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

The Bank of New York Mellon SA/NV

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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	The Bank of New York Mellon SA/NV
Country	Belgium

Comments

Regulation	Guide	Issue	Article	Comment	Concise statement why your comment should be taken on board
☒	☐	Scope of Member State exemptions	9	Amendment	Suggested drafting for Article 9(7): "This Article shall only apply where the relevant Member State or competent authority has not exercised its option under Article 400(2) or Article 493(3) of Regulation (EU) No 575/2013 to grant a full or partial exemption for the specific exposure prior to the entry into force of this Regulation." Rationale: some member states/competent authorities have exercised their discretion under Article 400(2) rather than Article 493(3). Article 400(2) refers to full or partial exemptions by

					competent authorities; Article 493(3) refers to full or partial exemptions by Member States
☒	☐	There needs to be a suitable transition period.	27	Amendment	Suggested drafting: "This Regulation shall enter into force on [specify date providing a suitable transition period]." Rationale: in our view, there needs to be a suitable transition period between finalisation of the Regulation and its coming into force. As currently drafted, firms which may currently comply with CRR and EU 2015/61 may not have time to adjust to these Regulations if they come into force on or around 1 April 2016.
☒	☐	Consequential to having a suitable transition period	16-25	Amendment	Articles 16-25 would need to be adjusted to reflect a suitable transition period under Article 27.
☒	☐	Practical operationalisation of Annex I legal opinion	Annex I	Deletion	In paragraph 3(b), delete "and approved by the management body", as a management body does not "approve" or "not approve" legal opinions. The legal opinion is an advice to the management body.
☒	☐	Practical operationalisation of Annex I legal opinion	Annex I	Amendment	In paragraph 3(b) amend to state: "… there are no current or anticipated material legal impediments …". Rationale: this aligns with paragraph 2(a)(i). It is important that there is a materiality threshold, otherwise it is likely the legal opinion will be very heavily qualified.
☒	☐	Practical operationalisation of Annex I letter	Annex I	Amendment	In paragraph 3(a) replace "parent undertaking's" with "credit institution". Rationale: this is to avoid confusion about which entity should be executing the letter. This change would also align the drafting with the equivalent paragraph in Annex II.

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BNY MELLON

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16 December 2015

European Central Bank
Secretariat to the Supervisory Board
Public Consultation on Options and Discretions
60640 Frankfurt am Main
GERMANY

(submitted via email to SSMPublicConsultation@ecb.europa.eu)

Re: DRAFT ECB REGULATION / GUIDE ON OPTIONS / DISCRETIONS AVAILABLE IN UNION LAW

Introduction

The Bank of New York Mellon Corporation (BNY Mellon) is a global custody and trust company dedicated to helping its clients manage and service their financial assets throughout the investment lifecycle. As one of the world's largest investment services and investment management firms, BNY Mellon welcomes the opportunity to respond to this consultation.

BNY Mellon operates in Europe through: (i) branches of The Bank of New York Mellon (a New York state chartered bank) and (ii) directly established and duly authorised subsidiaries established in certain EU jurisdictions and branches of those entities operating in core EU member states.

In particular, in the context of this consultation, BNY Mellon operates in Europe through **The Bank of New York Mellon SA/NV** (BNYM SA/NV), a Belgian-headquartered bank with branches in Amsterdam, Dublin, Frankfurt, London, Luxembourg and Paris.

BNYM SA/NV is a "significant institution" pursuant to ECB criteria, and the proposed ECB Regulation will be directly applicable to BNYM SA/NV. Accordingly, we have a keen interest in this consultation. We attended the public hearing held in Frankfurt on 11 December 2015.

BNY Mellon provides services to clients and end-users of financial services globally. It is accordingly keenly interested to ensure financial markets operate fairly and consistently globally and that common standards ensure playing fields are kept level.

Executive Summary

- BNY Mellon welcomes this consultation process.
- We are generally supportive of harmonisation of options & discretions for significant institutions.
- It is important that the exercise of options & discretions caters for different business models of the significant institutions.
- There needs to be an appropriate transition period from national competent authority options & discretions to ECB options & discretions.
- Proposed Regulation Article 9 - as CRR Articles 400(2) and 493(3) are in substance the same, the ECB should recognise exercise of previous options & discretions, whether by a competent authority or member state under Article 400(2) or 493(3). Otherwise the distinction between national competent authority discretion and member state discretion would have an artificial and distorting impact, and would constitute form over substance.
- Proposed Regulation Annex I – we recommend some drafting changes to enable practical operation of this annex.

Completion of ECB Template for Comments

We have completed our responses in the ECB Template for Comments, and submitted the template document together with this letter. We have provided this covering letter in order to provide additional context to our response in the ECB Template.

Consultation Process

BNY Mellon welcomes the ECB's consultation in regard to the proposed Regulation and Guide. In particular we note that the ECB was not obliged to consult in regard to the Guide but has chosen to do so. We support this approach, noting that the Regulation and Guide are closely linked.

BNY Mellon attended the public hearing in Frankfurt on 11 December, and we thought that this process was useful. We appreciated hearing the views of the panelists on the issues raised at the public hearing.

We noted that the ECB intends to consult on additional topics (as referred to in the Guide) at a later stage, and we would welcome this. We would suggest that the ECB allow for a longer consultation period for future consultations (in line with other EU institutions and agencies) in order to obtain a larger number of responses from a wider range of stakeholders.

Harmonisation of Options & Discretions for Significant Institutions

In general, BNY Mellon supports the intention of the ECB to harmonise the exercise of competent authority options and discretions (O&Ds) under the Capital Requirements Regulation (CRR) and Liquidity Coverage Regulation (LCR), in respect of significant institutions in the Eurozone (ie, those institutions directly supervised by the ECB).

This will enable the ECB to create a single supervisory approach to the institutions it directly supervises, and in the long term will provide greater certainty regarding the approach to supervision. It avoids the ECB having to apply a separate supervisory approach according to the domicile of the significant institution. In our view, this is a logical development of the Single Supervisory Mechanism (SSM) and would be consistent with the role of the Single Resolution Board (SRB) in developing a common framework in the context of the Single Resolution Mechanism (SRM). In our view, the move towards a harmonised framework of O&Ds will assist the development of the Banking Union in the Eurozone member states.

Although we in general support the harmonisation of O&Ds, we recognise that there are legitimate reasons for exercise of O&Ds by national competent authorities (NCAs) and member states, which should be maintained where appropriate. We therefore support the ECB's approach of continuing to recognise certain of the O&Ds previously granted.

Catering for Different Business Models

We would also note that it is important for the ECB to recognise that significant institutions have different business models, and this needs to be factored into the exercise of O&Ds. This was a point which we raised at the public hearing. We are not necessarily convinced that this has been fully factored into the development of the draft Regulation and Guide, although we note that in the public hearing, Ignazio Angeloni did note in his remarks that some institutions have a centralised structure whereas others have a federalised structure. We note for reference that the European Commission's ongoing review of the CRR will consider how the CRR caters for different business models.

BNY Mellon, as a global custody and trust company, has a different business model from universal banks, investment banks and retail banks. The custody bank business model focuses on providing operational services to institutional customers, and we receive deposits as a by-product of those services. We place a large portion of these deposits at central banks as a matter of sound liquidity management. SA/NV has few off-balance sheet activities, no lending activities (except for overdrafts), no complex trading activities (SA/NV specialises in post-trade activities such as custody), and minimal reliance on repo funding.

Accordingly, a "one-size-fits-all" approach to exercise of O&Ds may not be suitable for all types of significant institutions.

Timeframe and Transition

Our primary concern relates to the transition process between NCA O&Ds and ECB O&Ds. Our understanding is that the ECB intends the Regulation to be published in the OJEU in March 2016, and therefore would come into force 20 days later, in March or April 2016.

This timeframe is an extremely short timeframe, in a situation where significant institutions may need to make substantive changes in order to comply with the new requirements by March/April 2016 (and without knowing what the final rules will be until February/March 2016). In our view, it may not be possible for some institutions to comply with all changes that apply to them, within this timeframe.

The changes that each significant institution will need to make will differ from institution to institution. This is because (i) the changes depend on the jurisdiction in which the institution is established (as NCAs would have exercised O&Ds differently), and (ii) it depends on whether the particular issue or requirement is relevant for that institution.

Therefore each institution will need to make its own assessment and gap analysis of the impact of the changes for that institution. It is not a situation where the impacts will be in the same overall direction for in-scope institutions.

Furthermore, as some of the required changes may be substantial for significant institutions, it is not simply a question of "implementation" of regulatory change, but also may require some significant institutions to make strategic decisions about business activities undertaken; for example, changes to products, services and asset/liability management.

We would, therefore, respectfully submit that the ECB should give strong consideration to a transition period of sufficient duration before commencement of this Regulation (and that Article 27 is amended accordingly). This will enable significant institutions to properly plan for and implement any required changes, and to work closely with their joint supervisory teams (JSTs) in this process.

We also believe that delaying the commencement date will also benefit the JSTs as it will give them time to understand and prepare for the new rules and how the rules will impact upon the institutions they supervise.

We would also recommend that the ECB maintain flexibility in its regulatory regimes so that it can grant general or specific waivers so that longer transition periods can be used in circumstances where this in the interests of the significant institution, the ECB as competent authority and the wider community to achieve the objectives of prudence, simplification and openness of the SSM.

Concept of Legitimate Expectations

We also think that delaying the commencement date in this way would be consistent with the concept of "legitimate expectations", which was referred to on a number of occasions during the public hearing.

BNYM SA/NV recognises that the ECB is the primary prudential supervisor for significant institutions in the Eurozone, and accordingly, that it should fall to the ECB to exercise competent authority O&Ds where provided for in the CRR and LCR.

However, it is also important to recognise that the SSM is relatively new. Significant institutions have a history of supervision by NCAs under which they may have exercised particular O&Ds in ways which are different from how the ECB intends to exercise those O&Ds.

Accordingly, significant institutions do have legitimate expectations about how those O&Ds will be exercised; in particular, that if changes to O&Ds will be made, that a reasonable timeframe for adjustment is set. This is vital in order to ensure that significant institutions can properly plan for, make strategic decisions, and implement relevant changes without disruption to day-to-day business. This will enable significant institutions to continue to contribute to the EU's jobs and growth agenda.

Large Exposures (Proposed Regulation, Article 9)

You will recall that the ECB's approach on large exposures was raised at the public hearing. Our primary concern is that the ECB's approach of distinguishing between (i) NCA exercise of O&Ds, versus (ii) member state exercise of O&Ds, is not well suited to this particular item.

As we understand it, the general approach of the ECB in regards to O&Ds is for the ECB (in its capacity as "competent authority") to step into the shoes of the NCAs when it comes to exercise of NCA O&Ds for significant institutions. This approach would be consistent with the SSM.

Similarly, the ECB would not step into the shoes of the member states when it comes to member state O&Ds. This is because the ECB is not equivalent to a member state, and therefore feels that it should not be exercising member state O&Ds or interfering with member state O&Ds where they have been exercised.

Whilst this general approach may work for some of the topics covered in the proposed Regulation, we do not feel that this works effectively for the large exposures O&D under Article 9. Applying this approach to Article 9 results in an arbitrary outcome based on technical application of this approach, rather than a purposive, logical approach.

CRR Article 400(2) and 493(3)

The reality is that Article 400(2) and 493(3) are identical in terms of the substance of the Articles, and they run in parallel with each other. Indeed, the actual drafting of points (a)-(k) in each of these articles is identical. Accordingly, it is possible for the O&Ds in relation to points (a)-(k) to be exercised by competent authorities alone, member states alone, both competent authorities and member states, or none.

This has been approached in different ways in the various jurisdictions. In our view, some member states have chosen not to exercise O&Ds under Article 493(3), because the member state recognised that their competent authority could exercise the O&Ds under Article 400(2), and as a matter of public policy preferred that the O&Ds are exercised by the competent authority (with full knowledge and agreement of the member state).

Also, some member states formally delegate the exercise of member state discretion to their competent authority in respect of certain matters. This may not always be apparent from the formal legal texts used in the relevant jurisdiction. And member states and competent authorities would not have been able to take into account the ECB's proposed approach to the draft Regulation, when determining how to exercise the various O&Ds, particularly in regard to Article 400(2) and 493(3).

Our understanding is that the Banking Law of Belgium specifically delegates certain member state discretions to the National Bank of Belgium (NBB) – so in some cases the NBB may be exercising its own discretion as competent authority, and in other cases exercising a member state discretion as a fully authorised delegate of the member state (in other words, the member state is exercising its O&Ds through its delegate).

Accordingly, noting how O&Ds can be exercised in certain member states, and noting that the substance of Article 400(2) and 493(3) are identical, we think it is an artificial distinction to draft Article 9 of the proposed Regulation such that it only applies "where the relevant Member State has not exercised its option under Article 493(3) … to grant a full or partial exemption for the specific exposure prior to the entry into force of this Regulation." In practice, it should not matter whether the discretion has been exercised by the member state or competent authority (or both).

Recommendation

We would therefore recommend that Article 9 is amended to read as follows:

> "This Article shall only apply where the relevant Member State or competent authority has not exercised its option under Article 400(2) or Article 493(3) of Regulation (EU) No 575/2013 to grant a full or partial exemption for the specific exposure prior to the entry into force of this Regulation."

Such an amendment would cater for the practical reality that the substance of Article 400(2) and 493(3) is the same, and that various member states/competent authorities would have gone about implementing the O&Ds in different (but legitimate) ways.

Large Exposures (Proposed Regulation – Annex I)

We would recommend a number of changes to Annex I of the proposed Regulation to enable practical operation of Annex I. Our changes relate to paragraph 3(a) and (b):

> 3. For the purposes of verifying whether the conditions specified in paragraph 1 and 2 are met, the European Central Bank may request credit institutions to submit the following documentation.
>
> (a) A letter signed by the ~~parent undertaking's~~ credit institution's Chief Executive Officer (CEO), with approval from the management body, stating that the credit institution complies with all the conditions for an exemption as laid down in Article 400(2)(c) and Article 400(3) of Regulation (EU) No 575/2013.
>
> (b) A legal opinion, issued either by an external independent third party or by an internal legal department, ~~and approved by the management body~~, demonstrating that there are no ~~obstacles~~ current or anticipated material legal impediments that would hinder timely repayment of exposures by a counterparty to the credit institution that arise from either applicable regulations, including fiscal regulations, or binding agreements.

The rationale for these changes are as follows:

- The expression "parent undertaking" in paragraph 3(a) may lead to confusion as to which entity should execute the letter. In our view, it should be the credit institution, as this would be consistent with the remainder of the paragraph, and the drafting of the equivalent paragraph in Annex II.
- The words "and approved by the management body" should be deleted from paragraph 3(b). The legal opinion is advice to the management body given by lawyers in their professional capacity; it is not for the management body to "approve" or "not approve" the advice given to it.
- In paragraph 3(b), the word "obstacles" is too broad. We recommend replacing it with "current or anticipated material legal impediments" as this aligns with paragraph 2(a)(i). The legal opinion can only advise on legal issues, not other issues (including practical impediments).

Concluding Remarks

BNY Mellon looks forward to further engagement with the European Central Bank in regard to this Consultation and any future consultation papers on this topic.

Laura Ahto
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