EUROPEAN CENTRAL BANK
BANKING SUPERVISION

Public consultation

on a draft Guideline and a draft Recommendation on the exercise of options and discretions available in Union law for less significant institutions (LSIs)

Questions and answers

1 Why are you extending the application of harmonised O&Ds to LSIs? What do you want to achieve?

The ECB is responsible for the effective and consistent functioning of the Single Supervisory Mechanism. As part of its oversight tasks, it is required to ensure that high supervisory standards are applied consistently within the SSM area to all supervised credit institutions.

One of the main objectives of the O&D project has been to foster financial integration through the harmonisation of the applicable supervisory rules, and to ensure a level playing field among SSM banks. This in turn would increase the resilience of banks and foster market transparency with respect to the soundness of individual credit institutions and the banking sector as a whole.

2 What is the legal basis for doing this?

According to the SSM Regulation, the ECB may issue regulations, guidelines, general instructions or recommendations to national competent authorities (NCAs) with a view to ensuring the effective and consistent functioning of the SSM.

3 Can you explain why you use different legal instruments to harmonise the exercise of options for the purposes of supervising significant and less significant institutions?

The use of different legal instruments to harmonise the exercise of options for the purposes of supervising significant and less significant institutions can be explained by the distribution of responsibilities between the ECB and the NCAs. While significant institutions (SIs) are subject to the direct supervision of the ECB, LSIs are directly supervised by the NCAs.

For SIs two distinct instruments – the ECB Regulation and the ECB Guide on options and discretions available in Union law – were adopted. Regulations are adopted by the ECB when necessary to implement specific tasks concerning policies relating to the prudential supervision of credit institutions. The ECB chose this legal instrument to determine how to exercise the options and discretions of general application available in Union law vis-à-vis significant credit institutions.

The Guide is a non-binding instrument that provides guidance to joint supervisory teams on how to assess on a case-by-case basis individual requests and/or decisions that would involve the exercise of an option or discretion.

As regards LSI supervision, the ECB may, as part of its overarching role of oversight, issue guidelines to NCAs, in accordance with which supervisory tasks are to be performed and supervisory decisions adopted by them. The ECB intends to make use of this power to harmonise the exercise of O&Ds of general application for the purpose of LSI supervision, thereby supporting the objective mentioned in Q&A 1. By contrast, as regards the NCAs' assessment of the individual exercise of options and discretions for which LSIs apply, the ECB intends to issue a (non-binding) recommendation to NCAs on the specifications to be applied in their assessment of applications received from LSIs.

4 Why are you putting forward two documents for consultation? What is the difference between the guideline and the recommendation?

Two distinct instruments are submitted in this consultation. The first document, the guideline, is a binding legal instrument which lays out how NCAs should exercise a number of O&Ds of general application for LSIs. For these O&Ds a specific policy rationale justifies the adoption of a uniform approach for all credit institutions in order to ensure that prudential supervision of credit institutions is implemented in a coherent and effective manner. The uniform approach will also ensure that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States participating in the SSM, and that those credit institutions are subject to the same supervisory standards.

The second document, the recommendation, is a non-binding legal instrument that provides guidance to NCAs on how to individually assess certain other O&Ds which are not of general application. Establishing a common set of specifications is necessary in order to foster consistent supervisory practices within the SSM framework. It will also ensure where needed the equal treatment of SIs and LSIs as well as a level playing field for all credit institutions across the SSM countries. Furthermore, the recommendation provides guidance to NCAs on how to exercise and individually assess a number of O&Ds for which a common approach specific to LSIs is warranted.

5 Is this not burdening the LSIs too much? On average they are much smaller.

The options and discretions in European banking legislation are a key source of divergence in the application of supervisory rules. If not harmonised, such options and discretions to be exercised by supervisors make it more complicated and in some cases even impossible to supervise banks in the SSM area in a consistent and equal manner.

In the majority of cases it is considered to be appropriate to apply the same O&D policies for SIs and LSIs. The assessment was guided by the proportionality principle to ascertain that the application of the O&D policies will not lead to an undue burden for LSIs. As a result it is proposed, for a number of O&Ds, to maintain flexibility for the NCAs where harmonisation is not considered necessary to ensure the robustness of supervision or to attain a level playing field. It also needs to be kept in mind that many of the O&Ds are not relevant for the majority of LSIs as they are, for example, only applicable to consolidated banking groups or institutions that are using internal models for Pillar 1 purposes.

6 Are there cases of O&Ds where the policy for SIs and LSIs will differ? Which criteria did the ECB consider in order to decide whether to apply to LSIs the same policies as adopted for SIs?

The exercise of O&Ds vis-á-vis LSIs has been analysed with a particular view to the principle of proportionality, i.e. to what extent a different policy recommendation may be warranted for the exercise of specific options. In the majority of cases, the policy proposals for LSIs are the same as those adopted for SIs. For a relatively small number of O&Ds it is proposed to issue a specific policy for LSI supervision deviating from the policy stance developed for SIs. The reasons for this differ.

In some cases, a simple reference to the policy for SIs is not possible as the policy proposal also needs to cover the coordination between the ECB and the NCAs (e.g. options related to a certain event like the system-wide failure of a settlement system or to specific instruments such as covered bonds). In other cases, the application of the principle of proportionality could lead to different policy proposals for LSIs. Furthermore, several options in the Capital Requirements Regulation are related to transitional arrangements. For the transitional arrangements that expire at the end of 2017 it is proposed not to issue any policy proposal for LSI supervision as differences in these requirements will automatically cease to exist at that time.

It is also proposed to maintain flexibility for the NCAs for a number of O&Ds where harmonisation is not deemed to be necessary to ensure the robustness of supervision or to attain a level playing field.

7 Are you planning to address in the future any options and discretions that are not covered now?

Some O&Ds will require future follow-up work, mainly actions to be undertaken by the European Banking Authority or the European Commission, in order to form a concrete policy stance. In addition, for some O&Ds the ECB needs to gain experience from the assessment of specific cases in order to further specify the policies and criteria it will apply.

If more specific policies and specifications for these O&Ds for the purposes of the supervision of SIs are developed in the future, the ECB will assess, in close cooperation with NCAs, the degree to which these policies and specifications should be extended to the supervision of LSIs.