European
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EBF COMMENTS ON THE ECB PUBLIC CONSULTATION ON OPTIONS AND DISCRETIONS

I. GENERAL COMMENTS

1. The ECB Review & the Single Rulebook

- Three Rulebooks instead of one Single Rulebook

The European Banking Federation has always been of the opinion that achieving regulatory harmonisation across the EU is essential for a Single Market in financial services as it contributes to promoting a level playing field amongst institutions and reducing the administrative burden incumbent on institutions providing financial services on a cross-border basis. Moreover, neither financial stability nor investor confidence within the EU are being served by the legal complexity resulting from the possible co-existence of differing regulatory frameworks applicable to banks. Moreover, as the ECB is well aware, managing the ensuing complexity also involves a huge administrative burden for banks.

The EBF, therefore, strongly welcomes the initiative that the ECB has taken to engage into a basic review of the various options and national discretions which have been included in the Directive 2013/36/EU and EU Regulation n° 575/2013. The EBF also fully supports the initiative taken to also address options and discretions included in Level 2 legislation. The various proposals made by the ECB represent a welcome leap forward towards harmonising supervisory practices within the SSM zone.

At the same time, however, the consequence of the proposals is that the Single Rulebook which the CRR aimed to introduce would now be transformed in three separate Rulebooks, i.e. one for significant banks in the SSM-zone, another for non-significant banks within the SSM-zone, and one for EU banks outside the SSM-zone.

This fragmentation goes against what the EU legislator has wished to achieve.

- Non-significant banks from the SSM-zone need to be included in the scope of the proposals

We note that the scope of the proposals is restricted to significant banks only.

Because of the short deadline set for responding to the consultation, time did not allow us to carefully examine if, in doing so, the proposals are in line with the Principle of Equality before the Law, which is one of the fundamental principles of EU Law. It requires that comparable situations are not treated in a different manner unless the difference in treatment is objectively justified. We note that the proposals introduce a range of competitive distortions in favour and/or against significant institutions in a wide range of circumstances without any justification whatsoever being provided. The ECB proposals are in any event a radical departure from a long-standing strategy pursued by the EU Commission since the first Banking Directive according to which all banks must, in principle, be made subject to identical rules.

Therefore, the EBF strongly believes that it would be appropriate to issue Instructions to NCAs with a view to harmonising the exercise of O&Ds between significant and less significant banks

- <u>Steps need to be taken to make sure that the proposals are extended to banks from the non SSM-zone</u>

The EBF notes that the ECB is only authorised to exercise options and national discretions in respect of the banks which it supervises, i.e. SSM banks. As an inevitable consequence, its proposals result in introducing disparities in supervisory practices between participating and non-participating EU member states and, therefore, in creating a divide between banking groups of which the head offices are established within the SSM zone and those outside the SSM zone.

Against this backdrop, the EBF would like to strongly encourage the ECB to invite the European Commission to take an initiative aiming at increasing convergence across the EU with regards to the national options and discretions which have been included in the Directive 2013/36/EU and EU Regulation n° 575/2013, either by means of a Proposal for a Regulation or by conferring to the European Banking Authority a mandate to issue Guidelines in this respect.

- <u>Legal basis</u>

We would like to recall that all EU institutions, including the ECB, have a duty to state the reasons on which their legal acts are based (Article 296(2) TFEU). When elaborating legal acts, EU institutions shall also ensure constant respect for the general principles of European law, especially the principle of proportionality and the principle of legal certainty.

We do question the review of proportionality made by the ECB when drafting the proposed measures as it appears clearly that some measures are excessive in respect of the objectives pursued.

Additionally, we consider that the legal basis of the proposed measures is questionable. The present initiative of the ECB, in particular the draft Regulation, is based on Article 4.3 of the Council Regulation No 1024/2013 of 15 October 2013 which confers specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions ("SSM Regulation"). It provides that "the ECB may [also] adopt regulations only to the extent necessary to <u>organise or specify the arrangements for the carrying out of the tasks</u> conferred on it by this [SSM] Regulation". The SSM Regulation provides also explicitly that the ECB shall apply all relevant Union law for the purpose of carrying out the tasks conferred on it by the SSM Regulation. We note however that some provisions of the ECB proposed regulation would amend the CRR by imposing additional requirements on credit institutions (as demonstrated below). Therefore we question the appropriateness and the sufficiency of the legal basis on which the ECB supports its action since the proposed regulation goes partly beyond the objective of organizing or specifying the arrangement for the carrying out of its tasks.

2. The ECB Review & the Freedom of Establishment and the Free Movement of Capital

The EBF welcomes in particular that the ECB has seized its review of existing national options and discretions as an opportunity to lift, as a matter of principle, those regulatory obstacles which result in creating an artificial divide between banking groups within the Banking Union today merely on the ground that they have established entities in different countries across the SSM zone. Operating a distinction between banking groups merely on the basis of the location of the entities which it has set up in the SSM zone, would have contravened the objectives and principles which has been enshrined in the EU Treaties.

This is a crucial step towards achieving financial integration within the EU. However, we note that the proposals made in this regard are far too modest.

a) Liquidity Waivers

The proposals made in respect of liquidity waivers at cross-border level are too stringent in requiring that significant sub-entities or significant groups of sub-entities in one Member State maintain in that Member State 75% of the level of HQLA that would be required in order to comply with the fully phased-in LCR Requirements at the solo or sub-consolidated level (see p 12 of the proposed Guidance). Furthermore, the LCR reporting at solo level will be maintained and is not in the scope of this « waiver ». The ECB contemplates reducing the ring-fencing to 50% at the latest in 2018 in light of the evolution of the banking union.

The ECB proposals are not justified.

- They assume that only a limited (i.e. 25%) part of the Banking Union will be completed in the next three years. This is a very pessimistic assumption considering the significant progress made so far and the recent proposal of the European Commission for a European Deposit Insurance Scheme (EDIS) as the third pillar of the Banking Union. The Commission has also published a comprehensive action plan for “further reducing risk in the Banking Union” by implementing TLAC requirements in the EU, amending the CRR following the discussions within the Basel Committee, enhancing convergence of national insolvency laws, etc.

- They substantially reduce the attractiveness of a cross-border waiver. Moreover, it creates trapped liquidity and thus strongly contradicts the general idea of a liquidity waiver. Furthermore, the requirement puts SSM banks at a disadvantage compared to banks from other jurisdictions which do not impose such requirements thus endangering a level playing field.

- They implicitly provide banking groups which manage their liquidity centrally with an incentive to convert their significant subsidiaries (eligible to the limited LCR waiver) into branches (in most cases not subject to the LCR requirements at solo level)

- By requiring that 75% of the level of HQLA should be maintained in the Member State where significant sub-entities or significant groups of sub-entities are situated, they contravene Article 63.1 of the Treaty of the Functioning of the European Union according to which all restrictions on the movement of capital between Member States are prohibited.

  If it is considered that such a restriction can be justified in the light of overriding reasons, those reasons must be duly stated and documented. As the EU Commission has carefully explained," *requirements having restrictive effects on capital flows cannot be considered per se as breaches of Article 63 when they are not discriminatory, and are duly justified for prudential purposes, suitable for securing the objective they pursue and proportionate to that objective.*"[1]. This means that any decision introducing restrictions to the free flow of capital needs to be motivated to allow judicial authorities to assess if the proposed restriction is indeed suitable for securing the objective that the requirement pursues or if the requirement is indeed proportionate to that objective. Yet, we note that the draft Guidance does not give any reason to the proposed requirements whereas it appears to be clearly excessive considering the objectives pursued and, therefore, non-compliant with the Principle of Proportionality.

In light of the above, we urge the ECB to review its position on LCR waivers at cross-border level.

b) Exemption of intra-group exposures (Articles 400(2) and 113(6) CRR)

- Introduction

It is worthwhile highlighting that intra-group exposures should be seen in conjunction with liquidity topics. The free movement of funds (capital and liquidity) is one of the pillars underpinning the viability and the structural and functional operability of banking groups. Moreover, it is a basic condition to achieve a credible application of the Recovery and Resolution Plans of many banks especially those organised under an SPE. Many banking groups are managed on the basis of a "Regional Liquidity Center" principle, implying that not all the entities are self-sufficient in terms of liquidity, with the main regional liquidity hubs providing the needed funding to their respective subsidiaries and the parent companies, in order to reach an efficient liquidity pooling at group level.

The advent of the Banking Union actually resulting in a single supervision and resolution mechanisms, moves the focus on Banking Groups supervised and resolvable on consolidated

[1] European Commission, Legal Obstacles to the Free Movement of Funds between Institutions within a Single Liquidity Sub-Group, Report from the Commission to the European Parliament and the Council (COM 2014/327final, 5 June 2014. See: http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-327-EN-F1-1.Pdf

level instead of supervision and resolvability based on an approach where solo supervision and resolution stand in the focus. Such an approach implies a free flow of capital and liquidity as per the EU Commission's objective[2].

- Large exposures limit (Article 400(2) CRR)

Article 9(2) of the draft Regulation and its Annexes specify the conditions for full exemption of intra-group exposures from Large Exposures requirements. It is not clear from this Article how the ECB will treat partial or full exemptions already-granted by national competent authorities. The ECB should assess carefully the impact of retroactive effect of these exemptions on the funding model of cross border institutions as alluded to above.

We are of the opinion that the conditions laid down in Article 9(2), while it may be envisaged for extra-SSM exposures though drastic, contradict the core principle of free flow of capital and liquidity within the SSM. A full exemption should be automatically granted for intra-group intra-SSM exposures, with the possibility for the ECB to oppose this exemption in case it is deemed inappropriate or misleading as far as the supervision of the institution is concerned. However, such refusal should be treated as an exception.

It should in any event be clearly stated that institutions already benefiting from a full or partial exemption which would be challenged by the ECB considering that these institutions do no satisfy the conditions, these institutions should be granted a sufficient time period to address deficiencies objected while still benefiting from the exemption already in place.

Article 9(7) should make clear that in the case that a Member State has exercised the option under Article 493(3) and the law of this Member State entrusts the national competent authority with supervisory discretion, this supervisory discretion shall be exercised by the ECB. Therefore the following wording should be added to Article 9(7): "Where an option under Article 493(3) of Regulation (EU) No 575/2013 is exercised by a Member State the ECB will apply the national law and hereby exercise any discretion that such national law grants to competent authorities."

- Risk weightings (Article 113 (6) CRR)

We are surprised to note that the consultation has not addressed the option provided for in Article 113(6) CRR.

Article 113 of the CRR disciplines the application of risk weights on the basis of the exposure class and credit quality of the exposure itself in order to calculate the risk-weighted exposure amounts. Its paragraph 6 provides the competent authorities with the power to authorise an institution to apply a risk weight of 0% to exposures (with the exception of exposures giving rise to Common Equity Tier 1, Additional Tier 1 or Tier 2 items) if its counterparty is its parent undertaking, its subsidiary, a subsidiary of its parent undertaking or a "related undertaking"[3].

[2] Ibidem.
[3] I.e. an undertaking linked by a relationship within the meaning of Article 12(1) of Directive 83/349/EEC.

Such authorisation can be provided only if the following conditions are satisfied:

a) the counterparty is an institution, a financial holding company or a mixed financial holding company, financial institution, asset management company or ancillary services undertaking subject to appropriate prudential requirements;
b) the counterparty is included in the same consolidation as the institution on a full basis;
c) the counterparty is subject to the same risk evaluation, measurement and control procedures as the institution;
d) the counterparty is established in the same Member State as the institution;
e) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities from the counterparty to the institution.

Whether the application of waivers at Member State (MS) level in the context of the new Banking Union remains appropriate, should be carefully contemplated. In fact, if the discretion is extended to exposures within the Union – instead of being restricted only to exposures within the same country - it will go in the same sense of the free movement of funds.

Moreover, the interlinks of Article 113 (6) CRR with other concerned pieces of regulation need to be considered as well.

- Article 33 of the Liquidity Coverage Ratio Delegated Act which states that inflows should be capped at 75% (the denominator) makes an explicit reference to Article 113, (6), CRR. It allows for intragroup flows to be fully or partially exempted from the inflows cap provided that, amongst others, the requirements set out in Art. 113(6) CRR are fulfilled: the counterparty must be established in the same Member State as the institution.

- In relation to the Leverage Ratio, the Leverage Ratio Delegated Act amending Article 429 (7) CRR, confers to competent authorities the option to permit institutions not to include in the "exposure measure" (the denominator) certain exposures which can benefit from the treatment laid down in Article 113 (6). Competent authorities may grant that permission only where all the conditions set out in Article 113 (6) are met. According to Article 113 (6) subparagraph (d), one of such conditions is that the counterparty of the institution is established in the same Member State as the institution itself. The condition in subparagraph (d) penalises cross-border banking groups since a large amount of their exposures belongs to counterparties which are certainly not established in the same Member State as the parent undertaking institution. Hence, while Article 8 CCR allows to derogate from the application of liquidity requirements on an individual basis when an entity (all or some of its subsidiaries in the Union) is seen as a single liquidity sub-group, risk-weighted assets rules provide the same possibility only on a limited basis (i.e. provided they are based in the same country).

The ECB should interpret the condition provided for in Article 113 (6) letter d) and the delegated acts described above - requiring that in order to apply a zero risk weighting to intragroup exposures the counterparty is established in the same Member State as the institution - as applying also to situations in which both the counterparty and the institution are under the jurisdiction of the same resolution and supervisory authority.

3. The ECB Review & the Principle of the Protection of Legitimate Expectations

The EBF is satisfied to note that the ECB proposals have considered the principle of the protection of legitimate expectations (hereafter referred to as “the Principle”) which is part of the legal order of the European Union and which aims to ensure that the situations and legal relationships governed by European law remain foreseeable.

We note, however, that the proposals did not take the Principle sufficiently into account. Our understanding is that the Principle provides institutions in particular with protection whenever transitional arrangements are concerned which have been made public and on which banks have relied in good faith when determining their capital planning – irrespective whether those arrangements flow from European or national legislation of from an administrative decision taken by a competent authority directly on the basis of the CRR.

We consider that such transitional arrangements can in any event not be revoked for a reasonable period. Against this backdrop, the EBF recommends:

1) to remove the various provisions which maintain stricter national rules for transitional O&Ds, and to harmonise instead the transitional O&Ds by accepting as a rule that application will be made of the (most favourable) treatment provided for in the transitional arrangements which have been incorporated in the CRR.

2) to maintain the permission not to deduct equity holdings in insurance undertakings (Article 18 of the Draft Regulation) until December 2022.

3) to maintain, if the bank is requesting it, the non-inclusion/non-deduction of unrealised gains and losses on exposures to central governments classified as AFS, in those Member States where it was decided prior to 1 January 2014 to not to include AFS gains/losses from central government exposures on CET1 Capital following Article 467 (2) CRR.

4) to maintain the possibility given to credit institutions to add to their Common Equity Tier 1 capital the amount referred to in Article 473 (1) CRR multiplied by the applicable factor foreseen in this Article until the the coming into force of the International Financial Reporting Standard replacing IAS 39.

5) to consider maintaining the existing national provisions on DTA that rely on future profitability (Article 21 (2) and (3) of the Draft Regulation) for the next three budget years and require a 100% deduction only from budget year 2019.

II. SPECIFIC COMMENTS

A. DRAFT REGULATION

ARTICLE 4 – DEFAULT OF AN OBLIGER (Article 178 (1) CRR)

It would be appropriate providing for a transitionary period to allow banks to adapt their models and systems. This period should allow a consistent integration of all the regulatory initiatives and supervisory guidance outcomes, on-going or still in preparation[4], in the models of institutions without a need to re-work and adapt continuously.

It needs to be highlighted that the EBA has launched a consultation on the application of the definition of default (Art. 178 of CRR). As a consequence, it would seem appropriate for the ECB to conform any decision which the ECB would take in this regard to the outcome of this consultation process, also in respect of transition periods.

ARTICLE 9 – EXEMPTIONS TO THE LARGE EXPOSURES REGIME (Annexes I & II to Article 400(2) CRR)

- Both Annexes stipulate that the ECB may request a legal opinion approved by the management body demonstrating that there are no obstacles that would hinder the timely repayment of exposures by a counterparty, a regional or a central body to the credit institution arising from either applicable regulations, including fiscal regulations or binding agreements.

  It is, however, a generally accepted and elementary principle of law that it is impossible to provide positive evidence of a negative fact. The General Court of the EU has decided that the principle of *actori incumbit probatio* precludes a party from having the burden of proving purely negative facts.[5]

  Furthermore, the EU Commission[6] has already examined the issue recently to conclude that its "review has not revealed relevant legal obstacles that would prevent institutions from entering into contracts that provide for the free movement of funds between them within a single liquidity sub-group."

  Moreover, requiring such a legal opinion does not seem relevant, and by imposing such a requirement, the ECB imposes additional conditions which go beyond the CRR provisions.

ARTICLE 11 – LIQUIDITY OUTFLOWS - 5% OUTFLOW RATE FOR TRADE FINANCE OFF-BALANCE SHEET ITEMS ("TF OBS ITEMS") (Article 420(2) CRR & Article 23 (2) Commission Delegated Regulation)

- **The proposed 5% outflow rate is too high**

[4] E.g. Draft RTS on the definition of default issued by the EBA, September 2015; Discussion paper "The future of the IRB Approach" issued by the EBA, march 2015; BCBS consultative document on the design of a framework based on standardised approaches; Model Quality Review by the ECB.

[5] General Court, 10 May 1990, Paul F. Sens v. Commission T-117/89.

[6] European Commission, Legal Obstacles to the Free Movement of Funds between Institutions within a Single Liquidity Sub-Group, Report from the Commission to the European Parliament and the Council (COM 2014/327final, 5 June 2014.

Article 23 (2) of the Commission Regulation provides competent authorities with an option in this regard: they may apply an outflow rate of up to 5% for TF OBS items.

We strongly oppose the ECB proposal to apply the foreseen maximum 5% outflow rate. It would be more appropriate applying an outflow rate of 0% instead considering that off-balance sheet trade finance products, are mainly technical guarantees (bid bonds, performance bonds, tender bonds, advance payment and retention guarantees) and documentary letters of credit (L/C). When a guarantee or documentary L/C is drawn by the beneficiary, it represents the payment of a normal trade flow which is already captured in the outglow assumptions for current accounts. As a result, the additional liquidity outflow is normally zero.

- If a client is in default and cannot honour its financial obligations, the LCR framework assumes that performing clients do not default in the 30 day time horizon. Therefore additional liquidity outflows would only concern off-balance sheet exposures on clients that are already unable to meet their obligations on the LCR calculation date and where settlement by the bank is expected within 30 days. However, there is a strong case that this is still accounted for in the current account outflow assumptions.
- The other instance were the bank would be called upon to discharge the obligation is where there is a disagreement between the client and its trade counterparty. This is a rare occurance and would not be correlated to a potential liquidity crisis.

Hence additional illiquidity outflows generated by these products are effectively zero. We therefore believe a 0% outflow rate for off-balance sheet trade finance products such as guarantees and documentary letters of credit to be most appropriate.

- **Case-by-case decision instead of fixed outflow rate**

If the ECB would, notwithstanding the explanations provided above, maintain its view that TF OBS positions need to be given an outflow rate higher than 0%, we believe that it would be more appropriate for the ECB to restrain from exercising this option and that it should decide instead on the applicable outflow rate on a case-by-case basis depending on the actual outflow risk a bank has with its TF OBS positions. As a consequence, this issue would be dealt with in the OND-Guide, and not in the OND Regulation, and there would be no automatism and no fixed outflow rate with respect to TF OBS items

A case-by-case approach could result in the applicable outflow rate being 0% considering that there may be situations in which TF OBS positions do not expose banks to any liquidity risk. This can be the case, for example, if, as explained above, the bank is in a pure pass through function channeling monies through from buyer to exporter (in case of L/Cs) or whenever historical data justify a 0% outflow rate due to the lack of historical losses (e.g. in case of trade finance guarantees).

- **The scope of Article 23 (2) for TF OBS items is unclear**

Both the Commission Regulation and the CRR make reference to Article 429 CRR (Leverage Ratio) and to Annex I of CRR with respect to TF OBS items. It is most unclear, however, which TF OBS items are covered by Article 420 (2) and Article 23 (2) respectively.

We suggest that the ECB would clarify – or ask the EBA to clarify - which TF OBS positions are covered by the 5% outflow rate and explain to what extent Article 429 is of relevance.

ARTICLE 12 - LIQUID ASSETS - TREATMENT OF MINIMUM RESERVES (Article 10 (1) (b) (iii) Commission Regulation)

- **The proposal is too complex**

The proposed approach is overly complex. It will require internationally active banks to take into consideration three different treatments for different entities within their perimeter. We strongly recommend to keep the approach as simple as possible and to avoid undue complexity and lack of comparability for different entities within a banking group.

We would recommend providing institutions with an option to follow one leading treatment (e.g. treatment provided for SSM-entities) for the whole banking group.

- **Need for a level playing field**

The treatment specified in Art 12 (2) (b) discriminates against (i) EU Member States which are not part of the SSM and (ii) 3rd countries with LCR regulation in comparison to SSM Member States and 3rd countries without a LCR regulation.

(i) Banks domiciled in <u>non-SSM Member States</u> are penalised if no agreement between the local CB/NCA (comparable to the ECB common understanding) is in place because they are not allowed to include any minimum reserve amount. Such an outcome is unjustified considering that banks cannot influence/force local CB/NCA to conclude such an agreement.
As a consequence, it would seem appropriate to treat minimum reserves in a more flexible way and, more particularly, to provide for the possibility to include at least the MR excess. Otherwise, internationally active banks will have different MR treatment within their perimeter. If the ECB would nevertheless stick to its proposal, it should ensure - at least for the EU - that such agreements are in place in all jurisdictions before applying Article 12 to ensure consistency and to maintain a level playing field.

(ii) Banks from 3rd countries with LCR regulation are at a disadvantage compared to 3rd countries without LCR regulation (e.g., Ukraine, Serbia, Bosnia), where minimum reserve excesses can be included without further requirements to be met (according to Article 12 (2) (c) DR). This is another element of penalisation for such 3rd country jurisdictions in addition to the "worse-of"-treatment for 3rd countries specified in Art 2 (3) of the Commission Regulation. It is unclear, moreover, which treatment applies to 3rd countries with LCR regulation, when the local LCR regulation stipulates a different treatment compared to the ECB-approach (only MR excess allowed), i.e., when ECB-approach and 3rd country regulation is not comparable. This is further complicated by the “worse-of” treatment specified in Art 2 (3) DA LCR combined with a lack of clarity about which of the both treatments is worse. Against this background, it is unclear, which MR components are allowed to be included for 3rd countries with LCR regulation.

- **Future Review**

Article 12 (4) of the draft Regulation stipulates that the ECB may review the criteria for eligibility of level 1 assets provided for in paragraph 2(a) within one year.

We suggest that the ECB would put the envisaged review of the common understanding referred to in Article 12 (4) at use to adopt a less restrictive approach on the MR treatment and, more particularly, that it will seize this opportunity to also include the MR volume itself (not only excess), combined e.g. with an outflow to cover potential contingent outflow risk during the MR reporting period to be sufficiently prudent.

ARTICLE 13 – LEVEL 2B ASSETS (Article 12 (1) (c) (i) Commission Regulation)

The Commission Regulation specifies that, in the absence of any decision from the competent authority or public authority in relation to major stock indexes, credit institutions shall regard as such a stock index composed of leading companies in the relevant jurisdiction.

The proposal is not in line with the Commission Regulation because the proposed Article 13 does not cater for the situation in which no decision has been taken on this. This needs to be rectified as Article 12 (1)(c) (i) of the Commission Regulations concerns a binding rule and not an option or a discretion and cannot, therefore, be ignored or altered by the ECB.

ARTICLE 16 – ARTICLE 467 (3) CRR – TRANSITIONAL ARRANGEMENTS FOR UNREALISED LOSSES MEASURED AT FAIR VALUE – EXPOSURES TO CENTRAL GOVERNMENTS CLASSIFIED IN THE “AVAILABLE FOR SALE” CATEGORY

Article 467 (2) of the CRR provides a derogation to the competent authority to allow institutions not to include gains and losses on exposures to central governments classified as available for sale (AFS) in CETI capital in cases where such treatment was applied before 1 January 2014. If applied, this derogation allows institutions not include those gains and losses until IFRS 9 enters into force in the EU. According to Article 16 of the draft Regulation, however, the applicable percentage of unrealised losses on exposures to central governments classified in the "Available for Sale" category needs to be included in CET1.

We strongly believe that it would be inappropriate to suddenly disallow institutions requesting it to not to include gains and losses on exposures to central governments classified as available for sale (AFS) in CETI capital in cases where such treatment was applied before 1 January 2014.

- The proposal does not respect the wish expressed by many legislators who allowed the non-inclusion of the abovementioned gains and losses to postpone harmonisation until the coming into force of IFRS 9. As a result, it impacts reatroactively in the banks' capital planning and,therefore, contravenes the Principle of Protection of Legitimate Expectations which aims to ensure that the situations and legal relationships governed by Community law remain foreseeable.

- The proposal would introduce excessive volatility in the entities' equity in those Member States. During the recent banking crisis and market disruption, exposures to central governments bore significant losses. If these losses need to be deducted from the capital of institutions, it will have a significant impact on the capital positions across the banking sector of many Member States. The derogation which the CRR provided was meant to allow institutions to significantly reduce volatility in CET1 until the market returns to normality. Conversely, where exposures to central governments have resulted in gains, this derogation also provides institutions with a method of reducing volatility in CET1

  While there is uncertainty either in the valuation of exposures to central governments either through market valuations or the potential treatment in regulatory capital, it would seem prudent to continue to exclude gains and losses for these exposures from capital.

- The proposal will produce a cliff-edge on the recognition of losses as a consequence of the shift in approach.

- The elimination of the prudential filter in those jurisdictions where such treatment was applied in the past may also activate the mechanism of additional valuation adjustments (AVAs) for the available for sale portfolios, given the size of these portfolios in the industry. This involves the application of more complex calculation method (core approach rather than simplified approach) with consequent implementation costs, capital consumption as well as the complications introduced in capital planning.

On these grounds, the forthcoming Regulation should continue to allow those institutions on the basis of Article 467 (2) CRR, not to include AFS gains and losses on exposures to central governments classified as available for sale (AFS) in CETI capital.

ARTICLE 17 – ARTICLE 468 (3) CRR – TRANSITIONAL ARRANGEMENTS FOR UNREALISED GAINS MEASURED AT FAIR VALUE – EXPOSURES TO CENTRAL GOVERNMENTS CLASSIFIED IN THE "AVAILABLE FOR SALE" CATEGORY

The same reasoning as in the previous Article, with regard to unrealised gains measured at fair value.

ARTICLE 21 (3) – ARTICLE 478 (3) CRR - ARTICLE 478(3),(A) AND (B) OF REGULATION (EU) NO 575/2013: APPLICABLE PERCENTAGES FOR DEDUCTION FROM COMMON EQUITY TIER 1 OF SIGNIFICANT INVESTMENTS IN FINANCIAL SECTOR ENTITIES AND DEFERRED TAX ASSETS THAT RELY ON FUTURE PROFITABILITY:

The content of paragraph 3 of this Article of the draft modifies and reduces the 10-year phase-out period for deferred tax assets contained in regulations currently applicable.

The DTA current schedule of deductions is actually more in line with an economic scenario of recovery for these assets. This requires a longer-term adjusted period, given the extraordinary nature of its generation as a result of the restructuring of the credit system. Additionally, such amendment breaks the principle of legitimate expectations, which requires that the authorities and the Administration are consistent with their own actions or their own past conduct respecting the legal expectations created.

B. *Draft GUIDE*

I.3. CAPITAL WAIVERS (Article 7 CRR) (p.5 et seqq)

- **General Comments**

The various eligibility criteria for capital waivers which are being put forward are very demanding and disproportionate in the SSM context.

It is particularly surprising to note that the ECB puts forward 8 conditions merely to satisfy the prompt transfer of funds or repayment of liabilities while this can, in most cases, be demonstrated in a rather simple way.

- The legal opinion demonstrating that there are no obstacles to the transfer of funds or repayment of liabilities by the parent undertaking is a considerable burden (both timewise and financially) and is unnecessary, especially considering that the prompt transfer of funds or repayment of liabilities can be very easily demonstrated in most cases, in particular for subsidiaries established in the European Union, by the legal structure, the past flows of funds or the absence of substantial minority interests in the subsidiary.
- A letter signed by the parent undertaking's CEO, with approval from the management body stating that the significant supervised group complies with all the conditions for granting the waiver(s) laid down in Article 7 of the CRR is also an unnecessary and considerable burden for large groups with a substantial amount of subsidiaries and can be viewed as a deterrent measure to prevent an institution from submitting too many requests for exemption.

- **Waivers granted in the past**

Our understanding is that the proposed Guidance is not meant to influence unconditional and legally compliant waivers which a competent authority has granted in the past on the basis of Article 7 CRR considering that such waivers have created legitimate expectations and cannot, therefore, be altered.

- **Right to appoint the management body** (p. 9, under (x))

It is mentioned under (x) that the ECB will take into account 'any agreement that grants the parent undertaking the right to appoint or remove a majority of the members of the management body of the subsidiary'. This requirement is redundant considering that Article 22 (1) (b) of Directive 2013/34/EU stipulates that undertakings drawing up consolidated financial statements need to have the right to appoint or remove a majority of the members of the administrative, management or supervisory body of its subsidiary undertakings.

I.4. LIQUIDITY WAIVERS

NATIONAL LIQUIDITY WAIVER (Article 8 CRR) (p. 9 et seqq.)

- **Reporting requirement for waived entities** (p. 9/10)

The Draft Guide explains that the ECB plans to exclude reporting requirements from liquidity waivers, meaning that they will remain in place.

In general, reporting requirements on solo level conflict with the general idea of a liquidity waiver. Reporting requirements are burdensome for banks, inconsistent with a centralised liquidity management approach which a waiver environment necessarily implies and reduce the attractiveness of a waiver substantially. Therefore, such requirements should be removed for waived entities once the waiver is approved. The reporting infrastructure could remain in place in order to be able to report in case waiver approval is withdrawn or for stress situations, but there should be no requirements in a going concern environment.

We assume that the ECB is proposing to maintain the supervisory reporting requirements as a means to monitor the liquidity situation of those banks which have received a waiver. However, liquidity monitoring is governed by different legal instrument than the ITS on supervisory reporting and it would clearly be illegal for a competent supervisory authority to use supervisory reporting requirements as a proxy.

- **Liquidity SREP** (requirement (1) (iii) at p. 10)

The proposal is that a liquidity position of the consolidating institution would be considered to be sound if it has received a score of at least 2 or higher in the SREP Liquidity assessment over the past two years. However, the draft Guidance does not explain what happens if such score is not available. Furthermore, the scores on the SREP liquidity assessments are not published or shared with the banks. In addition, the criteria for each score level has not been published, other than what is included within the EBA SREP Guidelines (which remains extremely vague). It is therefore difficult to foresee how the ECB can guarantee a consistent application of supervisory judgment across the range of firms it supervises. Therefore the outcomes of SREP liquidity risk assessments should not be utilised as criteria for awarding Liquidity Waivers.

The proposal implies that, assuming that a bank would obtain a score in 2016 for the first time, it would be only in a position to apply for a waiver from 2018 onwards, which is most unfair. We would like to suggest that, at the very least during an interim period, the ECB guidance should provide for a more flexible treatment: it should be sufficient that the liquidity SREP does not reveal breaches at the time of application and over the previous three months (as required for cross-border waivers under (1)(i) at p. 12). It should in any event be borne in mind that the level of sophistication with respect to internal liquidity risk management is currently changing dynamically and that banks also tend to improve further their level of sophistication when preparing for a waiver. In such an environment, looking back to a situation of 2 years earlier is more than likely to convey a distorted picture of the actual situation.

- **Legal Contract - Capital Requirement Clarification** (requirement (3) (i) at p. 11)

The legal contract which will be required to be signed by all members of the Liquidity Subgroup will be for an unlimited amount and will have no defined maturity date. There does not appear to be any guidance with regard to the capital requirement that entities will have to hold for this. For example if there is a large and a small entity which form a liquidity subgroup, they will both have signed the same legal contract with an unlimited amount, will this mean they will both have the same capital requirement for this facility? We would propose that zero capital requirement would be required for contracts for the purposes of Liquidity Waivers under Article 8 of CRR as having capital requirements would be burdensome for banks and reduce the attractiveness of the waiver substantially.

- **The Free movement of funds requirement (FMF)** (requirements (3) (ii) and (4) (i) at p. 11)

It is proposed that banks would be required to bring evidence about the free movement of funds and the ability to meet individual and joint obligations as they come due.

- The language of the requirement is extremely general. More guidance should be provided on what evidence applying banks are precisely expected to bring in this regard.
- The proposal that the applying bank would moreover be required to support FMF evidence by means of a legal opinion is inappropriate: it is indeed a generally accepted and elementary principle of law that it is impossible to provide positive evidence of a negative fact. A lawyer can confirm at the most that he or she did not find any reference to or entry of a particular item or transaction. Furthermore, requiring a legal opinion in this regard is questionnable considering that the EU Commission[7] has already examined the issue recently to conclude that its "review has not revealed relevant legal obstacles that would prevent institutions from entering into contracts that provide for the free movement of funds between them within a single liquidity sub-group". We believe that, as a result of this authorative evidence, the onus should be on the competent authority to demonstrate to any applicant of a liquidity waiver that there would indeed be a legal impediment, and not *vice versa*.
- In addition, consideration of national insolvency laws is irrelevant as, in a liquidity sub-group, support between entities would need to occur much before the point of insolvency.

[7] European Commission, Legal Obstacles to the Free Movement of Funds between Institutions within a Single Liquidity Sub-Group, Report from the Commission to the European Parliament and the Council (COM 2014/327final, 5 June 2014.

Regarding contracts referred to under Article 8(1)(c) CRR, we would like to suggest that the ECB would consider providing a common template to banks.

- **Legal impediments to the fulfilment of the contract** (requirement (4) (iii) at p. 11)

According to the proposal, the applying bank would be expected to provide a confirmation from the relevant NCA that the national liquidity provisions do not contain impediments to the fulfillment of the contract.

The language of the proposed guidance should be amended considering that a bank is not in a position to oblige its NCA to follow-up on its request. It should, therefore, be more reasonable to require the competent NCA (and not applying banks) to deliver such conformation once a bank has applied for the waiver, or probably even better, that the ECB itself would undertake the research needed.

CROSS-BORDER LIQUIDITY WAIVER (Article 8 CRR) (p. 11 et seqq)

- **General Comments**

We welcome that banks are being provided with an opportunity to apply for a cross-border waiver.

General guidance is missing on what the requirements are whenever a waiver application concerns a banking group that includes SSM-entities as well as non-SSM-entities.

- **Determining 'significant sub-entities'** (requirement (2) (i) at p. 12)

Article 59 of the SSM Framework implies that if total assets exceed €5bln and cross border assets exceed 20% of total assets or cross border liabilities exceed 20% of total liabilities then an institution is a 'significant sub entity'. The fact that a cross border liquidity waiver is being sought means that in many cases that one of total cross border assets or liabilities will exceed 20%. The application of this rule for cross border liquidity waivers seems contradictory when compared to the unlimited nature of the free movement of funds required by the contracts between members of a liquidity sub group. Given that the contract is for unlimited amounts, the application of a 20% cross border threshold including intergroup assets/liabilities is illogical.

We would propose that Article 59 is removed for determining if an institution is a 'significant sub entities' for Cross Border Liquidity Waivers or if retained that cross border assets /liabilities with members of the same liquidity subgroup would be excluded when determining if the 20% cross border threshold is exceeded.

- **Minimum Level of HQLA** (requirements (2) (i) (b) , (3) and (4) at p. 12-13)

The 75%-requirement for significant entities referred is much too strict.

- It assumes that only a limited (i.e. 25%) part of the Banking Union will be completed in the next three years. This is a very pessimistic assumption considering the significant progress made so far and the recent proposal of the European Commission for a European Deposit Insurance Scheme (EDIS) as the third pillar of the Banking Union. The Commission has also published a comprehensive action plan for "further reducing risk in the Banking Union" by implementing TLAC requirements in the EU, amending the CRR following the discussions within the Basel Committee, enhancing convergence of national insolvency laws, etc.

- It contradicts the spirit of the CRR, which recognises the existence of liquidity waivers in situation of going concern provided fair conditions are met.

- It substantially reduces the attractiveness of a cross-border waiver. Moreover, it creates trapped liquidity and thus strongly contradicts the general idea of a liquidity waiver. Furthermore, the requirement puts SSM banks at a disadvantage compared to banks from other jurisdictions which do not impose such requirements thus endangering a level playing field.

- It implicitly provides banking groups which manage their liquidity centrally with an incentive to convert their significant subsidiaries (eligible to the limited LCR waiver) into branches (in most cases not subject to the LCR requirements at solo level)

- It contravenes Article 63 of the Treaty according to which all restrictions on the movement of capital and payments between Member States are prohibited. It is striking to note in this regard that the draft Guidance provides no explanation whatsoever justifying why the proposed requirement is being imposed. As a result, the draft guidance does not allow judicial authorities to assess if the proposed restriction is indeed suitable for securing the objective that the requirement pursues nor if the requirement is indeed proportionate to that objective. As a result, any court will obviously refuse to validate the requirement.

It needs to be observed in this context that a "sufficient" level of HQLA can also be ensured by means of the Pillar 2 Review.

If the 75%-requirement would nevertheless be maintained, at least a full Inflow Cap Exemption should be allowed without further approval by competent authorities to mitigate the penalising impact.

The language of the requirement should in any event be reviewed. The condition set under (3) according to which "the LCR requirement is the highest applicable level…., if allowed by national law" – is most unclear. Its language should be enhanced to facilitate understanding.

The Impact assessment which is required under (4) is also most unclear. In (4) (ii) a full assessment of the implications by the management body and by the competent authorities is required. How should such an assessment be performed (contents, level of detail, involvement of management body)? Is the applying bank expected to collaborate with competent authorities? Does it concern a joint assessment by applying bank and its competent authority or, in contrast, two separate exercises? Whatever the answer may be, it should in any event be avoided for such impact assessments to be overly cumbersome. It should therefore be kept on a general level with focus on the major points in order to keep efforts at an acceptable level.

- **75% HQLA requirement for 'significant sub entities'** (requirement (2) (i) (b))

The draft consultation document notes that the ECB intends to reassess the 75% by 2018 "in particular in order to set the lower bound at 50%, to ensure the safety and freedom of cross-border intragroup liquidity flows." If a HQLA requirement is retained for significant sub entities then we request that the ECB begin with a 50% HQLA requirement on the basis that this appears to be the level that the ECB is targeting in the longer term and would be more supportive of the stated objective of ensuring safety and freedom of cross border intergroup liquidity flows.

INFLOW CAP EXEMPTION

Article 425 (1) CRR stipulates that, subject to the prior approval of the competent authority responsible for supervision on an individual basis, the institution may fully or partially exempt inflows where the provider is a parent or a subsidiary institution of the institution or another subsidiary of the same parent institution or linked to the institution by a relationship within the meaning of Article 12(1) of Directive 83/349/EEC.

We note that the Draft Guide does not address this situation. Guidance on inflow cap Exemption applications should be included in the final version of the Guide after having consulted the industry.

I.4. INSTITUTIONAL PROTECTION SCHEMES (Article 8(4) CRR) (p. 13-14)

The credit institution is required to submit a legal contract that stipulates irrevocable control rights of the sub-consolidated entity against the waived entities within the liquidity risk framework (under (ii)).

However, applicable company law generally does not allow for boards to give up their control rights irrevocably as this would effectively mean that the board gives up its core responsibilities (conflict with board's fiduciary duties).

II. OWN FUNDS

DEDUCTION OF INSURANCE HOLDINGS (p. 16)

Where permission for non-deduction has been granted prior to 4 November 2014, credit institutions may continue to not deduct the relevant holdings provided that appropriate disclosure requirements are met.

Our understanding is that reference is being made here to existing disclosure requirements and it would be helpful if it the text would clarify which disclosure requirements are being meant here.

It needs to be observed that the ECB has no legal authority to impose new Pillar 3 disclosure requirements at its own initiative because such requirements can be imposed only by Law, i.e. an act emanating from the EU legislator.

4. MATURITY OF EXPOSURES (Article 162 of the CRR) (at p.20-21)

This paragraph proposes the use of the Maturity parameter as set out in Article 162(1), namely 0,5 years for repurchase agreements (or securities or commodities borrowing and lending transactions) and 2.5 years for all other exposures. The Irish NCA has specifically disallowed the use of this 0,5/2.5 year maturity parameter (other than for the scope detailed in 162(4) which falls outside the scope of the OND). Some Irish banks have obtained specific approval for the implementation of the Maturity parameter driven by a cash flow schedule under Article 162(2). If the ECB's Guide in relation to this parameter is adopted, does this render Article 162(2) and the scope outlined in Article 162(4) superfluous so that the 0,5/2.5 year parameter would be available to all Exposure Classes which are subject to the maturity adjustment factor under Article 153?

This leads to continued uncertainty for banks which is unnecessary and undermines the objective of harmonisation in ECB regulation. It would be preferable for the ECB to determine the maturity parameter to be used in the RWA calculations and for that parameter to be implemented on a mandatory basis.

III.11. CALCULATION OF THE VALUE-AT-RISK NUMBER (Article 366(4) of the CRR) (at p. 22)

The ECB is of the view that the calculation of the addend for the purpose of calculating the capital requirement referred to in Articles 364 and 365 of the CRR should be based on hypothetical and actual changes in the portfolio value, according to the specifications set out in Article 366(3).

We believe however that there are cases in which overshooting are not the result of model deficiencies but can be attributed to P/L impacts. The extension of the backtesting addend automatically to overshootings arising from losses in actual p&l is not merited where the p&l is driven by factors that are not intended to be captured or capitalised through the VaR model. Actual outliers are not good reflections on the performance of the underlying VaR model, which is appropriately represented by hypothetical backtesting. Examples of p&l which is captured through actual p&l but not Hypo p&l or the VaR model would be CVA, DVA and their hedges. These are excluded by design from the VaR model and are captured through other capital charges or deductions.

For the addend to be driven by these factors, where they are capitalised appropriately elsewhere represents an inappropriate double counting of risk through capital. We therefore believe that the ECB should**,** on a case by case basis, apply the limitation based on Art 366 (4) if overshootings are not the result of deficiencies of internal models.

V.3. COMPLIANCE WITH LIQUIDITY REQUIREMENTS (Art 414 CRR) (at p. 23)

In general, the flexibility of lower frequencies/longer delays is appreciated considering that the NSFR tends to be a much less volatile ratio than the LCR so that a less frequent reporting frequency is justified and appropriate.

It would be appropriate providing a similar treatment for the LCR. Any relief could be limited to exceptional circumstances, but there should be at least some supervisory flexibility to allow lower frequencies/longer delays based on a case-by-case decision.

V.4. INTRAGROUP LIQUIDITY FLOWS (Article 422 (8 & 9) (at p. 23 et seqq.)

- **General Comments**

We note that the requirements set to benefit from differentiated treatment of intragroup liquidity inflows and outflows are very stringent and even dissuasive. They should be alleviated. Notably the requirement imposing that the institutions should demonstrate that they are fulfilling their LCR on an individual and consolidated basis for at least one year should be removed: the proposed requirement is not consistent with the purpose of the exemption and will unduly postpone the ability of an entity to benefit from the exemption.

Furthermore, the requirement for an access to regular daily monitoring systems of the liquidity positions is too demanding from an operational perspective, the sharing of daily liquidity monitoring reports should be sufficient to enable the ECB to adopt a view on intragroup flows.

- **Impact of the forthcoming RTS on the specification of the additional objective criteria referred to in Articles 29 (2) and 34 (2) of Commission Delegated Regulation (EU) No 2015/61**

The requirements for preferential treatment of intragroup flows do not appear to be fully consistent with the proposals made in the EBA Consultation Paper on intragroup flows

(EBA/CP/2015/22)[8]. Our understanding is that the ECB will be legally required to fully align its Guidance to the RTS once it will have become final.

- **Intragroup outflows** (p. 24)

With respect to intragroup outflows, the CRR provides for a preferential treatment for certain intra-group on-balance sheet items as specified in Article 422(7), whereas such preferential treatment is not possible for off-balance sheet items (facilities).

In the Commission Regulation the situation is the reverse: according to Article 29 intragroup facilities as specified in Art 31 can be subject to a preferential treatment, whereas a preferential treatment is not possible for on-balance sheet items.

The ECB draft guidance (p. 24) it is not fully clear on whether SSM-banks can apply for:
- (a) on-balance items only (CRR-based);
- (b) off-balance items only (DA LCR-based); or
- (c) both.

It is neither clear, if for the Commission Regulation purposes the CRR-based preferential treatment for on-balance sheet items could be applied (and vice versa for CRR reporting purposes).

We understand that alternative (c) is the approach followed by the ECB which is also clearly the approach preferred by banks. The ECB Guide should be more explicit in this respect. The ECB should keep in mind that SSM banks would be put at a disadvantage, if for SSM banks only applications for OBS items (facilities) based on Commission regulation were possible, whereas for non-SSM banks it would also be possible to apply for intragroup on-balance sheet items based on CRR. For internationally active banking groups with SSM-supervised and non SSM-supervised banks it is crucial to have a group-wide consistent approach to ensure a level playing field and avoid undue complexity.

- **National applications for intra-group outflows / Requirement (i) Draft Guide / ECB vs EBA requirements** (p. 24)

We understand that for national applications (requirement (i) and (ii)) ECB is leveraging on Article 3 (d) & (e) and 4 (b) of the EBA draft to specify Article 422 (8) (b) CRR and Article 29/ (1) (a) of the Commission Regulation. The EBA draft applies to cross-border applications only whereas ECB is defining such EBA cross-border requirements for national applications. This (kind of gold plating) approach and corresponding requirements are deemed to be overly restrictive for national applications and should be relaxed by ECB.

- **Requirements set out under (iii)** (page 25)

[8] CP on Draft Regulatory Technical Standards on the specification of the additional objective criteria referred to in Articles 29 (2) and 34 (2) of Commission Delegated Regulation (EU) No 2015/61 […] under Article 422 (10) and 425 (6) of Regulation (EU) No 575/2013 (Capital Requirements Regulation – CRR).

- The proposal that any application for preferential treatment be supported by a formalised decision by the management bodies of both the liquidity providing entity and the liquidity receiving entity, is overly restrictive and cumbersome. The language of the ECB Guide should be relaxed in this respect.

- Concerning the assessment of the liquidity risk profile of liquidity-receiving entities, we recommend that liquidity risk management and the frequency of monitoring should be tailored to the intrinsic volatility of the activity. As this provision will mainly be used to ensure LCR compliance of (often small) specialised lending subsidiaries (leasing, factoring, consumer lending) which have very stable liquidity risk profile, it should not be required to put in place a very expensive and largely pointless daily monitoring process by the providing entity.

- Intragroup flows within the SSM-zone should be automatically eligible to this preferential treatment considering that entities are subject to and comply with LCR requirements (criterion (a) of arts.29(2) and 34(2) LCR DA in such a situation.

- **Intragroup Liquidity Inflows** (p. 26)

The requirements set out for intragroup liquidity inflows should fully mirror the outflow requirements. In the ECB Draft this is largely the case, but not fully. We make especially reference to cross-border applications, requirements (i) on p. 27, where requirements are set ((a), (b), (c)) that are not included in the outflow section. ECB should amend the Guide accordingly.

V.8. CURRENCY MISMATCHES (Art 8 (6) DA LCR) (p. 29**)**

The criteria based on which ECB might impose limits on FX mismatches should be significantly more restrictive. In essence, according to the ECB draft, it is sufficient to report significant currency without further criteria in order to be subject to an ECB limit. Additional risk-related criteria (e.g., liquidity mismatch in a particular currency, additional evidence that Article 8 (6) is not fulfilled by the bank) should be included to be more in line with the intention of the law and to restrict the scope of application of this ECB option to a reasonable extent.

Furthermore, the ECB draft does not contain any reference to the criteria specified in Article 8 (6)(a) and (b). Additional guidance should be given how ECB intends to exercise these criteria.

V. 10. MULTIPLIER FOR RETAIL DEPOSITS COVERED BY A DGS (Article 24 (6) Commission Regulation) (p. 29)

The criteria specified in the ECB draft are basically in line with Commission Regulation.

Because some third country regulations (e.g., Turkey, Russia) do not contain a 3% retail outflow category, Article 24 (6) will presumably be “dead law” for internationally active banking groups, especially when also considering the worse-of treatment for 3rd countries specified in Article 2 (3) Commission regulation. Banks would appreciate if ECB allowed a 3% treatment for retail deposits in 3rd countries, where the DGS (deposit guarantee scheme) provides equivalent protection compared to the EU-DGS, but without the need to fulfill further criteria.

V. 11. HIGHER OUTFLOW RATES (Article 25 (3) Commission regulation)

It would be helpful if the Guidance could clarify:
- how 'empirical evidence' for outflow rates will be determined;
- how the concept of "aggressive marketing policies" need to be understood.

V. 12. OUTFLOWS WITH INTERDEPENDENT INFLOWS (Article 26 Commission Regulation) (p. 30)

- **General**

It would be helpful if the ECB could provide guidance on the scope of Article 26 to, more precisely, clarify which kind of business / positions can be taken into account. Restricting the scope of Article 26 to retail structures would in any event not be reasonable considering that we are not aware of any interdependent structures which could qualify adopting such a perspective.

- **Requirement (i) – same gross amounts for interdependent flows:**

More flexibility should be granted in the ECB Guide with respect to the "gross amount"-criterion.

More clarity would need to be provided on the requirement to have the same gross amount taken into account in paragraph (i) by indicating that it is "the same gross amount before application of the standard and applicable weightings of inflows and outflows".

- **Requirement (iv) – more flexibility based on economic view**

Some more flexibility should be given to the timing of cash flows. Where cash flows do not match for a small number of days this should not prevent from the application of Article 26 Commission Regulation. Having LCR methodology in mind where the timing of cash flows within the 30 day time horizon is not considered (for LCR it does not make a difference if inflow is received on t=1 or t=30) this is an appropriate approach and would avoid undue results from an economic perspective.

There is a lack of guidance in the ECB draft on which aggregation level the Article 26-application should be done. It does not seem to be feasible (neither for applying banks nor for ECB) to apply/approve on single transaction level. There should be general language in the ECB guide regarding appropriate application level, and actual aggregation level would be defined by ECB on a case-by-case basis during the application procedure. Banks would have to prove the Article 26-requirements on category level, not on single transaction level; small timing mismatches for single transactions within a category should not prevent an approval for the whole category based on an immateriality assessment by ECB.

V. 13. SPECIALISED CREDIT INSTITUTIONS (Article 33 (3), (4) and (5) Commission Regulation) (p. 31)

To benefit from a more lenient treatment, Article 33(5) of the Commission Regulation requires in respect of specialised credit institutions, amongst others, that the timing of inflows matches the timing of outflows.

However, for specialised lending subsidiaries, match-funding assets and liabilities is generally achieved on an aggregate basis (as these are generally retail, low-individual value loans). There will generally not be a contractual link between the maturity of each individual loan and the maturity of the matched funding. Accordingly the criteria which the draft Guidance proposed criteria are too restrictive and would prevent the application of this article to the intended businesses (e.g. leasing and factoring subsidiaries).

EXCLUSION OF PROPORTIONAL CONSOLIDATION (Article 18 (2) CRR) (at p. 38)

The ECB considers that, for prudential purposes, full consolidation should be applied, even in cases where the liability of the parent undertaking is limited to its share of capital of the subsidiary and the other shareholders must and can meet their liabilities, as specified in Article 18(2) of the CRR. The ECB intends to reassess its policy, based on the criteria to be specified in the Commission Delegated Act which will be issued in accordance with Article 18(7) of the CRR.

This policy is against Article18 (2) CRR where the proportional consolidation is allowed on a case-by-case basis. There are situations where the liability of the parent undertaking is limited to the share of capital that the parent undertaking holds in the subsidiary, the liability of the other shareholders is clearly established and its solvency is satisfactory that this policy stance would be disproportionate and even unfair to oblige to uses full consolidation for two reasons:

a. It would mean that the institutions should bear all the risks of the subsidiaries regardless the fact they only are liable for a proportion.
b. In addition, it would imply that only the capital provided by the parent undertaking is eligible whereas the own funds provided by other shareholders is only partially eligible (minority interest rules) though in real terms is available to absorb losses.

Finally, there are third countries whose national laws oblige than investments in strategic sectors such as the banking sector is done with national partners. Therefore, if the ECB decides to delete the proportional consolidation will hinder the investment in those jurisdictions.

EXPOSURES TO PUBLIC SECTOR ENTITIES (Article 116 (4) CRR) (at p. 39)

The ECB intends to allow exposures to public sector entities to be treated as exposures to the central government in whose jurisdictions they are established, in cases where it assesses that there is no difference in risks. For this purpose, the ECB plans to communicate a list of eligible public sector entities. It would be essential, in our view, that the ECB takes into account in producing that list the input of the correspondent Member State, including entities in third countries.

It would also be recommended making availablea list at an early stage to avoid doubts arising about the weights to be used. In addition, we would like to stress that procedures relating to this option should be specified at an early stage as well. Finally, we are of the opinion that the ECB should assess such cases on an individual basis due to differences concerning the way in which the public sector is organised in the various Member States.

RISK WEIGHTS AND LOSS GIVEN DEFAULT FOR EXPOSURES SECURED BY MORTGAGES ON RESIDENTIAL OR COMMERCIAL IMMOVABLE PROPERTY (Articles 124(2) and 164(4) of the CRR)

These Articles currently allow NCAs to increase risk weights under the Standardised Approach or set minimum LGD floors under the IRB Approach for exposures secured on property.

As currently drafted it does recognise that there are different real estate markets with different features and different levels of risk across Member States and helpfully proposes the adoption of a common methodology to be used by all NCAs to be used to underpin or justify decisions to vary from the risk weights proposed in the CRR or the LGDs estimate produced internally by banks. This would represent an improvement on current practice which appears random and devoid of analytical foundation. It is noted that the ECB intends to exercise these ODs in close co-operation with the macro-prudential authorities.

However, the proposed approach will result in a continuation of inconsistency of RWAs and undermines the SSM's objective of harmonisation of prudential regulation across Europe. The CRR should be developed with the objective of absolute convergence in Pillar 1 calculations, with Pillar 2 adjustments under the SREP and in particular the macro-prudential capital buffers being the appropriate mechanism used to adjust between jurisdictions to take account of differences in national economic and financial conditions.