EUROPEAN CENTRAL BANK

BANKING SUPERVISION

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
Die Deutsche Kreditwirtschaft / German Banking Industry Committee

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General comments
Unfortunately, the changes, for example to the “ECB Guide on options and discretions available in Union law”, have not been indicated. This results in avoidable additional effort for all parties involved in the consultation (consider: cost of compliance). In future ECB consultations, please provide documents in which all changes are indicated and supplemented, if applicable, by the reasons for the changes.

Template for comments

Public consultation on revisions to the ECB's polices 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

ID	Section	Page	Type of comment	Detailed comment	Concise statement as to why your comment should be taken on board	Name of commenter	Personal data
1	Section II, Chapter 1 Numbers 3 and 4	10, 11, 18	Amendment	The Guide refers at several points to “a letter signed by the parent undertaking’s CEO, with approval from the management body” (see e.g. page 21 in the context of documentation for Article 8 of the CRR). We consider this requirement to be too time-consuming operationally and believe that it should be sufficient for the relevant letters to be signed by other senior executives at the bank if the management body has given its approval. Please therefore amend the Guide accordingly.	See under Detailed comment	Glaser, Jessica	Publish
2	Section II, Chapter 1, Number 3, Capital waiver	13	Amendment	We consider the requirement to obtain written confirmation by the third country competent authority responsible for the subsidiary that there are no practical impediments to the transfer of own funds or repayment of liabilities to be unrealistic. Our understanding is that measures enacted in emergency situations can also restrict the transferability of own funds. These could also include the sort of restrictions on distribution that were enacted in light of the COVID-19 pandemic. We therefore cannot imagine that a third country competent authority will issue such a far-reaching confirmation. Article 7(3) of the CRR talks of any “material practical or legal impediment”. In our opinion, the aspect of materiality should also be taken into account when considering whether a subsidiary in a third country is at all relevant for the group’s solvency and the free transfer of capital. Subsidiaries that are immaterial for the overall assessment of the parent undertaking cannot result in any material impediments to granting a waiver. In light of this, we are asking the ECB to waive confirmation by the third country competent authority at least in the case of immaterial subsidiaries, and instead to apply the materiality of the subsidiary for the assessment of a waiver under Article 7(3) of the CRR. For assessing materiality, the same criterion could be used that currently forms the basis for reporting affiliates in template C06.00 on group solvency under Implementing Regulation (EU) 2020/451 with regard to supervisory reporting.	See under Detailed comment	Glaser, Jessica	Publish

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3	Section II, Chapter 1, Number 4, Liquidity waiver	14	Amendment	According to the Guide, the ECB does not generally intend to allow any waivers for liquidity reporting requirements. A waiver is possible only in cases in which all credit institutions belonging to the group have their registered office in the same Member State. For the institutions, creating an additional reporting requirement will involve significant effort and costs. In many cases, the benefits of a waiver lie less in the exemption from compliance with the requirements and more in the exemption from the reporting requirements. The ECB's general decision not to grant any waivers from the liquidity reporting requirements mean that much of the relief intended by the legislator will be lost. We also do not understand the restriction of potential waivers from the liquidity reporting requirements to cases in which all institutions have their registered office in the same Member State. In our view, it should really also be possible after several years of a functioning Single Supervisory Mechanism (SSM) to reflect the concept of a single internal market when granting such waivers. We are asking the ECB not to express any general opposition to granting waivers from liquidity reporting requirements and in particular to extend the scope of possible waivers to cases where all group member institutions have their registered office in Member States.	See under Detailed comment	Glaser, Jessica	Publish
4	Section II, Chapter 1, Number 4, Liquidity waiver/LCR/NSFR	15	Amendment	With regard to the requirement for contracts under Article 8(1)(c) of the CRR, the ECB imposes the condition that these cannot be terminated unilaterally by either party as long as the waiver granted by the ECB has not been revoked. We consider this requirement to be highly restrictive for cases where the sale of a subsidiary is intended. In our view, it should be possible to obtain a waiver from the liquidity requirements even if there is an intention to sell a subsidiary, and at the same time to be able to terminate the contract conditionally in the event of sale. An opening clause allowing conditional termination of the contract (e.g. in the event of sale) should be incorporated into the Guide.	See under Detailed comment	Glaser, Jessica	Publish
5	Section II, Chapter 1, Number 8, Consolidation (Article 18(7) of the CRR)	20	Amendment	For the application to apply a consolidation method different from the equity method, the ECB requires, among other things, "(ii) a qualitative and quantitative assessment of the alleged inadequate reflection of risks or undue burden if the equity method is applied" and "(iii) evidence that the alternative approach leads to a treatment that is as prudent as that resulting from the application of the equity method." We assume that such applications will generally be submitted for holdings with only very low and immaterial carrying amounts in relation to the parent undertaking. The institutions' goal is mainly to keep the effort for application of the equity method low or to avoid it altogether. In this respect, we consider the effort resulting from the ECB's requirements to be disproportionate, as it means that the institutions would have to regularly calculate the equity method (which they actually want to avoid) in order to provide the necessary evidence. In particular institutions that have already received a waiver approval for their existing holdings as at the 31 December 2020 reporting date will find it difficult to provide evidence of the (qualitatively and quantitatively) disproportionate effort involved in applying the equity method in their application for newly acquired holdings whose amounts are immaterial. To keep the operational effort from such an application low both for the banks as well as for the supervisor, we propose to focus the detailed evidence and audit requirements on cases where the aggregate amount of the relevant carrying amounts reaches a size that is relevant for the group.	See under Detailed comment	Glaser, Jessica	Publish

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6	Section II, Chapter 1; Number 9, Exclusion from Consolidation (Article 19(2) of the CRR)	20	Amendment	In our view, in Chapter 1, paragraph 9, page 20, of the present draft of the OnD Guide, the ECB goes beyond the framework conditions set out in the CRR: “In this respect, institutions, financial institutions or ancillary services undertakings which are a subsidiary or an undertaking in which a participation is held may be considered of negligible interest only with respect to the objectives of monitoring institutions when institutions are able to provide strong evidence of such negligible interest on the basis of a comprehensive assessment of all the risks stemming from these entities, and the ECB decides on a case-by-case basis that their exclusion from the scope of prudential consolidation does not and is not expected to affect the monitoring of institutions on a consolidated basis.” In our opinion, Article 19(2) of the CRR does not set out that a waiver can only be granted if an undertaking is negligible in respect of all risks at the same time, as otherwise Article 18 of the CRR would not provide for any differences in prudential consolidation methods. We therefore propose deleting “… of all the risks stemming from these entities…” and incorporating new wording along the lines of “…. of the risks that are relevant for the waiver an institution is applying for ….”. We also believe that the wording in the next sentence of the draft: “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, …” is not covered by the text of the CRR. The option to apply for a waiver under Article 19(2) of the CRR is not in any way subordinate to other options provided for in the CRR. Under n-GAAP rules, immaterial holdings are normally exempted from the consolidation requirement. In the case of larger institutions, these exemptions can quickly exceed an aggregate amount of EUR 10 million, up to which non-inclusion would be allowed Article 19(1) of the CRR even without a case-by-case decision.This will make it necessary to apply for case-by-case decisions for a large number of holdings, in each case with very low carrying amounts. We assume that divergence should only happen in cases where this is absolutely necessary. In this respect, we are asking the ECB not to generally classify a case-by-case decision under Article 19(2) of the CRR as an exception, but to consider it to be the rule. We therefore suggest deleting the word “...exceptional...”. The requirements of Article 18 of the CRR mean that there are differences in the prudential scope of consolidation for purposes of solvency, large exposures and the leverage ratio on the one hand, and for liquidity purposes (Part 6 of the CRR) on the other. To meet the requirements of Part 6 of the CRR, the undertakings referred to in paragraphs 3 to 6 of Article 18 of the CRR are not to be included in accordance with Article 18(1) of the CRR. This means that individual undertakings can be excluded from the prudential scope of consolidation for liquidity purposes, while at the same time they are included in the prudential scope of consolidation for, e.g., solvency or large exposures purposes. It should also be noted that the existing options in Article 7 and Article 8 of the CRR certainly result in distinctions when fulfilling the requirements for solvency, large exposures and the leverage ratio, as well as for liquidity purposes. In light of the different risks and the different data and process requirements for fulfilling the relevant requirements (carrying amounts v. cash flow information in the case of the LCR and AMM), we consider differences in the treatment of liquidity and other risks to be generally reasonable.	See under Detailed comment	Glaser, Jessica	Publish

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7	Section II, Chapter 2, Number 3 (Article 26(3) of the CRR)	22	Amendment	By amending Article 26(3) of the CRR, the lawmakers specifically intended to exclude subsequent issuances whose provisions are substantially the same as the provisions of issuances for which the institutions have already been granted permission from the requirement to obtain permission and to enable the direct and immediate classification of the issuances as CET1 by the institutions. In our view, however, the process now set out in the Guide (submission of the provisions governing the issuance and further declarations at least 20 calendar days before classification as CET1/classification as CET1 only if no objections are raised by the ECB) constitutes an indirect approval process. Additionally, the immediate classification of an issuance as CET1 will be impossible in particular because the documents to be submitted also include evidence that the instruments are fully paid up. This would result in a situation where classification as CET1 would be ruled out for at least 20 days after payment. We are asking the ECB to modify the “notification process” in such a way that immediate classification of subsequent issuances by the institutions as CET1 remains possible, as intended by the lawmakers. The institutions should be required to submit a notification, including the documents referred to, at the latest on initial classification as CET1. The ECB would subsequently be able at all times to object to classification as CET1. With regard to the evidence that the instrument is fully paid up, however, it should be possible in all cases to submit it at a later date.	See under Detailed comment	Glaser, Jessica	Publish
8	Section II Chapter 4, Number 5 (3) (iii)	35	Amendment	Although there has been no change to the English version (“clear commitment”), the German version was changed (previously “eindeutig zugesagt”, now “eindeutig verpflichtet”). There is no reason to change the wording in the German version if there was no change in the English version.	See under Detailed comment	Glaser, Jessica	Publish
9	Section II, Chapter 6, Number 15 (Article 428b(5) of the CRR)	55	Amendment	For a bank raising its funding mainly in its home market, lending in foreign currency – including to customers in the home country – is refinanced in the home currency while hedging the FX risk with cross-currency swaps. Both the lending activity as well as the FX hedge require stable funding in the NSFR in foreign currency terms, though this does not include funding in the home currency. We appreciate that there is no 100% NSFR limit in foreign currency, as this would prohibit the relevant lending business. Furthermore, we think that no NSFR limit in currency terms should be imposed. The ECB should nevertheless assess potential mismatches in line with Article 428b(5) points (a) and (b) and thereby consider the individual business strategy of the institution.	See under Detailed comment	Glaser, Jessica	Publish
10	Section II, Chapter 6, Number 18 (Article 428ai of the CRR)	59	Clarification	In its remarks on No. 18 in Chapter 6 (Liquidity), the ECB intends to permit the application of the simplified NSFR (sNSFR) for small subsidiaries of banking groups regulated by the ECB as well. “Where the applicant institution belongs to a group with an EU parent institution that does not meet the definition of a small and non-complex institution defined under Article 4(145) of the CRR, the ECB intends to permit the applicant institution to apply the simplified net stable funding requirement only where there is no evidence that such application would prevent the group from complying with the net stable funding requirement as defined under Chapter 1 of Title IV of Part Six of the CRR at the consolidated level.” Is this to be understood in such a way that, provided that the calculated NSFR is also > 100% when the sNSFR is applied for subsidiaries of an ECB-regulated banking group, application of the sNSFR can be made at the level of the individual institution and the sNSFR reporting items in accordance with templates C.82 and C.83 of the subsidiary can be included in the group reporting items?	See under Detailed comment	Glaser, Jessica	Publish
11	Section III Chapter 4, Number 1.	69f	Clarification	Recital (2) of the Guideline proposes removing the corresponding passage (see our comments there). How does this fit together?	See under Detailed comment	Glaser, Jessica	Publish

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ECB Regulation on Options and Discretions under Union law

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1					Glaser, Jessica	Publish

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ECB Guideline on Options and Discretions under Union law

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1	Recital (2)	Deletion	In accordance with the final sentence of Recital (2) of the ECB Guideline for LSIs, in the absence of any evidence and analysis, the general policy authorising the application of a 3% outflow rate should be removed from Regulation (EU) 2016/445 and hence from Guideline (EU) 2017/697. Instead of deletion, there should continue to be an option for credit institutions and DGSs/IPSs to manage the necessary evidence for the member institutions. The option to authorise the application of a 3% outflow rate through confirmation of the conditions by the Commission itself represents a conscious decision by the issuer of the Regulation (see Recital (13) of Regulation (EU) 2015/61), which it must now also fill with life. Additionally, the proposal to remove this passage contradicts the remarks in Section III of the ECB Guide. Chapter 4 1 (see above). Institutions that are members of a recognised IPS in accordance with Article 113(7) of the CRR should be able to provide the evidence of the outflow rate at the level of the IPS. The unrestricted transfer of liquidity between the IPS institutions is possible if the conditions set out in Article 113(7) of the CRR are met.	See under Detailed comment	Glaser, Jessica	Publish

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2	Article 6(d) in conjunction with Annex II	Clarification	The CRR does not define the term “cash clearing operations” used in Article 400(2)(d) of the CRR in more detail. A narrow definition of the term via the ECB Regulation or the ECB Guideline on O&Ds should be rejected. The functions mentioned under No. 2 (a) to (d) should be understood as exemplary, with no requirement to meet them cumulatively. Therefore, it should be clarified that the wording “including, but not limited to the following” is to be understood in this sense. We also understand the addition “but not limited to the following” to mean that it is also sufficient for the use of the exemption for network-structured institutions if the legal basis of the regional or central institution provides for the assumption of the central bank function for the institutions affiliated to the network, and the liquidity of its members is ensured via the statutes of the institutional protection scheme. The same applies with respect to Article 9(4(of the ECB Regulationin conjunction with Annex II of that Regulation.	See under Detailed comment	Glaser, Jessica	Publish

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ECB Recommendation on Options and Discretions under Union law

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