



EUROPEAN CENTRAL BANK

BANKING SUPERVISION

## Feedback statement

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

on options and discretions available in Union law

BANKENTOEZICHT

August 2016

BANKTILLSYN BANKU UZRAUDZĪBA

BANKŲ PRIEŽIŪRA NADZÓR BANKOWY

VIGILANZA BANCARIA

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This document is intended to give an overview of the comments received during the public consultation on the draft Addendum to the ECB Guide on options and discretions available in Union law, and provide an assessment of those comments. It also explains the amendments made to the draft Addendum as a result of the public consultation. It must be underscored that this document does not provide an interpretation of provisions of EU law, given that only the Court of Justice of the European Union can provide a legally binding interpretation of those provisions.

# A Overview and analysis of responses

1. On 18 May 2016 the European Central Bank launched a public consultation on a Draft Addendum to the ECB Guide on options and discretions (O&Ds) available in Union law (“the Guide”). The consultation encompassed O&Ds in Regulation (EU) No 575/2013 (CRR), along with certain O&Ds in Directive 2013/36/EU (CRD IV), as well as some other O&Ds in Commission Delegated Regulation (EU) 2015/61. The public consultation ended on 21 June 2016. In addition to soliciting written comments, the ECB also granted 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 am Main on 3 June 2016. 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, all the comments presented at the public hearing have also been reiterated via written submission. Accordingly, the ECB has given due consideration to all the comments received during the consultation period.

This feedback statement presents an overall assessment of the comments received during the public consultation and aims to address the most significant issues raised by those comments. Amendments to the draft Addendum have been made as a result of the comments received.

2. In total, 13 responses were received, mostly in English. Contributions were submitted by credit institutions and by market and banking associations, amounting to a broad participation by the relevant stakeholders. Table 1 shows the breakdown of the responses to the public consultation according to the category of respondent.

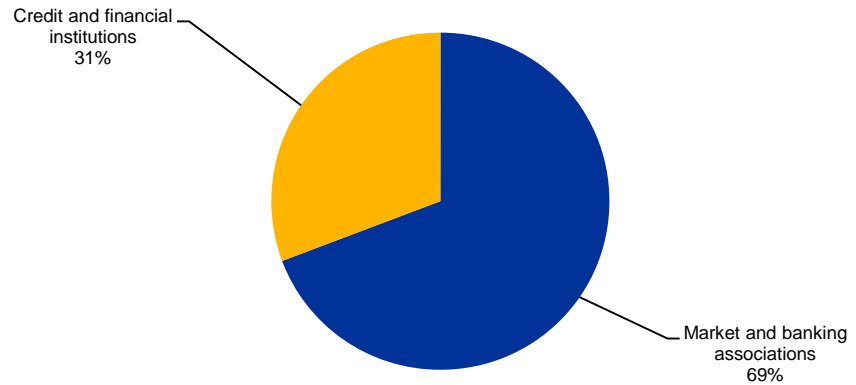
**Table 1**  
Responses to the public consultation

Breakdown of the responses according to the category of respondent		
Category	Numbers	Percentage
Credit and financial institutions	4	31%
Market and banking associations	9	69%
<b>Total contributions</b>	<b>[13]</b>	<b>100%</b>

### Chart 1

#### Respondents to the public consultation

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3. A complete draft proposal for the adoption of the draft Addendum was transmitted by the Supervisory Board to the Governing Council of the ECB on 2 August 2016. The Addendum, as adopted by the Governing Council of the ECB on 9 August 2016, was published on the ECB website together with this feedback statement on 10 August 2016. A consolidated version of the ECB Guide on options and discretions available in Union law will soon be published on the website.

## 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 and 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 Articles 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 adds a layer of regulatory complexity and further increases compliance costs, especially for firms operating across borders, and also leaves 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 if 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 within the supervisory 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 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.
13. Many O&Ds have been identified by the ECB and the large majority have been exercised, or policy indications for their individual exercise have been provided, with Regulation (EU) 2016/445 and the ECB Guide on options and discretions

available in Union Law published on 24 March 2016. With this draft Addendum to the ECB Guide a few additional O&Ds are dealt with, specifying the policy framework that the Joint Supervisory Teams (JSTs) will take into account when assessing individual applications for the implementation of the relevant provisions.

# Draft Addendum

## C General Comments on the draft Addendum

### C.1 Interaction of the O&Ds project with the ANACREDIT Regulation (Regulation (EU) 2016/867).

14. *One respondent submitted that while the ECB is striving with the O&Ds project to harmonise the regulatory framework within the SSM, at the same time several additional national discretions have been introduced with the ANACREDIT regulation*
15. The ECB takes note of the comment and refers to the document [Feedback Statement. Responses to the observations on the draft European Central Bank Regulation on the collection of granular credit and credit risk data](#), published in May this year, and in particular to paragraph 5.2, p. 13, where the issue of potentially divergent national statistical reporting requirements within the ANACREDIT framework is addressed.

### C.2 Existing waivers

16. *Several respondents asked for an explicit clarification that existing (or pending) supervisory decisions already granted by national competent authorities with reference to the O&Ds included in the draft Addendum remain valid.*
17. The ECB takes note of the comments. It has already been clarified in several public statements that existing waivers or exemptions remain valid until further notice (please see also Article 150 of Regulation (EU) No 468/2014 – Framework Regulation). The ECB is carrying out a thorough review process of waivers and exemptions currently in place in order to assess their consistency with the policy stance defined in the Guide. Only in cases of material misalignment with the policy specifications set out in the Guide will the ECB consider measures to ensure the overall alignment of individual decisions with the policy specifications, always taking into account the general principles of Union Law, including the protection of legitimate expectations. In the event of material misalignment between the policy framework previously applied by national competent authorities and the overall policy rationale as set out in the ECB guide on options and discretions available in Union Law, the ECB will explore all available measures in the context of ongoing supervision and will discuss any potential issues with supervised entities before reaching any determinations. Within this framework, any revocations are to be considered only as a last resort after less detrimental measures have been explored. It is not therefore deemed necessary to insert a specific assurance to that effect in



the ECB Guide, considering that the validity of existing waivers and exemptions derives directly from EU law and general principles of law.

18. In no case can there be an issue of retroactive application of the ECB policy to the assessment of pending applications. Pending applications will be considered according to the framework developed by the ECB as communicated in this Guide, potentially taking into account transitional (phase-in/phase-out) periods where appropriate.

## D Comments on specific sections of the draft addendum

### D.1 Article 7 CRR capital waiver and leverage considerations

19. *Some respondents questioned the legitimacy of including leverage considerations in the assessment of the conditions for granting a capital waiver, given that such considerations are not mentioned specifically in the CRR. They also mentioned that the leverage requirement will not be introduced any earlier than 2018, hence at least until that date leverage considerations cannot be introduced in the exercise of supervisory discretion.*
20. The ECB takes note of the comments. With regard to leverage considerations not included in the Level 1 text for the Article 7 capital waivers, the ECB confirms that it does not intend to introduce additional requirements. It notes, however, that there is a clear link in the legislation between granting a waiver for risk-based capital requirements at the domestic level and a waiver for the leverage ratio requirement (non-risk-based) at the same level of the group structure within a Member State (Article 6(5) of the CRR). Thus, a supervisory decision to grant a waiver pursuant to Article 7 of the CRR covers both types of capital requirements (risk-weighted and non-risk-weighted). In this framework, the ECB believes that it is necessary and appropriate, from a prudential perspective, to carry out an assessment both from a risk-weighted and non-risk-weighted perspective, before allowing solo entities not to comply with both requirements, in order to take into account whether the risk of excessive leverage could be a prudential concern for solo entity(ies) covered by the capital waiver of Article 7 of the CRR. The two objectives of the leverage ratio (i.e. preventing the build-up of excessive leverage, and acting as a supplementary back-stop measure to risk-weighted requirements) should not be neglected when carrying out firm-specific prudential assessments.
21. We do, however, agree with the assertion that an assessment of leverage-related considerations should be carried out only after a minimum level for the leverage ratio requirement is actually introduced in Union Law (Part 7 of the CRR). Leverage reporting and disclosure requirements are, however, already in force. Thus, the JSTs can already take into account, when granting an Article 7 waiver, that those requirements already included in Part 7 of the CRR will also be automatically waived. However, it can be anticipated that the prudential supervisory assessment of an Article 7 CRR waiver application will at the moment be influenced primarily by risk-based considerations, until a minimum level for the leverage ratio requirement is in place in EU law.
22. Some aspects of the text were redrafted in order to take these comments into account and clarify that leverage-related considerations do not amount to an additional prudential requirement, specifying also that only after the introduction

of a minimum leverage requirement in EU law will leverage-specific considerations be taken into account.

23. *Some respondents asked for a clarification of the criteria used to carry out the above-mentioned assessment of leverage considerations. The draft addendum mentions the factors set out in paragraph 4 of the same chapter of the Guide, but this is considered to be insufficiently clear or exhaustive.*
24. The ECB takes note of the comment. We agree that the reference to paragraph 4 of the same Chapter of the draft ECB Guide might be misleading in this context, given that the assessment for an Article 7 CRR waiver has a considerably wider scope than the assessment concerning exclusion from the exposure measure for the leverage calculation of specific intragroup exposures. We have therefore deleted this specific reference.
25. *One respondent added that the current text only seems to address situations where the subsidiary might encounter funding problems and be unable to utilise the liquidity allocated at the holding company level through intra-group exposures. This respondent submitted that in a stressed scenario too, the subsidiary would be able to close or reduce the intra-group funding exposures if/when needed, while at the same time the group holding would have contingency funding measures in place at group level in order to deal with a sudden crisis. It seems to be a problem of liquidity management at the group level rather than at the solo level.*
26. The ECB takes note of this comment. However, the ECB would disagree with the view that in this context potential prudential risks can arise only at the consolidated level. There can be cases where specific individual entities in the group are overleveraged at the solo level, as a result of, for example, the business strategy of the entity or the group. Even if support mechanisms are defined at the group level, the adequacy of those mechanisms needs to be assessed by the supervisor on a case-by-case basis, taking into account the financial conditions of the individual entity at the solo level to ensure, inter alia, that the entity(ies) will not engage in deleveraging activities, which can also have wider financial stability effects.

## D.2 Exclusion of intragroup exposures from the exposure measure of the leverage ratio (Article 429.7 CRR). Interaction with Article 113.6 CRR.

27. *Several respondents submitted that the exclusion of intragroup exposures from the exposure measure for the calculation of the leverage ratio is automatic once the 0% risk weighting is granted to such exposures pursuant to Article 113(6) of the CRR.*
28. Article 429(7) of Regulation (EU) No 575/2013 stipulates that the competent authority may permit the exclusion of intragroup exposures from the calculation

of the leverage ratio where the conditions mentioned in that provision are met. Given the clear wording of the provision (“competent authorities may permit”) the competent authority has been entrusted with the discretion to grant or not to grant permission for exclusion from the exposure measure of the above-mentioned assets, also where the conditions specified in the provision are actually met, provided that there are justified and well specified prudential reasons concerning the leverage ratio as a prudential requirement which justify the rejection of the application. Therefore, also in the case of fulfilment of the conditions as set out in Article 113.6, paragraphs (a) to (e), and where the approval for the 0% risk weight of the intragroup exposures has already been granted, the competent authority could actually reject the application for an Article 429(7) exemption.

29. This is based on the two different prudential rationales and objectives of the risk-based and non-risk-based capital requirements. In fact, it is of fundamental importance to consider that the objective of the leverage ratio requirement<sup>1</sup> is to introduce a simple, transparent, non-risk-based prudential requirement to act as a credible supplementary measure to risk-weighted capital charges. Moreover, the prudential framework of the leverage ratio aims to restrict excessive balance-sheet expansion in the banking sector, in order to prevent the occurrence, in times of crisis, of destabilising deleveraging processes that can cause direct losses for the credit institution, as well as damage to the broader financial system and the real economy. To this end, a simple leverage ratio framework is critical and complementary to the risk-based capital framework. This is also reflected in Recital 91 of the CRR, which explains that “risk-based own funds requirements are essential to ensure sufficient own funds to cover unexpected losses. However, the crisis has shown that those requirements alone are not sufficient to prevent institutions from taking on excessive and unsustainable leverage risk.”
30. Accordingly, several exposures that attract 0% or very low capital charges are included in the exposure measure for the calculation of the leverage ratio. There is, therefore, no automatic connection between an exposure which is exempted from risk-weighted capital requirements on the one hand and its exclusion from the exposure measure for the calculation of the leverage ratio on the other. Within this framework, Article 429(7) explicitly states, in the specific case of intragroup exposures within a member state, that competent authorities are entrusted with supervisory discretion to exclude such assets from the exposure measure. The way this discretion is exercised in order to reach a positive or negative decision on specific applications pursuant to Article 429(7) is the subject matter of the specifications included in Section 2, Chapter 1, paragraph 4 of the ECB Guide.

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<sup>1</sup> See recital (92) of Regulation (EU) No 575/2013 which refers to “the introduction of a leverage ratio as a supplementary measure to the Basel II framework [...] to discourage from excessive leverage.

31. *Several respondents requested clarifications of the specifications that will be used by the Joint Supervisory Teams in order to assess applications for an Article 429(7) exemption. In particular, they asked for clarification of the meaning of the “potential impact on the credit institution of a change in economic and market condition, especially with regard to its funding position” and which kind of bearing on this assessment the SREP decision will have. They also asked for clarification of the sentence “the ECB intends to carry out a forward-looking assessment to ascertain that the exemption does not have the effect that leverage as defined in Article 4(1)(93) would no longer be adequately measured by the leverage ratio” with specific reference to the words “forward looking assessment“. Respondents also requested a more specific explanation of what JSTs will be required to evaluate (and how) in relation to the exemption concerning the leverage ratio as an efficient complementary measure to the risk-based capital requirements. Lastly, one respondent asked for clarification of the kind of evaluation JSTs will be carrying out with reference to the impact that an Article 429(7) exemption can have on recovery and resolution plans.*
32. The ECB takes note of the comments. It must be clarified that the Guide, while ensuring consistency of the guidelines for the assessment, must not be interpreted (and is not to going to be applied) in an overly restrictive manner. The inclusion of the Supervisory Review and Evaluation Process (SREP) assessment as a specification in this particular case must also be read in this context. Therefore, it is not correct to assume that there can be no deviations from the SREP results in the course of ongoing supervision and in the assessment of specific applications. This notwithstanding, a SREP decision must obviously be considered the basis for the exercise of supervisory judgment by the JSTs in the course of ongoing supervision. This would also apply in the case of this specific assessment.
33. The wording “forward looking assessment” has been clarified in the text to better explain the intention behind carrying out this prospective assessment. The JSTs will look closely at the materiality of intra-group exposures and their potential impact on overall balance-sheet expansion in a forward-looking manner, considering business model analysis or other relevant factors. It is not, however, deemed feasible for the specifications in the Guide to define ex ante and conclusively how the bank could be impacted by overall market conditions in future situations.
34. Given that the leverage ratio, as mentioned above, acts as a backstop to risk-based capital requirements, potential deficiencies of, for example, the credit institution’s risk-modelling or risk management processes would probably mean that the leverage ratio has a relatively higher importance for prudential supervision in the specific case and could potentially be the most effective tool to mitigate the risks the bank might face. JSTs are therefore invited to take such indicators into account when deciding whether or not to exempt intragroup exposures from the exposure measure for the calculation of the leverage ratio.
35. As far as the interaction with Bank Recovery and Resolution Directive (BRRD) requirements is concerned, it is noted that this specification is aligned with

similar specifications already included for the assessment of applications for Article 7 CRR waivers in the first package of O&Ds. The purpose of introducing this specification, which is related to the BRRD tools, is to provide the basis for an assessment of consistency between different regulatory frameworks, where necessary.

### D.3 Risk weights for intra-group exposures at the domestic level (Article 113.6 CRR)

36. *Several respondents submitted comments to the effect that the documentation requested for assessing the applications pursuant to Article 113.6 of the CRR is too cumbersome and that at least some documentation is already provided to the JSTs pursuant to other reporting obligations or in other supervisory contexts. Respondents also questioned the feasibility of the requirement to provide a legal opinion that needs to be approved by the management body of the institution.*
37. The ECB takes note of the comments. We agree that if the documentation has already been provided to the JSTs under other reporting obligations or in other circumstances, including in the course of the normal supervisory dialogue, there should be no duplication of submissions. The text now includes a specific sentence to that effect. Legal opinions can generally be provided in several circumstances and on many aspects of the legal framework, including in order to assert the lack of legal impediments “to the prompt transfer of own funds or repayment of liabilities from the counterparty to the institution” as required by Article 113(6)(e). This specification (i.e. providing a legal opinion) has already been introduced, with exactly the same wording and content, in the exercise of other O&Ds, including, for instance, in the ECB’s O&D regulation (Regulation (EU) 2016/445), in the Annexes related to intragroup large exposure waivers (Article 400(2) of the CRR).

### D.4 Applicability of Article 24.2 CRR on IFRS prudential reporting

38. *Most respondents welcomed the ECB’s intention to allow IFRS reporting in specific cases even if the overall policy stance is not to require credit institutions to report in IFRS format in cases where n-GAAP are applied according to the relevant accounting framework. Nonetheless, several respondents questioned the introduction of overly restrictive conditions to that effect. In particular, respondents questioned whether the application should be submitted by all the legal entities involved and especially why IFRS reporting should then apply to all the legal entities within a banking group (this condition was dubbed by one respondent an “all or nothing condition”). Respondents also sought clarification of the meaning of banking group (whether it should be considered only at the parent holding company level – highest level of consolidation – or also at the*

*sub-consolidated level). The need for a legal opinion on the national applicable legal framework approved by the management body of the credit institution was also criticised, while clarification was sought on which specific reporting obligations would be required to switch to IFRS (the non-exhaustive list in the current text was considered misleading). Several respondents considered the need to provide a periodic reconciliation statement between GAAP and IFRS too burdensome and it was proposed that this reconciliation statement should be limited in terms of time (only for two years after the switch) and scope (only for the own funds item). Lastly, some respondents argued for the introduction of a transitional period before all entities which would be covered by an Article 24.2 CRR application would be required to implement all the conditions specified in the Guide.*

39. The ECB takes note of the comments. We have clarified the term “banking group” in the revised text and underscore that it must be read as the banking group at the highest level of consolidation covering all SSM entities, as specified in the ECB significance decision and also published in the ECB list of supervised banks as periodically updated.
40. On the “all or nothing” approach (i.e. all the entities in the Group as defined above must be reporting in IFRS after an Article 24(2) application has been granted), the ECB reiterates that this is considered an important aspect of granting Article 24(2) CRR applications.
41. In general, we consider that the exercise of the option in that article following firm-specific applications can be considered a means to achieve a higher degree of consistency in terms of supervisory reporting within the group. Therefore, we are of the view that it is prudentially sound, as a principle, to expect that in cases of firm-specific applications for the exercise of the option in Article 24(2) of the CRR all entities in the group must be required to switch to IFRS for prudential reporting, in order to simplify operational requirements (also for the competent authority) and ensure comparability among all reporting entities within the group. In the ECB's view, those aspects should also be considered the main incentives for credit institutions to submit an application for an Article 24(2) CRR requirement (i.e. switch from n-GAAP reporting to IFRS reporting). We would then consider the “all or nothing” approach as a very important aspect of the assessment of applications pursuant to Article 24(2) of the CRR in order to avoid regulatory arbitrage among various entities within the same group.
42. We have, nonetheless, deleted the condition of providing a legal opinion showing that there are no obstacles in the legal national framework to the application of IFRS for prudential reporting even if the national accounting framework is n-GAAP, because we considered that a case-by-case, firm-specific application of Article 24(2) of the CRR with an individual supervisory decision would clearly overrule any national legal constraints related to the applicable accounting framework. It must be underscored that the national accounting framework will obviously still be used for all other relevant purposes (e.g. profit and losses statement, tax matters, etc.).



43. The ECB has slightly revised the condition related to the external auditor's statement, which must now certify that the reported data are consistent with the applicable IFRS as endorsed by the European Commission. This statement must be submitted at least annually.
44. With regard to the transitional period for the application of the conditions, the requests have been accepted. New wording has been inserted to specify that the ECB can consider granting a transitional period, as appropriate on a case-by-case basis, for the full implementation of the above-mentioned conditions. This will be a case-by-case assessment, taking into account the specific operational burden deriving from the implementation of the conditions.
45. The ECB understands the concern related to the lack of specifications of all the relevant reporting requirements that should follow IFRS reporting after an Article 24(2) CRR application has been granted. However, it is not feasible to define ex-ante and exhaustively in the Guide all the reporting requirements that will be affected by the switch to IFRS. The JSTs, as well as the credit institutions, can refer to the reporting framework as applicable at the time of the application.

## D.5 Additional collateral outflows from downgrade triggers (Article 30.2 of the Liquidity Coverage Requirement Delegated Act (LCR DA))

46. *Several respondents asked for clarification of the definition of total outflows: whether they are weighted or unweighted and whether they refer to gross or net outflows. It was also mentioned that the 1% threshold is too low and should be raised to 5% or 10% of total outflows. Further clarification was also requested on the reporting procedure for these material outflows.*
47. The ECB takes note of the comments. The ECB clarifies that "total outflows" must be understood as "gross liquidity outflows". The new draft text has been amended accordingly.
48. On the materiality threshold we propose to leave 1% of total outflows as clarified above, since this threshold is viewed as appropriately prudent, given that outflows below this threshold, even if they were not taken into account in the LCR, would only produce an improvement in the ratio of less than 1 percentage point. It is important to underscore that the calibration of the threshold will be reviewed once more data are available and if considered necessary.
49. On the reporting procedure, credit institutions are expected to notify the ECB directly as part of the regular reports submitted to the competent authority pursuant to Article 415(1) of the CRR. This has been clarified in the text.



50. *A number of respondents pointed out that some institutions are not subject to individual external ratings. Therefore, they questioned the applicability of the ECB specifications in such cases, insofar as they refer to external ratings.*
51. The ECB expects that, in line with Article 30(2) of the LCR DA, institutions that are not externally rated should notify the impact on their outflows of a material deterioration of their credit quality corresponding to a 3-notch downgrade. Institutions can liaise with the JSTs to determine, on a case-by-case basis and in the light of the specific contractual provisions, how this material deterioration can be ascertained.

## D.6 Preferential Treatment. Exemption from cap on inflows (Article 33.2 LCR DA)

52. *Several respondents submitted comments to the effect that there is no functional equivalence in terms of prudential impact between an Article 8 CRR liquidity waiver and preferential treatment deriving from a combination of Article 33.2 and Article 34 of the LCR DA.*
53. The ECB continues to believe that options and discretions should be applied in a consistent manner, also in cases of potential functional equivalence. The ECB has identified cases where a combination of Article 34 and Article 33(2) options, or only an Article 33(2) exemption, has a comparable effect to an Article 8 CRR waiver. More specifically, in cases where, as a result of exercising the option, the liquidity buffer requirement of one of the exempted entities would be reduced to zero (or close to zero), this would have a comparable effect to this entity being waived from liquidity requirements altogether pursuant to Article 8 of the CRR. In those circumstances, the exempted institution, while it would still be subject to the LCR requirement and to the corresponding reporting requirement, would not be required to hold a buffer of liquid assets.
54. In this regard, it must be clarified that, should this equivalence not be present in a specific case, the bank's application will be assessed according to the specifications corresponding to the Articles which are invoked therein and not to the specifications for an Article 8 CRR waiver.
55. *Several respondents asked for clarification with regard to practical aspects of the applications based on those provisions, most importantly whether there is a hierarchy of applications based on the CRR provisions (Article 8) and the LCR DA provisions (Articles 33.2 and 34) (i.e. whether one application would be considered a prerequisite for the other). A few respondents also asked which documents would be required for the applications based on 33.2 LCR DA and pointed out that there is a duplication between the documentation required under specifications (vi) and (ix).*
56. The ECB does not consider that an application for an Article 8 CRR waiver is a prerequisite for granting an exemption from the cap on inflows. Institutions may

apply simultaneously for different liquidity waivers or exemptions. However, the ECB expects institutions to provide sufficient reasons for their choice of application (in particular with regard to the applicable legal basis), in order to simplify the assessment. Furthermore, even though there is no specific documentation required for applications based on Article 33.2 of the LCR DA, institutions may refer to the documentation mentioned for Article 8 CRR waiver applications, applying those specifications by analogy. Finally, the ECB considers that there is no duplication, given that specifications (vi) and (ix) refer, respectively, to pre-exemption and post-exemption situations.

57. *A few respondents asked for clarification on which provisions would fall within the scope of specifications aiming to guarantee that “there are no provisions which would allow the party to withdraw from its obligations to provide support”. They pointed out that certain provisions in national legislation, for example insolvency laws, would give Authorities the power to suspend payment obligations, irrespective of the existence of such obligations in previous contracts entered into by the bank.*
58. The ECB takes note of the comment. The revised Guide clarifies that, similarly to the specifications for Article 34 of the LCR DA, this specification only refers to contractual provisions and not to legislative provisions.
59. *One respondent pointed out that not all potential intragroup counterparties are required to produce contingency funding plans. In such a case, if one of the parties is the group’s ultimate parent entity, the group contingency funding plan could be used to satisfy this specification.*
60. The comment is accepted and the revised text of the draft Addendum clarifies that, in the absence of a contingency plan at solo level for the applicant entity, the JST can take into account the group (or parent) contingency funding plan.
61. *Some respondents suggested that the ECB should allow applications for the exemption from the cap on inflows, irrespective of whether the threshold is (about to be) reached by the credit institution, in order to enable potential applicants to have some certainty regarding their liquidity management and planning.*
62. The ECB takes note of the comment. As a principle, the ECB considers that applications for exemptions in the context of Article 33(2) of the LCR DA that are not necessary in order to enable the credit institution to comply with the LCR requirement should be avoided. It also notes that the circumstances forming the basis of the ECB’s assessment on whether or not to grant the exemption may change significantly over time. The ECB therefore considers, from a prudential perspective, that the JST should assess those circumstances at the point in time where the bank is close to the threshold, as otherwise the exemption may hide other changes in the liquidity profile of the institution. In this way, the circumstances on which the decision is based will be aligned to the circumstances under which the bank will actually make use of the exemption in order to comply with the LCR requirement. However, due to the

volatility of the LCR, the ECB is prepared to consider applications from entities that, while respecting the LCR requirement at the time of the application, are close to the minimum requirement and are therefore at risk of a temporary breach. The revised text reflects this consideration.

63. *A few respondents pointed out that the ECB policy would result in only inflows from undrawn credit and liquidity facilities (off-balance-sheet items) being able to benefit from the exemption from the cap on inflows. The respondents are of the view that such a restriction is not in line with the scope of Article 33.2 LCR DA, which refers to intra-group inflows from both on- and off-balance-sheet items and does not provide for any limitations to off-balance-sheet items.*
64. The ECB accepts this comment. The Guide has been amended to clarify that inflows from both on- and off-balance-sheet items could be exempted from the cap on inflows and the scope of the exemption is not restricted to that of Article 34 of the LCR DA, which is confined to off-balance-sheet items.
65. *A few respondents asked for clarification of how the “granting [of] the exemption” may “impact the risk management systems“ of the applicant institution.*
66. The ECB takes note of the comment and the Guide has been amended accordingly. The applicant institution is expected to factor in the impact of the exemption on its liquidity risk management systems, with a view to fulfilling the requirements of Article 86 of CRD IV.
67. *One respondent asked for further clarification on the ECB’s approach to assessing an application for the exemption only (i.e. not in combination with other provisions), and in particular whether the ECB intends to consider the overall liquidity buffer requirement when deciding to exempt inflows from the cap.*
68. The ECB underscores that, also in the case of applications only for exemption from the cap on inflows, the JST must carefully assess the impact of granting the exemption on the credit institution’s overall liquidity buffer. More specifically, the ECB will consider whether the liquidity buffer requirement would be reduced to zero if the exemption were granted. It will also consider the type of inflows that would benefit from the exemption. Nevertheless, the ECB does not intend to impose a minimum amount of liquid assets on an institution that could partially offset the actual lower cap for exempted inflows. A clarification on the approach has been inserted in the final Guide.
69. *Several respondents noted that the requirement for prior approval by the ECB for substantial changes to contractual agreements giving rise to inflows is overly restrictive, considering that contractual changes may be needed for day-by-day business purposes.*
70. In the final version of the Guide, the ECB clarifies that it intends to assess ex ante only those contractual changes that might affect its overall conclusion that the inflows could be relied upon in times of stress. Changes or renewals not

having an impact on this conclusion do not need to be submitted for prior approval, even though they would need to be notified to the ECB.

## D.7 Combination of the functions of Chairperson and Chief Executive (Article 88(1)(e) CRD IV)

71. *A few respondents submitted comments to the effect that the ECB stance on the separation of the oversight and executive functions is too strict. In their opinion Article 88(1)(e) does not state that the chairman of an institution should not have executive powers. It merely prohibits one and the same person from exercising the functions of Chairman and CEO (with the aim of avoiding the concentration of power in a single person). Moreover, in the respondents' view, and pursuant to international standards and guidelines, a chairperson is allowed to have executive duties. It is considered to be best practice to separate the roles of chairman and CEO, but this does not mean that it is inappropriate to have an executive chairman. Respondents requested that the final text of the Guide refrain from stating that "the ECB considers that the separation of the executive and non-executive functions is the rule for credit institutions".*
72. *Respondents also mentioned that this CRD IV provision has been implemented in various Member States by means of legislative acts transposing the Directive and that those national legislative provisions must be respected by the ECB.*
73. The ECB takes note of the comments. The principle underlying the draft introductory sentence of Section 2, Chapter 9.3, stems from generally accepted corporate governance principles, well reflected in all EU Member States' company law frameworks: the existence of two separate and different functions for board members – executive and non-executive. This principle of separation is also enshrined in Article 88(1)(e) of CRD IV, where a distinction is expressly made between the "Chairman of the management body in its supervisory function" (non-executive functions) and "chief executive officer" (executive functions). The above principles are also in line with the Basel Standards, according to which "to promote checks and balances, the chair of the board should be an independent or non-executive board member". Therefore both Article 88(1)(e) (which is very clear in this respect) and the Basel Guidelines concur with and support the ECB's position as laid down in the draft Addendum.
74. For the reasons stated above, we therefore consider that the original draft wording is appropriate and that there is a need to separate the "executive and non-executive functions" in keeping with the current applicable legal framework. Nonetheless, we have changed the wording of that specific introductory sentence in order to take into account some of the comments mentioned above.
75. Lastly, it is worth reiterating that, as already stated in Section 1, Chapter 2, paragraph 11 of the ECB Guide on options and discretions available in Union Law, as published on 24 March 2016, the ECB always acts within the limits of applicable EU law. In particular, where the ECB Guide refers to O&Ds in

CRD IV, the ECB sets out its policy stance without prejudice to the application of national legislation transposing directives, in cases where a relevant policy choice has already been adopted in the national legislation.

## D.8 Initial Capital Requirements (Article 93.6 CRR)

76. *A few respondents mentioned that this specific option should not concern the SSM, given that it “refers only to very small institutions with very specific national circumstances” and asked for assurances that the ECB will not exercise such option for less significant credit institutions (LSIs).*
77. The ECB takes note of the comment. We agree that this option should not concern credit institutions under direct ECB supervision, also in cases of subsidiaries within significant supervised groups, and we are not aware at this stage of any cases that would suggest otherwise. Accepting the comments, we have deleted the reference to this option in Section 3 of the Guide, which includes options that are not being dealt with immediately but have only been highlighted in case of future application. This specific option will be analysed, if necessary, within the workstream dedicated to the extension of the O&Ds project to LSIs.