EUROPEAN CENTRAL BANK

BANKING SUPERVISION

PUBLIC CONSULTATION

Draft ECB Regulation on the exercise of options and discretions available in Union law

Draft ECB Guide on options and discretions available in Union law

Template for comments

Institution/Company

Deutsche Börse AG

Contact person

Mr ☒ Ms ☐

First name
Jürgen

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Hillen

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☐ Please tick here if you do not wish your personal data to be published.

Please make sure that each comment only deals with a single issue.

In each comment, please indicate:

- the document to which the comment refers (Regulation and/or Guide)
- the relevant article/chapter/paragraph, where appropriate
- whether your comment is a proposed amendment, clarification or deletion.

If you require more space for your comments, please copy page 2.

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Draft ECB Regulation on the exercise of options and discretions available in Union law

Draft ECB Guide on options and discretions available in Union law

Template for comments

Name of Institution/Company	Deutsche Börse AG
Country	Germany

Comments

Regulation	Guide	Issue	Article	Comment	Concise statement why your comment should be taken on board
☒	☐	Large exposure exemptions	9	Clarification	According to Article 493 paragraph 3 CRR the member states may fully or partially exempt certain exposures as also listed in Article 400 paragraph 2 CRR from the application of the exposure limit stipulated in Article 395 paragraph 1 CRR. In using this option to our understanding the conditions of Article 400 paragraph 3 may be surpassed. Member states implement such rules in a variety of ways depending on the legal framework of the different member states.

They may include some of the exemptions in the national law or another piece of national regulation (regulation, ordinance, circular etc.). This may be done in the course of the ordinary legislative process or a delegated act which potentially may be issued by the competent authority based on specific delegated powers to do so.

The decision not to use a dedicated option given may be done by explicitly excluding this choice in the legislative text (not very comment if used at all) or alternatively explicitly stating the opposite rule, mentioning the non-usage of the choice in the reasoning of the legislative proposal or by simply be quiet on the choice. Furthermore, national law may delegate the determination of the choice to the competent authority which may then execute the choice according to Article 493 paragraph 3 CRR and not based on Article 400 paragraph 2 CRR.

As a consequence of the different possibilities to exercise the option by member states it may be unclear how the documentation of the choice is to be read: Explicit choice not to use the option or a non-usage of the option.

Following that it may be unclear how Article 9 paragraph 7 of the proposed regulation and in principle consequently the whole Article 9 is to be interpreted. In our view it is more than likely that all member states have exercised in the one or the other way its option under Article 493 paragraph 3 CRR. If this is the case, most likely the core content of Article 9 of the proposed regulation is useless. Germany for example has issued a regulation to execute the options which has been implemented by the ordinary legislative

					process using both chambers of the parliament and based on an explicit rule in the banking act to issue such details in a delegated regulation. Contrary, e.g. Luxembourg has in principle delegated the powers to the competent authority which has issued in this competence a binding regulation. Any choice that would have not been taken by either Germany or Luxembourg (in the examples give above) therefore in our view would rather document that the option was exercised as being not used on purpose. It is therefore necessary to determine what situation is meant in Article 9 paragraph 7 of the proposed regulation.
☒	☐	Large exposure exemptions	9	Clarification	We cannot follow the logic of the ECB that any exercise of the option given in Article 493 paragraph 3 CRR by a member state after the proposed ECB regulation enters into force would be overruled by the ECB regulation while an exercise of the same option prior to that point in time would prevail. We clearly ask the ECB in the supporting documents to explain the legal basis for this approach.
☒	☐	Large exposure exemptions	9	Clarification	Article 400 paragraph 2 as well as Article 493 paragraph 3 CRR give the possibility to exempt all exposures listed in these paragraphs fully or partially. As such, we clearly oppose the limitation of Article 9 paragraphs 4 and 5 draft regulation which only exempt 80 % of the relevant exposure. Although we understand that different member states have partially also limited the exclusion of such exposures, we do not share this view and kindly ask the ECB to reconsider the limitations of the proposed rules.

					The level 1 text for good reasons has given the possibility for full exemptions and without a comprehensive reasoning the ECB should not limit this possibility.
☒	☐	Large exposure exemptions	9	Amendment	In relation to the detailed requirements for exposures as defined in Article 400 paragraph 2 lit. c and d CRR we understand the background and motivation of the ECB to formulate additional requirements. However, the wording of Article 9 paragraph 2 is duplicating the relevant “undertakings” by (1) referring to the undertakings as stated in Article 400 paragraph 2 lit. c and (2) explicitly naming them in addition. As such, the wording of the text should be reconsidered and shortened in order to avoid duplication of content (see proposal below). “2. The exposures listed in Article 400(2)(c) of Regulation (EU) No 575/2013 incurred by a credit institution to the undertakings referred therein shall be fully exempted from the large exposures limit established by Article 395(1) of that Regulation, provided that the conditions set out in Article 400(3) of that Regulation, as further specified in Annex I to this Regulation, are fulfilled."
☒	☐	Exposures towards national central banks	12	Amendment	Institutions in general will not have exposure towards the ECB directly but towards the national central banks of the Eurosystem. As such, the reference in Article 12 paragraph 2 lit. a of the draft ECB regulation seems to be misleading. In order to clarify and to be precise we recommend adjusting the wording by replacing “exposures to ECB” with “exposures to national banks of the Eurosystem”.
☒	☐	Identification of major	13	Amendment	Article 12 paragraph 1 lit. c point i sentence 1 of the delegated

		stock indices		regulation (EU) 2015/61 determines that the competent authorities may identity major stock indices in its countries. Article 13 of the draft regulations determines the usage of such indices as identified by the competent authorities (only). However, according to Article 12 paragraph 1 lit. c point i sentence 2 of the delegated regulation (EU) 2015/61, institutions may determine on their own major stock indices in any jurisdiction in the absence of an identification of such an index by the relevant authority. The proposed wording of the draft regulation in our view is excluding such own assessment and therefore limiting the rights of the institution without a suitable legal basis to do so. As such, the respective rights of the institutions need to be retained by an appropriate wording (e.g. “sentence 1” could be inserted in the reference to the delegated act).
☐	☒	Signature requirements on the requests for a waiver according to Article 7 paragraph 1 and 3 CRR	Amendment	(chapter 1, point 3, page 8 and 9 of the proposed guide) Corporate law in the member states varies as the legal form of institutions does. In addition, some member states recognise in principle all members of the management body (split in the different roles as executive or supervisory members) equally. Consequently, there is no unique role implemented of a leader of the executive management or CEO. Furthermore, there is no definition of a “CEO” in CRD IV / CRR or the related level 2 legislative texts. As such, we clearly propose to replace the signature needs by the CEO / CEOs with the signature needs of two members of senior management (as defined in Article 3 paragraph 1 No. 9 CRD IV).
☐	☒	Intragroup liquidity flows – relationship between LCR usage	Amendment	(chapter 1, point 3, page 8 and 9 of the proposed guide) In the three named paragraphs, there is always a requirement to

		and usage of national quantitative liquidity measures and resulting consequences		have fulfilled the LCR on a stand alone and consolidated level for at least one year. This however, is derived in two alternative scenarios. It is unclear to us, why (a) first a reference to the applicability of the LCR as such is made and (b) alternatively national liquidity requirements are taken as a starting point to derive to the same conclusion. We kindly ask to reconsider the formulation as the sense of the reference to the national requirement is totally unclear. Potentially, the second alternative is targeted to “(b) where instead of the LCR national liquidity requirements ONLY are in place,…”?
☐	☒	Risk and audit committee	Amendment	(chapter 9, point 3, page 34) The size of the management body and the dedicated functions of individual bodies including (sub-) committees are dependent to some degree of the national company law. In a two tier structure, the requested committees of CRD IV are in principle committees of the management body in its supervisory function or supervisory board. The size of such boards may be very small and according to national law only members of the board can be members of any sub-committee. In addition, the minimum size of any committee may be given. In Germany for example the national law requires a supervisory board of at least three members for a stock corporation (§ 95 AktG). In addition, the same requirement hold true for any (sub-) committee of the supervisory board. Thus, in the case of a small

				supervisory board, any committee arising from the supervisory board would consist of the same members of the supervisory board. Member states have to incorporate the rules of CRD IV as this is a directive and not a regulation. As such, the member states are free in defining in the law or in the interpretations of its law guidelines if and when they regard the need to implement (sub-) committees as being fulfilled. As such, national law may not require any (sub-) committee as long as the overall size of the supervisory board is small and the matters designated to be dealt with in (sub-) committees are discussed and decided upon in the supervisory board as a whole. In case national law does under the conditions named above not require any committee at all, ECB in our view cannot legally ask to implement even a separate risk and audit committee. As such, ECB should consider setting a caveat for such situations in its guide.
☒	☒	Translations of the draft regulation and draft guide	Amendment	Beside our comments above we kindly ask to review the translated versions of the documents to ensure a correct and reliable application. For example a “CEO” can not be translated into German with “Leiter” with the same meaning (this would be possibly a “Vorstandsvorsitzender” or “Sprecher des Vorstandes” which are two distinct solutions only for stock corporations in Germany not to talk about different legal forms of a company and shows the difficulty with the term “CEO” also form a language perspective). In addition "without prejudice” (Articles 16 to 23 and 25) is translated mistakable with “unbeschadet”.
☐	☐		Choose one option	

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16 December 2015

Public Consultation on harmonising the exercise of options and discretions in Union law

FAC / JH

Dear Madam or Sir,

Deutsche Börse Group (DBG) welcomes the opportunity to comment on the "Draft ECB Regulation on the exercise of options and discretions available in Union law" and the "Draft ECB Guide on options and discretions available in Union law" issued on 11 November 2015.

DBG is operating in the area of financial markets along the complete chain of trading, clearing, settlement and custody for securities, derivatives and other financial instruments and as such mainly active with regulated Financial Market Infrastructure (FMI) providers.

Among others, Clearstream Banking S.A., Luxembourg, and Clearstream Banking AG, Frankfurt/Main, who act as (I)CSD as well as Eurex Clearing AG as the leading European Central Counterparty (CCP), are also credit institutions and are therefore within the scope of the European Capital Requirements Directive (CRD) and Capital Requirements Regulation (CRR). The Clearstream subgroup is supervised on a consolidated level as a financial holding group. Currently, none of our group entities are designated as significant and under direct supervision of the ECB. Nonetheless and as we see this draft regulation and guide as a possible precedent for following legal initiatives, we use the opportunity to provide our feedback on the proposed regulation and guide.

1. General comments

In general, we support the approach of the ECB to foster the harmonisation of supervisory practices and the establishment of a level playing field within the SSM area, in order to preserve financial stability and integration of the banking system. Overall, we agree with the chosen determinations of certain discretions and options.

Regardless of our general support on unified rules wherever possible, we nevertheless want to point out that in order to facilitate the dealing with institutions of different sizes and different business models (e.g. the specialised business activities of the FMIs within our group) an adequate level of proportionality needs to be considered and some room for discretion should be kept to the competent authorities.

Beside our general support of the ECB proposal, we do want to point out that any legal text (i.e. the proposed regulation) or regulatory guideline (i.e. the proposed guide) needs to be clear and precise in its content and wording. As such, we do want to raise a few aspects and comments mainly related to some inconsistencies in and lack of clarity of the proposed regulation and guide in the following which we have also summarised in the requested and enclosed consultation template. Due to the short consultation period our arguments may not be presented to a full extent and not with all details considered. As such, we kindly ask to see our comment also in the context of the arguments stated in the public hearing and are happy for further discussion if deemed useful.

2. Comments on the draft regulation

a) Large exposure exemptions – Article 9 draft regulation

According to Article 493 paragraph 3 CRR the member states may fully or partially exempt certain exposures as also listed in Article 400 paragraph 2 CRR from the application of the exposure limit stipulated in Article 395 paragraph 1 CRR. In using this option to our understanding the conditions of Article 400 paragraph 3 may be surpassed.

Member states implement such rules in a variety of ways depending on the legal framework of the different member states. They may include some of the exemptions in the national law or another piece of national regulation (regulation, ordinance, circular etc.). This may be done in the course of the ordinary legislative process or a delegated act which potentially may be issued by the competent authority based on specific delegated powers to do so.

The decision not to use a dedicated option given may be done by explicitly excluding this choice in the legislative text (not very comment if used at all) or al-

ternatively explicitly stating the opposite rule, mentioning the non-usage of the choice in the reasoning of the legislative proposal or by simply be quiet on the choice. Furthermore, national law may delegate the determination of the choice to the competent authority which may then execute the choice according to Article 493 paragraph 3 CRR and not based on Article 400 paragraph 2 CRR.

As a consequence of the different possibilities to exercise the option by member states it may be unclear how the documentation of the choice is to be read: Explicit choice not to use the option or a non-usage of the option.

Following that it may be unclear how Article 9 paragraph 7 of the proposed regulation and in principle consequently the whole Article 9 is to be interpreted. In our view it is more than likely that all member states have exercised in the one or the other way its option under Article 493 paragraph 3 CRR. If this is the case, most likely the core content of Article 9 of the proposed regulation is useless. Germany for example has issued a regulation to execute the options which has been implemented by the ordinary legislative process using both chambers of the parliament and based on an explicit rule in the banking act to issue such details in a delegated regulation. Contrary, e.g. Luxembourg has in principle delegated the powers to the competent authority which has issued in this competence a binding regulation.

Any choice that would have not been taken by either Germany or Luxembourg (in the examples give above) therefore in our view would rather document that the option was exercised as being not used on purpose.

It is therefore necessary to determine what situation is meant in Article 9 paragraph 7 of the proposed regulation.

Furthermore, we cannot follow the logic of the ECB that any exercise of the option given in Article 493 paragraph 3 CRR by a member state after the proposed ECB regulation enters into force would be overruled by the ECB regulation while an exercise of the same option prior to that point in time would prevail. We clearly ask the ECB in the supporting documents to explain the legal basis for this approach.

Beside our request of clarification on the applicability of Article 9 as a whole and especially of the conditions set in Article 9 paragraph 7 of the draft regulation, we also want to comment on the content of Article 9 paragraphs 1 to 6:

- Article 400 paragraph 2 as well as Article 493 paragraph 3 CRR give the possibility to exempt all exposures listed in these paragraphs fully or partially. As such, we clearly oppose the limitation of Article 9 paragraphs 4 and 5 draft regulation which only exempt 80 % of the relevant exposure.

Although we understand that different member states have partially also limited the exclusion of such exposures, we do not share this view and kindly ask the ECB to reconsider the limitations of the proposed rules. The level 1 text for good reasons has given the possibility for full exemptions and without a comprehensive reasoning the ECB should not limit this possibility.

- In relation to the detailed requirements for exposures as defined in Article 400 paragraph 2 lit. c and d CRR we understand the background and motivation of the ECB to formulate additional requirements. However, the wording of Article 9 paragraph 2 is duplicating the relevant "undertakings" by (1) referring to the undertakings as stated in Article 400 paragraph 2 lit. c and (2) explicitly naming them in addition. As such, the wording of the text should be reconsidered and shortened in order to avoid duplication of content (see proposal below).

  "2. The exposures listed in Article 400(2)(c) of Regulation (EU) No 575/2013 incurred by a credit institution to the undertakings referred therein shall be fully exempted from the large exposures limit established by Article 395(1) of that Regulation, provided that the conditions set out in Article 400(3) of that Regulation, as further specified in Annex I to this Regulation, are fulfilled ~~and insofar those undertakings are institutions, financial institutions subject to appropriate prudential requirements, parent financial holding companies, parent mixed financial holding companies, ancillary service companies, insurance undertakings, re-insurance undertakings or insurance holding companies, covered by the same supervision on a consolidated basis in accordance with Regulation (EU) No 575/2013, Directive 2002/87/EC of the European Parliament and of the Council, or with equivalent standards in force in a third country, as further specified in Annex I to this Regulation~~."

b) Article 12 paragraph 2 lit. a draft regulation

Institutions in general will not have exposure towards the ECB directly but towards the national central banks of the Eurosystem. As such, the reference in Article 12 paragraph 2 lit. a of the draft ECB regulation seems to be misleading. In order to clarify and to be precise we recommend adjusting the wording by replacing "exposures to ECB" with "exposures to national banks of the Eurosystem".

c) Article 13 draft regulation

Article 12 paragraph 1 lit. c point i sentence 1 of the delegated regulation (EU) 2015/61 determines that the competent authorities may identity major stock indices in its countries. Article 13 of the draft regulations determines the usage of

such indices as identified by the competent authorities (only). However, according to Article 12 paragraph 1 lit. c point i **sentence 2** of the delegated regulation (EU) 2015/61, institutions may determine on their own major stock indices in any jurisdiction in the absence of an identification of such an index by the relevant authority. The proposed wording of the draft regulation in our view is excluding such own assessment and therefore limiting the rights of the institution without a suitable legal basis to do so. As such, the respective rights of the institutions need to be retained by an appropriate wording (e.g. "sentence 1" could be inserted in the reference to the delegated act).

3. Comments on the draft guide

a) Signature requirements on the requests for a waiver according to Article 7 paragraph 1 and 3 CRR (chapter 1, point 3, page 8 and 9 of the proposed guide)

Corporate law in the member states varies as the legal form of institutions does. In addition, some member states recognise in principle all members of the management body (split in the different roles as executive or supervisory members) equally. Consequently, there is no unique role implemented of a leader of the executive management or CEO. Furthermore, there is no definition of a "CEO" in CRD IV / CRR or the related level 2 legislative texts. As such, we clearly propose to replace the signature needs by the CEO / CEOs with the signature needs of two members of senior management (as defined in Article 3 paragraph 1 No. 9 CRD IV).

b) Intragroup liquidity flows – relationship between LCR usage and usage of national quantitative liquidity measures and resulting consequences (chapter 5, point 4 and 5, page 25, 27 and 28 of the proposed guide)

In the three named paragraphs, there is always a requirement to have fulfilled the LCR on a stand alone and consolidated level for at least one year. This however, is derived in two alternative scenarios. It is unclear to us, why (a) first a reference to the applicability of the LCR as such is made and (b) alternatively national liquidity requirements are taken **as a starting point to derive to the same conclusion**.

We kindly ask to reconsider the formulation as the sense of the reference to the national requirement is totally unclear.

Potentially, the second alternative is targeted to "(b) where **instead of the LCR** national liquidity requirements **ONLY** are in place,…"?

c) Risk and audit committee (chapter 9, point 3, page 34)

The size of the management body and the dedicated functions of individual bodies including (sub-) committees are dependent to some degree of the national company law. In a two tier structure, the requested committees of CRD IV are in principle committees of the management body in its supervisory function or supervisory board. The size of such boards may be very small and according to national law only members of the board can be members of any sub-committee. In addition, the minimum size of any committee may be given.

In Germany for example the national law requires a supervisory board of at least three members for a stock corporation (§ 95 AktG). In addition, the same requirement hold true for any (sub-) committee of the supervisory board. Thus, in the case of a small supervisory board, any committee arising from the supervisory board would consist of the same members of the supervisory board.

Member states have to incorporate the rules of CRD IV as this is a directive and not a regulation. As such, the member states are free in defining in the law or in the interpretations of its law guidelines if and when they regard the need to implement (sub-) committees as being fulfilled. As such, national law may not require any (sub-) committee as long as the overall size of the supervisory board is small and the matters designated to be dealt with in (sub-) committees are discussed and decided upon in the supervisory board as a whole. In case national law does under the conditions named above not require any committee at all, ECB in our view cannot legally ask to implement even a separate risk and audit committee. As such, ECB should consider setting a caveat for such situations in its guide.

d) Translations of the draft regulation and draft guide

Beside our comments above we kindly ask to review the translated versions of the documents to ensure a correct and reliable application. For example a "CEO" can not be translated into German with "Leiter" with the same meaning (this would be possibly a "Vorstandsvorsitzender" or "Sprecher des Vorstandes" which are two distinct solutions only for stock corporations in Germany not to talk about different legal forms of a company and shows the difficulty with the term "CEO" also form a language perspective). In addition "without prejudice" (Articles 16 to 23 and 25) is translated mistakable with "unbeschadet".

***

We hope our comments are seen as a useful contribution to the discussion and will be considered in future issuances.

Yours faithfully,

Jürgen Hillen
Executive Director

Ralph Kowitz
Consultant