



EUROPEAN CENTRAL BANK
EUROSYSTEM

Template for comments

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

Institution/Company

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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.

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Deadline: midnight CET on 23 August

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1	1. 3. Options and discretions exercised in exceptional circumstances or in support of monetary policy	5	Amendment	with regard to the leverage ratio, the waiver to exclude certain central bank exposures from the calculation of the leverage ratio provided for in Article 429a(5) of the CRR.	<p>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.</p> <p>This is the result of the Quick Fix of CRR, new article 500 b.2.: 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 policies.</p> <p>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.</p> <p>We acknowledge that the ECB decision published on september 17th (Decision (EU) 2020/1306) specifically refers to exposures towards Eurosystem as it's specifically mentioned in the text: "With regard to the exposures listed in point (b) of Article 500b(1) 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".</p> <p>In this regard we would like to share with you our understanding on Article 500b) 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 500b CRR there's no limitation to exclude exposures outside the Eurosystem, because the term "central bank" under CRR is defined in Article 4. 46 CRR and also includes third countries (46) 'central banks' means the ESCB central banks and the central banks of third countries; Central Bank definition in the CRR refers also to third countries</p> <p>In this vein 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).</p> <p>Some of our banks has 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.</p> <p>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.</p>	Asociación Española de Banca, (AEB)	Publish
2	2. Chapter 1: Consolidated supervision and waivers of prudential requirements 9. EXCLUSION FROM CONSOLIDATION (Article 19(2) of the CRR)	20	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 43 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	<p>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.</p> <p>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 risk to the group other than the mere impairment of the value of the participation in its capital (activities such as advice, credit reference service).</p> <p>The consolidated application of prudential requirements on these subsidiaries might limit banks' competitiveness in an era of growing competitive pressure. While non-bank competitors, be them small fintech 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.</p> <p>Based on the above, for those subsidiaries of banking groups that do not add risks to the group other than the potential loss 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.</p>	Asociación Española de Banca, (AEB)	Publish
3	Chapter 2 Own funds 5. DEDUCTION OF INSURANCE HOLDINGS (Article 49(1) of the CRR)	23	Clarification	in 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	Asociación Española de Banca, (AEB)	Publish

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4	Chapter 2 Own funds CALCULATION OF THE TRIGGER OF ADDITIONAL TIER 1 INSTRUMENTS ISSUED BY SUBSIDIARY UNDERTAKINGS ESTABLISHED IN A THIRD COUNTRY (Article 54(1)(e) of the CRR)	24	Clarification	The ECB intends to consider the national law of the third country or the contractual provisions governing the instruments as equivalent to the requirements set out in Article 54 of the CRR if: (i) ...; (ii) the consultation with the EBA confirms the assessment of equivalence.	We believe the ECB should proactively ask to the EBA for each jurisdiction on third countries, in order to receive the EBA 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 reviewed in case both Regulations (CRR of Third Country Law) are amended. We believe that this process shouldn't be performed on an ex-post basis for each single issuance, which would delay the assessment on 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	Asociación Española de Banca, (AEB)	Publish
5	Chapter 2 Own funds 11. REDUCTION OF ADDITIONAL TIER 1 OR TIER 2 INSTRUMENTS DURING THE FIVE YEARS FOLLOWING THEIR DATE OF ISSUANCE (Article 78(4) of the CRR)	25	Clarification	To recognise as exceptional circumstances (art 78. 4 d) the mere improvement of market conditions or reduction in the cost of the issuance as long as the old issuance is replaced by a new instruments of the same or higher quality or in case of non-replacement the capital ratios exceeds in a margin the current requirements	Provided that the relevant conditions set out in Article 78(1) of the CRR are met, the ECB intends to (i) generally permit the reduction of Additional Tier 1 or Tier 2 instruments during the five years following their date of issuance under the conditions specified in Article 78(4)(c) and (e) of the CRR; and (ii) permit the reduction of Additional Tier 1 or Tier 2 instruments during the five years following their date of issuance under the conditions specified in Article 78(4)(a), (b) and (d) of the CRR only if justified following a case-by-case assessment. Due to current low profitability of European banks, derived from ultra-low level of interest rates and the Covid crisis, the ECB should accept the reduction of the cost the issuance as an exceptional circumstance for the amortization of AT1 or T2 instruments during the first five years. The ECB should permit it without justification as long as the old issuance is replaced by other issuance of the same or higher quality. In case the old issuance were not replaced, then the ECB should required that capital and MREL ratios exceeded in a minimum margin the requirements in place for the institutions.	Asociación Española de Banca, (AEB)	Publish
6	Section II - Chapter 3 Capital Requirements	29	Amendment	The ECB considers appropriate to require a fixed maturity at 2.5 years in case that institutions have not received permission to use their own loss given default (LGD) and conversion factors for exposures to corporates, institutions or central governments and central banks. This will imply, for a given PD and LGD, a unique risk weight whatever the maturity of the exposure is, reducing consequently the risk sensitivity of the IRB formula. We think that don't allowing for the actual maturity for those exposure classes subject to the foundation approach will create a disparity in risk weighted assets. Given the absence of any internal model for the calculation of the maturity we suggest the ECB to apply the national discretion that allows to use the cash flow maturity for portfolios treated under the FIRB. The introduction of a maturity mitigation should be foreseen especially for trade finance products under the foundation approach under the following circumstances: (i) short term self-liquidating trade transactions (ii) issued as well as confirmed letters of credit that are short term.	Allowing for the effective maturity instead of the regulatory parameter set at 2.5 for exposure under the FIRB approach would lead to a more accurate risk weight of short-term exposure thanks to a better model accuracy due to the application of a parameter based on actual contracts (for which conservative assumptions are not warranted). This waiver is particularly relevant in view of the future implementation of the Basel III framework, under which all large exposure portfolios will be treated under the FIRB approach. In particular, appropriate arrangements as regards the maturity are needed in respect of the treatment of Trade finance exposures, that are typically short term and are overly penalised by the application of a 2.5 fixed maturity. Since the trade finance under the Basel III standard would already face a relevant increase of the average CCFs applied to this business, recognising a different maturity would help the business sustainability over time. Basel III allows a national discretion for the use of the effective maturity (paragraph 107) and this has been endorsed by the EBA in the Basel III CfA 5/8/2019 (Section 4.2.7. paragraphs 390-392).	Asociación Española de Banca, (AEB)	Publish
7	Chapter 10 Timeline for the assessment of proposed acquisitions of qualifying holdings	62	Amendment	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(7) of the CRD. Potential extensions will be assessed on a case-by-case basis.	As a general rule, a maximum period of three months should be sufficient to conclude the proposed acquisition	Asociación Española de Banca, (AEB)	Publish
8	Chapter 11 Governance arrangements and prudential supervision 4. COMBINING THE FUNCTIONS OF CHAIRMAN AND CEO (Article 88(1)(e) of the CRD)	63	Amendment	Related to the separation of the executive and non-executive functions: the ECB considers the separation of the functions of Chairman and CEO should be the rule	The draft Addendum to the ECB Guide keeps this item in observing that " <i>the ECB considers the separation of the functions of Chairman and CEO should be the rule.</i> " 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: " <i>the chairman of the management body in its supervisory function of an institution must not exercise simultaneously the functions of a chief executive officer within the same institution, unless justified by the institution and authorised by competent authorities.</i> " This provision is not saying that the chairman on an institution should not have executive powers. It merely prohibits one and the same person to exercise the functions of the <u>Chairman and CEO</u> (with the aim to avoiding the concentration of power in a single person). It needs to be highlighted that various Member States have implemented Article 88 CRD IV by means of legislation. The Guidelines of the Basel Committee on Banking Supervision setting the Corporate Governance principles for banks (July 2015) cannot be used either to support the general view taken in the draft Addendum. Paragraph 62 of those Guidelines acknowledges way that " <i>In jurisdictions where the chair is permitted to assume executive duties, the bank should have measures in place to mitigate any adverse impact on the bank's checks and balances, eg by designating a lead board member, a senior independent board member or a similar position and having a larger number of non-executives on the board.</i> " 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 preventing an excessive concentration of power in an executive chairman. Likewise, the European Banking Authority's Guidelines on Internal Governance under Directive 2013/36/EU stipulate (under Title II, section 4 point 36) that " <i>As a general principle, the chair of the management body should be a non-executive member. Where the chair is permitted to assume executive duties, the institution should have measures in place to mitigate any adverse impact on the institution's checks and balances (e.g. by designating a lead board member or a 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 simultaneously the functions of a CEO within the same institution, unless justified by the institution and authorised by competent authorities.</i> " These three documents convey the same message: it is best practice to split the roles of chairman and CEO, but this does not mean that it is inappropriate to have an executive chairman. As a result, the starting point which the ECB proposes adopting - i.e. that there would be a need to separate the " <i>executive and non-executive functions</i> " - is not consistent with the current applicable legal framework. The final text of the Memorandum should, therefore, restrain from stating that "the ECB considers the separation of the functions of Chairman and CEO should be the rule."	Asociación Española de Banca, (AEB)	Publish

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ECB Regulation on Options and Discretions under Union law

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1	Explanatory memorandum. Treatment of required central bank reserves (Article 428r(2) of the CRR).	Clarification	Further detail is sought regarding the range in which the RSF factor will be set for Central Bank reserves in third countries	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	Asociación Española de Banca, (AEB)	Publish
2	Regulation. Whereas: (8)	Clarification	Outflows from stable retail deposits (Articles 24(4) and (5) of Commission Delegated Regulation (EU) 2015/61 and Article 13 of the ECB Regulation)	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.	Asociación Española de Banca, (AEB)	Publish

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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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