Template for comments

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

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<tr>
<th>Institution/Company</th>
<th>ASOCIACIÓN ESPAÑOLA DE BANCA (AEB)</th>
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<tbody>
<tr>
<td>Contact person</td>
<td>Mr/Ms</td>
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<tr>
<td>First name</td>
<td>(AEB)</td>
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<tr>
<td>Surname</td>
<td>Asociación Española de Banca</td>
</tr>
<tr>
<td>Email address</td>
<td><a href="mailto:publicpolicy@aebanca.es">publicpolicy@aebanca.es</a></td>
</tr>
<tr>
<td>Telephone number</td>
<td>00 34 91 7891311</td>
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General comments
## Template for comments

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

**ECB Guide on Options and Discretions under Union law**

Please enter all your feedback in this list.

When entering feedback, please make sure that:
- each comment deals with a single issue only;
- you indicate the relevant article/chapter/paragraph, where appropriate;
- you indicate whether your comment is a proposed amendment, clarification or deletion.

### Deadline:

midnight CET on 23 August

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| 1  | 3. Options and discretions exercised in exceptional circumstances or in support of monetary policy | 23  | Amendment | with regard to the leverage ratio, the answer to exclude certain central bank exposures from the calculation of the leverage ratio provided for in Article 429(6) of the CRR. | On September 17th 2020, the ECB made public its decision that euro area banks under its direct supervision may exclude certain central bank exposures from the leverage ratio. This decision by ECB Banking Supervision came after the Governing Council of the ECB, as monetary authority of the euro area, confirmed that there are exceptional circumstances due to the coronavirus (COVID-19) pandemic.

This is the result of the Quick Fix of CRR, new article 4. 2. of an institution may exclude the exposures listed in paragraph 1, where the institution’s competent authority has determined, after consultation with the relevant central bank, and publicly declared that exceptional circumstances exist that warrant the exclusion in order to facilitate the implementation of monetary policy.

Our question is whether the SSM as our competent authority has already consulted and got any confirmation from the rest of the central banks where we do operate as a Group, as we hold relevant claims (including reserves) on the different central banks of our footprint through our bank subsidiaries. | AEB considers that the ECB decision published on September 17th (Decision (EU) 2020/1306) specifically refers to exposures towards Eurosystem as it’s specifically referenced in the text.

With regard to the exposures listed in point (b) of Article 500(b) of Regulation (EU) No 575/2013 the determination in paragraph 1 shall apply to those exposures to Eurosystem central banks that relate to deposits held in the deposit facility or to balances held on reserve accounts, including funds held in order to meet minimum reserve requirements.

In this respect we would like to share with you our understanding on Article 500(b) and its interaction with the decision already taken. AEB considers that the scope of Article 500(b) is wider than the scope covered under the ECB decision 2020/1306.

Under Article 500(b) CRR there’s no limitation to exclude exposures outside the Eurosystem, because the term “central bank” under CRR is defined in Article 4. 48 CRR and also includes third countries.

We acknowledge that the current SSM decision is only focused on the Eurosystem but we consider that further SSM decisions are needed in order to permit cross border banks exclude positions held in third countries central banks (as CRR already permits it).

Some of our banks have made this question to their JST (on cc) and they have kindly channeled it to the relevant horizontal teams, but the answer given by the horizontal teams in our view has not been complete, as the horizontal team made reference only to the decision already taken by the SSM and they don’t make comments on further ECB/SSM decisions.

That is why we are referring this question.

We are not able to benefit fully from the provisions of the quick fix on the leverage ratio. We are convinced that the same or very similar exceptional circumstances exist in relevant third country central banks that warrant the exclusion in order to facilitate the implementation of monetary policies. | Banca Española de Banca, (AEB) | 

| 2  | 2. Chapter 1 Consolidated supervision and network of prudential requirements | 23  | Amendment | In the exceptional case that the ECB permits the exclusion of a subsidiary or of an entity in which a participation is held from the scope of consolidation, the ECB expects the participation in that subsidiary or entity to be treated as a significant investment in a financial sector entity, provided that the definition set out in Article 4. 3 of the CRR is met and its valuation is effected in accordance with the equity method, or, in cases where it would be unduly burdensome to apply the equity method, with the valuation method applicable under the relevant accounting framework. | The prudential regulatory framework requires groups of credit institutions to comply with it on a consolidated basis. This means that credit institutions, financial institutions and ancillary services undertakings that belong to a banking group are affected by this regulation and have to apply banking-level controls, no matter their activity or actual risks involved.

However, in a single consolidated group it is possible to find both subsidiaries that add financial risks or other risks that could compromise the continuity of the banking group’s operations (lending, leasing, guarantees and commitment, etc.) and others that add no risks to the group other than the mere impairment of the value of the participation in its capital activities such as advice, credit reference services.

The consolidated application of prudential requirements on those subsidiaries might limit banks’ competitiveness in an era of growing competitive pressure. While non-bank competitors, be them small branch startups or large technological companies, are only subject to activity-based regulation or are not regulated at all, banks’ subsidiaries might face difficulties in attracting and retaining talent or might incur in higher costs and time-to-market to deliver innovation as a result of bank-grade requirements for internal control, risk management or outsourcing.

Based on the above, for those subsidiaries of banking groups that do not add risks to the group other than the potential box of the investment, consideration should be given to the need to apply the proportionality principle in the application of the prudential framework, depending on the specific activity carried out by that subsidiary and the related risk. | Banca Española de Banca, (AEB) | 

| 3  | 6. Exclusion from Consolidation (Article 19(2) of the CRR) | 23  | Clarification | at cases where the credit institution plans to submit a request to the ECB for such permission | Further details regarding the application to be submitted to the ECB | Banca Española de Banca, (AEB) | 

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The ECB considers appropriate to require a fixed maturity at 2.5 years in case that
Amendment to the ECB Guide keeps the item in observing that “the ECB considers the separation of the functions of Chairman and CEO should be the rule.” A close examination reveals that such a statement is not supported by the applicable legal framework: Article 88.1.e of CRD IV stipulates that: “the chairman of the management body in its supervisory function of an institution must not exercise insubordinately the functions of a chief executive officer within the same institution, unless justified by the institution and authorized by competent authorities.”

The draft Addendum to the ECB Guide keeps the item in observing that “the ECB considers the separation of the functions of Chairman and CEO should be the rule.” A close examination reveals that such a statement is not supported by the applicable legal framework: Article 88.1.e of CRD IV stipulates that: “the chairman of the management body in its supervisory function of an institution must not exercise insubordinately the functions of a chief executive officer within the same institution, unless justified by the institution and authorized by competent authorities.”

The Basel text is unambiguous: a chair is permitted to have executive duties. Moreover, the spirit and objective of the Basel guidelines are clearly not about prohibiting a chairman to assume executive duties but about preserving an excessive concentration of power in an executive chairman.

As a general rule, a maximum period of three months should be sufficient to conclude the proposed acquisition, without excluding the possibility of an extension, in accordance with Article 22(1) of the CRR. Potential extensions will be assessed on a case-by-case basis.

As a general rule, a maximum period of six months should be sufficient to conclude the proposed acquisition, without excluding the possibility of an extension, in accordance with Article 22(1) of the CRR. Potential extensions will be assessed on a case-by-case basis.

the opinion on whether the conversion trigger under Third Country Law is equivalent to the trigger as defined in article 54.

This should be done for each jurisdiction prior to a concrete issuance and should only be relaxed in case both Regulations (CRF of Third Country Law) are amended. We believe that this process should not be performed on an ex-ante basis for each single issuance, which would delay the assessment of the eligible of the AT1 instruments. As a result of this, the Banks with important subsidiaries on third countries will have certainty on the level of the trigger under Third Country Law required in order to be eligible at consolidated level.

The draft Addendum to the ECB Guide keeps the item in observing that “the ECB considers the separation of the functions of Chairman and CEO should be the rule.” A close examination reveals that such a statement is not supported by the applicable legal framework: Article 88.1.e of CRD IV stipulates that: “the chairman of the management body in its supervisory function of an institution must not exercise insubordinately the functions of a chief executive officer within the same institution, unless justified by the institution and authorized by competent authorities.”

As a general principle, the chair of the management body should be a non-executive senior independent board member, or by having a larger number of non-executive members within the management body in its supervisory function. In particular, in accordance with Article 88.1(e) of Directive 2013/36/EU, the chair of the management body in its supervisory function of an institution must not exercise insubordinately the functions of a CEO within the same institution, unless justified by the institution and authorized by competent authorities.

Likewise, the European Banking Authority’s Guidelines on Internal Governance under Directive 2013/36/EU stipulate (under paragraphs 62-64 of those Guidelines) that “in jurisdictions where the chair is permitted to assume executive duties, the bank should have arrangements in place to mitigate any adverse impact on the bank’s checks and balances, e.g. by designating a lead board member; a senior independent board member or a similar position and having a larger number of non-executive on the board.”

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

**ECB Regulation on Options and Discretions under Union law**

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<td>1</td>
<td>Explanatory memorandum. Treatment of required central bank reserves (Article 428r(2) of the CRR).</td>
<td>Clarification</td>
<td>Further detail is sought regarding the range in which the RSF factor will be set for Central Bank reserves in third countries</td>
<td>We understand the aim of the ECB requiring a factor for the Required Central Bank reserves, nevertheless due to the high requirements of Required Central Bank reserves in some third countries, we ask you to please give further detail about the range in which this factor will be set. The Article 428r of the CRR applies a general 0% required stable funding factor to all reserves held by the institution in the ECB or in the central bank of a Member State or the central bank of a third country, including required reserves and excess reserves. From our perspective, if a factor should be applied it would be aligned with the type of asset (as it is defined in the 2015/61 Regulation) that will be deposited in the ECB or in the central bank of a Member State or third country. Furthermore, in case most of the banks constitute these reserves with cash a 0% factor should apply. Conversely, if in some countries (such as, LATAM) these reserves could be constituted with other assets, the corresponding % factor should apply.</td>
<td>Asociación Española de Banca, (AEB)</td>
<td>Publish</td>
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<td>2</td>
<td>Regulation. Whereas. (8)</td>
<td>Clarification</td>
<td>Outflows from stable retail deposits (Articles 24(4) and (5) of Commission Delegated Regulation (EU) 2015/61 and Article 13 of the ECB Regulation)</td>
<td>We are concerned with these stress scenarios that need to be presented, and with the clarifications it is conditional to obtain the waiver having evidence of the behavior of the depositors. We would like to have more information about the expectations of the ECB about this point and how to present the scenarios regarded on the regulation or if it is possible to developed others by the Group to demonstrate the stability of the accounts.</td>
<td>Asociación Española de Banca, (AEB)</td>
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Public consultation on revisions to the ECB's policies concerning the exercise of Options and Discretions (O&Ds) in Union law

ECB Guideline on Options and Discretions under Union law

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ECB Recommendation on Options and Discretions under Union law

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