EUROPEAN CENTRAL BANK

BANKING SUPERVISION

Template for comments

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

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General comments

Template for comments

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

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;**
- **you indicate the relevant article/chapter/paragraph, where appropriate;**
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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	Personal data
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(a)(ii), and Article 87(1), point (a)(ii), of the CRR	31	Deletion	There is a critical inconsistency between the ECB draft guidance in point 15 of the chapter on Own Funds and the amended Article 84 of CRR3 regarding the treatment of minority interests for subsidiaries in third countries: Article 84 of CRR3 for Third-Country Subsidiaries: The text specifies unambiguosly that for third-country subsidiaries, the comparison mechanism should take the lower of: (i) Local supervisory regulations applicable to the subsidiary (individual capital requirements). (ii) Local supervisory regulations applicable to the subsidiary but on a consolidated basis (i.e., accounting for intragroup exposures). This makes it clear that the comparison mechanism is entirely based on the local supervisory framework for third-country subsidiaries, without reference to CRR-specific capital requirements and without leaving this issue to the discretion of the supervisor. In contrast to this, what it is actually left to the supervisory discretion is the possibility for the competent authorities to allow the entities to choose either of the two options (no matter which is the lesser) "the competent authority may allow an institution to subtract either of the amounts referred to in point (a)(i) or (ii), once that institution has demonstrated to the satisfaction of the competent authority that the additional amount of minority interest is available to absorb losses at consolidated level". However, the ECB guidance suggests applying the lower of: (i) CRR requirements extended to the subsidiary at a consolidated level. (ii) Local third-country supervisory requirements. Thus, apart from the fact that the ECB has not been granted with the discretion to modify the methodology for calculating these minority interests, the ECB does it by deviating from the article 84 in the CRR text as it does introduce CRR-derived consolidated requirements into the comparison for non-EU subsidiaries which does create a disadvantage for non-EU subsidiaries	ECB makes an interpretation of art. 84, which is not aligned with CRR text. Article 84 CRR3 establishes a mandatory methodology for calculating minority interests and does not grant discretion to supervisory authorities. Therefore, interpreting its provisions falls outside the stated purpose of the O&D Guide, which is to clarify the application of options and discretions available to supervisors. Also, the ECB text contradicts the intent of the revised CRR3, which explicitly restricts the comparison to the local regulatory framework. The ECB guidance effectively imposes CRR-level requirements on non-EU subsidiaries, which undermines the recognition of local supervisory regulations as independent and tailored to the jurisdictional risks.This creates an unnecessary and unwarranted disadvantage for non-EU subsidiaries by potentially undervaluing their minority capital contribution based on requirements not reflective of their local risk environment.	Cadarso, Pedro	Publish
2	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 subsisdiaries 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. Article 84 CRR3 establishes a mandatory methodology for calculating minority interests and does not grant discretion to supervisory authorities. Therefore, interpreting its provisions falls outside the stated purpose of the O&D Guide, which is to clarify the application of options and discretions available to supervisors. The inclusion of Article 84 CRR3 in the guide risks expanding its scope beyond supervisory discretions and may create legal uncertainty by introducing interpretations that could diverge from the plain text of the CRR3 amendments. We request the ECB to reconsider whether interpreting binding provisions such as Article 84 CRR3 is within the intended remit of the O&D Guide, ensuring that its focus remains on areas of supervisory choice as originally intended.	To preserve a level-playing field between european credit institutions that have different business models and profiles.	Cadarso, Pedro	Publish

3	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, the ECB sets conditions that are effectively impossible to meet, as it cannot justify the total transferability of resources from one subsidiary to another. By definition, the equity of a specific subsidiary is intended to absorb losses at its own level. It is unreasonable to expect that the minority interests of Subsidiary A should absorb losses occurring in Subsidiary B. In practice, this approach either overrides the CRR3 framework or renders the authorization process impossible to implement effectively. Furthermore, we believe that, in the case of the supervisor (other than the ECB) overseeing a subsidiary on an individual or subconsolidated basis, it would be unrealistic to require the subsidiary to transfer resources generated through the activation of a loss-absorption mechanism to other entities within the consolidated group. Such a transfer of resources would also be unfeasible for subsidiaries under ECB supervision	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.	Cadarso, Pedro	Publish
4	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. We believe the process of the test should have started through a new Consultation Paper from the EBA to amend the tests, and afterwards an endorsement at EU level (Delegated Regulation) in order to became Regulation in force. 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.	Cadarso, Pedro	Publish

5	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	45	Deletion	Regarding chapter 3 paragraph 11: 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. 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.	The conditions detailed in the guide do not align with the regulator's intent regarding Article 314.3 The separate ILDC were included in CRR to avoid distortions in the Group's ILDC calculation when the NIM profile of the solicitant subsidiary is of a different nature than the profile of its banking group and therefore leads to an overestimation of its operational risk consolidated capital requirements. The separate ILDC was included in the CRR to prevent distortions in the Group's ILDC calculation when the NIM profile of the requesting subsidiary differs significantly from that of its banking group. This discrepancy could otherwise result in an overestimation of the consolidated capital requirements for operational risk.	Cadarso, Pedro	Publish
7	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	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.	Cadarso, Pedro	Publish

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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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