In addition to the current exercise (the 'Call for Evidence') the Commission should conduct a 'fit for purpose' check of existing financial services legislation with a view to adjusting it to the digital market reality, ensuring consistency across different pieces of legislation. Cross cutting issues to be investigated include:

- Data protection – safeguard the right balance between data protection requirements and profiling for fraud prevention and creditworthiness assessment (see example 3 under Issue 8 for suggestions on tackling digital identity issues.) When you put your data on a blockchain, what disclosures and record keeping standards are required? If that data is compromised, what remediation and risk

mitigation techniques are appropriate? How should competing jurisdictional data privacy standards be mediated?

- Digital security policy – There is a need for definitive guidelines and clarification of which security requirements are mandatory from the regulatory side. The best way to ensure this is to work with the regulators from as early a stage as possible to ensure that both parties fully understand the solutions under development and the regulatory restrictions needed.
- Best practices and governance – The regulators should be aware that the transfer of value in a digital asset model can and should eliminate steps in the current process that may be mandated by governing law. When you put an asset on a blockchain, what securities regulations apply? How much of the regulations presume current business models (e.g., Confirm/Affirm)?

Provision for the outsourcing of Know Your Customer / AML / "European External Action Service Policy " – using block-chain – for example, smart contracts to digitally identify or share customer identity information. This has great potential but will need close collaboration to ensure security and compliance. As competing standards arise in this space, the regulators should not mandate a standard solution but provide guiding principles.

- Crypto-cash vs. standard currency – different jurisdictions treat crypto-cash in different ways (e.g. tax position) which stifles its usage. Clearer EU guidelines on interpretation of crypto-currency (how they are treated in terms of regulation and taxes across different jurisdictions) are needed to keep up the momentum.

-Block-chain pseudo identity – clarity is needed to better understand the Block-chain pseudo identity from the regulatory perspective. What is the Client's role / sign-off necessary in electing to be a part of the blockchain driven marketplace?

- Locus of trade in a digital world – what jurisdiction should govern transactions where buyer, seller, place of trade, computer hardware, and governing law of the agreement could all be different?

Example 5 for Issue 8 (Rules outdated due to technological change)

To which Directive(s) and/or Regulation(s) do you refer in your example? *

Digital Single Market initiative.
EU General Data Protection Regulation (GDPR)

Please provide us with an executive/succinct summary of your example: *

The Digital Single Market initiative needs to ensure the right balance between competition and innovation with trust and security. Areas where this is currently not the case include access restrictions, the use of 'big data', a lack of collaboration between authorities, and national and unco-ordinated approaches to cyber-security.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

Geographically motivated access restrictions clearly help national authorities, but limits the possibility of having a single view of the customer globally. Innovation should not be confined to political borders to be truly paradigm shifting.

The use of data, and in particular 'big data', is central to the development of innovative customised services for the benefit of customers. The new EU General Data Protection Regulation (GDPR) should provide legal certainty on the use of big data while also aligning national data protection rules.

We strongly believe collaboration with other regulators on a global scale is needed to enable jurisdictions to better balance the needs of security with innovation. This is a view shared across the industry and recognized by the World Economic Forum (WEF) who see this as a key topic in 2016.

Cyber security is obviously an extremely sensitive topic, but one that needs to be tackled multi-nationally if efforts to tackle cyber-crime are (i) to be effective, and (ii) do not unduly undermine innovation in the market.

Data protection is one of the key issues associated with big data and is gaining importance due to:
1) The increasing volumes and availability of personal data from social media, (e.g. through digitalization of information);
2) Consumers are increasingly moving online and want immediate access to more personalized products and services over a variety of distribution channels;
3) Enlarged possible targets (e.g. data transfers to clients);
4) Increasing number of possible assailants (Organized crime, Hacking activities, economic espionage, etc.)
As such, we urge the Commission to collaborate with other regulators on addressing these issues.
The related issue of cyber security needs to be tackled multi-nationally if efforts to tackle cyber-crime are (i) to be effective, and (ii) do not unduly undermine innovation in the market.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

The EU should take the lead in initiating collaboration with other regulators in regular dialogues on issues related to the role of technology in financial services.

The EU Digital Single Market should include a full set of harmonised cyber security standards which follow internationally agreed cyber security principles to allow for, mutual recognition or equivalence with the USA. We note that sharing of information about attempted or actual cyber-incidents is vital to enable the EU to become cyber-resilient. The sharing should be voluntary and as efficient and effective as possible, ideally via a real time pan European forum (a "one-stop-shop") that replaces the current set-up where firms need to notify several authorities at the same time. The global dimension of cyber security should be monitored to ensure international consensus, particularly as other jurisdictions contemplate new cyber laws. The EU should also create a framework for cyber security's monitoring to strengthen preventive measures and to ensure effective and better coordinated responses to cybercrime at EU level.

Issue 9 – Barriers to entry

Please document barriers to market entry arising from regulation that the EU should help address. Have the new rules given rise to any new barriers to entry for new market players to challenge incumbents or address hitherto unmet customer needs?

Example 1 for Issue 9 (Barriers to entry)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), Art. 3, 11

Please provide us with an executive/succinct summary of your example: *

Differences in national insolvency laws mean the treatment of collateral posted to CCPs in cross-border instances is unclear.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

There is a lack of clarity under EMIR whether collateral posted at the CCP will be in all circumstances returned to the end client in a cross border context (even within the EU), as EMIR did not harmonise national insolvency laws. This uncertainty makes it more expensive to obtain clean legal opinions, which leads to punitive capital requirements when dealing with EU firms.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

The treatment of collateral posted at CPPs on a cross-border basis (both EU/EU and EU/third country) should be reviewed. It is important to ensure legal certainty regarding the effectiveness of client asset protections and the consistency of national insolvency laws is a crucial element of this. We suggest that this issue could be addressed in the forthcoming Commission review of insolvency as part of the CMU Action Plan.

Example 2 for Issue 9 (Barriers to entry)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), Article 3, 11

Please provide us with an executive/succinct summary of your example: *

EU central banks are exempted from EMIR whereas third country central banks are not exempted from EMIR. We do not consider this to be justified and believe all central banks should be exempted from EMIR.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

EMIR automatically exempts EU central banks from its application scope. For third country central banks, however, no such automatic exemption is available. Rather, the Commission first has to determine that an exemption is necessary based on comparative analysis of the treatment of central banks established in third countries and the risk-management standards applicable to transactions entered into by central banks in those jurisdictions (which the Commission did with respect to the US and Japan and with a planned exemption (only) for Switzerland, Australia, Canada and Hong Kong). It appears difficult to imagine a scenario which does not justify a full exemption for these (and potentially other) third country central banks. Rather, requiring a report from the Commission on risk mitigation on these jurisdictions' central banks appears to be unnecessary and a sub-optimal use of EU resources.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We believe third country central banks should be exempted from the scope of EMIR.

Example 3 for Issue 9 (Barriers to entry)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (AIFMD) – Articles 35, 36, 39, 40, and 42

Please provide us with an executive/succinct summary of your example: *

Optimising the pan-EU passport for institutional investors/funds which is currently provided for under AIFMD, but not fully functional, should be a high priority.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

It is important to ensure that the administrative fees charged by Host State authorities for the processing of marketing notifications and further additional procedural requirements are not excessive and do not render the use of the AIFMD passport economically unattractive from a distribution point of view.

If an EEA fund or manager is approved by its home regulator, it should be freely distributable within the EEA to the respective target client groups and be free to manage any fund in any Member State respectively. The pass-porting/notification requirements are a multiplication of work that is quite expensive and there is no obvious added value to that system.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

If an EU-wide approval as described above is not possible, harmonization of national distribution/approval regimes is necessary as a second best alternative. For instance, under the AIFMD, distribution has become highly complex in France and Germany due to the addition of very specific requirements which has de-facto prohibited private placements in these jurisdictions, while other Member States like the UK or the Netherlands still allow private placement.

Example 4 for Issue 9 (Barriers to entry)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Undertakings for Collective Investment in Transferable Securities Directive

Please provide us with an executive/succinct summary of your example: *

Increasing cross-border participation in UCITS.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

We believe costs of production and distribution should not be increased by regulation, but rather decreased where feasible in order to ensure supply. Opening investment possibilities for retail investors in the ambit of capital markets also means that they need to be allowed, without too high barriers or an overburdening information regime, to invest in riskier products across borders, including for their pensions, although they need to understand and be prepared to take this risk.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Therefore we would advocate increasing cross-border participation in UCITS by seamless, non-complex and unified/mutually accepted distribution rules across EEA Member States (including through harmonisation of the retail market regime and avoidance of gold-plating, in particular for risk-open and sophisticated retail investors – see our comment on investor re-classification) and preferably including non-EEA States such as Switzerland, APAC, Latin American countries where UCITS are already heavily distributed, e.g. based on automatic reciprocal recognition of rules.

Example 5 for Issue 9 (Barriers to entry)

To which Directive(s) and/or Regulation(s) do you refer in your example? *

(If applicable, mention also the articles referred to in your example.)

Third country equivalence determination processes in EMIR, MiFID2/R, and Solvency 2

Please provide us with an executive/succinct summary of your example: *

Attracting capital from all over the world is central for Europe's economy and a key part of the Commission's ambitions for a Capital Markets Union.

Equivalence assessments are a tool for providing international companies regulated to the same high standards as the EU with EU market access, enabling them to facilitate investment from the rest of the world and contribute to the EU's economy. However, recent experience of the equivalence determination process has been mixed with regards to transparency and predictability.

To this end, we suggest the EU set out an enhanced process for determining equivalence, the main elements of which should include:

- Results-orientated assessments of equivalent regulatory objectives, with criteria clearly set out in legislation;
- improved processes involving third-country authorities, with timely procedures and deadlines, again set out in legislation, and
- Transparent handling, with decisions based solely on the regulatory assessment.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *

(Please give references to concrete examples, reports, literature references, data, etc.)

In the absence of a positive equivalence assessment there is the closing off of EU businesses and consumers from investment opportunities, just when the recovery needs their support the most. As regulation became more complex, and the number of equivalence assessments to be made multiplied, the processes has become equally complex and resource intensive, leading to a number of problems with the substance of what is to be assessed; the process, and the handling:

Firstly, with regards to the substance:

- There has been no overriding standard in the different legislative measures, with approaches varying from one to the next;
- The criteria has not always been precise, with too much leeway for interpretation, and
- The basis of comparison has not always been clear. Assessing whether or not third country legislation achieves the same regulatory objectives is often difficult to do.

Secondly, the process has been unclear and unpredictable:

- The choice of which countries to assess and their grouping for assessment purposes seems arbitrary and unclear. Third countries cannot initiate the process but have to wait for the Commission to do so;
- There are no clear timeframes or deadlines, at both the stage when the ESAs (when mandated) conduct their assessments, and after the Commission receives their recommendations.

- As such, the Commission retains considerable discretion over the process, reducing certainty for third countries.

These practical problems put into question market access, even when equivalent regulation is actually in place, or when third countries are willing to implement equivalent rules.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

The SFC suggests that as part of the CMU project, the EU should establish an enhanced process for making equivalence determinations. This should be based on identifying best practice to be applied at each stage of the process, right through from when the Commission consults on the initial legislation to when the relevant ESA has completed its assessment. The idea is to strike a balance between a common transparent approach to equivalence assessments, while avoiding a one size-fits-all approach, with insufficient flexibility to adapt the process to a range of forthcoming legislation.

Such an enhanced approach should:

- Specify criteria for prioritising equivalence assessments, grouping countries, and defining timeframes, tailored to the legislation in question, to be adhered to during the determination process.
- Mandating prioritisation of third countries whose approaches are most similar to the EUs.
- A more systematic involvement of third-country authorities in the assessment process, and even earlier whilst the Commission is preparing legislation.
- A process of dialogue and discussion in the event of negative assessments, with both parties working to overcome obstacles to a positive decision.
- Future legislation should define results-based criteria against which the ESAs (when mandated) and the Commission will make the assessments, so that regulatory objectives can be compared.
- These criteria should be based on global benchmarks agreed in international institutions such as IOSCO.
- Positive equivalence decisions should be fast-tracked where the third country regime in question has been deemed fully equivalent by the ESAs, with the Commission approving them within a specified timeframe or explaining why it is not going do so. Adoption delay would otherwise raise substantial concerns and uncertainty amongst market participants of possible equivalence gaps identified by the Commission that are preventing the timely adoption of a positive equivalence decision
- Legislation should provide for transitional arrangements to be in place while equivalence is being assessed in order to address possible delay in the equivalence determination process and provide market participants with legal clarity and certainty.

Theme C. Interactions of individual rules, inconsistencies and gaps

Issue 10 – Links between individual rules and overall cumulative impact

Given the interconnections within the financial sector, it is important to understand whether the rules on banking, insurance, asset management and other areas are interacting as intended. Please identify and explain why interactions may give rise to unintended consequences that should be taken into account in the review process. Please provide an assessment of their cumulative impact. Please consider whether changes in the sectoral rules have affected the relevancy or effectiveness of the cross-sectoral rules (for example with regard to financial conglomerates). Please explain in what way and provide concrete examples.

Example 1 for Issue 10 (Links between individual rules and overall cumulative impact)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, articles 412 and 511, Liquidity Coverage Ratio and Leverage Ratio

Please provide us with an executive/succinct summary of your example: *

Seldom used committed debt facilities attract Liquidity Coverage Ratio (LCR) outflow factors which in conjunction with the leverage ratio impact discourages banks from providing them to certain clients.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

Large insurers will typically have a diverse capital and funding base, often including substantial long dated and undated subordinated debt. By their nature, they maintain large liquidity reserves/marketable investments and will supplement those for flexibility purposes with commercial paper programmes. In order to facilitate their short and long term ratings, however, they also usually maintain sizeable committed debt facilities provided by banks. These facilities are seldom if ever drawn (events in 2008 illustrated this), but nevertheless attract punitive Liquidity Coverage Ratio (LCR) outflow factors.. For the bank providing the facility, this in turn increases balance sheet HQLA and exacerbates Leverage Ratio (LR) constraints. The combined impact of the LCR and LR here discourages banks from providing these facilities to top rated insurance counterparties and may reduce the diversity of funding sources for insurers who are key constituents of the long term financing market.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Consideration should be given to reviewing and separately categorising these outflow factors for well rated insurers, taking into account the nature and profile of their liability mix.

Example 2 for Issue 10 (Links between individual rules and overall cumulative impact)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, articles 412 and 511, Liquidity Coverage Ratio and Leverage Ratio

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR)

Please provide us with an executive/succinct summary of your example: *

Concern about the interaction between the High Quality Liquid Assets requirements in the LCR and the LR.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

Banks are required to hold a portfolio of low-risk assets under the LCR, but the LR then requires them to be valued at their full nominal value. This interaction means that in order to optimise under the LR banks have to acquire high-yield/high-risk assets, with a consequent reduction in exposures to middle range assets, such as lending to SMEs. This incentive structure is fundamentally at odds with prudent risk management and safe and sound banking practices.

Similarly, overlapping requirements in the HQLA and derivatives regulation are making it difficult to secure, and reduce the availability of, high-grade collateral. There are several unwanted effects of this in the market place, such as the increasing use of lower quality collateral, and an incentive for banks to hold sovereigns on their balance sheets instead of other assets.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We strongly share the opinion of the Basel Committee and the Swiss TBTF Commission that the leverage ratio should not become the binding capital constraint in the normal course of business. The supplemental leverage ratio should, however, ensure that an appropriate minimum level of capital is held at all times as a backstop in the event that the risk-based measure fails to capture certain risks appropriately. The EC should therefore ensure that the leverage ratio is calibrated in a way that it is not the binding capital requirement.

The risk-based approach, based on internal models, **with a back-stop leverage ratio** - as agreed in Basel III - and complemented by stress-tests is an effective combination to ensure adequate capitalization of the banking system and establish the basis for financial stability and the efficient provision of financial services to households and corporations.

Example 3 for Issue 10 (Links between individual rules and overall cumulative impact)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (COM(2013) 71 final)

Please provide us with an executive/succinct summary of your example: *

There is an inconsistency between the Commission seeking to create a Capital Markets Union, ostensibly to promote cross-border investment, while at the same time undermining it by pursuing the introduction of an FTT. We are concerned by the well-documented and potentially severe impact on European sovereign and corporate financing at a time where growth and investment is still weak. In light of this, the FTT should be reconsidered.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The FTT will distort markets between participating and non-participating countries, undermining investment throughout the EU and from external sources of finance, and the integrated capital market the CMU is supposed to create.

The wide scope of the proposed FTT is expected to have a severe negative impact on liquidity. In the absence of exemptions, especially in the case of market-making, the effect on trading volumes in derivatives and in the cash market will be negative, not only in the participating Member States, but also for non-participating financial centres as well.

The costs of an FTT will have to be borne by end users such as savers, pensioners and SMEs trying to access the market, off-setting the potential consumer benefits of CMU. Moreover, these costs to market participants and the real economy of implementing even a limited FTT may likely exceed the revenues generated by the tax.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

In light of the above, the need for an FTT should be reconsidered and the proposal withdrawn if not supported by cost benefit analysis (which we believe to be the case).

Should an EU FTT be introduced, it is crucial that the most damaging aspects of the Commission proposal are addressed. In particular: the territorial application should be reduced to an issuance based tax akin to the existing national FTT in France. As a minimum, market making, repos, intra-group transactions and corporate and sovereign bonds need to be exempted. There should be an exemption for intermediaries so that the tax is only charged to the final buyer of the transaction (as the current proposal applies to both sides and on each leg of the transaction). The imposition of the tax and the tax collection cannot be unbundled. We advocate for central collection of the tax by a settlement system and a consistent approach between participating Member States in terms of registration, accounting and reporting obligation. Tax collection mechanism from third countries needs to be clearly established.

Example 4 for Issue 10 (Links between individual rules and overall cumulative impact)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions.

Please provide us with an executive/succinct summary of your example: *

This proposal, currently under consideration by the co-legislators, will add considerably to the regulatory burden placed on the banking industry since the crisis. Moreover, it is intended to address perceived problems that have, on the whole, already been dealt with by other pieces of legislation, meaning that the benefits to be had are rapidly diminishing.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The Bank Structural Reform Regulation (BSR) was proposed towards the end of the last Commission's mandate in January 2014. It is the follow-up to the Liikanen High Level group's work, established by Commissioner Barnier to examine risk in the banking sector, and the role structural reforms might play in better managing it.

Since the Liikanen report in October 2012, a number of significant reforms affecting the industry have been enacted, notably the CRR and CRDIV package, the Banking Recovery and Resolution Directive, and, of course, the Banking Union itself. Further changes are on their way, such as the FSB's standard for loss absorbing capital, TLAC, and further reforms being considered by the Basel Committee, such as FRTB. In addition to these regulatory changes, the industry has responded to market pressures and undertaken considerable restructuring at its own initiative.

In view of all these changes, we believe it is necessary to thoroughly reassess the cost benefit justification for the BSR.

In terms of the benefits, most have already been realised:

- The banking industry has already increased considerably Tier 1 capital, by around 80 per cent or Eur609 billion, according to one study (PwC, *Impact of bank structural reforms in Europe Report for AFME*, November 2014).
- Article 17 of the BRRD meanwhile furnishes national authorities with a comprehensive set of powers to address to tackle perceived structural weaknesses, e.g. limiting or ceasing activities; divesting assets, restricting business lines and products, and altering group legal structures.
- Finally, through the introduction of bail-in and measures such as MREL and TLAC, it appears from cost of funding data that the so-called implicit guarantee has been largely eroded. While difficult to prove a negative, there has been a steady convergence of funding costs between G-SIBs and non G-SIBs since the beginning of 2012, suggesting that larger banks are no longer receiving a benefit as a result of the perceived tax-payer guarantee (see PwC November 2014, pp.20-26.)
- Finally, EU banks have anyway repositioned themselves towards their core business, reducing considerably their investment banking activity, and descaling through cost-saving programmes.

Against these, the costs of BSR, for banks and the economy more generally, are considerable. According to PwC:

- BSR could add a 30 basis point or 25 per cent increase to borrowing costs, in particular for those smaller firms who profitability is more sensitive to borrowing costs. PwC calculates that this will translate into an annual increase in borrowing costs to corporates of Eur5 billion across the EU.
- Similarly, asset managers and investors will need to pay more to trade in corporate debt. Compounded over time, this could reduce returns by 5 per cent, as well as mark-to-market losses of Eur82 billion. At a time when the Commission is actively pursuing a Capital Markets Union, this seems counterproductive.
- In addition, separating institutions as proposed in the BSR takes expertise away from corporate clients, who will no longer have access to the full range of services they currently receive. This will lead to increased client fees, as customers have to obtain services from a variety of banks.
- Separation will prevent banks from undertaking market-making activities, and so add to the already significant problem of lack of liquidity. This is particularly the case with the EU corporate bond market, especially the secondary market.
- Finally, PwC have estimated a considerable impact on the EU economy in the form of a permanent reduction in the steady-state level of GDP of 0.15 per cent, or Eur20 billion, and unemployment effects of a third of a million.

Of course, the impact of the financial crisis itself was considerably higher, and it is right that measures have been taken to both reduce the likelihood of a similar event in future, and ensure that the private sector, not taxpayers, bears the costs. However, given that the potential benefits of BSR in terms of increased financial stability have already been or are being delivered through other measures, the economic costs if implemented are not outweighed by the benefits.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Notwithstanding the General Approach already agreed on the BSR file in the Council, the Commission, as part of Vice President Timmermans' Better Regulation initiative, should reassess the costs and benefits of BSR in light of the regulatory changes since 2012 and those yet to come, notably TLAC. Unless the benefits can be shown to truly outweigh the costs, the Commission should, in our view, consider withdrawal of the BSR.

If the proposal is not withdrawn, we believe it is essential that the BSR includes an appropriately calibrated de-minimum exemption that fully exempts banks with small deposit levels given that the trading activity of such banks does not benefit from an implicit subsidy from deposit taking activities and given that the failure of such a bank would not have a systemic impact on the deposit guarantee scheme.

It is also important that any restrictions on prop trading are narrowly defined and there are no restrictions imposed on market making or long-term investments.

Example 5 for Issue 10 (Links between individual rules and overall cumulative impact)

To which Directive(s) and/or Regulation(s) do you refer in your example? *

(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms

Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast)

European Fund for Strategic Investment and Project Portal – (EU) Regulation 2015/1017

Please provide us with an executive/succinct summary of your example: *

Elements of the new prudential framework increase the capital charges for long-term infrastructure investment, thus reducing the incentive for institutions to fund this type of activity. In addition, there are a number of other policy responses that could be considered at the EU level to promote infrastructure investment.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *

(Please give references to concrete examples, reports, literature references, data, etc.)

Basel III rules consider the risk associated to infrastructure investments as similar to the risk associated to long-term corporate debt, imposing higher capital ratios. For example, compared to Basel II, Basel III capital charges for long-term corporate and specialised loans increased by 30bp and 60pb respectively (see "B20 Infrastructure & Investment Taskforce Policy Paper" – September 2015.[3]) Such measures negatively affect investment's profitability and lead to higher lending rates and shorter maturities. However, infrastructure investments have proven lower volatility and higher resilience to the economic cycle.

The uncertain Net Stable Funding Ratio (NSFR) calibration in the new capital framework affects the capacity of banks to provide loans to infrastructure projects. The NSFR requires long-term lending to be matched to long-term liabilities, which are more expensive as a result of the CRR. Moreover, the fact that the specific calibration is yet to be determined is a source of uncertainty, further deterring banks from long-term investments.

And while we welcome the recent changes to Solvency II to treat infrastructure as a separate asset class and make sure that capital charges reflect risk/return, there is still a need to ensure that capital requirements distinguish between long-term corporate debt and infrastructure debt.

[3] See paper at: http://b20turkey.org/policy-papers/b20turkey_infra.pdf

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

The capital treatment of certain specialised lending needs to be revisited. Many specialised lending products can be very useful in supporting productive investment and infrastructure financing.

A clarification in the NSFR calibration should address the problem of certainty vis-à-vis long-term liabilities.

Solvency II could more easily promote long-term investment if the prudential requirements for insurers investing in infrastructure and high-quality securities were reviewed with regard to a more beneficial capital treatment.

Other suggestions to help improve the infrastructure investment climate are:

- Developing clear and transparent legal procedures, i.e. provisions for fair competition and enforceable rights that have the potential to unlock private sector long-term / infrastructure financing.
- Promoting stable and fair regulatory pricing frameworks. The frameworks should match the life of the underlying assets to boost confidence in better matched capital through long time horizons and reduce risk.
- Ensuring that new standards under development include a cost-benefit assessment of impact on the provision of long-term investment (e.g., the International Capital Standards for Insurers).
- Reviewing accounting standards in order to grant an international level playing field, consistency and harmonisation with financial sector specific regulation and disclosure requirements as well as data collection requirements.
- Developing a clear framework for taxation that promotes long-term investments. Predictability in the framework for capital gains taxation should be ensured and consistent with subnational, national and regional as well international levels across bilateral and multilateral investments, if available. In particular, this is a challenge in the case of subsidies at different levels. Ensure that taxes do not systematically advantage / disadvantage certain types of investors and are stable over time.
- Limiting the re-negotiation risk by evaluating various governance and contract mechanism to reduce political risk in long term / infrastructure financing.
- An industry standard template: providing an overview of disclosure and reporting requirements on an initial and semi-annual basis, which should also be used for industry performance data aggregation and analysis including event-based disclosures and public disclosure of compliance certificates, as well as a template for a prospectus / offer document.

Finally, the new European Fund for Strategic Investments could do more to allow performance data and creation of benchmarks, for example adopting industry best practices on standardization of information for infrastructure investment, for example, through the use of templates in the investment project portal developed by the European Services Roundtable.

Issue 11 – Definitions

Different pieces of financial services legislation contain similar definitions, but the definitions sometimes vary (for example, the definition of SMEs). Please indicate specific areas of financial services legislation where further clarification and/or consistency of definitions would be beneficial.

Example 1 for Issue 11 (Definitions)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), especially Articles 2(7), 10(1)(b), 10(3)

Directive 2004/39/EC of 21 April 2004 on Markets in Financial Instruments (MiFID I), Article 19(6)

Please provide us with an executive/succinct summary of your example: *

A concrete example where EMIR has created unintended consequences is shown by the absence of equivalence decisions to date in the context of MiFID I. The lack of equivalence determination of third-country markets under Article 19(6) of MiFID I means that each time a non-financial counterparty (NFC) enters into an exchange traded derivative contract on a third-country market, it is erroneously treated as an OTC derivative under the definition of Article 2(7) of EMIR.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

The absence of equivalence decisions to date in the context of MiFID I has an unintended consequence for the purposes of Article 10(1)(b) and 10(3) of EMIR, insofar as these cleared trades are treated as OTC trades and therefore count towards the clearing threshold applicable to non-financial counterparties under Article 10(1)(b) of EMIR. This may lead an NFC to be above the clearing threshold due to the computation of those "false OTC derivatives" executed on third-country exchanges and, as result, subject to EMIR stricter requirements with respect to clearing obligations, risk mitigation and implementation timelines. We believe this to be contrary to the Commission's intentions reflected in its Green Paper on Building a Capital Markets Union (CMU), as we understand that one of the cornerstones of the CMU is precisely to make markets work more effectively and efficiently.

We understand that, in the context of the recently agreed proposal for a Regulation on reporting and transparency of Securities Financing Transactions (SFTR), the legal view emerged that the Commission cannot adopt a decision on the equivalence of third-country markets in relation to derivatives under Article 19(6) of MiFID I as this provision only refers to an equivalent third-country market with respect to shares admitted to trading on such a market, and not derivatives.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

To address this legal issue, SFTR Article 32 amends the definition of OTC derivatives in EMIR and introduces a specific equivalence procedure under EMIR (with a new EMIR Art. 2a) enabling the Commission to determine the equivalence of third-country markets with respect to derivatives

executed on those markets. We welcome those provisions in SFTR and strongly encourage the Commission to prioritise the equivalence assessments of third-country markets given that they have been outstanding for a long time, i.e. since MiFID I came into force.

More generally, there is a need to ensure that definitions that are dependent upon determinations to be made in other legislations, e.g. equivalence, are clearly identified, tracked and assessed to minimise the impact of inconsistent application upon those subject to the legislation. Not only should defined terms in EMIR be aligned with terms used in other related EU legislation, but they would also ideally be aligned with the terms used by BIS and CPMI-IOSCO.

Please also refer to the Swiss Finance Council's response to the public consultation on the review of EMIR.

Example 2 for Issue 11 (Definitions)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps Text with EEA relevance

Please provide us with an executive/succinct summary of your example: *

The Short Selling Regulation (SSR) includes an exemption that excludes market makers from several requirements relating to disclosure and the covering of positions provided the relevant market making criteria are satisfied. Where the market making occurs in an instrument within scope of the SSR on a third country market, it is necessary that the third country market has been deemed equivalent by the Commission relative to the EU market in several areas.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

In order to obtain a market making exemption where the market making occurs in an instrument within scope of the SSR on a third country market, it is necessary that the third country market has been deemed equivalent by the Commission to the EU market in several areas. However, to our understanding, the EC has not yet undertaken equivalence assessments on any third country markets. This prevents market makers on third country markets benefiting from the market making exemption for such activity even when the other market making criteria are satisfied and thus effectively discriminates against non-EU firms.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We believe that, in relation to the SSR, and EU legislation more generally, it is crucial that any third country equivalence assessments in relation to identified key third country markets are undertaken and the decision published, at least 6 months in advance of the entry into force of the legislation. This would ensure a level playing field between firms headquartered inside and outside of the EU and

ensure third country firms have sufficient lead-in time to prepare to be compliant with the final rules they face.

An alternative would be to change the definition of "market making activities" in the SSR to permit non-EU firms to make use of the exemption automatically.

Issue 12 – Overlaps, duplications and inconsistencies

Please indicate specific areas of financial services legislation where there are overlapping, duplicative or inconsistent requirements.

Example 1 for Issue 12 (Overlaps, duplications and inconsistences)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), Article 39

Please provide us with an executive/succinct summary of your example: *

The extra-territorial application of Article 39 of EMIR on segregation and portability has created a conflict of laws resulting from cumulative and conflicting rules of multiple jurisdictions applying these rules to cross-border transactions. In this respect, the requirement that a clearing member shall offer its clients the choice between omnibus and individual client segregation is incompatible with US legislation so that US clearing members are unable to comply with Article 39 of EMIR.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

US Futures Commission Merchants (FCMs) are required by Article 39(5) of EMIR to offer individually segregated accounts to their clients when providing clearing services on EU CCPs. Such a requirement is incompatible with the US Bankruptcy Code so that US clearing members are unable to comply with Article 39 of EMIR.

As we highlighted in our response to the public consultation on the review of EMIR, the resulting patchwork will substantially increase operating costs and complexity to execute such cross-border transactions, and create incentives not to execute them on a cross-border basis, which would in turn increase the risk of market fragmentation and liquidity, as well as increase cost and risk for end users. We believe that these implications are contrary to a number of explicit policy goals, notably reducing systemic risk, migrating a maximum of suitable OTC derivatives to central clearing, ensuring a viable cross-border derivatives market, and ensuring that the EU is an attractive location with which to transact.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We propose that the Commission addresses this issue by amending EMIR to disapply the Article 39 requirement to offer clients both an individual segregation and omnibus segregation option in respect

of clearing members located in any third-country where conflicts of laws arise, for example by leveraging the third-country equivalence decisions issued under EMIR Article 25. Non-EU clearing members should still be required to comply with the disclosure requirements of EMIR Article 38 and Article 39(7) in accordance with the relevant guidance in the ESMA Q&A.

Example 2 for Issue 12 (Overlaps, duplications and inconsistences)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR), Article 30

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), Article 4

Please provide us with an executive/succinct summary of your example: *

EMIR Article 4 introduces a clearing obligation, detailing the conditions and the requirements for counterparties to clear specific classes of OTC derivatives. In order to comply with the clearing obligation, EMIR adds that counterparties can be a clearing member of a CCP, a direct client of a clearing member or establish indirect clearing services. With regard to the latter, indirect clearing services, a mandate is included in EMIR to further detail the applicable requirements. Specifically, under Article 4 of EMIR, ESMA is empowered to develop a draft RTS on the types of indirect clearing arrangements that do not increase counterparty risk and ensure that the assets and positions of the counterparty benefit from protection with equivalent effect to that referred to in Articles 39 and 48 of EMIR.

Under Article 30 of MiFIR, indirect clearing arrangements with regard to ETD are permissible provided that they meet certain requirements. Under Article 30, ESMA is empowered to define the requirements with regard to ETD with the same objective as the objective for the EMIR RTS for OTC derivatives.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

For several years now, the industry has collectively been working to devise a commercially viable approach to offering indirect clearing requirements for OTC derivatives that is compliant with the requirements under EMIR. But as of today, no solution has been found, and no OTC derivatives indirect clearing offerings are available. Whilst we believe some positive changes have been proposed by ESMA in the consultation, we have significant concerns with several of the proposals which we consider will have a seriously detrimental impact of the functioning of the existing ETD indirect clearing model and likely result in no workable OTC derivative indirect clearing model emerging.

We do not believe that the requirements in the EMIR and MiFIR Level 1 legislation for indirect clients to benefit from protections with equivalent effect to those for direct clients are feasible in the

absence of national client asset regimes across the EU that provide appropriate client asset protections at all levels of the clearing chain. We do not consider that operational segregation of indirect clients' assets and positions in the books and records at each level of the chain will be effective in the absence of such national client asset regimes. In order to make the Level 1 "equivalent effect" obligation viable, it is imperative that there is a robust legal construct in EU and national legislation to ensure an equivalent level of protection, rather than a reliance on bespoke arrangements to be devised by counterparties at each level of the chain. The latter approach is simply not scalable and will not result in a robust, uniform or commercially viable approach. We note that ESMA is of the opinion that EMIR Article 48(7) overrides national insolvency law. Whilst this view is untested and subject to challenge, if the policy intent is that it does override national insolvency law, then we think that a similar approach to that should be taken in respect of the indirect clearing structures as opposed to putting the onus on clearing members (CMs) and direct clients (DCs) to individually validate the effectiveness and potentially supplement national client asset protections by putting in place additional bespoke structures.

Regarding the specific proposals in the consultation paper, we believe the proposal in the RTS for a new type of Gross Omnibus Segregated Account (GOSA) account, and associated requirements regarding the functionality associated with such accounts, will require CCPs, CMs, DCs and ICs and any additional entities in the chain to develop systems, change booking models, controls and procedures to support this new account functionality which will differ from CCP to CCP and therefore be highly complex and costly. The indirect clearing requirements are also likely to require the repapering of all indirect clearing arrangements (regardless of whether the client selects an omnibus or gross omnibus account). This would impact thousands of legal relationships along the entire clearing chain (including structures to meet the Article 5(8) obligations) which will be extremely burdensome and costly for CMs, DCs, indirect clearers and ICs. For direct clearing, it has proven difficult for clients to sign the FOA Clearing Module so a re-documentation exercise of this scale would be incredibly resource intensive and costly at all levels of the chain.

The ESMA proposals will require fundamental changes to the current collateral model that is typical in ETD indirect clearing arrangements offered by wealth managers where collateral provided by wealth management clients to wealth managers is held on a regular pledge only, so not passed through to the next party in the chain. The broker side is usually funded from the wealth manager's own working capital and assets, on behalf of the wealth management clients. The reason for this is that physical collateral transfer for hundreds and thousands of often small end client accounts would be extremely administratively burdensome and cost intensive. **We believe the changes to this model (which is long-standing and accepted by indirect clients) required by the ESMA proposals will increase the operating and collateral costs for the end client significantly and likely make the costs of clearing prohibitive.**

In summary, we are concerned that the proposals in the draft RTS will entail a number of challenges which could result in the widespread withdrawal of ETD indirect clearing arrangements in light of the resultant operational, documentation, business, capital, collateral and compliance requirements. **In view of this, we do not consider the ESMA proposals to be workable in the proposed form. Fundamentally, we do not consider that the EMIR and MiFIR Level 1 requirement for indirect clients to benefit from protections equivalent to direct clients can be achieved in a scalable manner without (a) changes to EU client asset regimes and (b) changes to the proposed account model and booking**

model requirements to allow a more simplified gross omnibus account structure within an indirect clearing chain.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

Recognising that the necessary changes to EU client asset regimes will not take place in the short term, we believe that an interim regime in the period before the more fundamental changes that are required can be implemented, should focus on delivering an indirect clearing solution that meets clients' clearing access requirements but is also legally robust and operationally scalable. Consistent with this, we believe the EMIR and MiFIR regimes should be based on the following principles:

- Disclosure of segregation arrangements / risks to the indirect client and client choice regarding the level of protection received, instead of a need to offer both a net omnibus indirect clearing account (NOSA) and gross omnibus indirect clearing account (GOSA).
- It should be sufficient for each CM to open one NOSA and/or GOSA at the CCP for holding the assets and positions of all of its indirect clients (segregated from its direct clients' and house business) with no additional segregation at each level of the indirect clearing chain.
- Allow indirect (bank) participants to continue to hold client non-cash collateral on regular pledge, so on custody, which provides an effective collateral protection option to the end client in most jurisdictions today, in combination with a net omnibus account for the indirect participant on its broker side.
- A scope that focuses exclusively on EU entities and does not capture non-EU entities, or provides flexibility for indirect clearing arrangements that include non-EU entities to be permissible with adequate disclosure of the risks. Special emphasis should be given in respect of cases where a non-EU entity is included within the clearing chain, interposed between EU-entities. It is important that such non-EU entities should clearly not fall in scope of the draft RTS given the concerns this would create in respect of potential conflicts of law issues (e.g. insolvency).

Example 3 for Issue 12 (Overlaps, duplications and inconsistences)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR)

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC

Please provide us with an executive/succinct summary of your example: *

Inconsistency between EMIR and CRDIV in the area of CCP clearing impacting end-users, in the form of higher prices and entry barriers.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

We do not believe that EMIR and CRD IV always mutually re-enforce the G20 objective of increasing the extent to which derivatives are cleared via CCPs. Whilst EMIR seeks to promote central clearing, the CRD IV-mandated regulatory capital costs and leverage ratio requirements applicable to central clearing have directly resulted in clearing brokers leaving the industry, thereby reducing access to central clearing.

Whereas the European Markets Infrastructure Regulation (EMIR) aims to promote and mandate central clearing, the CRR requirements on exposures to CCPs result in relatively high risk weighted assets and leverage ratio constraints for clearers with exposure to CCPs.

In particular, we point to the concerns with (i) the Current Exposure Method (CEM) and the Standardised Method (SM) for measuring exposure at default (EAD) for counterparty credit risk (CCR) and (ii) Capital requirements for bank exposures to central counterparties.

(i) The Current Exposure Method (CEM) and the Standardised Method (SM) for measuring exposure at default (EAD) for counterparty credit risk (CCR)

The CEM had been criticised for several limitations, in particular that it does not differentiate between margined and unmargined transactions, that the supervisory add-on factor did not sufficiently capture the level of volatilities as observed over recent stress periods, and the recognition of netting benefits was too simplistic and not reflective of economically meaningful relationships between derivatives positions.

Although being more risk-sensitive than the CEM, the SM also has several weaknesses. Like the CEM, it does not differentiate between margined and unmargined transactions or sufficiently capture the level of volatilities observed over stress periods. In addition, the definition of “hedging set” leads to operational complexity resulting in an inability to implement the SM, or implementing it in inconsistent ways. Further, the relationship between current exposure and potential future exposure (PFE) is misrepresented in the SM because only current exposure or PFE is capitalised. Finally, the SM does not provide banks with a true non-internal model alternative for calculating EAD because the SM used internal methods for computing delta-equivalents for non-linear transactions.

(ii) Capital requirements for bank exposures to central counterparties

As noted by the BCBS, application of the interim BCBS capital requirements for bank exposures to central counterparties, as implemented in the EU, could lead both to instances of very little capital being held against exposures to some CCPs, and potentially in certain cases, to capital charges higher than for bilateral transactions. There was also concern that, in some cases, the capital treatment might create disincentives to the maintenance of generous default funds.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We believe the Commission should as soon as possible implement in CRD IV/CRR the BCBS framework for "The standardised approach for measuring counterparty credit risk exposures" published in March 2014 which addresses some of the known deficiencies of the CEM and the SM and improves the risk sensitivity of the capital framework.

It should also implement the BCBS framework for "Capital requirements for bank exposures to central counterparties" published in April 2014 which introduces a framework that seeks to ensure banks' exposures to central counterparties are adequately capitalised, while also – in support of the G20 mandate to clear centrally all standardised over the counter derivatives – preserving incentives for central clearing, and promoting robust risk management by banks and CCPs.

Issue 13 - Gaps

While the recently adopted financial legislation has addressed the most pressing issues identified following the financial crisis, it is also important to consider whether they are any significant regulatory gaps. Please indicate to what extent the existing rules have met their objectives and identify any remaining gaps that should be addressed.

Example 1 for Issue 13 (Gaps)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

National restrictions preventing occupational pension funds investing in long-term infrastructure projects

Please provide us with an executive/succinct summary of your example: *

There are also other regulations that prevent a market in infrastructure from developing, such as national restrictions preventing occupational pension funds from investing in long-term infrastructure projects.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

In 2014, the Commission proposed a Directive (IORPS II) which would, among other things, stop Member States banning occupational pension funds from investing in assets with a long-term profile such as infrastructure, unless the restrictions are justified on prudential grounds; we are supportive of this position.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We believe the Commission should resurrect the suggestion in IORPS II to ban such restrictions.

Theme D. Rules giving rise to possible other unintended consequences

Issue 14 – Risks

EU rules have been put in place to reduce risk in the financial system and to discourage excessive risk-taking, without unduly dampening sustainable growth. However, this may have led to risk being shifted elsewhere within the financial system to avoid regulation or indeed the rules unintentionally may have led to less resilient financial institutions. Please indicate whether, how and why in your view such unintended consequences have emerged.

Example 1 for Issue 14 (Risks)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 575/2013 of the European Parliament and of the Council on Prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, article 501

Please provide us with an executive/succinct summary of your example: *

The SME supporting factor and the exemption from the CVA risk charge for SMEs under-prices counterparty credit risk in the EU.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

We are not convinced that the SME supporting factor is necessary to stimulate the provision of finance to SMEs. Based on the EBA's discussion paper on the SME supporting factor, there does not appear to be sufficient evidence to justify a reduction in SME loan risk weights, (see EBA Discussion Paper on SMEs and the SME Supporting Factor, European Banking Authority, July 2015.) We acknowledge that SMEs were not the counterparties where the majority of counterparty credit risk mark-to-market losses were taken during the crisis, however, as both the EBA and the Basel Committee have recognised there remains a significant counterparty credit risk when lending to them, particularly where exposures are uncollateralised.

To that end, we agree with the EBA that a full exemption from the CVA risk charge for SMEs is not warranted. CVA should be applied to these exposures in a way consistent with the evolving Basel CVA framework to ensure international consistency.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

We recommend the Commission and EU central banks engage in the Basel level discussions to ensure that the calibration of CVA strikes an appropriate balance between the risks of SME lending and increases in hedging costs, rather than diverging from global standards.

Example 2 for Issue 14 (Risks)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

BCBS Draft Revised Standardised Approach to Credit Risk (to be implemented in the EU via a potential update to CRR)

Please provide us with an executive/succinct summary of your example: *

Changes to the SA-CR could have unintended impacts on banks' ability to lend to corporates and to SMEs. Two issues, the impact of the proposed Credit Conversion Factors on corporates, and the flat risk weight approach to exposures to unrated SMEs, are a cause of particular concern.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

1. Corporations, both large and small, use committed bank credit limits to protect working capital, guard against a downturn and also to improve ratings on their short-term commercial paper issuance. Substantial CCFs in the new BCBS draft rules for these off balance sheet items will either mean these facilities will no longer be provided, or only at prohibitive costs. We are concerned this will lead to curbed lending and have adverse impacts on the real economy. The new rules apply high credit conversion factors, not just on irrevocable committed limits, but also now on unused and fully revocable facilities.
2. Description: the reintroduction of external credit ratings into the draft BCBS rules is positive. However, banks also lend to many SMEs which are unrated. The flat risk weight applied to such exposures lacks risk sensitivity and penalises this kind of economically beneficial lending.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

For the first issue, we recommend differentiation between revocable and irrevocable commitments (already different legal contracts), and for revocable we would recommend a lower Credit Conversion Factor (suggest 10%).

On the second issue, for unrated corporations, rather than a one-size-fits all, and risk insensitive flat risk weight, we propose the re-introduction of some basic financial ratios (e.g. leverage, profitability etc.) to ensure more risk sensitivity and more efficient capital allocation.

Issue 15 - Procyclicality

EU rules have been put in place to make the financial system less procyclical and more stable through the business and credit cycle. Please indicate whether some rules have unintentionally increased the procyclicality of the financial system and how.

Example 1 for Issue 15 (Procyclicality)

To which Directive(s) and/or Regulation(s) do you refer in your example? *
(If applicable, mention also the articles referred to in your example.)

Regulation (EU) No 648/2012 EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), Article 11 and the related regulatory technical standards which still need to be published by the ESAs

Please provide us with an executive/succinct summary of your example: *

Large sectors of the OTC derivatives markets are not currently clearable and some might never be appropriate for central clearing. A study published in 2012 by ISDA following the publication of the BCBS/IOSCO proposals for margin requirements for non-centrally cleared derivatives showed that an increase in initial margin (IM) requirements in stressed market conditions will result in increased demand for new funds at the worst possible time for market participants[4]. Risk-sensitive IM, contemplated by the VaR approach in the proposals, could have major adverse systemic implications. The ESAs and the Commission should consider this when finalising and adopting the final RTS under EMIR.

Please provide us with supporting relevant and verifiable empirical evidence for your example: *
(Please give references to concrete examples, reports, literature references, data, etc.)

IM requirements can increase in stressed market conditions, perhaps by a factor of three. This is pro-cyclical for the banking system and there is a real possibility that some banks might fail to raise sufficient funds. This is also pro-cyclical for markets as forced selling of assets by sell-side and/or buy-side to generate more cash to fund IM calls during market disruptions adds to economic and market stresses. A loop effect may result. Asset price declines caused by asset sellers could further increase volatility, resulting in increased IM calls, more asset sales, and so on.

IM is pro-cyclical: it would dramatically impact liquidity, reduce the availability and liquidity of vital risk management tools and could potentially lead to a funding shock that could severely damage the banking system and the real economy. The value of IM is that it makes each node in the system less vulnerable to defaults at adjacent nodes, but this comes at a cost. IM posted out makes each node weaker, since it consumes liquidity resources at the node: (i) market stress potentially exposes this weakness to a critical degree; (ii) IM introduces institutions to potentially dangerous obligations under the guise of protecting those institution. Somewhat counter-intuitively, thresholds, while making the IM challenge more affordable in normal conditions, cause a dangerous leveraging effect in stressed markets, greatly increasing pro-cyclicality.

[4] Initial Margin for Non-Centrally Cleared Swaps – Understanding the Systemic Implications, ISDA, November 2012.

If you have suggestions to remedy the issue(s) raised in your example, please make them here: *

It is likely optimal to have some level of pro-cyclicality, not to eliminate it completely, as any risk sensitive framework will increase capital requirements as credit condition worsen.

But pro-cyclicality can be cured by moving to a regime where margin amounts are fixed at the time of transaction and not changed as markets move to a stressed condition, or by imposing a ceiling on the maximum of amount of IM. Any fixed amount should not be set at a level which would be large enough to cover margin needs even in a stressed market as although this would remove pro-cyclicality, it would severely impair liquidity in the un-cleared markets. Even if IM was set at a level that potential future exposure would not be completely covered by margin, risks not covered would be covered by capital. Variation margin would also be exchanged daily.