



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

Institution/Company

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General comments

EBF 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. Among the several prudential rules that the Guide at hand deals with, we seek for drawing your attention to salient topics (yet not exclusively), such as the Danish Compromise, the Trading Book exemption, the minority interests, derogation to calculate a separate interest, leases and dividends component for specific subsidiaries.

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 Regulation 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;
- you indicate whether your comment is a proposed amendment, clarification or deletion.

Deadline: midnight CET on 10 January

ID	Section	Type of comment	Detailed comment	Concise statement as to why your comment should be taken on board	Name of commenter	Personal data
1	Transitional arrangements for ECAI credit assessments of institutions		The consultation provides for an extension of the transition period up to July 2026. However, given the low availability of compliant ratings in the market, banks consider that ECB should be ready to extend further this deadline until minimum 3 large agencies provide compliant ratings considering that the CRR3 provides the flexibility to comply by 31 December 2029, especially given that in CRR3 there is a possibility for a deadline until 31 December 2029 to comply with this requirement. In addition, we would see fit to provide for a practical solution in the event that such conditions are not met even after 2029. We would therefore suggest an amendment to the ECB Regulation which would allow – from the established deadline of the transitional period - the use of ECAI credit assessment of issuers' intrinsic strength (absent from any government support) and, for example, Moody's Baseline Credit Assessment (BCA), the Stand Alone Credit Profile Rating (or "SACP"), or Fitch's Issuer Default rating (or "IDR") as an alternative to XGS ratings, as the former already do not consider implicit government support. This would need to be clarified via an amendment as these are not qualified as ratings.			Publish

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ECB Guide on Options and Discretions under Union law

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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
	Section II, Chapter 1, Point 15	23		Art. 24(2) CRR allows competent authorities to use IFRS for prudential purposes, including in cases where the national applicable accounting framework requires the use of n-GAAP. We welcome that the ECB basically maintains the decision not to exercise the option set out in Art. 24(2) CRR in a general manner. However, we disagree with ECB's intention to consider exercising the option on a case-by-case basis.	Institutions for which the national applicable accounting framework requires the use of n-GAAP should continue to be allowed to use n-GAAP for prudential purposes, unless banks request the use of IFRS. The valuation of assets and off-balance-sheet items and the determination of own funds in accordance with IFRS is associated with high processual and IT costs. It should be noted that some international banks would be required to follow three sets of accounting standards (e.g. US GAAP, IFRS, and n-GAAP), with substantial associated costs. Where the difference between accounting standards forms a material impediment for the benchmarking of peer banks for a particular regulatory issue or concern, a targeted, alternative solution should be explored rather than enforcing a full implementation of another accounting standard.		Publish
1	Section II, Chapter 2, Point 5 "Deduction of Insurance Holdings (Article 49(1) of the CRR)"	27	Clarification	The current proposal leads to risk weight and not to deduction of holdings of non-CET1 instruments issued by insurance covered by Article 49(1). This is a material change of the current framework and lead especially to an increase of CET1 consumption. We wonder if the Article 49(1) relates to total own funds or only CET1; hence, whether the ECB interpretation to extend risk weight to AT1 & T2 is legally correct. Firstly, this article is part of the subsection " <i>exemptions from and alternatives to deduction from Common Equity Tier 1 items</i> " and authorisations already given focus on CET1. Secondly, the Article's last paragraph states that " <i>The method chosen shall be applied in a consistent manner over time</i> ". Thirdly, extension to AT1 and T2 would be inconsistent with Article 56 and 66 that request those instruments to be deducted from bank's own funds. Thus, this proposal would entail the adaptation of the Level 1 text which falls within the exclusive competence of legislator.	We are of the view that Article 49 (1) should only cover shares (CET1 instruments) and not "all own funds-equivalent instruments".		Publish
	Section II, Chapter 2, Point 8 "Reduction of own funds:excess capital margin requirement Article 78(1), point (b), of the CRR)"	28	Clarification	It is unclear what the ECB expects in point (v).	The ECB Guide is silent regarding the forward-looking information to be provided for replacement files (Article 78(1) point (a) of the CRR): in those cases, it can be argued that the information already available to the JST as part of the continuous supervision (e.g. business plans, ICAAP report, etc.) should be sufficient and hence no additional documentation should have to be produced.		Publish
		28	Amendment	We would appreciate if the requirements and documents to be provided would be taken into account in a proportionate manner to the applied reduction in own funds. This means that in the case of very small amounts of applied reductions in own funds (e.g with with effekt on Capital Ratios <10bp), lower or graduated doumentation should be required. This refers to the scope and as well to the uptodateness of the documents. In cases with very low materiality, it should also be possible for the ECB (the JST's) to make a decision solely on the basis of the ECB's already available information. We also understood from JSTs that this could make the process much easier for the ECB and Banks, without any additional risks.	Operational burden for institutions and ECB (JSTs).		Publish
		29	Amendment	This does not reflect the intention of the latest changes of the RTS on Own Funds (DR 2014/241) which was to reduce the burden for all parties involved in the approval process. Against this background, we would appreciate if the ECB (the JST) would be able to refrain from the requirement of new documents in the case of unchanged renewals of continuing general prior permission (same amount, small amout) on a case-by-case basis. In those cases it should also be able to make a decision on the basis of the already available information.	Operational burden for institutions and ECB (JSTs).		Publish
	Section II, Chapter 2 Point 15: Minority Interests Included in Consolidated Common Equity Tier 1 Capital in the case of Third-Country Consolidated Requirements	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 the Article 84 CRR3, 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.		Publish

	Section II, Chapter 2 Point 15: Minority Interests Included in Consolidated Common Equity Tier 1 Capital in the case of Third- Country Consolidated Requirements	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.		
	Section II, Chapter 2 Point 16	31	Deletion	By implementing CRR3, the EU legislator provides that the competent authority may allow an institution to subtract either of the amounts referred to in Article 84(1) 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. In the current draft Guide, it is now specified that the decisive criterion should be whether the provisions governing the instruments owned by persons other than the undertakings included in the consolidation include loss-absorption mechanisms that are automatically activated in the case of losses suffered by other undertakings included in the consolidation, or if those undertakings are subject to write-down or conversion of their capital Instruments or eligible liabilities pursuant to Article 59 of the BRRD. To our understanding, the ECB Guide requires that losses of all other undertakings of the group should be borne by the instruments issued by another subsidiary and owned by persons not included in the consolidation. This means that the instrument should cover losses of affiliates (sister companies) of the issuing subsidiary as well. In our opinion, this does not correspond to the intention of the EU legislator, according to which it should be ensured that losses of the respective subsidiary (with minorities) will also be borne proportionately by the minority shareholders at the consolidated level. Where this is ensured, it should be possible to use the capital requirements of the group for the allocation, even if the capital requirements at the subsidiary level are lower. The requirement that the provisions of an instrument should ensure the loss absorption of other affiliated undertakings is not realistic because it will never me met in practice and leads the intended relief ad absurdum. It does not reflect the intention of the EU legislator by implementing this derogation. The requirement should be limited to the proof that minority shareholders are actually bearing losses incurred on subsidiary level on a pro rata basis and that those losses are therefore also borne by third parties on a consolidated basis and not additionally burdening the own funds at group level.	Materialty aspects. Implementation in ECB Guide leads the intention of EU legislator ad absurdum.		Publish
	Section II, Chapter 2 Point 16	31	Amendment	To apply for the third country minority interest treatment (article 84 of CRR) documentation to be provided to the ECB is extremely complex and granular, and should be submitted at least 4 months in advance.			
	Section II, Chapter 2 Point 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 we cannot justify a total transferability of resources from one subsidiary to another one. The equity on a specific subsidiary by definition, is subject to absorb losses at subsidiary level but it makes no sense that minority interest of subsidiary A need to absorb the losses that occur in subsidiary B. In practice, this overrides the CRR3 or at least makes this authorization to be impossible to be granted and effectively applied. Apart from the above mentioned, we believe that in the case of the supervisor (different from ECB) of the subsidiary on an individual basis or subconsolidated, there is no chance to require the subsidiary to transfer the resources generated through the activation of the loss-absortion mechanism to those other undertakings included in the consolidated level.	The ECB while exercising its Options and Discretions needs to avoid negating the intention of the regulation and effectively create an impossible condition to comply with.		Publish
	Section II, Chapter 2 Point 16	31	Amendment	Regulation 2024/1623 ("CRR3") has amended Art. 84 (1) CRR by adding a new subparagraph which provides that institutions may derogate from the „lower of the two requirements“-rule of Art. 84 (1) (a) CRR when calculating the amount of minority interest that is eligible for being recognised in the consolidated CET1 capital of the consolidated banking group: “By way of derogation from point (a) of the first subparagraph, the competent authority may allow institutions to subtract either of the amounts referred to in point (i) or in point (ii), once the 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;” The revised ECB's guide on options and discretions in chapter 16 (p. 31 et. seq.) establishes criteria to demonstrate loss absorbency on group level that in our view go significantly beyond the legal rationale of the CRR rules on minority interest recognition. The ECB's explanatory document introduces a new requirement for the automatic intragroup transfer of resources by stating the following: “Since capital held by third-party investors covers the losses suffered by the issuing entity only, in order to make it possible for this capital to also absorb losses at consolidated level, an automatic intragroup transfer of resources would be needed.” In our view, the general requirement for an automatic intragroup transfer of resources to demonstrate loss absorbency for the additional amount of minority interest recognised is inconsistent with the current requirements for minority interests and not supported by the legal rationale of the CRR. Furthermore, it is not consistent with the Basel standard and rationale for the „lower of the two requirements“-rule.	The current requirements on automatic loss transfer are legally impossible to fulfill and not aligned with rationale of underlying CRR rules on minority interests. Therefore, we propose the deletion of automatic loss transfer and the replacement with adequate criteria on loss absorption. The ECB Guide should differentiate between (a) cases where the stand-alone capital requirements of the subsidiary are lower and (b) cases where the stand-alone capital requirements of the subsidiary are higher. The Guide's requirements for an automatic intragroup transfer are especially unsuitable for case (a). In our view, to recognise an additional amount of minority interest at group level under the new CRR3 rules, in category (a) it must be demonstrated that there is sufficient capital in the subsidiary where the minority interest originates to cover the higher group requirements for the subsidiary. In this situation, loss absorbency on group level does not require that minority interests cover losses outside of the subsidiary where the minority interest originates. Instead, it is required to demonstrate that the subsidiary has sufficient capital to cover its higher capital requirement from a group perspective. We therefore suggest amending the O&D Guide accordingly and to differentiate the loss absorbency requirements for the recognition of additional amounts as minority interests in alignment with the legal rationale of the CRR and the Basel Standard.		Publish

				Specifically in situations where the subsidiary's stand-alone requirements are lower than the capital requirements that relate to it on group level, e.g. cases where the institution wants to apply point (ii) of Art. 84 (1) (a) CRR as a derogation from the „lower of the two requirements“-rule such an intragroup transfer requirement should not be applicable. In this case loss absorbency on group level is given if the capital requirements on group level are supported by the capital of the subsidiary. In the opposite case where the stand-alone requirements are higher than the capital requirements that relate to it on group level, we do understand that in order to prove loss absorbency on group level such an automatic transfer might be required. In our view it will in practice however not be possible to fulfil this requirement. 1. Automatic intragroup transfer not aligned with legal rationale of minority interests under the CRR 3 As articulated by the "Fiche on minority interest" during the CRR 3 legislative process, the current minority interests recognised are considered loss absorbent on group level although there is no automatic intragroup transfer. The reasoning of the Fiche acknowledges the economic and legal reality that a loss is absorbed in the subsidiary (where the minority interest originates) by the own funds of the subsidiary (and not by the own funds of other undertakings that belong to the same group). It is considered sufficient that there are regulatory capital requirements based on which the subsidiary will maintain the own funds needed to fulfil them. In the current rules, this is limited to the „lower of the two requirements“-rule of Art. 84 (1) (a) CRR. In our view, the same definition of loss absorbency should also apply for the new derogation. I.e. the minority interest recognised can be considered loss absorbent at group level if the amount is limited to a capital requirement applicable to the subsidiary that reflects the higher capital requirement of the subsidiary on group level. "In more practical terms this means, in case the subsidiary's own funds instruments are written down or converted, the generated loss absorption is confined to the subsidiary. Therefore, the recognised minority interest is limited to the requirements applicable to the subsidiary". Note that for the new CRR 3 derogation from the „lower of the two requirements“-rule of Art. 84 (1) (a) CRR, this may also relate to the higher capital requirements that apply to the subsidiary on the consolidated level (under Art. 84 (1) (a) point (ii) CRR) (although the ECB's Guide with its automatic loss transfer requirements solely seems to focus on cases where the stand-alone requirements of the subsidiary are higher than the actual risk contribution of the subsidiary under CRR rules and where the ECB might therefore expect a demonstration that the excess capital is available to cover losses elsewhere in the group, see 2. for more detail). Under the CRR 3, deviations from the „lower of the two requirements“-rule of Art. 84 (1) (a) CRR are possible, provided sufficient loss absorbency of the additional amount (which is based on a regulatory requirement that applies to the subsidiary under Art. 84 (1) (a) point (i) or (ii) CRR) is demonstrated by the institution(e.g. that the subsidiary continuously steers its own funds above the capital requirements that apply to it on the consolidated level, and that the parent can ensure that the subsidiary meets its consolidated capital requirements, Art. 84 (1) (a) point (ii) CRR).			
				Therefore, we see no basis in the regulation for requiring an automatic intragroup transfer for the additional amount under the derogation introduced by the CRR 3, especially for cases where the subsidiary's stand-alone requirements are lower than the group requirement (as explained in more detail below under 2.). With regard to the Basel standard the reason to limit the recognition of minority interest to the amounts being used to cover the minimum capital requirements on subsidiary level and not only on group level (lower of the two requirements-rule) was explained in the Definition of capital in Basel III – Executive Summary :“As surplus capital in the subsidiary, that is, more than the statutory minimum requirement, could be repaid to the holders of the non-controlling interest”. Accordingly, there is no basis for requiring an automatic intragroup transfer. This makes clear that the focus is to ensure that sufficient excess capital is available on subsidiary level to rule out this risk. Moreover, if loss absorbency would be defined such that an automatic intragroup transfer via the provisions of own funds instruments would be required, it would be impossible to fulfil such a requirement. Apart from legal impediments in corporate law of European countries, this is because any subsidiary that is subject to own funds requirements on a standalone basis, which is a mandatory requirement according to Art. 84 (3) CRR, would not be able to meet the requirement for provisions for automatic absorption of losses incurred by other group entities without violating the qualitative requirements for the recognition of the subsidiary's own funds instruments under the CRR and IFR.			
				In more detail: Section II, chapter 2, point 16 (1) of the consultation on the revisions to the ECB guide on options and discretions specifies that the ECB will assess the following two criteria: “whether the provisions governing the instruments owned by persons other than the undertakings included in the consolidation [...] include loss-absorption mechanisms that are automatically activated in the case of losses suffered by other undertakings included in the consolidation [...] or if those undertakings are subject to write-down or conversion of their capital instruments or eligible liabilities pursuant to Article 59 of the BRRD”. Comments on the first criterion regarding the terms and conditions of the relevant instruments If loss absorbency would be defined such that an automatic intragroup transfer would be required, it would be impossible to fulfil such a requirement. This is because a subsidiary that is subject to own funds requirements on a standalone basis would not be able to meet the requirement for the automatic absorption of losses incurred by other group entities without violating the qualitative requirements for the recognition of the subsidiaries' own funds instruments under the CRR and IFR. CET1 instruments by design absorb the losses of their issuer (e.g. the issuing institution), but not the losses of e.g. other subsidiaries of an ultimate parent.			

			In company law, stocks of stock corporations are part of share capital of the stock corporation that absorb the losses of the stock corporation, which is not liable for losses incurred by other entities in a wider or different consolidation circle of a group. The assessment of the eligibility of CET1 instruments under the CRR is also tied to a classification as stocks in the sense of the applicable national company law (see the EBA's list of capital instruments that competent EU and EEA authorities have classified as CET1). Further, Art. 28 (1) (i) CRR on the loss absorbency of CET1 instruments requires that “compared to all the capital instruments issued by the institution, the instruments absorb the first and proportionately greatest share of losses as they occur, and each instrument absorbs losses to the same degree as all other Common Equity Tier 1 instruments”. The creation of AT1/T2 instruments that absorb losses pari passu with CET1 instruments could accordingly endanger the CET1 instruments of the subsidiary. Moreover, it would be doubtful if CET1 instruments that designed to absorb losses of other group entities would still be available to absorb the losses of their issuer first, as required by Art. 28 (1) (i) CRR. The inclusion of mandatory distributions in the provision of the subsidiary's CET1 instruments to cover losses of other group undertakings would also violate the requirements for CET1 instruments, in this case Art. 28 (1) (h) CRR (“the conditions governing the instruments do not include any obligation for the institution to make distributions to their holders and the institution is not otherwise subject to such an obligation”). For AT1/T2 instruments, it would not be aligned with the concepts of AT1/T2 loss absorption if the AT1/T2 instruments of a subsidiary would absorb the losses of its ultimate parent and of any “upstream” subsidiary of the parent. If e.g. the AT1 instruments of the subsidiary would be written down due to such losses, the requirement of Art. 54 (3) CRR (that the amount of instruments recognised in AT1 items is limited to the minimum amount of CET 1 items that would be generated if the principal amount of the AT1 instruments were fully written down or converted into CET1 instruments would no longer be met, since this relates to the subsidiary and not to the wider consolidated group of entities. Finally, if the subsidiary's own funds instruments (CET1/AT1/T2 instruments) would equally absorb losses (here: of other group entities), this could endanger their ranking.			
			Comments on the second criterion regarding Art. 59 BRRD This second criterion relates to “Article 84(1), point (a), of the CRR”, i.e. the rules on the inclusion of certain CET1 items (such as CET1 instruments) of the subsidiary in the consolidated CET1 capital and refers to: “if those undertakings are subject to write-down or conversion of their capital instruments or eligible liabilities pursuant to Article 59 of the BRRD”. It is not clear to us what is meant by “write-down or conversion” with respect to CET1 instruments and how this could be achieved for CET1 instruments. We also note that it is unclear to which entity this requirement applies and under which circumstances the write-down of conversion must be triggered. The wording “[...] loss-absorption mechanisms that are automatically activated in the case of losses suffered by other undertakings included in the consolidation [...] or if those undertakings are subject to write-down or conversion of their capital instruments or eligible liabilities pursuant to Article 59 of the BRRD” suggests that the criterion applies to the undertaking that has incurred the loss. However, based on the context, we assume it applies to the subsidiary from which the minority interest originates. We further assume that the write-down or conversion requirements apply to AT1 or T2 instruments issued by the subsidiary from which the minority interest originates, since a conversion of CET1 instruments would not make sense. Equally, it is not clear under which circumstances the write-down or conversion must be triggered. In a SPE group, write-down or conversion will not be triggered automatically by the resolution authority for the own funds instruments of subsidiary A if another subsidiary B suffers losses (the idea would rather be that losses are effectively passed on to the resolution entity). 2. ECB Guide should differentiate between (a) cases where the stand-alone capital requirements of the subsidiary are lower and (b) cases where the stand-alone capital requirements of the subsidiary are higher Finally, the Guide's requirements for an automatic intragroup transfer are especially unsuitable for cases where the stand-alone capital requirements of the subsidiary are lower (i.e. where the institution wants to apply Art. 84 (1) (a) point (ii) CRR instead) – as evidenced by The “Fiche on minority interest”. The “Fiche on minority interest” explains the rationale of the pre-CRR 3 „lower of the two requirements“-rule as follows: “to ensure that the risk and capital allocated to the subsidiary do not exceed those determined at the consolidated level” (see the part of the text starting with “however”): “The rationale for limiting the recognition of minority interests is that only the amount of minority interests that would cover losses on consolidated level should be recognised at consolidated level. [...]			

				In more practical terms this means, in case the subsidiary's own funds instruments are written down or converted, the generated loss absorption is confined to the subsidiary. Therefore, the recognised minority interest is limited to the requirements applicable to the subsidiary. However, to ensure that the risk and capital allocated to the subsidiary do not exceed those determined at the consolidated level, a second safeguard was introduced, which limits the recognition to the requirements on consolidated level. The lower of the two levels should be applicable, ensuring that only that part of own funds is recognised on a consolidated level, which would absorb losses attributable to the group. The above explains that the cap at the capital requirement from a group perspective was deemed necessary to align the amount of minority interest recognised with the amount of risk considered, i.e. to cap the recognition of minority interest in cases where the group's consolidated capital requirement of the subsidiary is lower than the subsidiary's standalone capital requirement. This cap ensures the loss absorbency on group level, as it restricts the minority interests recognised on group level to the capital requirements applicable on group level for the subsidiary. The CRR3 allows to derogate from the currently irremovable constraint of "the lower of the two levels should be applicable" condition and it provides institutions with the opportunity to demonstrate to the competent authority that the higher amount would also be loss absorbent at group level. In order to recognise this additional amount of minority interest at group level, it is necessary to demonstrate that this amount is available to absorb losses at the consolidated level. In this context it is important to distinguish the two possible scenarios with regards to minority interest recognition, namely (a) a situation where the minimum capital requirement at the standalone subsidiary level is lower than the requirement from a group contributory perspective; and (b) a situation where the standalone requirement is higher than the group contributory one; In our view, to recognise an additional amount of minority interest at group level under the new CRR3 rules, in category (a) it must be demonstrated that there is sufficient capital in the subsidiary where the minority interest originates to cover the higher group requirements for the subsidiary. In this situation, loss absorbency on group level does not require that minority interests cover losses outside of the subsidiary where the minority interest originates. Instead, it is required to demonstrate that the subsidiary has sufficient capital to cover its higher capital requirement from a group perspective (e.g. due to higher P2R or G SIB / O SIB Buffers on consolidated level). We therefore suggest amending the O&D Guide accordingly and to differentiate the loss absorbency requirements for the recognition of additional amounts as minority interests in alignment with the legal rationale of the CRR.			
	Section II, Chapter 2 Point 16	31	Amendment	From a legal point of view, an entity should not be required to absorb losses of any other "undertakings" of the group. For company law reasons, own funds can only be transferred by a given entity to its shareholder or its subsidiary and not to any "undertaking" (such as sister company). CET1 is by nature loss absorbent, and minority shareholders automatically absorb their share of losses at the level of the relating entity. Therefore, no additional proofs, including any legal opinion(s) or any board statement(s), related to the loss absorption should be required under article 84. The inclusion of mandatory distributions in the provision of the subsidiary's CET1 instruments to cover losses of other group undertakings or specific loss absorption mechanisms that contravene the creditors' hierarchy would also violate the eligibility criteria. For Additional Tier one and Tier 2 instruments (articles 85-87), if issued by EU entities subject to BRRD, the write down and conversion of article 59 3c) BRRD is statutory (i.e. provided that (i) "those instruments are recognised for the purposes of meeting own funds requirements on an individual and on a consolidated basis" and (ii) they are subject to a joint decision of the consolidating supervisor and the appropriate authority of the Member State of the subsidiary) therefore we do not think that a legal opinion on the automaticity, effectiveness and enforceability will add any further assurance on the fact they will be "available to absorb losses at consolidated level". Such request of a legal opinion is not relevant and constitutes a disproportionate request for instruments issued by an EU entity subject to BRRD. For proportionality reasons, statements from the Board (approving the legal opinion and "certifying that there are no current or foreseeable practical impediments to the transfer of the resources ") should not be required to account more minority interests. Board statements should be limited to significant topics like for commitments in the context of capital waivers. We therefore suggest to amend the O&D Guide accordingly and to differentiate the loss absorbency requirements for the recognition of additional amounts as minority interests in alignment with the legal rationale of the CRR.			Publish
	Section II, Chapter 3 Points. 3 and 4	33	Amendment	Banks that are classifying exposures under Banking Book as per current rules will have to ask for Trading Book classification exemption under new rules. Two issues have been identified : - if exemptions are not yet provided, banks will have to share data as if the products are classified under TB as per new rules while they are not (Banking Book as per current treatment). - documentation to be provided for Trading Book exemptions are too granular and too complicated to retrieve (e.g. derivatives and hedge funds).			Publish
	Chapter III, Trading Book Classification Exemption (Article 104(4) of the CRR)	33	Clarification	Article 104(3)(h) of CRR3 assigns own liabilities in the non-trading book unless resulting from market making activities or unless they are not splittable. Market making is part of trading intent justification but trading intent can also be met for non-market making activities. For those cases where trading intent is demonstrated but where own liabilities are not resulting for market making activities (where there is a potential overlap between 104(3) and 104(2)), the ECB should not impose the priority given to the non-trading book list of Article 104(3) on the trading book list of Article 104(2). More generally, where there is a potential overlap between 104(3) and 104(2), points (d) to (i) the ECB should grant banks some flexibility in specific cases if and where needed.			Publish
	Section II, Chapter 3 Points. 3 and 4	33	Amendment	The guide should comply with CRR3 and clarify that Article 104(2)(d): • Covers transactions where the business or activity model corresponds to a trading purpose, resulting in their classification as FVP&L; and • Excludes items classified as Fair Value through Profit and Loss (FVP&L) when the business or activity model does not correspond to a trading purpose, particularly derivatives that mitigate IRRBB and are included in the IRRBB (or FXRBB) management framework, consistent with EBA Guidelines on IRRBB and FXRBB. It is reminded that transactions not accounted for Fair Value through Profit and Loss (FVP&L) are classified in the prudential Banking Book (notably derivatives accounted for hedge accounting) are not subject to Article 104(2)(d). The ECB should delete sections, (ii) and (iii)(a) on page 35 of the guide related to Article 104(2)(d) that are irrelevant and replace them with clarifications that: • Transactions recognized as FVP&L are included in the prudential Banking Book when they fall under the IRRBB framework or in FXRBB framework; • Other transactions that align with a trading purpose, including hedging transactions with a trading purpose that are accounted for as FVP&L in the prudential Trading Book. Note that since Article 104(2)(d) targets transactions aligned with a trading purpose, these transactions cannot be classified in the prudential Banking Book and hence are not subject to exemption requests.	The Trading Book Classification Exemptions section is not consistent with the Level 1 text. This misalignment would lead to a dramatic and unjustified broadening of the scope of transactions subject to supervisory pre-approval, extending beyond the commonly understood analysis of Level 1 text. It would also introduce overly prescriptive technical requirements on instruments included in the scope of the exemption request, creating additional administrative burden and supervisory uncertainty. At a time when there is a push for regulatory simplification in Europe, these requirements would lead to unnecessary overcomplexity and misalignment with CRR3 and the European regulatory framework. For a more detailed analysis, please refer to the dedicated memo titled "Memo on Trading Book exemption_contribution to the ECB consultation".		Publish

	Section II -Chapter 3 - Point 3 iv	34	Amendment	For some banks that have not had a trading book until now, structured issues in the own liabilities have been classified in banking book without splitting the embedded option. Their back-to-back hedging products are also included in banking book. There is neither trading intent nor residual market risk exposure. However, in accordance with Article 104(2), point (i), and the third subparagraph in Article 104(2), these banks would be required to create a trading book to host the structured issues and the back-to back hedges, which would generate an unnecessary burden if exemption cannot be applied. Therefore, we suggest removing the following sentence from the relevant paragraph in the O&D guide: <i>"the ECB considers this to be especially relevant for the requirements in Article 104(2), point (i), of the CRR, including the splitting of instruments ,"</i> or adding a condition such as <i>"unless the institution could prove the absence of trading intent "</i> at the end of the paragraph.			Publish
	Section II -Chapter 3 - Point 3 ii.b	35	Amendment	Granular information is requested on the hedged instrument such as the termination date, while for macro-hedge this information is not available.			Publish
	Trading Book Classification Exemption	33	Clarification	New rules may have the unintended consequence of significantly increasing the number of applications submitted to the ECB. In this respect, has the ECB conducted an impact assessment before proposing changes via the Guide with the objective of assessing how the considerable flow of applications it will receive could be managed? Also, has the ECB assessed the time that it will require to provide responses to the applying banks (significant delays will introduce operational challenges to banks pending their application status being approved/not approved)? It is also not clear, how the bank should manage the positions, for which ECB approval has been requested, while awaiting for the approval.			Publish
	Section II, Chapter 3, paragraph 3 2nd sub para (iv) (v) (vi)	36	Amendment	CRR3 Article 104(4) provides that the ECB shall approve a derogatory classification in the banking book where the institution has effectively demonstrated the absence of trading intent or hedging of a position with trading intent. Items (iv), (v) and (vi) from the second sub-paragraph indicate that banks should submit: (iv) an impact assessement on own fund requirements (v) the intended accounting treatment and estimate of the account value (vi) the expected position size and impact on risk metrics Apart from the intended account treatment mentioned in item (v), the other items are not relevant for the required demonstration. Furthermore, this may suggest that two requests with similar rationale but different impacts/metrics may be treated differently, which would go against the level 1 text. Finally, providing such metrics and impact assessments is quite burdensome and as mentioned above, provide limited added value for the processing of such requests.	The basis for a derogation to the presumptive trading book classification is to demonstrate an absence of trading intent (or hedge of an exposure with trading intent) to the satisfaction of the supervsiroy authority. The ECB Guide is listing a number of items which are not relevant for the demonstrattion and potentially quite burdensome to produce. Therefore, they should be removed from the derogation file.		Publish
	Section II, Chapter III, Point 6: EQUITY EXPOSURES INCURRED UNDER LEGISLATIVE PROGRAMMES TO STIMULATE SPECIFIED SECTORS OF THE ECONOMY (Article 133(5) of the CRR)	41	Amendment	The EBC proposed approach requires as an eligibility condition, to apply the specific treatment for exposures incurred under legislative programmes laid down in Article 133(5), a loss risk reduction corresponding to the reduction in the risk weight. This seems to go far beyond the Level 1 text, that only requires legislative programmes to provide "significant" subsidies or guarantees. However, the approach proposed by the ECB appears too strict and doesn't reflect the most common public/private partnership practices on private equity market, also considering that guarantees or other clauses directly reducing the risk of losses are used in case of debt exposures. Moreover, in private equity transactions there are different criteria and terms to calculate losses, that should also be considered. Then, equity exposures eligible under the ECB approach can hardly be identified and the aim of the Art. 133 (5) would fade away. A different approach, more aligned with the private equity market practices , would be needed to identify the subsidies that can be deemed "significant".	The proposed approach would severely limit the possibility to apply the specific treatment for exposures incurred under legislative programmes laid down in Article 133(5), and would therefore jeopardise the achievement of the objectives of the legislators in implementing this discretion, including to foster long-term equity investments.		Publish
	Chapter 3, Section 2 Point 6 EQUITY EXPOSURES INCURRED UNDER LEGISLATIVE PROGRAMMES TO STIMULATE SPECIFIED SECTORS OF THE ECONOMY (Article 133(5) of the CRR)	41	Clarification	In the context of public/private partnership programs focused on private equity investments, some structures launched by public bodies (e.g multilateral development banks) propose different risk/ rewards structures to the investors depending on the classes of quotes/shares they invest in. Then, investors in class A quotes/shares (which we assume to be the subjects indicated in par. 5 point a)) can take a higher risk in comparison to the investors in class B quotes/shares (which we assume to be banks or other private investors), as the repayment of class A quotes/shares is subordinated in case of losses. Different should be also the terms to calculate the reduction in risk of losses, that should consider the value of a bank' s stake in comparison with the NAV value (in case of an exposure through an investment fund). Where used in the context or legislative programmes, such structures should be considered eligible for the purpose of the application of Article 133(5).	Equity exposures referred to structures with "different classes of risks/rewards" in the context of legislative programmes should be considered eligible for the purpose of the application of Article 133(5).		Publish
	Chapter 3, Section II Point 6 EQUITY EXPOSURES INCURRED UNDER LEGISLATIVE PROGRAMMES TO STIMULATE SPECIFIED SECTORS OF THE ECONOMY (Article 133(5) of the CRR)	41	Amendment	In order to reduce the administrative burden for both banks and supervisors, ECB could introduce a solution allowing Competent Authority to grant a unique prior permission (for example on request of a public institution participating to the legislative program or of the vehicle where banks are investing in), which could directly apply to all banks underwriting exposures under the legislative program.	Introducing the option of a unique prior permission that is valid for all banks partecipating to a legislative program, would significantly reduce the administrative burden for both banks and supervisors, as well as provide certainty to the market and ensure level playing field among the banks.		Publish

	Section II, Chapter 3 Capital Requirements Point 11. DEROGATION TO CALCULATE A SEPARATE INTEREST, LEASES AND DIVIDENDS COMPONENT FOR SPECIFIC SUBSIDIARIES (Article 314(3) of the CRR) [...]	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. 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 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. 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.		Publish
	Chapter 3, Section II, Derogation to calculate a separate interest, leases and dividends component for specific subsidiaries (Article 314(3) of the CRR)	45	Amendment	314(3)(b) The current proposal defines "high PDs" by comparing the credit risk exposures of the retail/commercial banking subsidiary to the PDs of "similar loans" of the parent credit institution without defining the notion of "similar loans". Therefore, we propose the below amendments: - The PDs of at least 50% of the subsidiary's combined retail and commercial credit risk exposures, measured by taking Stage 1 IFRS 9 PDs over the last five years, are at least twice as high as the Stage 1 IFRS 9 PDs of loans within the same exposure class of the parent credit institution measured on an individual basis over the same period. 314(3)(c) As the exemption will modify the business indicator and will not impact the losses, we propose the below amendments to the wording: - (i) the credit institution's loss component calculated on a consolidated basis does not exceed its business indicator component calculated on a consolidated basis before the application of the derogation or due to the derogation (for this purpose, its loss component should be calculated by multiplying its average annual operational risk losses over the last five years by 15);	Using the well-defined "exposure class" concept poses less interpretation risk than the notion of "similar loan".		Publish
	Section II, Chapter 3, Point 13 "Permission to use the Alternative definition of sensitivities"	49-51	Amendment	The requirements go beyond existing approvals based on quantitative approaches. It should be made clear that the detailed requirements in Chapter 3, Section 13 only apply to banks adopting a qualitative approach and not remaining with existing approval with quantitative approach. - Under paragraph 8.i.b. we see limited added value for providing the PnL reports for the alternative sensitivity use case. - Under paragraph 8.ii. we suggest to de-couple the internal audit reports from the ongoing monitoring activity as both could be executed at different frequencies. We suggest to remove the requirements set out under 8.ii. as being supervised by the regular internal audit as formulated in Chapter 3, Section 12 Internal Review.			

	Section II, Chapter 3, Point 16 " 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)"	52	Amendment	The ECB Guide lists two conditions for approving the fallback on internal ratings: "(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." The first condition is not disputable, but the second one may be overly conservative. The use case for probability of default (PD) models in the context of CVA is much more simple than the original use case for IRB risk weights, as PD models will only be used to determine whether a counterparty falls into the broader investment grade (IG) or high yield (HY) categories. There are cases where a model may encounter high severity findings accompanied by open limitations and conditions in the context of the IRB risk weights, yet still effectively distinguishes between IG and HY counterparties. For example, if the ECB imposes a floor or add-on for certain rating grades. While this may render the model overly lenient for IRB purposes, if these grades still classify as IG, banks should still be allowed to use them for calculating CVA RWAs. Furthermore, the CVA use case closely resembles the transitional arrangement outlined in the output floor (CRR Article 465.3), which permits EU banks to assign a lower risk weight to unrated corporates classified as IG when assigned a PD less than or equal to 0.05%. We note that this approach does not require approval from the ECB and is not bound by the same constraints. We suggest the following amendment to the wording: "(ii) the JST does not have concerns related to that approved IRB model and its performance to differentiate between counterparties deemed to be investment grade (i.e. mapped to a credit quality step 1 to 3) and those deemed to be non-investment grade (i.e. mapped to a credit quality step 4 to 6), substantiated by high severity findings that have resulted in the imposition of limitations or conditions that are still unresolved.	The use case for internal ratings in the CVA risk charge is much simpler (differentiate between IG and NIG) that the use case of computing the IRB risk-weight. The conditions set for allowing the use of internal ratings for CVA OFR appear to be too restrictive.		Publish
	Section II, Chapter 11, Point 3 "Combining the risk committee and the audit committee (Article 76(3) of the CRD)"	89	Amendment	As regards the definition of significant credit institutions, point (i): In our opinion, the asset size criterion should be raised to EUR 15 billion. The current criterion (EUR 5 billion) would in principle mean that all institutions that are not SNCIs would be immediately deemed as "significant". In our opinion, this does not correspond to the intention of Art. 76 (3) CRD. EUR 15 billion, based on the SSM definition of "high impact" LSIs, would be appropriate. If no adjustment occurs, it should be at least rendered clear that this asset size is solely relevant in relation to the requirement of Art. 76 (3) CRD.	By raising the asset size criterion to EUR 15 billion, in order to reflect the meaning of "significant".		Publish
4	Sections II and III, Chapter 2, Point 2 "Calculation of the services component for institutional protection schemes (operational risk) (Article 314(5) of the CRR)"	93	Clarification	The EBA RTS has not yet been published regarding article 314 of CRR and as such banks need clarity on the process to be followed (e.g. simple notification needed and for which information).			Publish

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 Guideline 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	Type of comment	Detailed comment	Concise statement as to why your comment should be taken on board	Name of commenter	Personal data
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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 Recommendation on Options and Discretions under Union law

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

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