

Template for comments

Public consultation on revisions to the ECB's policies concerning the exercise of Options and Discretions (O&Ds) in Union law

Institution/Company

Banco Santander SA

Contact person

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First name

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Email address

Telephone number

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General comments

Banco Santander welcomes the opportunity to engage with the ECB in the consultation process on its revised Guide on options and discretions in the European Union law. We also thank the ECB team on the opportunities that have been provided to explain our position and we remain at your disposal for any further clarifications if they are required.

Template for comments

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ECB Guide on Options and Discretions under Union law

Please enter all your feedback in this list.
When entering feedback, please make sure that:

- each comment deals with a single issue only;
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Deadline: midnight CET on 10 January

ID	Section	Page	Type of comment	Detailed comment	Concise statement as to why your comment should be taken on board	Name of commenter
1	Chapter 2 - Own Funds 15. MINORITY INTERESTS INCLUDED IN CONSOLIDATED COMMON EQUITY TIER 1 CAPITAL IN THE CASE OF THIRD-COUNTRY CONSOLIDATED REQUIREMENTS (Article 84(1), point (a)(ii), Article 85(1), point (a)(ii), and Article 87(1), point (a)(ii), of the CRR	31	Deletion	The exclusion from the derogation of the "lower of the two requirements" when calculating minority interests for third-country subsidiaries is not sufficiently justified and is severely punitive for banking groups with a higher presence in third-countries. Additionally, this exclusion does not take into account EBA regulatory and supervisory equivalence status from third countries.	To preserve a level-playing field between european credit institutions that have different business models and profiles.	Banco Santander
2	Chapter 2 Own Funds 16. DEROGATION FROM THE "LOWER OF THE TWO REQUIREMENTS" CRITERION WHEN CALCULATING MINORITY INTERESTS AND QUALIFYING TIER 1 and TIER 2 CAPITAL (Article 84(1), point (a), Article 85(1), point (a), and Article 87(1), point (a), of the CRR)	31	Amendment	According to the drafting of this point, it is not possible to meet the conditions required by the ECB to apply the 'lower of rule'. The ECB by setting out conditions that are effectively impossible to meet is going against the intention of the legislator that decided to include this option in the regulation. The current drafting of the ECB guide does not allow this possibility, because the extension of the loss-absorption and financial transfer mechanism to the losses suffered by the parent company (upstream path) or by any of the institution's sister companies (cross-stream path) would render the new waiver of article 84(1)(a) CRR fundamentally unusable for any institution, as would essentially imply the need for the intermediate institution to guarantee the assets or liabilities of its parent and/or sister companies. The ECB Guide should clarify that the requirements are only applicable for losses registered in subsidiaries of the institutions where minority interests exist (downstream path). Regarding the loss-absorption mechanism, the conditions for the waiver should take into consideration the nature of the own funds instruments (while losses incurred in subsidiaries would immediately affect the CET1 instruments, these losses may only affect the Additional Tier I (or AT1) and Tier II (or T2) instruments based on their loss-absorbency conditions, which are reflected in the prudential regulations. Requiring an "immediate" loss absorption by AT1 and T2 would essentially alter their prudential regime, with unintended and unpredictable consequences and even its ineligibility as own funds in the issuing entity). Additionally, the requirement for immediately transferring the financial resources generated through the loss absorption to the legal entities where the losses have been registered may need to be revisited. In this regard, the loss absorption by minority interests holding CET1, AT1 or T2 instruments in the institution may not result in the generation of financial resources, but precisely on using the already available own funds for absorbing the losses arising in the institution subsidiaries. An automatic transfer of resources to subsidiaries risks creating a guarantee from the institution to other entities, including non-banks, and institutions in third-countries where we understand to be against the ECB and SRB prudential policies and goals. Finally, we are not aware of any prudential regime that confers the supervisory authority the capacity to require banks to transfer resources to their subsidiaries. The mere reference to a supervisory authority requesting the transfer of financial resources to its parent or sister companies, especially when headquartered in a different country, seems outlandish.	The ECB while exercising its Options and Discretions needs to avoid negating the intention of the regulation and effectively creating an impossible condition to comply. The conditions detailed in the Guide override in practice the CRR3 or at least makes this authorization impossible to be granted and effectively applied.	Banco Santander
3	Chapter 3 Capital Requirements 8. SIGNIFICANT RISK TRANSFER (SRT; Articles 244(2) and (3) and 245(2) and (3) of the CRR) n order to assess whether or not the reduction in RWEAs is justified by the risk transferred, the ECB will use, in particular, a quantitative test which compares the reduction in capital requirements achieved by the originator with the share of credit risk losses transferred to third parties through the securitisation. This quantitative test is met if the capital relief (Ratio 1) is lower than or equal to the risk transferred (Ratio 2).	42	Amendment	SRT and CRT tests need to legislated by the EBA and endorsed at EU level, rather than legislated by the ECB. The CRT test from EBA 2017 report were included in a Consultation Paper, as opposed to the CRT test of EBA 2020 report that were part of an EBA report but not approved at the EU level. In addition to this, there is a reference to the High Cost of Protection which is not included in the Regulation. This was covered by Basel years ago, but it didn't become Regulation in force.	The adoption of a test that has not followed the full process of consultation and approval by the required appropriate governance bodies.	Banco Santander
4	Chapter 3 Capital Requirements 11. DEROGATION TO CALCULATE A SEPARATE INTEREST, LEASES AND DIVIDENDS COMPONENT FOR SPECIFIC SUBSIDIARIES (Article 314(3) of the CRR) [...] With regard to the condition laid down in Article 314(3), point (c), of the CRR, that use of the derogation provides an appropriate basis for calculating the credit institution's own funds requirements for operational risk, the ECB will take into account whether: (i) the credit institution's loss component calculated on a consolidated basis before the application of the derogation or due to the derogation does not exceed its business indicator component calculated on a consolidated basis (for this purpose, its loss component should be calculated by multiplying its average annual operational risk losses over the last five years by 15); (ii) the credit institution's ratio of operational losses to operational risk capital requirements, calculated on a consolidated basis over the last five years, exceeds the ratio of operational losses to operational risk capital requirements of the subsidiary in respect of which the derogation has been requested, calculated on an individual basis over the same five-year period.	45	Deletion	Both conditions included for Article 314(3), point (c) introduce the operational risk loss element as a requisite to approve the separate ILDC calculation. CRR3 disregards operational risk loss data for the calculation of own funds requirements for operational risk in the EU as it is enunciated in the preamble of the regulation: "To ensure a level playing field within the Union and to simplify the calculation of own funds requirements for operational risk, that discretion should be exercised in a harmonised manner for the minimum own funds requirements by disregarding historical operational loss data for all institutions." Additionally, the condition on point (c) i) replicates in its entirety the ILM proposed in the Basel framework, by considering historical operational loss data and multiplying it by 15. Once again, the ILM was purposefully disregarded by the legislator when deliberating the new regulation. Therefore, by including operational losses as a qualifier for operational risk capital calculation, the ECB is going against the intention of the EU legislator and going beyond the supervisory discretion allowed in the CRR. It is important also to take into account that the loss component is already taken into account in the SREP assessment and ultimately in the Pillar 2 decision. If the ECB considers also the level of operational losses for granting the ILDC separated by jurisdiction it would be doubly penalizing the entity for the same concept and also in the case of the capital requirements of pillar 1 it would not achieve the objective of article 314.3 Point (c) of measuring the requirements prudently because they would be overestimated in the case of subsidiaries with high margins due to high default probabilities. Conditions included by the EU legislator in the CRR 3 for approval of the separate ILDC are almost identical than the conditions required in CRR 2 for the Alternative Standard Approach (ASA). If the additional conditions included in the ECB Guide were included in CRR, those geographies with an ASA approval wouldn't qualify for the same treatment under CRR3.	The ECB Guide by including operational losses as a qualifier for operational risk capital calculation, is going against the intention of the EU legislator enunciated in the preamble of Regulation (EU) 2024/1623 and therefore going beyond the supervisory discretion allowed in the CRR.	Banco Santander

5	Chapter 3 Capital Requirements USE OF INTERNAL RATINGS TO DETERMINE CREDIT QUALITY STEPS FOR SA-CVA AND BASIC APPROACH CREDIT VALUATION ADJUSTMENTS (BA-CVA) (Article 383p, 338s and 384(2) of the CRR) The ECB is of the view that the use of internal ratings for the determination of credit quality steps should be approved only under the following conditions: (i) an internal ratings-based (IRB) model approved by the supervisor for the same counterparties is in place; (ii) the JST does not have concerns related to that approved IRB model, substantiated by high severity findings that have resulted in the imposition of limitations or conditions that are still unresolved.	52	Amendment	Approved IRB models in place already have passed very strict requirements under Credit Risk Framework. Given that the sole purpose of this use is segregating if an exposure is high-yield or investment grade, applying a more conservative threshold in the external ratings scale-internal rating mapping to separate between the two categories, only for CVA, could be a proportional solution to this problem. Specifying how to apply for this approval and making the application simple. Although current Guidelines do not detail how to apply for such use, if the TB & BB Boundary (art.104 CRR3) exception application process (including the documentation to submit) from the drat could be taken as a reference, from a formal and procedural perspective it will imply a huge effort for institutions obtaining the use of an IRB model. Evaluate if it is feasible to allow Institutions to use IRB models with a Supervisory pre-approval by default. This would imply that institutions need to formally apply for using these models, but if the application has been submitted, during the evaluation period the institution can apply those models until the Supervisor a) denies it or b) propose changes or limitations to the scope proposed by the supervised entity.	Allowing banks to use IRB models with severe findings or limitations through the adaptation of the internal-external rating mapping. This will allow considering deficiencies in the models under the request.	Banco Santander
				In our opinion, the way in which the ECB should assess the appropriateness for a group to calculate a separate ILDC for a specific subsidiary to fulfill condition for Article 314.3 (c), should be to confirm whether the NIM profile of the solicitant subsidiary is of a different nature than the profile of its banking group and therefore it distorts the Group's ILDC calculation, which leads to an overestimation of its operational risk consolidated capital requirements. This approach is supported by the consultative document on operational risk issued by the Basel Committee in October 2014, where it observed that bank business models and jurisdictions emphasize varying NIM profiles and, as a result of this, in some cases the Business Indicator may not be a proper proxy for operational risk exposure. To address this issue, it introduced the ASA which applies a "cap" to the NIM in Basel II operational risk framework. Therefore, by analogy with the problem of calculating operational risk at a consolidated level in the case of banking groups with different NIM profiles under Basel II and the introduction of the separated ILDC to solve this problem in CRR3, competent authorities should assess whether the NIM profile of the subsidiary which applies for the separated ILDC is different from the rest of the Group's profile and not the group's loss component. By doing so, the assessment of whether the use of this derogation provides an appropriate basis for calculating the EU parent institution's own funds requirement for operational risk would be well founded.		

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ECB Regulation on Options and Discretions under Union law

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ECB Guideline on Options and Discretions under Union law

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ECB Recommendation on Options and Discretions under Union law

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