



EUROPEAN CENTRAL BANK

BANKING SUPERVISION

Feedback statement

Responses to the public
consultation on a draft
Regulation and draft Guide of
the European Central Bank

on the exercise of options and discretions
available in Union law

LS/15/150

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This document is intended to give an overview of the comments received during the public consultation on the draft Regulation of the ECB on the exercise of options and discretions available in Union law as well as on the draft Guide of the ECB on the exercise of options and discretions available in Union law, and provide an assessment of those comments. Moreover, it explains the amendments made to the draft Regulation and the draft Guide as a result of the public consultation. As such, this document does not prejudge the future interpretation and application of the provisions laid down in the Regulation. Moreover, only the Court of Justice of the European Union can provide a legally binding interpretation of provisions of EU law. The numbers of the articles of the Regulation referred to in this document, if not otherwise stated, are the original numbers of the articles of the draft Regulation as submitted to public consultation in November 2015.

A Overview and analysis of responses

1. On 11 November 2015 the European Central Bank launched a public consultation on a Draft ECB Regulation on the exercise of options and discretions (O&Ds) available in Union law (“the Regulation”) as well as on a draft ECB Guide on the exercise of options and discretions available in Union law (“the Guide”). This consultation was conducted in accordance with Article 4(3) of Council Regulation (EU) No 1024/2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (“the SSM Regulation”). The consultation primarily encompassed O&Ds in Regulation (EU) No 575/2013 (CRR), along with certain O&Ds in Directive 2013/36/EU (CRDI IV). The public consultation ended on 16 December 2015. In addition to soliciting written comments, the ECB also afforded an opportunity for industry participants and interested parties to provide additional input at a public hearing with senior representatives of the ECB. The event was held in Frankfurt on 11 December 2015. While the comments provided during the public hearing are not reflected in the figures of the table and chart below, they have nonetheless been taken into account. Moreover, most (if not all) of the comments submitted at the public hearing have also been reiterated via written submission. Accordingly, the ECB has given due consideration to all of the comments received during the consultation period.

This feedback statement presents an overall assessment of the comments received in the public consultation and aims at addressing the most relevant issues raised by those comments. Amendments to the draft Regulation as well as the draft Guide have been made as a result of the comments received. The table in Part F summarises the drafting amendments to the Regulation.

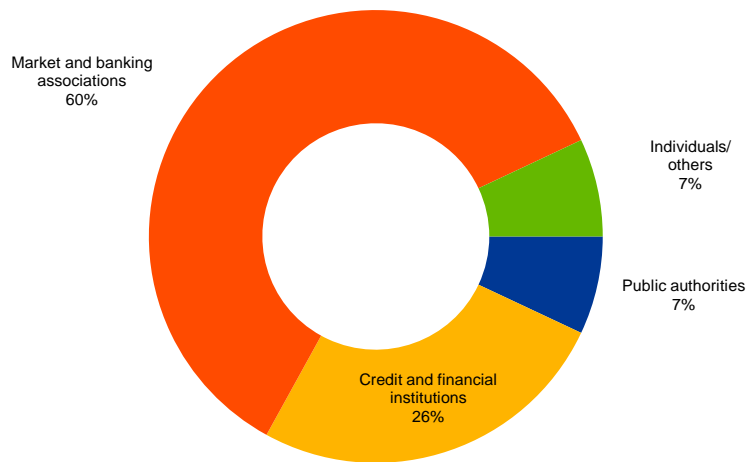
2. In total, 30 responses have been received, mostly in English. Contributions were submitted by public authorities, credit and financial institutions, market and banking associations, and individuals, amounting to a broad participation by the relevant stakeholders. Comments have been submitted from euro area Member States and also non-euro area Member States. Table 1 shows the breakdown of the responses to the public consultation according to the category of respondent.

Table 1

Category ¹	Numbers	Percentage
Public authorities	2	7%
Credit and financial institutions	8	26%
Market and banking associations	18	60%
Individuals/others	2	7%
Total contributions	30	100%

¹ Updated on 30 March 2016.

Chart 1
Total contributions



3. A complete draft proposal for the adoption of a Regulation was transmitted by the Supervisory Board to the Governing Council of the ECB on 8 March 2016. The Regulation adopted by the Governing Council of the ECB on 14 March 2016 along with the draft Guide was published on the ECB website together with this feedback statement on 24 March 2016.

B Explanation of the proposal and policy rationale

4. In accordance with article 127(6) of the Treaty on the Functioning of the European Union (TFEU) and the SSM Regulation (SSMR), specific supervisory tasks were conferred on the ECB with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage. This mandate requires the ECB to define a regulatory level playing field for the banks under its supervision.
5. Pursuant to Article 9(1) of the SSMR, the ECB is the competent or designated authority in the participating Member States for the purpose of carrying out the microprudential and macroprudential tasks entrusted to it by the SSMR. Those tasks are specified in Article 4(1)(2) and 5(2) of the SSMR and basically encompass all the tasks related to the prudential supervision of credit institutions.
6. To carry out those tasks, Article 4(3) of the SSMR provides that the ECB “shall apply all relevant Union Law, and where this Union Law is composed of Directives, the national legislation transposing those Directives”. The same provision also states that “where the relevant Union Law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall also apply the national legislation exercising those options”. The ECB shall directly apply all relevant EU Regulations (including the CRR and related Level 2 legal acts). This direct application also includes the exercise of all O&Ds granted to competent authorities. In this regard, the ECB is empowered to introduce its own exercise of the O&Ds provided for in the CRR and mandated only to competent authorities.
7. The CRR O&Ds mandated only to competent authorities represent the majority of O&Ds in the CRR. In fact, O&Ds mandated exclusively to competent authorities in the CRR comprise all the main provisions with regard to capital adequacy and liquidity requirements, including waivers regarding the application of prudential requirements on an individual basis. The majority of provisions which are considered material by the ECB in order to carry out prudential supervision consistently across the SSM are the CRR O&Ds mandated exclusively to competent authorities.
8. The O&Ds mandated to Member States (both in CRD IV and the CRR) require the application of the national provisions by the ECB. The O&Ds mandated to competent authorities by CRD IV may be exercised by the ECB, while respecting the national legislation implementing the relevant CRD IV provisions.
9. It was considered that for the exercise of O&Ds with general application, the most appropriate legal instrument is an ECB Regulation. For the exercise of O&Ds applicable on a case-by-case basis the ECB aims to develop general specifications

as general guidance for their exercise to ensure supervisory discretion is exercised consistently. Therefore, an ECB Guide is considered appropriate for this purpose.

10. Inconsistent application of O&Ds in participating Member States can have material effects on the overall level of prudence of the supervisory framework and the comparability of prudential requirements across credit institutions. This would make it difficult for market participants and the general public to gauge the overall capital adequacy of the credit institutions. The high number of such provisions also adds a layer of regulatory complexity and further increases compliance costs, especially for firms operating across borders, also leaving ample room for regulatory arbitrage. The ECB, as the single supranational supervisory authority, would not be able to supervise banks efficiently and consistently from a truly harmonised perspective, where significant divergences persisted in the application of EU prudential requirements within the Single Supervisory Area. Furthermore, while some of those differences will gradually diminish over the coming years as transitional arrangements are phased out, a large number of O&Ds are of a permanent nature, leaving considerable divergences in place in the absence of further steps towards harmonisation.
11. In line with the SSM mandate, applying robust prudential requirements wherever possible has been the guiding principle of the ECB's work on O&Ds. In addition, financial integration should be enhanced through harmonised prudential requirements to ensure a level playing field across within the supervision framework. The same prudential rules should apply for the same business model and the same level of risk. Additionally, the ECB pays close attention to the relevant international standards and, in particular, those emanating from the Basel Committee on Banking Supervision (BCBS). We also take into account legitimate expectations engendered by the previous exercise of the O&Ds by national competent authorities through specific supervisory decisions affecting individual credit institutions.
12. Since becoming the competent authority for the significant credit institutions within the euro area on 4 November 2014, the ECB has also been entrusted with the power to determine the most appropriate way to exercise the O&Ds granted to competent authorities for the institutions under its direct supervision within the SSM (i.e. significant credit institutions). Given its mandate to contribute to the safety and soundness of credit institutions and the stability of the financial system within the Union and in each Member State, including with a view to preventing regulatory arbitrage, the ECB has carried out a rigorous policy assessment in order to determine how to exercise those O&Ds in the best interests of the Banking Union. Moreover, at its meeting of 24 April 2015 the Eurogroup supported a concerted effort on O&Ds by the ECB "in order to move rapidly to a more level playing field within the banking union".
13. To that end, the ECB has identified over 150 O&Ds, ranging from the progressive phase-in of new standards and definitions of capital requirements to permanent exemptions from the general rules. These O&Ds allow a choice between alternative treatments (options), or the faculty to decide whether or not to apply certain provisions (discretions).

14. A central goal of this harmonisation initiative has been to foster financial integration, while setting rigorous prudential standards. A prudent harmonisation of O&Ds will help the ECB supervise significant credit institutions more efficiently and consistently across all participating Member States by promoting the regulatory level playing field and fostering safer, sounder, and more stable credit institutions, thereby ultimately enhancing economic growth and stability in the Euro area.

C Comments on the Regulation

C.1 The scope of application and the level playing field

15. *A number of respondents expressed their concerns on the scope of application of the Regulation, holding the view that its scope should be broadened in order to also cover less significant credit institutions which are not directly supervised by the ECB. These respondents saw the current limited scope of application as an impediment to the creation of a true level playing field within the SSM. On a similar note, it was suggested that the ECB should make use of its power to issue general instructions to national competent authorities to ensure that the Regulation and the Guide are applicable to less significant credit institutions. Furthermore, one respondent highlighted that certain O&Ds (e.g. Article 113(6) and (7) of the CRR) have been left out of the scope of the Regulation.*
16. While the Regulation and the Guide focus on significant credit institutions the ECB, in close cooperation with the national competent authorities (NCAs), will also assess how to ensure consistency of supervisory approaches with regard to less significant credit institutions. The ECB is responsible for the effective and consistent functioning of the SSM and, as part of its oversight tasks, should ensure the consistent application of high supervisory standards within the SSM. The ECB has taken into account the policies for the exercise of O&Ds with respect to significant credit institutions and the NCAs' responsibilities regarding less significant credit institutions. In this light, it soon intends to examine, within the SSM, whether identical policy recommendations should also be applied to less significant credit institutions for consistency reasons, or whether a specific approach is warranted due to differences, for example in the business models of LSIs, while also taking into account the principle of proportionality. With respect to certain O&Ds omitted from the current scope of the Regulation or the Guide the ECB confirms that a second phase of the project, encompassing, for instance, Article 113(6) and (7) of the CRR, as well as certain other provisions, is currently under preparation. This second phase will aim to complete the O&Ds project and is currently scheduled to be launched within the first half of 2016.

C.2 ECB's powers

17. *Some respondents expressed the view that it is not within the competence of the ECB to issue a Regulatory Act for the exercise of options and discretions in the CRR. This could be considered, they felt, as amending some provisions of the CRR and/or, on a more fundamental level, going beyond the scope of the ECB's powers to "adopt regulations only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it" by the SSM Regulation (Article 4(3) of the SSMR). It was also pointed out that the Regulation does not contain an express reference to Article 132 of the TFEU, where the extent of the regulatory powers of the ECB is defined.*

18. Article 4(3) of the SSMR is a specific provision that defines the extent of the regulatory powers of the ECB in the field of prudential supervision.
19. A literal interpretation of the main passage of Article 4(3), second sub-paragraph, of the SSMR would also lead to the conclusion that the ECB is competent to adopt a regulatory act for the exercise of the O&Ds available in Union Law that have been identified as generally applicable.
20. In this regard, it can be submitted that the ECB, in exercising those O&Ds by way of a Regulation, is legitimately “specifying” the arrangements for carrying out its prudential supervisory tasks that would otherwise be left unspecified. It must also be underscored that decisions to exercise O&Ds are not discretionary for the competent authority, but a specific legal obligation mandated by directly applicable European law.
21. Moreover, the ECB considers that it is clear from the third sub-paragraph of article 4(3) of the SSMR that the legislator, in defining the scope of the regulatory powers of the ECB in prudential supervision, aimed to prevent any potential risks that the ECB could impinge or encroach on the regulatory powers of the European Banking Authority (EBA) and the Commission mandated by the CRR and CRD IV pursuant to Articles 290 and 291 of the TFEU.
22. The powers to issue delegated acts, in the form of Commission regulations, to supplement or amend certain non-essential elements of legislative acts or implement their provisions, as envisaged in several provisions of the CRR and CRD IV, are clearly the remit of the Commission, usually acting on the basis of proposals from the EBA. Such powers are not directly connected with the exercise of O&Ds mandated only to competent authorities.
23. Recital 32 of the SSMR, besides mentioning that the ECB should not abuse its regulatory powers by replacing the exercise of tasks that pertain to the EBA, confirms that the ECB should exercise the powers to adopt Regulations in accordance with Article 132(1) of the TFEU. This article also clearly refers to the ECB’s regulatory powers “to the extent necessary to implement the tasks defined in [...] Article 25.2 of the Statute of the ESCB and of the ECB”, which basically replicates Article 127(6) of the TFEU on the prudential supervisory tasks of the ECB.
24. To clarify the above issues a new Recital 1 has been added to the draft Regulation.

C.3 Proportionality and free movement of capital

25. *A general concern regarding the proportionality of some measures has been expressed, based on the argument that they are too burdensome and costly for credit institutions. Moreover, many respondents submitted that certain provisions of the Regulation contradict the core principle of the free movement of capital within the EU and specifically within the SSM.*

26. The ECB is of the opinion that such a conclusion is not justified. The proposed policy package has been designed in accordance with prudence and impact assessment studies that have been conducted in relation to the most significant issues (e.g. on the capital impact of the rules on deferred tax assets). Furthermore, the Regulation on O&Ds envisages the possibility to address exceptional individual cases of material negative impact arising from the exercise of a number of O&Ds. While the free movement of capital is a fundamental principle of the Single Market, there are also other factors that need to be taken into account by prudential supervisors, particularly the safety and soundness of credit institutions. Consequently, the ECB is convinced that an appropriate balance has been struck in the proposed policy package.
27. *Some respondents expressed the opinion that removing the provisions which maintain stricter national rules for transitional O&Ds would increase harmonisation across the SSM. In this respect, it was proposed to introduce a general rule that the most favourable treatment provided for in the transitional arrangements across Member States should be applied to the whole SSM.*
28. The ECB considers that in cases where the national treatment for the transitional provisions in the CRR is stricter than the exercise of the O&Ds, it is prudentially warranted that such national rules should be allowed to remain in force until the end of the transitional period for the O&Ds.

C.4 Legitimate Expectations

29. *Some respondents submitted that the ECB draft Regulation and draft Guide did not take the principle of legitimate expectations sufficiently into account.*
30. The ECB has always acknowledged that the principle of legitimate expectations applied in regulated entities must specifically be taken into account. Union institutions must take the legitimate expectations of natural or legal persons into account when taking decisions which can affect their legitimate interests.

In this regard, EU case law (Court of First Instance, 30 June 2005, T-347/03 paragraph 102, *Branco v Commission*) has developed 3 criteria to establish a claim of the existence of legitimate expectations. These criteria are: (1) unconditional and consistent assurances originating from authorised and reliable sources must have been given by the authorities to the interested parties. (2) those assurances must be such as to give rise to legitimate expectations on the part of the party to whom they are addressed. (3) the assurances given must comply with the applicable rules².

² These criteria have been consistently confirmed by other decisions of the Court of First Instance and the European Court of Justice. For instance, Court of First Instance, 7 November 2002, T-199/01, *G v Commission* relied at paragraph 38 upon exactly the same three criteria as in *Branco*. Additionally, the Court of First Instance, 6 July 1999, T-203/97, *Forvass v Commission* (paragraph 70), before mentioning the three criteria recalled that the respect of legitimate expectations is among the fundamental principles of the European Community. Similar reasoning can also be deduced from the European Court of Justice Case 120/86 (*Mulder*) and the older Case 74/74 (*CNTA*).

It must be noted, though, that the Court has consistently excluded that a change of policy may per se amount to a breach of legitimate expectations. There cannot be any assumed rights on the part of the regulated entities that a specific policy choice will not ever change. This is made clear by ECJ Case 52/81 (Faust). At paragraph 27 the Court states that: “Since Community institutions enjoy a margin of discretion in the choice of the means needed to achieve their policies, traders are unable to claim that they have a legitimate expectation that an existing situation which is capable of being altered by decisions taken by those institutions within the limits of their discretionary power will be maintained”.

31. The ECB has to take the principle of legitimate expectations into account, as has been done, but this does not of itself prevent the ECB from introducing a potentially divergent policy, where appropriate safeguards are put in place.

C.5 Entry into force and applicability of the Regulation

32. *Some respondents considered that the 20-day period from publication after which the Regulation would enter into force is too short, considering the organisational changes that banks will be required to implement. A number of respondents requested that the date of entry into force be postponed or that a transitional period be allowed.*
33. The entry into force of the Regulation has been postponed to 1 October 2016 (subject to the Supervisory Board’s decision), while the provision on the definition of default becomes applicable on 31 December 2016.

C.6 National legislative provisions

34. *It was submitted that the ECB is not allowed to disregard the exercise of O&Ds already adopted by national legislation or specific decisions of the Competent Authorities. In this regard one respondent submitted that the ECB cannot override national legislation exercising specific O&Ds.*
35. The ECB is aware of the issue of potentially conflicting national legislation. In the case of options granted only to competent authorities, where they have been exercised through national legislation, the ECB is of the opinion that the principle of the primacy of European Law may be invoked and consequently national legislation conflicting with the provisions of EU law becomes inapplicable.

D Comments on specific provisions of the draft Regulation

D.1 Risk weighting and prohibition of qualifying holdings outside the financial sector (Article 3)

36. *One respondent argued that the draft regulation makes a decision as to whether the excess amount of qualified holdings shall be deducted or risk weighted and that the ECB does not have the power to make this choice.*
37. The provision makes clear that it is without prejudice to the option for credit institutions to deduct in full rather than risk weight the holding (1250%), in accordance with Article 90 of the CRR. In fact, the provision of the ECB Regulation exercises the option by simply choosing to risk weight the excess holdings at 1250%, rather than prohibit them.

D.2 Netting (Article 6)

38. *Two respondents expressed their concern about the ECB developing its own approach to netting. They pointed out that this approach would have to be modified if the EBA issued its guidelines as referred to in Article 327(2) of the CRR.*
39. The ECB is not in a position to pre-commit itself to comply with EBA guidelines before they have been developed and finalised. In addition, the ECB has already suggested in the Guide (Section III, Chapter 3) that it will duly take those Guidelines into account, again without pre-committing its decision to comply or potentially explain reasons for non-compliance, in accordance with Regulation (EU) No 1093/2010 (EBA Regulation).

D.3 Exemptions from the limits to large exposures (Article 9)

D.3.1 Intra-group exposures

40. *According to one comment, full exemption should be automatically granted for intra-group intra-SSM large exposures, with the possibility for the ECB to oppose this exemption in the event that it is deemed inappropriate; any other rule would contradict the core principle of free movement of capital and liquidity within the SSM. On the other hand, some other respondents presented the opposite view that such intra-group large exposures should be capped at 100% of the institution's eligible capital. It is further suggested to allow for a considerable transitional period to fully implement these rules. One respondent also claimed that the legal opinions required*

as part of the documentation would go beyond the CRR requirements and are very difficult to provide. An objection has been made by one of the respondents, who claimed that the burden of proof for the fulfilment of the requirements falls on the credit institutions and this creates some uncertainty for the institutions themselves. An objection was also raised to references in the Annexes to resolution plans and resolution strategies not known to the banks. Another request for clarification concerned the status of the existing waivers and their potential revocation. One respondent argued that there is no legal basis to limit the types of subsidiaries that qualify for the intra-group large exposure exemption envisaged by article 400(2)(c) of the CRR and that financial institutions should not be limited to those that are subject to appropriate prudential requirements.

41. The ECB policy, by allowing credit institutions to fully exempt intra-group large exposures after a self-assessment, aims to facilitate the free flow of capital within SSM banking groups, as long as certain prudential specifications are respected. In this vein, the proposed specifications are considered necessary for the banks to benefit from the exemption. Furthermore, in order to assess the criteria listed in Article 400(3) of the CRR, the ECB has the power to require that all the information necessary for this assessment be made available. The policy requirements do not go beyond the criteria listed in the CRR, but only specify them. References to aspects of resolution planning not known to credit institutions have been deleted. Legal opinions on the absence of legal impediments can be obtained and provided. It is important to underscore that existing waivers remain valid unless and until specifically revoked by the ECB after a thorough review process, taking into account the general principles of Union law, including the protection of legitimate expectations. Therefore, we do not see the need for a specific transitional period on this provision. It is noted that since the entry into force of the Regulation has been postponed, banks have an additional period to adjust to the new requirements. The objection to the limitation of the types of undertakings eligible for intra-group large exposure waivers has been accepted and the provision redrafted accordingly.

D.3.2 Exemptions for covered bonds

42. *A number of respondents held the view that covered bonds should be fully exempted from the limits to large exposures. One respondent proposed that since covered bonds also facilitate compliance with the liquidity coverage ratio requirements (Article 10(1)(f) of the Liquidity Coverage Ratio Delegated Act (LCR DA)) a full exemption would be justified.*
43. The policy choice to allow the exemption of large exposures for covered bonds is only partially intended to align the European framework with the Basel III standards for measuring and controlling large exposures, where the exposures to covered bonds are, only under certain conditions, assigned a value of no less than 20% of the nominal value of the exposure holding. Therefore, a partial exemption of 80% of the exposure value is proposed.

D.3.3 Interaction with Article 493(3) of the CRR

44. *Some respondents requested confirmation that if a Member State exercises the option under Article 493(3) of the CRR existing national legislation continues to apply and the ECB has the obligation to respect the national exercise. They further requested that this be made clear in Article 9(7) of the draft Regulation. One of the respondents pointed out that the wording of Article 9(7) of the Regulation indicated a potential discriminatory treatment for national exercise prior to or after the entry into force of the ECB Regulation.*
45. Article 493(3) of the CRR is clearly applicable. If there is any discretion left to the competent authorities in national legislation, the ECB will apply that discretion according to the criteria in national legislation, while potentially applying, by analogy, the same criteria laid out in the Annexes of the Regulation, where some residual discretion is left by national legislation to the Competent Authority. Article 9(7) of the draft Regulation has been revised and the final wording: “prior to the entry into force of this regulation” has been deleted.
46. *Two responses have been submitted stating that it should remain within the competence of the competent authority to carry out the assessment of credit institutions in order to grant the waiver pursuant to Article 9(6) of the Regulation in conjunction with Article 400(3) of the CRR.*
47. The purpose of including this O&D in the directly applicable ECB Regulation, as well as to draw up a detailed Annex of specifications, is for the banks to conduct a self-assessment which enables them to exempt their exposures on the basis of their operations, without having to submit a specific application to the competent authority. The ECB is, in any case, required to verify in the course of ongoing supervision that the conditions are being fulfilled on a continuous basis.
48. *One of the respondents requested clarification that exposures under Article 400(2)(i) of the CRR are exempted only up to 50% and 80% (as maximum amounts allowed) respectively.*
49. This comment has been accepted. The Regulation has been redrafted accordingly. The concept of “fully” exempted was thus clarified as also including up to the maximum allowed amount.

D.3.4 Liquidity reporting obligation (Article 10)

50. *One respondent objected to the imposition of additional liquidity reporting requirements.*
51. The ECB does not impose any additional reporting requirements. This article should ensure that the ECB directly receives the relevant reporting established by national liquidity provisions for the purpose of monitoring compliance of the institutions with national liquidity requirements that are maintained or implemented according to Article 412(5) of the CRR, where such reporting requirements are envisaged by the

national liquidity rules. The reporting should be provided in the same format and with the same frequency as specified in national rules. This reporting should be addressed to the ECB only in cases where the national competent authority has not already received this reporting.

D.3.5 Liquidity outflows (Article 11)

52. *A number of respondents viewed the outflow rate of 5% for trade finance off-balance-sheet items as excessive and suggested that a 0% rate be applied or alternatively that the rate be decided on a case-by-case basis. One respondent suggested that no maximum should be set and an average fixed outflow rate of 2.5% should be set instead.*
53. The 5% rate has been developed also taking into account the EBA report, which recommends that the calibrations for outflow rates as suggested by the Group of Governors and Heads of Supervision of the Basel Committee in 2013 are appropriate. Moreover, a 5% outflow rate for trade finance off-balance-sheet items as defined in Article 420(2) of the CRR and Article 23(2) of the LCR DA appears to be appropriately conservative to reflect a combined market-wide and bank-specific stress scenario.
54. *A request for clarification has been submitted by one of the respondents in order to clarify which trade finance off-balance-sheet positions are covered by the 5% outflow rate and to what extent Article 429 is of relevance.*
55. The scope of Article 23(2) of the LCR DA encompasses all products and services not already captured in Articles 27 to 31 of the LCR DA. The ECB Regulation specifies a 5% outflow rate for trade finance off-balance-sheet products, as referred to in Article 429 and Annex 1 of the CRR, that are not already captured in Articles 27 to 31 of the LCR DA. This would include, for instance, documentation such as trade letters of credit, import bills and export bills, guarantees directly related to trade finance obligations, etc.

D.3.6 Treatment of exposures towards central banks (Article 12)

56. *The approach is viewed as too complex by a number of respondents. Furthermore, it does not facilitate comparability as three different measures must be taken into account for internationally active banks. One respondent submitted that Article 12 discriminates between exposures to central banks of other Member States and of third countries that have introduced the LCR. Rephrasing was required to account for the fact that banks do not have direct exposures towards the ECB but rather to the Eurosystem national central banks. Two respondents requested information as to whether the ECB will publish a list of criteria determining the conditions under which a liquidity coverage requirement is considered equivalent to the LCR as mentioned in Article 12(3). Two respondents requested a transitional period for assets no longer*

deemed to be eligible regarding the discretion of the ECB to review the criteria for eligibility of Level 1 assets.

57. Taking the comments raised into account this article has been deleted.
58. In this regard, the ECB publication on 30 September 2015 of a common understanding with the NCAs as regards the conditions for the treatment of central bank reserves for compliance with the LCR, applicable both to significant and less significant credit institutions, is relevant.

D.3.7 Level 2B Assets (Article 13)

59. *A number of respondents pointed out that major stock indices need to be properly defined in order for the provision to ensure legal certainty. Moreover, the provision in the Commission's delegated act seems to leave to the credit institutions the choice of a major stock index in the absence of a designation by the competent authorities*
60. The comments have been taken into account and the article has been deleted.

D.4 Unrealised losses measured at fair value and unrealised gains measured at fair value (Article 16 and Article 17)

61. *Many respondents expressed their opposition to the removal of prudential filters for unrealised gains and losses on exposures to central governments in the "available for sale" (AFS) portfolio. One of the respondents considered it as possibly having detrimental material effects considering an immediate entry into force of the provision.*
62. The ECB considers that prudential concerns arising from potential losses stemming from these exposures justify the chosen policy to remove the prudential filters for the instruments in question. In addition, it must be noted that the proposed policy is aligned with Basel III standards. Furthermore, the entry into force has been delayed by six months and the provision, which is transitional, will be fully phased-in only in 2018. Once IFRS 9 is endorsed with a Commission Regulation the prudential filters will in any case no longer apply.
63. *Three respondents held the view that where competent authorities have exercised the power to allow institutions not to include unrealised gains and losses on exposures to central governments in own funds the ECB is not empowered to overrule this exemption until the endorsement and integration of IFRS 9 into EU law, amending IAS 39.*
64. It could be argued that the last sub-paragraph limits the discretion in the second sub-paragraph of that article. This is because the last sub-paragraph mandates that the treatment in the second sub-paragraph shall be applied until the Commission has adopted a Regulation endorsing IFRS 9. If that were the case, Article 467(2) would essentially be devoid of any application until IFRS 9 were applied, in cases where

the prudential filters were allowed before 1 January 2014. An appropriate interpretation of Article 467(2) second sub-paragraph is that it also allows competent authorities not to grant the introduction of prudential filters before the adoption of the Regulation endorsing IFRS 9. This seems to be confirmed by the wording of the third sub-paragraph where it states that the treatment set out in the second sub-paragraph shall apply until the adoption of IFRS 9. This means that the introduction of the prudential filters would not be possible after the adoption of the Regulation, but in the meantime, since the provision states “may”, it leaves the discretion to the competent authority as to whether to retain existing prudential filters.

65. This interpretation is also supported, for instance, by the exercise of this option by BaFin through “General Decree of BaFin with respect to Article 467 (2) CRR” (20.02.2014). BaFin interprets Article 467 (2) as allowing for revocation of the prudential filters also prior to the entry into force of IFRS 9: “... This General Decree is issued under the condition of preservation of revocation according to Article 36 paragraph 2 letter 3 of the Administrative Procedure Act.”
66. *With regard to the transitional provisions in general, one respondent claimed that no harmonisation is needed since they are going to expire anyway and, therefore, all instances of the exercise of the transitional O&Ds should be excised from the Regulation.*
67. The ECB considers that the harmonisation of the transitional provisions must be retained. As also explained in the accompanying Memorandum and highlighted by the comprehensive assessment conducted in 2014, the way transitional rules regarding the definition of own funds were previously exercised at the national level resulted in inconsistencies across Member States, with a significant impact on certain banks. More generally, fragmentation in the application of prudential standards has negative implications for banks, markets and supervisors. Therefore, harmonising the exercise of the transitional O&Ds was considered necessary from a prudential perspective.

D.5 Exemption from deduction of equity holdings in insurance companies from Common Equity Tier 1 items – non-conglomerates (Article 18)

68. *A number of respondents opposed the shortening of the period for non-deduction of insurance holdings where conglomerate supervision does not apply.*
69. An a maiore ad minus argument could point to the conclusion that the competent authority has also been empowered with the discretion to shorten the phase-in period of the obligation for credit institutions to deduct their holdings in an insurance undertaking. In this specific case this construction can also be inferred from textual elements such as the wide discretion granted to competent authorities to allow (or prohibit) non-deduction (“competent authorities may permit”) as well as the open timeframe envisaged in Article 471(1) of the CRR (“during the period” 2014-2022).

70. In fact, competent authorities have had the option to require full deduction of holdings in insurance undertakings since 1 January 2014. That considered, it seems arguable that they could also set an accelerated timeline, prohibiting non-deduction of insurance holdings within the timeframe specified in the provision and ahead of the final deadline for the permission of non-deduction. The year 2022 must, in fact, be considered as a final time limit after which the deduction of equity holdings in insurance undertakings outside the application of supplementary supervision for financial conglomerates is required by direct operation of law. However, competent authorities have also been given the discretion to require such deduction at an earlier stage.

D.6 Introduction of amendments to the International Accounting Standard 19 (Article 19)

71. *One respondent submitted the view that the provision in Article 19(2) is not necessary, since the CRR does not allow for the introduction of lower factors, hence a more restrictive approach would not be possible.*

The second paragraph of the article has been redrafted in order to take into account that some competent authorities may not have allowed credit institutions to add to their CET1 the amount referred to in the first paragraph of the article.

D.7 Applicable percentages for deduction from Common Equity Tier 1 of significant investments in financial sector entities and deferred tax assets that rely on future profitability (Article 21)

72. *A number of respondents opposed the shortening of the phase-out period for the non-deduction of DTAs that rely on future profitability on the basis of the principle of legitimate expectations and the possibility of creating an un-level playing field. The respondents proposed either the deletion of the article or appropriate amendments to realign the phase-out period to the CRR timeline.*

73. The ECB is of the view that the prudential benefits deriving from the quality of capital outweigh any potential negative impact. More specifically, Figure 3 of the accompanying Explanatory Memorandum shows that, among the banks examined within the quantitative impact study, the acceleration of the phase-out period exceeds 60 basis points for 3 banks only. These banks, however, would be covered by the exception in Article 21 of the ECB Regulation, as banks subject to restructuring plans.

74. *Some respondents argued that the ECB should define what it considers material in the context of an increase in the impact of the deductions an institution will face. Other respondents enquired whether the ECB has a certain materiality threshold already in mind.*

75. The nature of this assessment, which is dependent on institution-specific elements and may also depend on future developments currently not foreseeable, suggests that the development of an ex ante definition of materiality is – at least at this point in time – not feasible.

D.8 Treatment of equity exposures under the Internal Ratings Based (IRB) approach (Article 26)

76. *Two respondents pointed out that the provision has not been updated to reflect the EBA's latest regulatory technical standards (RTS) for the transitional treatment of equity exposures under the IRB approach.*
77. The provision was redrafted to take into account Commission Delegated Regulation (EU) 2015/1556.

D.9 Entry into force (Article 27)

78. *An additional transitional period was requested by some respondents to accommodate the necessary changes in their internal systems and controls.*
79. As already pointed out above, the entry into force of the Regulation will be postponed until 1 October 2016 to allow for the adjustment of internal processes and systems.

D.10 Conditions for assessing an exemption from the large exposure limit (Annex I)

80. *One respondent asked whether the annexes introduced for the purposes of the large exposure waivers in Articles 400(2)(c) and (d) should also be followed for other waivers in Article 400(2) of the CRR, or whether additional procedures will be introduced.*
81. The Annexes of the present Regulation are only applicable for the two specific waivers mentioned therein. The development of specifications for the other provisions of Article 400(2) was not prioritised for this phase of the project. However, the ECB has taken the comment into account and will consider whether further guidance is needed.
82. *A comment has been submitted on the issue that the CEO and the management body of the parent undertaking cannot be held liable for the implementation of local requirements and the requirement creates unnecessary bureaucratic burdens.*
83. The policy is consistent with the structure of a group: the parent undertaking must be able to ensure that the subsidiary complies with the relevant local requirements in order to benefit from the waiver.

84. *One respondent submitted that it is not appropriate to require an approval from the management body. The deletion of the words “signed by the CEO and approved by the credit institution's management body” has, therefore, been requested.*
85. The approvals in question are envisaged to ensure that the board of the credit institution is aware of and takes responsibility for the concentration of risk stemming from intra-group large exposures. This is also consistent with the general responsibilities of the board to oversee the risks and risk strategy of the credit institution, as specified in Article 76 of CRD IV, for example.
86. *It has been suggested that the term “parent undertaking's” should be replaced with “credit institution’s” to avoid confusion about which entity should be submitting the letter referred to at 3(a).*
87. The suggestion has been accepted with consequent redrafting.

E Comments to specific parts of the draft Guide

E.1 The scope of application and legal nature of the Guide (Section 1.2)

88. *It was questioned whether the non-binding nature of the Guide makes it a useful and enforceable tool of prudential regulation for the ECB. It was also questioned whether references to the BCBS standards should be included or could constitute additional criteria.*
89. The guide is a manual for the joint supervisory teams (JSTs) and is designed to underpin a generally consistent application of supervisory policies. It should also enhance the predictability of the application of prudential requirements for supervised entities, thus shaping their expectations. However, there may be specific cases in which departing from the guidance provided for in the Guide could be justified, as long as clear and sufficient reasons are given for such a decision.

E.2 Capital Waivers (Section 2.1.3)

90. *A number of respondents asked for clarification as to whether, following the introduction of the Guide, the existing waivers will be maintained and remain valid. A recurring concern was whether the condition that a waiver had no negative effects on the resolution plan would be conclusively established. It was also claimed that the proposed criteria for the assessment of eligibility for the waiver are disproportionate and go beyond the requirements imposed by the CRR (e.g. SREP for the parent institution does not show deficiencies in the area of internal governance and risk management).*
91. The existing waivers will not be affected by the introduction of the Guide and they will remain valid. This is also confirmed by Article 150 of the SSM Framework Regulation. However, during 2016 the ECB will initiate a review process of the waivers or authorisations granted before November 2014, with the aim of ensuring that those decisions are based on an assessment which is broadly aligned with the O&D policy and specifications. Only in cases of substantial misalignment will further actions be considered in order to achieve consistency with the O&D policy, also taking into account the principle of equal treatment and the legitimate expectations of supervised entities.
92. The resolution plan is a relevant criterion for the assessment of the fulfilment of the conditions provided for by Article 7(1) of the CRR. The same holds true for the requirement of a positive SREP outcome in the area of internal governance and risk management. These are operational requirements specifying the conditions laid down in Article 7 of the CRR.

E.3 Liquidity Waivers (Section 2.1.4)

E.3.1 Exclusion of reporting requirements from the waiver

93. *Many respondents objected to excluding the liquidity reporting requirements from the scope of the waiver.*
94. Given the importance of having adequate information on the liquidity situation and the management of liquidity at the cross-border level after granting the waiver on a cross-border basis, the reporting requirements have been maintained. With reference to liquidity waivers at national level only, the Guide already provides the possibility to waive reporting requirements.

E.3.2 Burdensome requirements for the waiver

95. *Quite a few respondents maintained that some of the requirements imposed in order to obtain the waiver are administratively burdensome and sometimes difficult to fulfil (e.g. SREP liquidity assessment of at least 2 legal opinions, statements signed by CEO, etc.).*
96. The reference to exact SREP scores will be deleted. However, the liquidity risk is assessed within the SREP. This assessment, if positive, provides a solid base for the JST to consider the liquidity position as sound. The SREP assessment cannot therefore be disregarded for this purpose. Ultimately, the JST has the responsibility for exercising supervisory judgement in each case. The suggested requirements and supporting documentation are necessary for the purpose of assessing the applications for cross-border waivers and are not disproportionate, in the ECB's view, compared with the benefit of the waiver for the bank with cross-border operations. Furthermore, this is aligned with the EBA's approach on preferential treatment.

E.3.3 Specific contract requirements within a liquidity sub-group

97. *Some respondents asked for deletion of the unlimited amount and time-going-beyond-validity-of-the-waiver reference in the contract on transfer of funds as well as of the precondition of non-existence of a unilateral right of termination.*
98. The comment is rejected. Intragroup obligations to extend funds to other entities also included in the liquidity sub-group would not be captured by the LCR calculated at the level of the liquidity sub-group. Consequently, those obligations would not increase the amount of high quality liquid assets (HQLA) required at sub-group level to meet the LCR requirement. Moreover, the ECB considers that any pre-defined amount might not be sufficient to provide for the free movement of funds between entities included in the sub-group and to enable these entities to meet their obligations at all times, including during a period of combined stress.

E.3.4 Requirement of maintaining HQLA at significant subsidiary level within a sub-group

99. *A number of respondents objected to the fact of maintaining a 75% of HQLA requirement at significant subsidiary level is too restrictive and prevents consolidated banking groups from effective liquidity management. Other respondents held the view that allowing for centralisation and harmonisation of liquidity management is an unwelcome development and national ring-fencing practices by macroprudential authorities (as suggested by extending the application of the requirement to other systemically important institutions (O-SII)) should remain possible.*
100. In the ECB's view, the policy stance reflected in the Guide strikes a balance between the general objective of pursuing financial integration and addressing national ring-fencing on the one hand, and the need for prudence on the other. More specifically, the ECB is adopting a positive approach with regard to liquidity requirements being waived for banking groups which operate on a cross-border basis, thereby acknowledging the importance of Article 8(3) of the CRR for the free flow of liquidity in the SSM area. At the same time, the ECB must take a cautious approach with regard to the liquidity requirements adopted after the financial crisis, given that this is a new prudential area both for supervisors and for credit institutions and the relevant rules are in the early stages of implementation. Therefore, the ECB has introduced certain limitations to the policy on liquidity waivers only for subsidiaries which are considered significant and systemic on a stand-alone basis. These subsidiaries represent a very small part of the total number of subsidiaries in the SSM Area (at the time of publication of the current version of the Guide, about 20 subsidiaries meet the criteria set out therein). They are required to maintain the designated level of HQLA in order to be sufficiently resilient to respond to any localised liquidity needs that may arise, thereby preserving financial stability. Moreover, the ECB has communicated its intention to consider relaxing this requirement and progressively lower the level of HQLAs which significant subsidiaries are required to hold, in order to adjust its policy to further developments towards the completion of the Banking Union and the establishment of a truly integrated banking sector.

E.3.5 Exclusion from consolidation (Section 2.1.8)

101. *The comments received were mostly focused on the inclusion of the Basel Committee standards as a criterion in the case-by-case assessment of exclusion from consolidation under Article 19(2) of the CRR and whether it tightens the scope of the CRR. Additionally, some of the respondents were of the opinion that the waiver should remain in place in relation to ancillary services undertakings.*
102. The ECB is of the view that it is appropriate and necessary to specify the general conditions set in the CRR for the assessment of whether an entity can be excluded from prudential consolidation. The reference to Paragraph 26 of the Basel Standards, which provides for specific cases in which an entity can be excluded, serves precisely this purpose, notwithstanding the non-legally binding nature of

these standards. Furthermore, said cases are substantially aligned with and do not go beyond the CRR framework.

103. In addition, it is clarified that the waiver could also cover undertakings providing ancillary services.

E.4 Own funds (Section 2.2)

E.4.1 Deduction of insurance holdings (Section 2.2.4)

104. *Respondents requested clarification with regard to the “additional disclosure requirements” imposed in the case of granting permission for non-deduction of insurance holdings within the context of Article 49(1) of the CRR*
105. The work on the content and structure of the disclosure requirements is ongoing at the time of publication of the present version of the Guide. The introduction of these requirements will be implemented in collaboration with the EBA.

E.4.2 Deduction of holdings in own funds instruments in the presence of Institutional Protection Schemes (IPS) (Section 2.2.6)

106. *Most of the respondents requested that the reporting frequency of institutional protection schemes (IPSs) to the authorities should be semi-annual and not quarterly. Moreover, it was reiterated among the respondents that the use of complete financial reporting (FINREP) sheets in the case of IPSs instead of simplified data point models would be a disproportionately burdensome procedure.*
107. Those comments have been taken on board. Regarding the frequency of the reporting requirement, the Guide has been revised to suggest reporting on a semi-annual basis. Regarding FINREP, the Guide has been revised to require that the IPS must only report financial reporting data points that also have to be reported by all IPS member institutions on an individual basis.

E.5 Reduction of own funds (Section 2.2.7)

108. *On the issue of the reduction of own funds two sets of comments were submitted by the respondents. The first set of questions relates to clarifications on whether the institution needs to “exceed or meet the capital requirements set out in the applicable SREP decision after the reduction of own funds” as part of the assessment on the determination of the excess margin pursuant to Article 78(1)(b) of the CRR. Second, concerns were raised as to whether the wording of the provisions in Chapter 2 introduces restrictions going beyond the requirements of Articles 79(1), 83(1) and 84(1) of the CRR. Finally, there was a comment on the redemption of shares in cooperatives under Articles 27 and 29 of the CRR.*

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109. The wording of the Guide has been revised to reflect the first comment, by clarifying that the institution is obliged to meet the capital requirements set out in the SREP decision. With regard to the second and third comments, it is noted that the proposed specifications in Chapter 2 are fully aligned with the CRR and with Commission Delegated Regulation No 241/2014 (regulatory technical standards for Own Funds requirements) and do not go beyond the content of those provisions.

E.6 Capital requirements (Section 2.3)

E.6.1 Exposure value (counterparty credit risk) (Section 2.3.9)

110. *One issue that emerged from the comments is the avoidance of institution-specific additions for the purpose of calculating the exposure value under Article 284(4) of the CRR when requiring a higher α . Second, some of the respondents requested clarifications on the co-existence of the higher value of alpha at 1.4 – as set by the ECB in Chapter 3 of the O&D Guide – with their own estimates of alpha granted in accordance with Article 284(9) of the CRR.*
111. Taking case-specific elements into account is considered appropriate in this instance, since this is a possible way to address specific model deficiencies by the supervisor. With regard to the second comment, it is clarified that existing permissions granted to institutions allowing them to estimate their own alpha are not affected by the publication of the Guide.

E.6.2 Calculation of VaR number (Section 2.3.11)

112. *Respondents expressed the opinion that the ECB should on a case-by-case basis apply the limitation under Article 366(4) of the CRR if overshootings are not the result of deficiencies in the internal models.*
113. The objective of the back-testing based on actual profit and loss (P&L) is to assess performance through a P&L close to the economic P&L. The VaR model will capture all the risk factors to the extent possible and will be sufficiently conservative to ensure that any overshootings related to back-testing of the actual P&L are limited. The ECB is in the process of assessing whether further guidance is needed on the calculation

E.6.3 Large exposures (Section 2.4)

114. *An argument has been presented that the last sentence of Chapter 4, paragraph 3 on large exposures should be removed because under Article 396(1) of the CRR the possibility should be left open for the ECB, in exceptional cases, to examine on a case-by-case basis whether the institution is allowed to have exposures over 100% of the eligible capital.*

115. From a prudential perspective, this limit functions as a backstop to the insufficient diversification of counterparties, by preventing significant loss in the event of default of a counterparty (single client or group of connected clients). Therefore, the ECB is of the view that it should be maintained. The nature of the Guide would cater for the requested flexibility in very exceptional cases, if needed and adequately justified,

E.7 Liquidity (Section 2.5)

E.7.1 Compliance with liquidity requirements – reporting intervals (Section 2.5.3)

116. *A respondent asked for clarification with respect to the reference to the net stable funding requirement (NSFR) only (which has not been finalised yet), and the fact that a reduced reporting frequency with respect to LCR is not envisaged. Others have also expressed the view that it would be appropriate to provide a similar treatment for LCR.*
117. A reference to stable funding requirements has been adopted as defined in Article 413 of the CRR. A clarifying sentence has been added – no lower reporting frequencies are envisaged where a credit institution does not meet the LCR. The policy choice is not to exercise the O&D for the LCR i.e. not to allow a lower reporting frequency and delays for the LCR). According to the SSM Regulation, additional reporting requirements could be imposed based on Article 16(2)(j) in the event that an institution is in a distressed situation, within the meaning of the conditions in Article 16(1) SSM Regulation. In such a situation, it is likely that additional, rather than less frequent, reporting requirements may be necessary.

E.7.2 Intragroup liquidity outflows (Section 2.5.4)

118. *A clarification was requested for the requirement to fulfil LCR looking one year backward – whether it refers to a national liquidity requirement or LCR (and the situation if LCR has not yet been in place for one year). Also, in general the requirements set to benefit from differentiated treatment of intragroup liquidity inflows and outflows are very stringent and dissuasive. An objection has been raised as to the inappropriateness of an institution being obliged to show that its depositor is barred from withdrawing a deposit and thus effectively withdrawing demand deposits. Another respondent has objected to the ECB having access to the daily monitoring system as a difficult and overly invasive request (too demanding from an operational perspective). An objection has also been raised concerning a differentiated treatment with respect to two entities from the same Member State as opposed to entities not established in the same Member State.*
119. The first comment was accepted and the Guide has been amended to clarify that compliance with national liquidity requirements, if any, may be used instead.

120. On the general content, however, the ECB considers, given the fact that the regulation on LCR is relatively recent and potentially subject to changes, that the assessment of the compliance with liquidity requirements looking one year backward is appropriate at this initial stage of application. With this in view, the specifications introduced in the Guide are deemed appropriate and are also aligned with the EBA approach as put forward in the latter's public consultation on objective criteria for cross-border preferential treatment (as published on 18 November 2015). The ECB also takes into account the fact that the LCR DA has been applicable since 1 October 2015.
121. The comment on the institution being obliged to show that its depositor is barred from withdrawing the deposit is accepted. The Guide has been amended to include specific wording which is appropriate for assessing short term outflows for deposit contracts.
122. With regard to the comment on access to daily monitoring systems, the ECB notes that it is the liquidity provider and receiver that should have access to the monitoring system of their counterparty (and not the ECB, as the submitted comment suggests). A clarification to this effect has been inserted in the Guide.
123. Lastly, with regard to the differentiated treatment based on the location of the entities, it is noted that such treatment is based on the applicable framework. Articles 422(8)(d) and 425(4)(d) of the CRR specifically mention that "the institution and the counterparty shall be established in the same Member State". Articles 422(9) and 425(5) impose a different procedure for cross-border preferential treatments. The same approach is adopted for Articles 29 and 34 of the LCR DA.

E.7.3 Intragroup liquidity inflows (Section 2.5.5)

124. *A request was submitted for the reference to the high quality SREP criterion to be deleted as vague and ambiguous. Guidance on inflow cap exemption applications was requested to be included in the Guide.*
125. The reference to high quality SREP was introduced to provide the necessary flexibility – within the limits set in applicable law, as well as in Section I of the Guide – for the JSTs when assessing an application to grant a preferential treatment.
126. The ECB has taken note of the second comment for its future work and will examine whether further guidance in this regard is needed.

E.7.4 Diversification of holdings of liquid assets (Section 2.5.6)

127. *The point was raised by several respondents that Article 17 of the LCR DA allows for a 70% threshold for covered bonds and there is no reason not to be in line with this requirement. The policy proposed was felt to be disproportionate, especially in currency areas with a limited amount of Level 1A assets available*

128. In principle the ECB does not question the fact that Article 17(1)(b) of the LCR DA allows a liquidity buffer with up to 70% of covered bonds. The ECB does not intend to implement a diversification principle in a mechanistic way but only on a case-by-case basis and after a specific assessment has been conducted.

E.7.5 Management of liquid assets (Section 2.5.8)

129. *Additional clarification was requested. It was argued that since currently no restrictions are imposed by NCAs in specific jurisdictions on running a separate pool of assets, imposing a requirement to apply for a waiver is onerous and unjustified. In addition, the waiver process does not clarify whether the existing waivers will remain in place, or a new procedure will be introduced.*
130. The comment is accepted and the Guide has been revised in order to add the possibility of a combined approach at individual level to manage liquid assets, if the institution can demonstrate that all the liquid assets are available to the liquidity management function. It should also be recalled that, until decided otherwise, a decision taken by the NCAs prior to 4 November 2014 remains applicable (Article 150 of the Framework Regulation).

E.7.6 Currency mismatches (Section 2.5.8)

131. *One respondent proposed to define the notion of significant currency and delete criterion (ii). In addition, the criteria on the basis of which the ECB might impose limits on foreign exchange mismatches should be significantly more restrictive. Additional risk-related criteria should be included. There is no reference to criteria specified in Article 8(6)(a) and (b) of the LCR DA.*
132. The notion of significant currency is already defined with reference to the definition given in Article 415(2)(a) of the CRR. However, amendments have been inserted in the Guide to reflect the other comments mentioned above. It is also noted that the specifications defined in paragraph 8 serve as the basis for the case-by-case assessment and will not automatically lead to limits on currency mismatches.

E.7.7 Multiplier for retail deposits covered by a deposit guarantee scheme (Section 2.5.10)

133. *A comment was submitted to the effect that since some third country regulations do not contain a 3% retail outflow category, Article 24(6) of the LCR DA will be inapplicable in such cases and it would be welcome if the ECB allowed for a 3% treatment for retail deposits in third countries, where deposit guarantee schemes (DGS) provide for equivalent protection. Another respondent suggested that it was impractical for a credit institution to have an obligation to find out whether such an arrangement existed.*

134. The ECB notes that, under Article 24(4) of the LCR DA, a 3% outflow rate could only be allowed in the EU from 1 January 2019. Therefore, the ECB considers that being less stringent than the requirements imposed at national level by third country supervisors would not appropriately reflect the liquidity position of subsidiaries established in that third country in the event of stress. Moreover, Article 24(6) of the LCR DA clearly requires that the 3% outflow rate shall also be applied in that third country.
135. The second comment has been accepted and the respective requirement for the credit institution has been removed.

E.7.8 Higher outflow rates (Section 2.5.11)

136. *Several respondents asked for clarification on how the empirical evidence for outflow rates will be determined and what would be considered under “aggressive marketing policies”.*
137. The ECB intends to consider several sources and a reference to a single specific source for such empirical evidence is not feasible. Relevant information might be brought to the attention of the ECB via different channels, including the SREP, on-site inspections, regular supervisory reports or bilateral supervisory discussions. With regard to the second part of the comment, the relevant paragraph of the Guide is not meant to supplement the risk factors identified in Article 25(2) of the LCR DA. Institutions are requested not to use “aggressive marketing policy” in their internal policies, which is a guiding concept for the ECB when considering imposing higher outflow rates on retail deposits.

E.7.9 Outflows with interdependent inflows (Section 2.5.12)

138. *Several comments were made regarding the need to clarify the requirement to have the same gross amount taken into account. Also, a clarification was requested for the type of business and positions that may be taken into account. The exact meaning of condition (iv) was requested. One respondent expected that the ECB will endorse business models/institutions already allowed by national authorities.*

Article 22 of the LCR DA limits the application of Article 26 to retail outflows. This Article also provides that to be recognised as interdependent inflows and outflows, the inflow must arise before the outflow or the inflow must be guaranteed by the central government of a Member State. In the former case, the inflow shall always and in all circumstances arise before the outflow, including within the day if both the inflow and the outflow are expected to occur within the same day.

E.7.10 Specialised credit institutions (Section 2.5.13)

139. *One respondent suggested that the criteria proposed by the ECB are too restrictive, since in cases of specialised lending subsidiaries there will generally not be a contractual link between the maturity of each individual loan and the maturity of the matched funding. This is generally achieved only on an aggregate basis. Others have also argued that the request for a low liquidity risk profile goes beyond the requirements in the LCR DA and that the reference to interrelated inflows and outflows is not relevant in this context*
140. On the first comment the ECB acknowledges that for some business activities identified in Articles 33(4) and 33(5) of the LCR DA the relation between inflows and outflows cannot always be demonstrated on a transaction-by-transaction basis. To this end, the ECB has amended the Guide to insert a new alternative possibility to demonstrate that the timing of inflows matches the timing of outflows.
141. The comment on the reference to interrelated inflows and outflows has also been accepted. The ECB has removed this reference and will refer instead to outflows and the corresponding inflows exempted from the cap.

E.8 Transitional provisions on capital requirements – Basel 1 floor (Section 2.6.4)

142. *A respondent requested clarification as to which specific requirements the provision would entail. A recommendation was proposed not to exercise the discretion in paragraph 2 and to exercise the option in paragraph 5 on a case-by-case basis.*
143. The requirements for the application of paragraph 2 are provided in the CRR. The same holds with regard to the CRR requirements to be assessed for paragraph 5. With regard to the prudential considerations, an ex-ante definition – and therefore, the exercise in a general manner – is not the preferred way forward, since the assessment of these options can be dependent on the elements of each case at the time of the examination.

E.9 Governance arrangements (Section 2.9)

E.9.1 Combining the risk and audit committee (Section 2.9.3)

144. *Some respondents objected to the provisions on the risk and audit committee, especially with regard to the power of the ECB to demand a separate committee if not provided for under national law and the criteria of significance.*
145. This is a broader issue resolved by the caveat in Section 1.11 where the Guide makes clear that the application of CRD IV O&Ds is subject to national laws. With regard to significance a threshold has been viewed as an appropriate criterion in

order to ensure transparency. Furthermore, it is not uncommon in national practice to determine significance in the way it has been determined in this section.

E.9.2 Additional non-executive directorship (Section 2.9.4)

146. *A request has been submitted to clarify the expression “permanent” in Section 2.9.4.(v). with regard to members of the supervisory board. Two respondents consider that the ECB should postpone laying down criteria until the EBA Fit and Proper Guidelines enter into force. One respondent argued for the deletion of the restriction in Section 2.9.4.(v) claiming that it would lead to privileges granted by law being indirectly sanctioned.*
147. “Permanent” should be read to mean for at least the normal term of one full mandate and temporary to be read as part of the normal term of a mandate. The ECB already has to process these applications in advance of any guidelines from the EBA and it is thus necessary to put some guidance in place. This could be amended once the EBA guidelines are published. The fact that a member benefits from privileged counting does not in itself rule out the granting of an additional non-executive directorship but overall time commitment is a separate criterion under Article 91 of CRD IV.

E.9.3 SREP Decisions for institutions with similar risk profiles (Section 2.9.5)

148. *One respondent was concerned about the specific circumstances of individual institutions being taken into account.*
149. The ECB can reassure stakeholders that these will be taken into account when justified, according to the principles set out in Section I.

E.9.4 Bilateral agreement on the supervision of credit institutions in non-participating Member States (Section 2.9.7)

150. *Two respondents argue that this provision does not relate to an option/discretion and should be deleted from the final Guide.*
151. This was taken into account. Indeed, Article 115(2) of CRD IV refers to the competent authority of the subsidiary taking the initiative. While it is the case that Article 115(2) of CRD IV envisages a delegation of responsibilities from the competent authority of the subsidiary to the competent authority of the parent institution, there is nothing that prevents the competent authority of the parent institution from discussing the potential delegation with the competent authority of the subsidiary. Moreover, in cases where the ECB is the competent authority that has authorised a parent undertaking which is a credit institution, it would, by bilateral agreement with the competent authority of the non-participating Member State, seek

to assume responsibility for supervising the subsidiary credit institution authorised in that Member State. This would be done through delegation of responsibilities from the competent authority of the subsidiary credit institution, in accordance with Article 115(2) of CRD IV.

E.9.5 Supervision of mixed financial holding companies (Section 2.9.9)

152. *Two respondents held the view that it should be made clear that the decision cannot be taken by the ECB on its own but in agreement with the relevant competent authorities.*
153. The cooperation arrangements with regard to both cases are already provided for in the legislation.

E.9.6 Establishment of financial holding companies or mixed financial holding companies (Section 2.9.10)

154. *A few respondents asked for a clarification of this provision, asking in which cases the ECB would require the establishment of a holding company connected to the circumstance of the location of the parent institution. In addition, they challenged the legal basis of the provision.*
155. The ECB can only require the establishment of a (mixed) financial holding company in the cases envisaged by article 127(3) of the CRD. In our view, the draft Guide is neutral and does not suggest that the ECB would require establishment in other scenarios. It is clear, therefore, that where the ultimate parent is within the Union the ECB could not require the establishment of a holding company based on article 127(3) of the CRD.

E.9.7 Capital conservation plans (Section 2.9.11)

156. *Three respondents objected to the imposition of a maximum time limit (2 years), arguing that this is not in line with the objective of setting timelines on a case-by-case basis.*
157. Taking into account the totality of the measures requested in distressed situations, setting a maximum of two years is considered reasonable. Moreover, this is not a binding limit to be applied in all cases, but rather a ceiling. The JSTs will set the appropriate limit for the replenishment of the buffers according to the specific elements of each case.

E.10 General policy – consolidated supervision and waivers of prudential requirements (Section III, Chapter 1)

E.10.1 Exclusion of proportional consolidation (Section 3.1.3)

158. *Five respondents claim that this paragraph of the Guide is contrary to the CRR, which provides for a case-by-case assessment, arguing that the ECB is mandating a binding requirement of full consolidation.*

159. In the view of the ECB, this is not the case. In accordance with the standard public law principle a stated policy must not fetter a public body's discretion to deviate from that policy in exceptional circumstances. This provision should, however, apply to non-exceptional cases.

E.10.2 Use of IFRS (Section 3.1.6)

160. *A large number of respondents opposed the potential exercise of the option in Article 24(2) of the CRR requiring institutions that at present exclusively apply national GAAP in their reporting to apply IFRS for prudential reporting purposes.*

161. The ECB will only reach a decision on the necessity of exercising this option after an assessment, which is currently ongoing. All submitted comments will be taken into consideration for this purpose.

E.10.3 Eligibility of capital instruments subscribed by public authorities in emergency situations (Section 3.2.1)

162. *The comment was made that the EU legislator has explicitly provided for the possibility of eligibility. The ECB should, accordingly, not be enabled to make an ex ante decision to no longer grant permissions in general. This would, in the respondent's view, tighten the CRR and result in the ECB exceeding its mandate.*

163. The Article relates to cases where the ECB is asked to recognise capital instruments subscribed by public authorities as part of own funds. The O&D is included in Section III to indicate that the ECB will assess the inclusion of such instruments within the framework of each concrete situation, if and when it arises.

E.10.4 Redemption of additional Tier 1 or Tier 2 instruments before five years have elapsed from the date of issuance (Section 3.2.2)

164. *A few respondents argued that the ECB has no power to add additional criteria and that the final Guide should make this clear.*

165. The expression “may” in Article 78(4) of the CRR gives the competent authority the discretion to grant permission to redeem AT1/T2 instruments before five years have elapsed if certain conditions are met. As Article 78(4) of the CRR does not impose an obligation on the competent authority to grant permission if the conditions are met, it would be open to the ECB to define a policy that sets out factors that need to be taken into account before granting the permission.

E.10.5 Exposure to public sector entities (Section 3.3.1)

166. *A large number of respondents argued that the ECB should consult and work with member states in developing such a list. Some consider it would be more appropriate for member states to appoint their own public sector entities.*
167. The ECB, for the purpose of exercising this option, is currently cooperating with the EBA, which has agreed to undertake an EU-wide exercise to define a list of public sector entities. Further input with regard to the entities involved may be provided within the framework of the EU-wide exercise.

E.10.6 Risk weights and loss given default for exposures secured by mortgages on residential or commercial immovable property (Section 3.3.2)

168. *Respondents pointed out that this could lead to different assessments within the same euro area Member State as both the ECB and the NCAs will have the power to make separate assessments which might lead to divergence in the capital requirements for directly and indirectly supervised banks. For this reason the respondents requested that the ECB work closely with national authorities in developing the methodology.*
169. As to the first remark, the ECB is working in close cooperation with the NCAs to ensure consistent regulatory requirements both for significant and less significant credit institutions. An appropriate balance is required between taking national real estate market specificities into account and preserving the level playing field across the SSM. It must be noted in this regard that the Commission’s regulatory technical standards will be setting unified criteria to be used by the competent authorities for assessing when to set higher risk weights.

E.10.7 Credit valuation adjustment risk (Section 3.3.7)

170. *One respondent viewed the abolition of the exemption arising from Article 382(4)(b) of the CRR as excessive and premature. Clarification was requested with regard to the interpretation of “structurally separated institutions”.*
171. This discretion is provided for by the legislator in Article 382(4)(b) of the CRR. The Guide does not, however, pre-empt the exercise in any specific direction. The

assessment on this option will take place after the pending EU legislative initiative on banking structural reform has been finalised.

E.10.8 Liquidity outflows (Section 3.5.1)

172. *A clarification has been requested for this Article, regarding its scope and purpose. Additionally, two respondents have requested that not only short term exercises (STEs) be taken into account but also the institutions' internal stresses as mentioned in Article 23(2) of Commission Delegated Regulation (EU) 2015/61 (the LCR Regulation).*
173. The aim of this paragraph is to convey the criteria to be used for the future calibration of the outflow rates with regard to off-balance-sheet products (excluding trade finance, which is covered by the ECB Regulation on O&Ds). The STE is not the sole criterion to be taken into account by the ECB for this purpose. The elements referred to in Article 23 of the LCR DA, including the type of stress referred to in the comment and further specified in Article 5 of the DA, will also be taken into account

F Amendments to the Regulation

174. Changes to the draft ECB Regulation on the exercise of options and discretions available in Union law were incorporated in the draft of the Regulation as a result of the comments received during the public consultation period. The following table summarises those amendments. Purely editorial changes are not listed.

Table 3
Amendments to the draft ECB Regulation

Provision in the Draft Regulation	Former provisions of the draft Regulation	Heading	Proposed amendment
New Recital 1	Not applicable	ECB regulatory powers	"The European Central Bank (ECB) is empowered to adopt regulations in accordance with Article 132 of the Treaty on the Functioning of the European Union. In addition, Article 132 of the Treaty and Article 34 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), by referring to Article 25.2 of the Statute of the ESCB, entrusts the ECB with regulatory powers to the extent necessary to implement specific tasks concerning policies relating to the prudential supervision of credit institutions
Recital 6 (Now Recital 7)		National legislation exercising O&Ds	(decision still pending) "Where relevant Union law is composed of regulations and where currently those regulations explicitly grant options and discretions for Member States, the ECB should also apply the national legislation exercising those options and discretions. Such national legislation should not affect the smooth functioning of the SSM, for which the ECB is responsible".
Article 2		Definitions	The Article has been amended to include also the definitions contained in Article 3 of the Commission Delegated Regulation (EU) 2015/61.
Article 9 (3)	Article 9 (3)	Large exposures-exemptions	Deletion of "institutions, financial institutions subject to appropriate prudential requirements, parent financial holding companies, parent mixed financial holding companies, ancillary service companies, insurance undertakings, re-insurance undertakings or insurance holding companies"
Article 9 (5)	Article 9 (1)	Large exposures – exemptions	The paragraph has been re-drafted in order to comply with Article 400(2)(i) of the CRR regarding the amount allowed for exposures.
Article 9 (7)	Article 9 (7)	Large exposures – exemptions	Deletion of the final wording "prior to the entry into force of this Regulation"
Article 12	Article 12	Liquid assets	The article has been deleted taking into account the comments received during the public consultation
Article 13	Article 13	Level 2B assets	The Article has been deleted taking into account the comments received during the public consultation
Article 17	Article 19	Introduction of amendments to IAS 19	Paragraph 2 has been amended further to comments submitted during the public consultation. The new drafting takes into account potential decisions or national legislation not to allow credit institutions to include in CET1 the assets referred to in the article (assets of defined benefit pension funds or plans)
Article 19	Article 21	Applicable percentages for deduction from CET1 of significant investments in financial sector entities and deferred tax assets that rely on future profitability	A change in the wording of paragraph 8 from "banks are allowed to apply" into "banks can apply"
Article 26	Article 24	Treatment of equity exposures under the IRB approach	The text has been re-drafted in order to take into account Commission Delegated Regulation 2015/1556 for the transitional treatment of equity exposures under the IRB approach.
Article 27	Article 25	Entry into force	The paragraph has been amended in order to provide for a delayed entry into force. The applicability of the definition of default (Article 4) is postponed to 31 December 2016.
Annex I 2 (b) (v) Annex I 3 (f) Annex II 3 (f)			The sub-paragraphs have been amended in order to clarify that the management of concentration risk should be consistent with the bank's recovery plans and not its resolution strategy as previously inaccurately stated, the latter being developed by the Resolution Authority.
Annex I 3 (a)			The words "parent undertaking" have been removed in order to avoid confusion regarding the entity signing the letter.

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Postal address 60640 Frankfurt am Main, Germany
Telephone +49 69 1344 7455,
e-mail media@ecb.europa.eu
Website <http://www.ecb.europa.eu>

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