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**Annex to the DBG Response to the Targeted consultation on the review of
the Directive on financial collateral arrangements**

Chairman of the
Supervisory Board
Martin Jetter

Executive Board
Theodor Weimer
(Chief Executive Officer)
Christoph Böhm
Thomas Book
Heike Eckert
Stephan Leithner
Gregor Pottmeyer

Aktiengesellschaft
mit Sitz in
Frankfurt/Main
HRB Nr. 32232
VAT Reg Nr. DE114151950
Amtsgericht
Frankfurt/Main

Question 2.1.1.

Please explain how this could be done:

On the question whether the FCD should explicitly specify the ways in which financial collateral consisting of “claims relating to or rights in or in respect of” financial instruments (e.g. dividend or interest) provided as financial collateral separately from their financial instruments under a security financial collateral arrangement could be evidenced in writing, we do not think that further specification of this point in the FCD would be particularly purposeful since the proper documentation of financial collateral arrangements (including potential secondary claims) is a matter determined under the respective national civil law.

Question 2.2.1

Please explain why you think that the concepts of 'possession' and 'control' in the FCD require further clarification and for which type of collateral.

Please elaborate how this should be done in your opinion

We consider that the concepts of ‘possession’ and ‘control’ in the FCD don’t present any problems in the provision of cross-border collateral. As such, these do not require any additional clarification. Even though the terms possession and control might be defined and applied slightly differently under different national laws, this poses no problem as long as the governing law itself is unambiguous.

Question 2.3.1

Please explain how this might be done for 'cash' and 'financial instruments'.

We believe this is a topic to be addressed under the respective governing law of the financial instrument.

Question 4.1.4

Please describe a solution that you consider appropriate:

Regarding the legal uncertainties identified in the discussion paper related to close-out netting provisions, we must state that although we do not agree with those uncertainties, we do believe that the FCD and the SFD could be more aligned to provide further legal certainty and to facilitate legal argumentations in favour of the enforceability of close-out mechanisms in the EU.

Question 4.2.1

Please specify why and how the legal opinions you have collected were changed:

The statements were not amended, but additional statements were added. Recovery and resolution measures are used to avoid an insolvency of the CCP and as a consequence, avoid termination. Thus, if a termination is avoided due to recovery measures, the statements with respect to close-out mechanism do not change.

Question 4.3.1

Please specify why and how the legal opinions you have collected were changed:

The opinions in question were additional statements in relation to recovery and resolution that do not affect conclusions on validity of close-out netting.

Question 4.5.1

Please explain your reasons as well as possible solutions taking into account possible interactions with other national or EU law (e.g. [W UD \(Directive 2001/24/EC\)](#), [BRRD \(Directive 2014/59/EU\)](#), [CCP RR \(Regulation \(EU\) 2021/23\)](#)) and the importance of close-out netting for risk management and the calculation of own funds requirements for credit institutions and investment firms under the CRR:

In this context, no specific need has been identified from a CCP perspective given previous experience in dealing with remote-access opinions.

Question 5.4.1

Please elaborate on how this might be done in a manner that is compatible with national laws regarding securities, companies, contracts, property and book-entry:

We consider that the FCD seems to be the wrong piece of legislation to address civil law concepts relating to DLT. This topic is rather to be addressed in Member States Law. We underline here again that the FCD is already – in our view – technologically neutral. Notwithstanding, a clarification on how the possession and control requirements could be applied to crypto assets would be advantageous.

Question 5.7.2

Do you see the need to remove a debtor's set-off rights? Please consider the set-off risks against the risks to households and SMEs in the event of the insolvency of a credit institution?

- No, it is for the collateral taker to decide what kind of collateral they accept and ensure appropriate risk mitigation where applicable - **X**

Question 5.7.2.1

Why do you see the need to remove a debtor's set-off rights?

In our view there is no need to statutorily restrict set-off rights, considering that the existing contractual limitations already achieve an adequate outcome in this regard.