EBA/RTS/2015/13

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# Final Report

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

# Contents

## Contents

# 1. Executive Summary

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

- a minimum set of the information on financial contracts that should be contained in the detailed records; and
- the circumstances in which the requirement to maintain detailed financial records should be imposed on institutions and relevant entities[1].

In accordance with this mandate the draft RTS specify the circumstances in which the requirement to maintain detailed records shall be imposed (Article 1) and the information which should be kept at a minimum in the detailed records (Article 2 and Annex I).

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

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

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

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

[1] As referred to in point (b), (c) or (d) of Article 1(1) of the BRRD.

# 2. Background and rationale

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

To support the application of this power Article 71(7) of the BRRD specifies that competent authorities or resolution authorities may require an institution or relevant entity[2] to maintain detailed records of financial contracts.

Article 71(8) of the BRRD requires the EBA to develop draft regulatory technical standards (RTS) specifying for the purposes of Article 71(7), a minimum set of the information on financial contracts[3] that should be contained in the detailed records and the circumstances in which the requirement should be imposed.

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

- Article 1: Requirement to maintain detailed records of financial contracts;
- Article 2 and the Annex: the minimum set of information on financial contracts which should be kept in the detailed records.

***Article 1: requirement to maintain detailed records of financial contracts***

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

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

However, it is important to note that the draft RTS do not preclude competent authorities or resolution authorities from imposing the same or similar requirements on other institutions.

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

[3] 'financial contracts' are defined in Article 2(1)(100) of the BRRD.. Thus, the EBA has been given a mandate to specify a minimum set of the information only on those financial contracts which are defined in Article 2(1)(100) of the BRRD.

***Article 2 and Annex I: the minimum set of information on financial contracts which should be kept in the detailed records***

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

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

The fields specified in the Annex to the draft RTS were introduced after assessing which information about financial contracts (e.g. details on parties to the financial contract, details on the transaction) could be important for the effective application of resolution powers and resolution tools. Thus, it is proposed that institutions should be required to keep such details on financial contracts as whether a financial contract included contractual recognition of resolution powers in relation to contracts governed by the law of a third country, information on value and valuation, collateral, termination rights and maturity; whether the financial contract is subject to netting arrangements; etc. Furthermore, in order to ensure consistency between different legal acts and reduce the burden for the institutions which are reporting relevant information to the trade repositories, in the draft RTS, where possible, the same language and structure is used as in the Commission's Delegated Regulation (EU) No 148/2013 and likely upcoming amendments to it.

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

The Annex to the draft RTS does not prescribe a template in which information should be contained; however, this is without prejudice to the discretion of competent authorities and resolution authorities to use it as a template or to prescribe the format in which the requested information should be provided within the timeframe set in the request. Furthermore, the draft RTS do not introduce an additional reporting burden for institutions or entities, as they require institutions and entities to maintain detailed records on an ongoing basis and make it available to the competent authorities and resolution authorities if requested.

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

**COMMISSION DELEGATED REGULATION (EU) …/..**

**of XXX**

**supplementing Directive 2014/59/EU of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms with regard to regulatory technical standards specifying a minimum set of the information on financial contracts that should be contained in the detailed records and the circumstances in which the requirement should be imposed**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 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.[4], and in particular Article 71(8) thereof,
Whereas:

[4] OJ L 173/12.6.2014, p.190.

(1) In order to ensure that competent authorities and resolution authorities may easily access data on financial contracts, as defined in Article 2(1)(100) of Directive 2014/59/EU, where the applicable resolution plan or the group resolution plan foresee the taking of resolution actions in relation to an institution or entity referred to in Article 1(1) (b), (c) or (d) of Directive 2014/59/EU, it should be specified that those institutions or entities should be required to maintain on an on-going basis a minimum set of information on such contracts. That should be without prejudice to the possibility of competent authorities or resolution authorities to require additional information to be kept in detailed records of financial contracts and to impose such requirements on other institutions or entities referred to in Article 1(1)(b), (c) or (d) of Directive 2014/59/EU when it is needed to ensure comprehensive and effective planning activity.

(2) In order to clearly define the minimum set of information to be maintained in detailed records of financial contracts by the relevant institutions or entities, the requested information should be listed in the Annex to this Regulation. That should be without prejudice to the discretion of competent authorities and resolution authorities to use it as a template or to prescribe the format in which the requested information should be provided within the timeframe set in the request.

(3) For the avoidance of doubt, the requirement imposed on the relevant institutions or entities to maintain detailed records of financial contracts should not affect the right of the competent authorities and the resolution authorities to request necessary information from trade repositories in accordance with Article 81 of Regulation (EU) No 648/2012 of the European Parliament and of the Council[5] and Article 71(7) of Directive 2014/59/EU.

(4) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority to the Commission.

(5) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council,[6]

[5] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

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

HAS ADOPTED THIS REGULATION:

*Article 1*
*Requirement to maintain detailed records of financial contracts*

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

When necessary to ensure comprehensive and effective planning activity, competent authorities and resolution authorities may impose the requirements referred to in the first subparagraph on institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU which are not covered by the first subparagraph.

*Article 2*
*Minimum set of information on financial contracts to be kept in the detailed records*

1. An institution or entity which is required to maintain detailed records of financial contracts under Article 1 shall keep in the records on an ongoing basis the minimum set of information listed in the Annex to this Regulation for each financial contract.

2. The institution or entity referred to in paragraph 1 shall, on request of the competent authority or resolution authority, make available and transmit the requested information on the financial contracts, to the requesting authority within the timeframe set in the request.

3. Where an information field listed in the Annex to this Regulation is not applicable to a certain type of financial contract and the institution or entity referred to in paragraph 1 can demonstrate this to the competent authority or the resolution authority, the information relevant to that field shall be excluded from the requirement under Article 1.

*Article 3*
*Entry into force*

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

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

Done at Brussels,

*For the Commission*
*The President*

*On behalf of the President*
*[Position]*

ANNEX

**The minimum set of the information on financial contracts to be included in the detailed records**

| | Field | Description of information to be maintained in detailed records of financial contracts |
|---|---|---|
| | **Section 1 – Parties to the financial contract** | |
| 1 | Record keeping timestamp | Date and time of record entry. |
| 2 | Type of ID of the reporting counterparty | Type of the code used to identify the reporting counterparty. |
| 3 | Reporting Counterparty ID | Unique code (Legal Entity Identifier (LEI), where available) identifying the reporting counterparty. |
| 4 | Type of ID of the other counterparty | Type of the code used to identify the other counterparty. |
| 5 | ID of the other counterparty | Unique code (LEI, where available) identifying the other counterparty of the financial contract. This field shall be filled from the perspective of the reporting counterparty. In the case of an individual, a client code shall be used in a consistent manner. |
| 6 | Name of the reporting counterparty | Corporate name of the reporting counterparty. This field can be left blank where LEI is used to identify the reporting counterparty. |
| 7 | Domicile of the reporting counterparty | Information on the registered office, consisting of full address, city and country of the reporting counterparty. This field can be left blank where LEI is used to identify the reporting counterparty. |
| 8 | Country of the other Counterparty | The code of the country where the registered office of the other counterparty is located or country of residence in case that the other counterparty is a natural person. |
| 9 | Governing law | Identify the law governing the financial contract. |

| | | |
|---|---|---|
| 10 | Contractual recognition – Write down and conversion powers (only for contracts governed by third country law subject to the requirement of the contractual term under the first subparagraph of Article 55(1) of Directive 2014/59/EU) | The contractual term required under Article 55(1) of the Directive 2014/59/EU.<br><br>When such contractual term is included in a master agreement and applies to all trades governed by that master agreement, it can be recorded at the master agreement level. |
| 11 | Contractual recognition – Suspension of termination rights (only for contracts governed by third country law) | The contractual term by which the creditor or party to the agreement creating the liability recognises the power of the resolution authority of a Member State to suspend termination rights.<br><br>When such contractual term is included in a master agreement and applies to all trades governed by that master agreement, it can be recorded at the master agreement level. |
| 12 | Contractual recognition –Resolution powers (only for contracts governed by third country law) | The contractual term, if any, by which the creditor or party to the agreement creating the liability recognises the power of a Member State resolution authority to apply resolution powers other than those identified in field 10 and field 11.<br><br>When such contractual term, if any, is included in a master agreement and applies to all trades governed by that master agreement, it can be recorded at the master agreement level. |
| 13 | Core business lines | Identify which core business line or core business lines the financial contract relates to, if any. |
| 14 | Value of contract | Mark to market valuation of the financial contract, or mark to model valuation reported in application of [Article 3(5) and 3(6) of the Delegated Regulation on Article 9 of Regulation (EU) No 648/2012]. The CCP‘s valuation to be used for a cleared trade. |
| 15 | Currency of the value | The currency used for the valuation of the financial contract. |

| | | |
|---|---|---|
| 16 | Valuation timestamp | Date and time of the last valuation.<br><br>For mark-to-market valuation the date and time of publishing of reference prices shall be reported. |
| 17 | Valuation type | Indicate whether valuation was performed mark to market or mark to model or provided by the CCP. |
| 18 | Collateralisation | Indicate whether a collateral agreement between the counterparties exists. Where financial contract is covered by the reporting requirement under [Delegated Regulation on Article 9 of Regulation (EU) No 648/2012] information on collateralisation shall be provided as required by these requirements. |
| 19 | Collateral portfolio | Indicate whether the collateralisation was performed on a portfolio basis. Portfolio means the collateral calculated on the basis of net positions resulting from a set of contracts, rather than per trade. |
| 20 | Collateral portfolio code | If collateral is reported on a portfolio basis, the portfolio should be identified by a unique code determined by the reporting counterparty. |
| 21 | Initial margin posted | Value of the initial margin posted by the reporting counterparty to the other counterparty.<br>Where initial margin is posted on a portfolio basis, this field should include the overall values of initial margin posted for the portfolio. |
| 22 | Currency of the initial margin posted | Specify the currency of the initial margin posted. |
| 23 | Variation margin posted | Value of the variation margin posted, including cash settled, by the reporting counterparty to the other counterparty.<br>Where variation margin is posted on a portfolio basis, this field should include the overall value of variation margin posted for the portfolio. |
| 24 | Currency of the variation margin posted | Specify the currency of variation margin posted. |

| | | |
|---|---|---|
| 25 | Initial margin received | Value of initial margin received by the reporting counterparty from the other counterparty.<br>Where initial margin is received on a portfolio basis, this field should include the overall value of initial margin received for the portfolio. |
| 26 | Currency of the initial margin received | Specify the currency of the initial margin received. |
| 27 | Variation margin received | Value of variation margin received, including cash settled, by the reporting counterparty from the other counterparty.<br>Where variation margin is received on a portfolio basis, this field should include the overall value of variation margin received for the portfolio. |
| 28 | Currency of the variation margin received | Specify the currency of the variation margin received |
| | **Section 2a – Financial contract type** | |
| 29 | Type of the financial contract | Classify the financial contract according to Article 2(100) of Directive 2014/59/EU. |
| 30 | Financial contract ID | Unique trade ID where the financial contract is covered by the reporting requirements under [Delegated Regulation on Article 9 of Regulation (EU) No 648/2012]. For any other financial contract, ID assigned by the reporting counterparty. |
| | **Section 2b – Details on the transaction** | |
| 31 | Effective date | Date when obligations under the financial contract come into effect. |
| 32 | Maturity date | Original date of expiry of the reported financial contract. An early termination shall not be recorded in this field. |
| 33 | Termination date | Termination date in the case of an early termination of the reported financial contract.<br><br>If not different from maturity date, this field shall be left blank. |

| | | |
|---|---|---|
| 34 | Termination right | Indicate whether the other counterparty's termination right under the reported financial contract is based on the insolvency or financial condition of the institution under resolution.<br><br>When such contractual term is included in a master agreement and applies to all trades governed by that master agreement it can be recorded at the master agreement level. |
| 35 | Master Agreement type | Reference to the name of the relevant master agreement, if used for the reported financial contract (e.g. ISDA Master Agreement; Master Power Purchase and Sale Agreement; International ForEx Master Agreement; European Master Agreement or any local master agreements). |
| 36 | Master Agreement version | Reference to the year of the master agreement version used for the reported trade, if applicable (e.g. 1992, 2002, etc.). |
| 37 | Netting agreement | If the financial contract is a part of a netting arrangement as defined in Article 2(1)(98) of Directive 2014/59/EU, a unique reference of the netting arrangement. |
| 38 | Type of liability/claim | Indicate whether liabilities arising from the financial contract are:<br>• entirely excluded from bail-in pursuant to Article 44(2) of Directive 2014/59/EU;<br>• partially excluded from bail-in pursuant to Article 44(2) of Directive 2014/59/EU;<br>• not excluded from bail-in pursuant to Article 44(2) of Directive 2014/59/EU. |
| | **Section 2c – Clearing** | |
| 39 | Clearing obligation | Indicate whether the reported financial contract belongs to a class of OTC derivatives that has been declared subject to the clearing obligation and both counterparties to the contract are subject to the clearing obligation under Regulation (EU) No 648/2012, as of the time of execution of the financial contract. |
| 40 | Cleared | Indicate whether clearing has taken place. |
| 41 | Clearing timestamp | Time and date when clearing took place. |

| | | |
|---|---|---|
| 42 | CCP | In the case of a financial contract that has been cleared, the unique code for the CCP that has cleared the financial contract. |
| 43 | Intragroup | Indicate whether the financial contract was entered into as an intragroup transaction, defined in Article 3 of Regulation (EU) No 648/2012. |

# 4. Accompanying documents

## 4.1. Impact Assessment

### Introduction

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

a. a minimum set of the information on financial contracts[7] that should be contained in the detailed records; and

b. the circumstances in which the requirement should be imposed.

Article 71(7) of the BRRD specifies that competent authorities or resolution authorities may require an institution or relevant entity[8] to maintain detailed records of financial contracts.

As per Article 10(1) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), provides that when any regulatory technical standards developed by the EBA are submitted to the Commission for adoption, they should be accompanied by an analysis of 'the potential related costs and benefits'. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.

In the absence of data on the information that is currently being kept and / or the additional cost that would result from the implementation of each of the proposed requirements (options), this IA provides only a qualitative assessment of the various options under which the institutions would be required to keep detailed records of financial contracts. Likewise, the preferred option was proposed after having assessed the qualitative characteristics of each option. The cost-benefit analysis provides a high-level assessment of the monetary net impact of the preferred option only.

### Problem definition and baseline scenario

Most Member States are currently preparing information collection and reporting procedures for the purposes of their bank recovery and resolution frameworks. Although an increased level of convergence is expected under the BRRD framework, variations may arise between Member States as regards requirements relating to the circumstances in which institutions and relevant entities shall be required to maintain detailed financial records and the information to be maintained in detailed records. This may create a lack of common understanding among

[7] Article 2(100) of the BRRD defines 'financial contract'. Thus, the EBA has been given a mandate to specify a minimum set of the information only on those financial contracts which are defined in Article 2(1)(100) of the BRRD.

[8] As referred to in point (b), (c) or (d) of Article 1(1) of the BRRD.

authorities and consequently some difficulties in promptly obtaining relevant information for the purposes of the application of the resolution powers and/or resolution tools to institutions or entities, in particular as regards those with cross-border operations.

### Objectives

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

### Assessment of the technical options

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

The assessment considers the following options:

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

Under Option 1, the requirement to keep detailed records would apply, on a standing basis, to all institutions and relevant entities within the scope of the BRRD. This option would ensure that at any time competent authorities or resolution authorities would have relevant detailed records of

financial contracts. Relevant IT systems should be developed in advance in a way to facilitate the collection of the relevant information on an on-going basis. Such advance preparation would prevent an excessive burden in collecting information where this is needed promptly (e.g. at the point of resolution) and systems had not been put in place to collect this information in advance.

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

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

However, under Option 2 the information would not be readily available on a day-to-day basis and in crisis situations it may be impossible, or extremely difficult, to gather, in a timely manner, the data needed in order for the authorities to take fully informed decisions about the application of powers (e.g. due to the volume of financial contracts/complexity of gathering such information). This could be even more apparent in cases of big and more complex institutions, potentially undermining the effective application of the resolution tools at the point of failure.

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

However, under Option 3 if an institution which had been identified as likely to be subject to insolvency proceedings were put under resolution, the authorities might not be able to get the relevant information on financial contracts in a timely manner. Nevertheless, this possibility is not

high enough to require the inclusion of these institutions under the requirement to maintain detailed records of financial contracts when the cost of doing so would be disproportionate to the benefits that such inclusion would bring.

Taking into account the above considerations the following conclusions can be made. Option 1 would not be proportionate as it would create an unnecessary burden for institutions which would not be or are highly unlikely to be resolved. Option 2 is not sufficient to ensure that the authorities have the information they need to prepare in advance for the resolution of the institutions that, in the event of failure, would be likely to be resolved through the application of the resolution powers. The collection of information near the point of resolution is unlikely to be feasible in practice for complex institutions with a great number of financial contracts. Option 3 is the most proportionate as it achieves the aim of ensuring that the relevant authorities can access readily the information they may need in connection with a resolution whilst ensuring that those institutions that are less likely to be resolved are not subject to requirements to maintain detailed records about their financial contracts. In any event Option 3 does not preclude the competent authorities and resolution authorities from requiring other institutions and relevant entities to maintain detailed records about financial contracts, nor does it preclude the authorities from requiring additional information to be recorded in the detailed records.

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

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

At first glance, Option 1 would appear to reduce the burden of information collection for the institutions subject to the requirement to maintain detailed records of financial contracts as regards information which is already reported to trade repositories under the Delegated Regulation on EMIR. However, this does not appear to be correct.

As a starting point, the objective of the RTS is to ensure that competent authorities and resolution authorities can access the relevant information for purposes relating to the BRRD. Most importantly, the definition of 'financial contract' under Article 2(1)(100) of the BRRD extends beyond the derivatives contracts to which the Delegated Regulation on EMIR relates. Therefore the requirements as to the information to be maintained in the detailed records must be extended to cover the rest of the financial contracts in question.

Moreover, the requirement to maintain detailed records of financial contracts should not increase the burden on institutions already maintaining detailed records of this information as a

result of the Delegated Regulation on EMIR or other requirements, as the RTS do not specify the format in which the information is to be contained in the detailed record. Therefore, if institutions are already recording the information they can continue to do so in accordance with their existing practices.

Option 2 keeps the position that the Annex to the draft RTS should be aligned as much as possible with the Delegated Regulation on EMIR (taking into account likely upcoming amendments) and introduces new fields of information to be contained in the detailed records which are particularly important for the BRRD purposes. This approach would ensure that at any time competent authorities and resolution authorities would be able to request and quickly get access to information from institutions or relevant entities or trade repositories for instance where this is important for the application of resolution powers and resolution tools. With regard to the additional burden for institutions which are already covered by reporting requirement arising from other legal acts, it should not create a significant additional burden as these institutions already collect and store information. Finally, the institutions or entities will be required to provide information to the competent authorities and resolution authorities only if requested, meaning that no additional reporting requirement will be created.

### Cost-benefit analysis of the preferred option

**Costs**: the option chosen will require institutions and entities to readjust their IT systems in order to capture all financial contracts falling under the definition of the BRRD. The cost of the preferred policy option, in relation to the current operational costs of institutions, should be low as information on derivatives which form a substantial part of financial contracts, is already being collected.

**Benefits**: the benefit of the preferred policy option in relation to the current operational cost of the institutions should be medium, as relevant information is essential in order to ensure the effective application of a stay power as well as to ensure effective and orderly resolution.

**Net impact of the preferred option**: the net impact (benefits–costs) of the preferred option is estimated to be low, justifying the implementation of the preferred option.

## 4.2. Views of the Banking Stakeholders Group (BSG)

The Banking Stakeholders Group (the BSG) suggested clarifying which subsidiaries are required to maintain detailed records of relevant financial contracts, expressing the opinion that those subsidiaries which are located in third countries which are beyond the scope of the BRRD and which belong to a group that has a multiple point of entry (MPE) resolution strategy should not be under the obligation of keeping the required records. EBA staff note that pursuant to Article 71(7) of the BRRD, to which the EBA mandate relates, the requirement can be imposed only on institutions and entities established in the Union. Therefore, it is not possible to make such a provision in the draft RTS in any case.

## 4.3. Feedback on the public consultation

The EBA publicly consulted on the draft RTS.

The consultation period lasted for 3 months and ended on 6 June 2015. Responses were published on the EBA website.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

In many cases several respondents made similar comments or the same body repeated its comments in response to different questions. In such cases, the comments, and the EBA's analysis, are included in the section of this paper where the EBA considers them most appropriate. Changes to the draft RTS have been incorporated as a result of the responses received during the public consultation.

### Summary of key issues and the EBA's response

- Respondents supported the EBA's proposed approach as regards the circumstances in which the requirement to maintain detailed records should be imposed. Some respondents requested that the RTS foresee a phase-in period for the requirements to maintain detailed records of financial contracts under the draft RTS.

  **EBA approach**

  The EBA notes that such phase-in period is not foreseen in the Level 1 text, and thus cannot be introduced in the RTS.

- Respondents supported the EBA's proposal that the relevant fields specified in the Annex to the draft RTS (the minimum information to be maintained in detailed records) should be aligned as much as possible with the relevant Regulation (EU) No 148/2013 on reporting to trade repositories and upcoming amendments to it ('Delegated Regulation on EMIR') RTS on EMIR') and to clarify and amend some fields. Some respondent raised concerns that not all fields would be relevant for all types of financial contracts.

  **EBA approach**

  The EBA, where relevant, has aligned fields with the Delegated Regulation on EMIR and upcoming amendments, as well as clarifying the language where necessary. Some fields have been deleted. The EBA also considers that it would be appropriate to clarify in the text that where a field is not applicable to a certain type of financial contract the information requested need not be maintained in the detailed records.

- Respondents have different views as regards the level at which the requested data has to be collected.

**EBA approach**

Some respondents argued that there is no need to specify different levels at which information should be collected. Others expressed their view that rather than looking at 'per trade' and 'per counterparty', it would be good to differentiate between 'master agreement-level' information on the one hand and 'counterparty-level' or 'transaction-level' information on the other, where appropriate and relevant. This approach is not in line with the Delegated Act on EMIR and upcoming amendments and contradicts the general position of the respondents on the need for alignment of this draft RTS with the Delegated Regulation on EMIR. Considering this, and in order to avoid both misalignment with the reporting approach under the Delegated Regulation on EMIR and the potential need for institutions to build two sets of systems to maintain records for, on the one hand, the purposes of the BRRD and, on the other, the purposes of the Delegated Regulation on EMIR, in the draft RTS the same approach as in the Delegated Regulation on EMIR has been taken. Only in relation to new fields, where relevant, has it been clarified that information can be collected at master agreement level if the relevant information applies to all trades governed by that master agreement.

## Annex: Summary of responses to the consultation and the EBA's analysis

| Comments | Summary of responses received | EBA analysis | Amendments to the proposals |
|---|---|---|---|
| **General comments** | | | |
| | | | |
| Recital 6 of the draft RTS | Respondents raised concerns as regards recital text mentioning that information should be kept in central location on relational database capable of being accessed by the competent authorities and resolution authorities or from which information can be extracted readily and transmitted to the relevant authority. In particular respondents were concerned by mention of 'central location on relational database' as it specifies a technology type which is not necessarily used by the institutions and might be too intrusive. Also, institutions mentioned that technical requirements do not fall under the mandate given to the EBA.<br><br>Other respondents supported the text as undoubtedly appropriate and correct.<br><br>Another responded agreed with the need to of have a database, but suggested that the database could probably be obtained from existing systems within banks. | The RTS does not have aim to define technical aspects how information should be stored and kept as it is out of the mandate. Rather the EBA intention was to encourage institutions to keep information in a way which would ensure easy access and transfer of information to competent authorities and resolution authorities. | The recital has been redrafted taking into account the comments received.<br><br>Article 2(2) of the draft RTS published in this report has been changed to 'make available and transmit the requested information on financial contracts, to authorities within the timeframe set in the request'. |

| Comments | Summary of responses received | EBA analysis | Amendments to the proposals |
|---|---|---|---|
| Phase-in period | Respondents requested that a transitional period be introduced in order to allow time to prepare to comply with the requirement.<br><br>Some respondents requested that the EBA RTS be postponed until relevant ESMA RTS are updated.<br><br>Respondents also raised concerns that the requirements in relation to securities contracts might not be compatible with the requirements under the Securities Financing Transactions Regulation (SFTR), on which currently the European Parliament and the European Council are having negotiations in trilogues. Under the SFTR ESMA might be given a mandate to issue RTS relating to reporting requirements. However, if given the relevant mandate, it is not expected that ESMA will finalise relevant RTS before the second half of 2016 or early 2017. Some Respondents raised concerns that the EBA RTS may pre-empt the development of the SFTR reporting requirements and also provide insufficient time for market participants to put the necessary systems in place, requesting that the RTS foresee a phase-in period. | The EBA understands respondents' concerns and has been closely cooperating with the ESMA in order to align relevant fields of the RTS with the latest amendments to the relevant ESMA RTS on reporting to trade repositories, which will also be aligned with ESMA RTS on reporting under MiFID.<br><br>As regards the SFTR, negotiations are still on-going and currently it is still not clear what the final text or the relevant ESMA mandate in relation to reporting requirements under the SFTR will look like. What is more, even if ESMA were given the relevant mandate, it would take time to develop such RTS.<br><br>Finally, a phase-in period cannot be foreseen in the draft RTS as it is not allowed by the Level 1 text. However, in any case the EBA will keep track of the regulatory developments in relevant fields and will initiate changes to the draft RTS if needed. | No amendments proposed. |
| **Responses to questions in Consultation Paper EBA/CP/2014/33** | | | |
| Question 1. Do you agree with the circumstances in which the requirement to maintain detailed records | In general respondents agreed with the circumstances in which the requirement to maintain detailed records should be imposed. | The EBA welcomes the support of the approach it has proposed in Article 1 of the draft RTS. | No amendments proposed. |

| Comments | Summary of responses received | EBA analysis | Amendments to the proposals |
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| should be imposed? | A few respondents noted that the range of the institutions covered is likely to change over time and institutions which do not fall under the requirement might be subject to the requirement in future. In this case, the relevant institution might need to have an adequate transitional period giving it sufficient time to implement the necessary processes and set up the required technical infrastructure.<br><br>One respondent suggested clarifying which subsidiaries are required to maintain records of the relevant financial contracts. The BSG's opinion is that those subsidiaries which are located in third countries which are beyond the scope of the BRRD and which belong to a group that has a multiple point of entry (MPE) resolution strategy should not be under the obligation of keeping the required records. These subsidiaries are themselves resolution entities and would be resolved under local resolution regulations. | As regards the phase-in period for institutions which are not automatically covered by the requirement under subparagraph 1 of Article 1, the EBA would like to note that resolvability assessment of an institution is a continuous process which should be repeated regularly in order to identify possible risks in advance and ensure adequate preparation to comply with the record keeping as well as other requirements under Directive 2014/59/EU, if needed. The EBA considers that once, according to the resolution plan, it is foreseen that resolution actions would be applied to an institution, it should comply with the requirement to maintain detailed records of financial contracts; no additional phase-in period should be foreseen as such a status would indicate that there was a greater risk that information on financial contracts might be needed for resolution purposes.<br><br>What is more, such a phase-in period is not foreseen in the Level 1 text.<br><br>As regards subsidiaries in third countries, the EBA staff would like to note that, according to Article 71(7)(8) of the BRRD, the EBA's mandate covers only institutions and entities established in the EU. | |

| Comments | Summary of responses received | EBA analysis | Amendments to the proposals |
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| Question 2. If the answer is no. What alternative approach could be used to define the circumstances in which the requirement should be imposed in order to ensure proportionality relative to the aim pursued? | One respondent supported Option 3 considered in the impact assessment, suggesting that all institutions be required to maintain detailed records of financial contracts. As an argument in favour, the respondent stressed that there are also potentially very significant benefits which accrue to firms themselves, not just in terms of regulatory compliance but also in terms of risk management and competitive advantage. Examples include collateral management, collateral optimisation and XVA calculations. These benefits far outweigh the costs associated with the data mining process. Indeed, the recognition of this fact is the reason why many institutions already routinely mine data of this type from their contractual portfolios. It was also noted that, looking at alternative approaches, it should be remembered that a degree of proportionality exists naturally within the market, in that institutions which would go into insolvency (or benefit from Article 4 simplified obligations), rather than stand to be resolved, tend to be smaller and less complicated in nature. It is likely that such firms will have fewer financial contracts from which to mine data. As such, the obligation in relation to such firms is likely to be much less in any event.<br><br>Other respondents agreed with the current circumstances in which the requirement to maintain detailed records should be imposed. | The EBA appreciates respondents' views and the support expressed by some respondents for extending the scope to all institutions. However, the majority of responses expressed support for the current version of the text, which aims to ensure proportionality.<br><br>The EBA also notes that, as is clarified in recital 1 of the draft RTS, nothing in the draft RTS will preclude competent authorities and resolution authorities from imposing such requirements on institutions or entities which are not covered by the mandatory requirement. | No amendments proposed regarding the mandatory requirement.<br><br>In line with recital 1, paragraph 2 in Article 1 has been added: 'When necessary to ensure comprehensive and effective planning activity, competent authorities and resolution authorities may impose the requirements referred to in the first subparagraph on institutions or entities referred to in point (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU which are not covered by the first subparagraph." |
| Question 3. Do you agree | In general all respondents supported the Annex to the | The EBA, after consulting with ESMA, where | In line with the comments |

| Comments | Summary of responses received | EBA analysis | Amendments to the proposals |
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| with the list of information set out in the Annex which it is proposed should be required to be maintained in the detailed records? | draft RTS. However, some clarifications, changes or deletions have been requested in relation to individual fields.<br><br>One respondent suggested additional wording in Article 3 of the draft RTS such that record keeping should be required for each financial contract under which the entity has a financial exposure, over a *de minimis* amount, as there might be contracts which are inactive from time to time and inactive contracts should not be caught by the provisions.<br><br>Some respondents suggested clarifying that if a contract does not have the information requested in one of the fields and if the institution can justify the reason for it, this particular field should be allowed to remain blank.<br><br>Some respondent raised concerns as regards the classification of financial contracts.<br><br>The BSG agreed with the list of information set out in the Annex, stressing that new requirements under the RTS must be accommodated within the existing reporting regulation in order to avoid the duplication of reporting requirements. | relevant, has clarified and amended fields; some fields have been deleted because the information can be aggregated from other fields or because the requirement might create an unproportional burden for the institution compared with the benefits it might bring.<br><br>As regards a *de minimis* rule, the EBA considers that such a requirement would be difficult to implement in practice, bearing in mind that positions vary frequently. What is more, it might not be in line with the legal mandate defined in the Level 1 text.<br><br>The EBA also considers that it would be appropriate to clarify that information need not be contained in the detailed records if the field is not applicable to a certain type of financial contract and an institution or an entity can justify this. | received Article 2(3) has been amended adding the following language: "Where an information field listed in the Annex to this Regulation is not applicable to a certain type of financial contract and the institution or entity referred to in paragraph 1 can demonstrate this to the competent authority or the resolution authority, the information relevant to that field shall be excluded from the requirement under Article 1 not be maintained in the detailed records.<br><br>In Annex I to the draft RTS published in this report fields 1, 2, 4, 6, 7, 8, 13, 14, 15, 16, 18, 19, 2, 21, 22, 23, 25, 26, 27, 39, 41 and 42 have been amended to take into account the latest ESMA RTS updates.<br><br>Fields 10, 11, 17, 28, 33, 36 |

| Comments | Summary of responses received | EBA analysis | Amendments to the proposals |
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| | | | and 37 have been clarified.<br><br>Fields 5, 6, 7, 18, 20, 29, 30, 34 and 42 (for these fields please see the original numbering in the consultation paper) have been deleted. |
| Question 4. If no. What kind of other information would be useful to maintain in detailed record of financial contracts? | One respondent stressed that in the event of resolution, the authority would need to know whether a contract relates to a critical economic function previously identified by the institution. This would be at least as relevant to the resolution authority as relation to a core business line (field 12).<br><br>One respondent noted that much of the information the lack of which could adversely impact the ability of a resolution authority to exercise resolution powers or resolution tools will be contained within master agreements, rather than transaction confirmations. With this in mind and with a particular focus on the ISDA Master Agreement, the respondent suggested considering requiring institutions to mine additional information from financial contracts. The respondent also suggested requiring institutions to retain a copy of the actual contract executed with each counterparty (at least as far as this relates to the information extracted from a master agreement rather than a transaction confirmation) together with the data to be included | As regards additional information and fields the EBA would like to note that the draft RTS lays down only the minimum set of information which should be kept in the detailed records, as required by the legal mandate defined in the Level 1 text. However, nothing in the RTS will preclude competent authorities and resolution authorities from requiring additional information to be kept in the detailed records, if needed.<br><br>Regarding specific fields requiring the institution to identify whether the financial contract relates to critical functions, the EBA agrees that this information might be used for a critical functions mapping exercise; however, it might not always be possible to identify to which critical function an | No amendments proposed. |

| Comments | Summary of responses received | EBA analysis | Amendments to the proposals |
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| | within the database. | individual contract relates. The EBA also notes that the Annex to the draft RTS already includes a field requiring institutions to identify whether financial contracts relate to core business lines which support critical functions. | |
| Question 5. Do you agree that in the Annex to the draft RTS the same structure as in Commission's Delegated Regulation (EU) No 148/2013 should be kept? | All respondents broadly supported the Annex to the draft RTS's alignment with the Commission's Delegated Regulation (EU) No 148/2013 and upcoming amendments. | The EBA has been closely cooperating with ESMA in order to align the draft RTS, where relevant, with the latest developments from ESMA on the Commission's Delegated Regulation (EU) No 148/2013 (Delegated Regulation on EMIR) and the RTS on reporting under MiFID. | In Annex I to the draft RTS published in this report fields 1, 2, 4, 6, 7, 8, 13, 14, 15, 16, 18, 19, 2, 21, 22, 23, 25, 26, 27, 39, 41 and 42 have been updated to take into account the responses received and upcoming amendments to the relevant ESMA RTS. |
| Question 6. Considering the question above do you think it would be possible and helpful to define expressly in the RTS which data points should be collected at a 'per trade' level, and which should be collected at a 'per counterparty' | As mentioned before all respondents strongly supported the draft RTS's alignment with the Commission's Delegated Regulation (EU) No 148/2013 and upcoming amendments. However, some respondents expressed the view that, rather than looking at 'per trade' and 'per counterparty', it would be better to differentiate between 'master agreement-level' information on the one hand and 'counterparty-level' or 'transaction-level' information on the other, where appropriate and relevant. | Considering the responses received to question 5, the EBA clarified, where relevant, the level at which information should be reported only in relation to new fields which do not appear in the Delegated Regulation on EMIR, so as to avoid both misalignment with the reporting approach under the RTS on EMIR and the potential need for institutions to build two sets of systems to maintain detailed records for, on the one hand, the purposes of the BRRD and, on the other, the | In Annex I to the draft RTS published in this report with regards to fields 10, 11, 12 and 34 it has been clarified that if provision is applicable across all trades governed by the master agreement, information can be recorded at a master agreement |

| Comments | Summary of responses received | EBA analysis | Amendments to the proposals |
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| level? | One respondent noted that the fact that a master agreement applicable to multiple trades can be amended at any point in time creates obvious challenges in making sure that data is accurate and up to date at all times. However, irrespective of this, in terms of the reporting required by the RTS, it would not seem necessary to specify which data points should be collected at a 'per trade' level and which should be collected at a 'per counterparty' level. | purposes of the RTS on EMIR. | level. |