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

Università degli Studi Roma Tre

Centro di Eccellenza in diritto europeo

Via Ostiense 161

I-00154 Roma

Jointly with

Prof. Avv. Gian Michele Roberti

EJC - Roberti & Associati

Place du Grand Sablon, 36

B-1000 Bruxelles

Contact person

Mr ☒ Ms ☐

First name
Gian Michele

Surname
Roberti

E-mail address
[redacted]

Telephone number
[redacted]

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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.

EUROPEAN CENTRAL BANK

BANKING SUPERVISION

PUBLIC CONSULTATION

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Template for comments

Name of Institution/Company Università degli Studi Roma Tre - Centro di Eccellenza in diritto europeo and EJC - Roberti & Associati

Country Italy/Belgium

Comments

Regulation	**Guide**	**Issue**	**Article**	**Comment**	**Concise statement why your comment should be taken on board**
☒	☐	Exemption from deduction of equity holdings in insurance companies from Common Equity Tier 1 items - Article 471(1) of REgulation (EU) No 575/2013	18	Deletion	In the light of the observations outlined with more detail in the attached document, it can be concluded that: - ECB function within SSM is focused on supervision (not on banking regulation); coherently, ECB acts consist in the application of pre-existing rules, via implementing decisions or non binding acts, without the possibility to modify the existing regulatory frame through substantive regulatory measures (see infra, sub 1); - in intervening on Article 471(1) CRR (while not envisaging any intervention on Article 49(1) CRR), ECB is violating

fundamental principles of the EU legal order: in particular, ECB's approach is inconsistent with the principle of protection of acquired rights, legitimate expectations and equality of treatment (see infra, sub 2.1);

- CRR intended to ensure a level playing field that cannot be altered by a unilateral regulatory intervention of the ECB (see infra, sub 2.2).

More particularly, as specified in the attached Observations, the following can be noted.

1. Institutional aspects

ECB cannot 'overwrite', by way of ECB's regulations, the pre-existent substantive regime set forth by the EU regulation No. 575/2013 (CRR), as consistently implemented by the national competent authorities. Any regulation adopted by ECB, aimed at modifying rules set by the EU legislator (namely, the substantive provisions of CRR, as implemented at national level), will be not only in breach of the rule of law, but will also alter the EU institutional balance ending up in ECB acting ultra vires beyond the boundaries of its institutional remit.

In this respect the following aspects can be briefly outlined:

- SSM is the basic law for any action taken by ECB within the scope (and for the implementation) of the same regulation.

SSM legal design can be best analysed as based on a fundamental divide between regulation and supervision (Wymeersch, 2014). In this perspective, the remit of the ECB as supervisor is essentially confined to prudential supervision, with limited (and substantively circumscribed) rulemaking prerogatives and 'playing a passive role in EU wide rulemaking' (Wymeersch, 2014; see also Siclari, 2014 and Brescia Morra, 2014).

- Coherently, according to Article 4(3), for the purpose of carrying out the tasks conferred on it by the SSM Regulation, ECB is essentially empowered to apply rules, and not to make them (see also 'whereas' 34).
- Consistently with its role of supervisor (not regulator), ECB is not entitled to adopt typical regulatory interventions. The EU legislator has clearly specified (Article 4(3) SSM Regulation) the kind of acts that ECB could take for performing its tasks under the SSM; namely: typical non binding acts (i.e. guidelines and recommendations); or acts of individual character (i.e. decisions).
- Furthermore, as far as 'regulations' are concerned, the EU legislator has carefully circumscribed ECB prerogatives. As specified by Article 4(3) of the SSM Regulation, ECB's regulatory powers are confined to operational aspects.
- Finally, should the EU legislator have envisaged to grant ECB with regulatory prerogatives, it would have not (and could have not) conferred them in an implicit way; instead, it would have introduced an explicit enabling provision in the SSM Regulation and would have defined the 'essential' elements on the basis of which regulatory powers were to be exercised.

In the light of the above, it can be concluded that: (i) ECB function within SSM is focused on supervision (not on banking regulation); coherently, (ii) ECB acts consist in the application of pre-existing rules, via implementing decisions or non binding acts, without the possibility to modify the existing regulatory frame through substantive regulatory measures.

2. Doubts of legality of the proposed ECB's regulation on

O&Ds

2.1. General aspects

Against this background, the draft ECB's Regulation on the exercise of options and discretions in Union law (Draft Regulation) raises serious doubts of legality.

With specific regard to Article 471(1) CRR, ECB acknowledges that such provision 'allows banks not to deduct their holdings in insurance subsidiaries until 2022'. Nonetheless, ECB envisages to severely reduce the phase out period from 2022 to 2018 (see Public consultation on a draft Regulation and Guide of the European Central Bank on the exercise of options and discretions available in Union law).

At the same time, ECB states that Article 49(1) CRR gives competent authorities the option to allow banks, on a case-by-case basis, not to deduct their significant holdings in insurance undertakings. However, with respect to Article 49(1) CRR, ECB recognises that a full deduction of insurance holdings would have a significant impact on bank-led conglomerates in the SSM; therefore, ECB opts for not intervening on Article 49(1) CRR, and 'to allow non-deduction', simply 'enhancing disclosure requirements'.

ECB's Draft Regulation raises criticism in several respects. CRR regulates O&Ds in a detailed way. Rules enacted by the EU legislator in this respect are clear and specific; they have to be (and have been) consistently implemented at national level through ad hoc implementing measures taken by the competent national authorities. As such, these rules are source of rights and legitimate expectations for all interested parties.

Intervening on Article 471(1) CRR (while not envisaging any intervention on Article 49(1) CRR), ECB is violating fundamental principles of the EU legal order. In particular, ECB's approach appears to be inconsistent with the principle of protection of acquired rights, legitimate expectations and equality of treatment. In this respect, it should be recalled that, being subject to the rule of law, ECB shall take due respect of those principles (in this respect see also whereas 8 of Draft Regulation and whereas 86 of SSM Regulation).

That having been said, two points can be emphasised.

(i) Acquired rights and legitimate expectations. As a derogation providing for a precise phase out period (until 2022), Article 471(1) - when implemented through national acts - is a source of rights for all interested parties. Consequently, when exercising its supervision prerogatives, EBC shall respect those acquired rights, as provided by the relevant EU legislation, in accordance to general principles of the EU legal order and to legal criteria recalled by the same ECB (see, to this effect, Case 68/69 Brock [1970] ECR 171, paragraph 7; Case 143/73 SOPAD [1973] ECR 1433, paragraph 8; Case 270/84 Licata v ESC [1986] ECR 2305, paragraph 31 and Centeno Mediavilla and Othersv Commission, paragraph 62; Centeno Mediavilla and Others v Commission, paragraph 63). Furthermore, 'any economic operator on whose part the national authorities have promoted reasonable expectations may rely on the principle of the protection of legitimate expectations' (ex multis, Case C-201/08, 10 September 2010, Plantanol, ECLI:EU:C:2009:539).

The Draft Regulation clearly disregards those principles. Article 471(1) CRR sets a period of time during which the 'deduction rule' is not to be applied. As recognised by the same ECB the very purpose of the norm is allowing ‘banks not to deduct their holdings in insurance subsidiaries until 2022’, so providing them with legal certainty until that date and granting them with an adequate and predefined time-window for their capital budgeting. In such a context, ECB’s Draft Regulation intervenes ex post on a situation already regulated by previous rules.

(ii) Equality of treatment. As said, the Draft Regulation provides for ECB’s intervention only on O&Ds set forth by Article 471(1) and not on O&Ds set forth by Article 49(1). As far as O&Ds based on Article 49(1) are concerned, ECB’s Supervisory Board has decided to keep the status quo: i.e. all decisions taken in this respect by national competent authorities before November 4, 2014, will continue to apply. Such disparity of treatment is objectively unjustified. Indeed, if ECB correctly respects rights and legitimate expectations of the interested parties with regard to O&Ds provided by Article 49(1) CRR, a fortiori it should respect O&D based on a more specific derogation like the one set by Article 471(1). Such a disparity of treatment will lead to a substantial discrimination among banks: in particular between those subject to Article 49(1) CRR, for which the status quo is preserved, and those subject to Article 471(1) CRR, for which a radical change is envisaged. This will affect the level playing field and will end up in a breach of the principle of equality of treatment.

In the light of the above, it can be concluded that intervening on Article 471(1) CRR (while not envisaging any intervention on Article 49(1) CRR), ECB is violating fundamental principles of the EU legal order; . in particular, ECB’s approach is inconsistent with the principle of protection of acquired rights, legitimate expectations and equality of treatment.

2.2. Further observations

Recital (80) of the CRR, which intended to ensure a “level playing field”, identifies one of the CRR’s aims as being to strengthen the way those financial conglomerates rules (in particular those relating to “double counting”) shall apply to bank and investment firm groups, ensuring their robust and consistent application. It also provides that any further changes that are necessary will be addressed in the review of the Financial Conglomerates Directive. These principles are implemented through Articles 49 and 471 of the CRR. Hence the CRR makes express provision for competent authorities to permit institutions which do not form part of a financial conglomerate and which have holdings in insurance undertakings, if certain requisites similar to those for conglomerates are met (Article 49), not to deduct their holdings but to risk weight them at 370% for a grandfathering period to run from 1 January 2013 to 31 December 2022. The CRR ultimately:

- ratified the “level playing field” between financial conglomerates and institutions (banks) with holdings in investment companies;
- allowed the competent authorities to permit risk weighting of holdings provided in particular that certain levels of control and financial analysis are in place at the financial institution (bank);
- established that the grandfathering period should apply to holdings in insurance undertakings owned by the institution (bank) as from 31 December 2013 and for the period running from 1 January 2014 to 31 December 2022.

Nowhere in the CRR is provision made that other authorities can reduce or modify the terms established by the CRR itself. Any

			eventual change by the ECB regarding the terms would thus be in evident conflict with the regulatory scheme established on this matter by the CRDIV/CRR and with its rationale. In particular, any eventual change in the above-indicated terms by the ECB would alter what is currently provided by Articles 49 and 471 and would also compromise the level playing field and the spirit of the Danish Compromise, benefiting in this case entities which form part of financial conglomerates (which would continue to be able to apply the provisions of Article 49 of the CRR) to the detriment of other non-conglomerate institutions. Considering that the ECB Regulation shall apply exclusively with regard to those credit institutions classified as 'significant', it would also compromise the level playing field between institutions that are part of a financial conglomerate, significant institution and non-significant institutions, creating three different approach for the insurance holdings. Rules stated by primary rules should apply in the same way for all the institutions. In the light of the above, it can be concluded that CRR intended to ensure a level playing field that cannot be altered by a unilateral regulatory intervention of the ECB.
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Università degli Studi Roma Tre
Centro di Eccellenza in diritto europeo
Via Ostiense 161 – 00154 Roma

EJC
Roberti & Associati
Place du Grand Sablon, 36
B – 1000 Bruxelles
[redacted]

OBSERVATIONS

Re: ECB Public consultation on its draft Regulation on the exercise of options and discretions available in Union Law - Risk weighting of investments pursuant to Article 471 of EU Regulation No. 575/13 (CRR) and proposed ECB regulation

Summary

With the prior permission of the supervisory authorities, the CRR brings about a temporary level playing field between the shareholdings held by financial conglomerates and banks (non-conglomerates), even being faced with some additional requirements. Temporary, in that Article 471 of CRR makes provision, for banks (not conglomerates) for an explicit "grandfathering" regime until 2022, before full deduction is introduced. This clear provision in the CRR, the result of a wide-ranging and debated consultation between the European Council, Commission and Parliament, has therefore generated legitimate expectations by institutions, leading amongst other things to a targeted capital planning. The grandfathering terms established, since they were established by primary European regulations cannot be shortened by regulations issued by a supervisory authority, which must operate exclusively within the confines of the powers attributed to it by Union law.

* * *

1. Institutional aspects

It is submitted that ECB cannot 'overwrite', by way of ECB's regulations, the pre-existent substantive regime set forth by the EU regulation No. 575/2013 (CRR), as consistently implemented by the national competent authorities. Any regulation adopted by ECB, aimed at modifying rules set by the EU legislator (namely, the substantive provisions of CRR, as implemented at national level), will be not only in **breach of the rule of law**, but will also **alter the EU institutional balance** ending up in ECB acting *ultra vires* beyond the boundaries of its institutional remit.

In this respect – while reserving a more detailed analysis for a possible further submission – the following aspects can be highlighted.

- Regulation No. 1024/2013 (SSM Regulation) confers 'specific tasks' on the ECB in relation to the prudential supervision of credit institutions. SSM Regulation is based on **Article 127(6) TFEU**, pursuant to which the Council may **unanimously**, and after consulting the European Parliament and the ECB, confer 'specific tasks' upon the ECB concerning prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings. Thus, SSM is the **basic law** for any action taken by ECB within the scope (and for the implementation) of the same regulation.

- SSM legal design can be best analysed as based on a fundamental divide between regulation and supervision (Wymeersch, 2014). In this perspective, the remit of the ECB as supervisor is essentially confined to prudential supervision, with limited (and substantively circumscribed) rulemaking prerogatives and ‘playing a passive role in EU wide rulemaking’ (Wymeersch, 2014; see also Siclari, 2014 and Brescia Morra, 2014).
- Coherently, according to Article 4(3), for the purpose of carrying out the tasks conferred on it by the SSM Regulation, ECB is essentially empowered to **apply** rules, and **not to make them** (see also ‘whereas’ 34). More precisely, as clearly specified in the abovementioned provisions, ECB ‘shall **apply** all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives’. In addition, where the relevant Union law is made of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB ‘shall **apply** also the national legislation exercising those options’.
- Consistently with its role of supervisor (not regulator), **ECB is not entitled to adopt typical regulatory interventions**. The EU legislator has clearly specified (Article 4(3) SSM Regulation) the kind of acts that ECB could take for performing its tasks under the SSM.

  Besides its (mere) participation to the development of draft regulatory technical standards or implementing technical standards by EBA, ECB acts are **limited** to:

  - typical non binding acts, i.e. guidelines and recommendations; or
  - acts of individual character. i.e. decisions.

  Quite obviously, those acts are subject to (and shall comply with) the relevant Union law and in particular legislative and non-legislative act, including those referred to in Articles 290 and 291 TFEU, as well as binding regulatory and implementing technical standards developed by EBA and adopted by the Commission.
- Furthermore, as far as ‘regulations’ are concerned, the EU legislator has carefully circumscribed ECB prerogatives. As specified by Article 4(3) of the SSM Regulation, ‘ECB may also adopt regulations **only** to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation’. It is important to recall that such provision was carefully drafted and specifically amended during the legislative process: indeed, the ‘trilogue’ purposefully modified it in order to circumscribe even more ECB’s regulatory powers (indeed, the original Commission proposal recognised an explicit implementing power to ECB, to be exercised by both, regulations and decisions, at ECB discretion; the text ultimately adopted significantly narrows the scope of the provision, confining the use of regulation for specific purposes of organisational nature).
- Therefore, as confirmed by the plain text of the norm and consistently remarked in literature, ECB’s regulatory powers are confined to **operational** aspects (coherent examples in ECB’s practice are the ‘framework regulation’ No. 468/2014 as well as regulation No. 1163/2014): by stating that ECB may adopt regulations ‘**only** to the extent **necessary** to organize or specify the arrangements for the **carrying out**’ of its

tasks, Article 4(3) of the SSM Regulation clearly implies that ECB regulatory prerogatives are limited to **self-organisations** of the exercise of its supervision tasks and cannot be construed in a way to permit ECB to 'overwrite' the existing legal frame with its own regulatory choices.

- Finally, should the EU legislator have envisaged to grant ECB with regulatory prerogatives, it would have not (and could have not) conferred them in an implicit way; instead, it would have introduced an explicit enabling provision in the SSM Regulation and would have defined the 'essential' elements on the basis of which regulatory powers were to be exercised.

In the light of the above, it can be concluded that: (i) ECB function within SSM is focused on supervision (not on banking regulation); coherently, (ii) ECB acts consist in the application of pre-existing rules, via implementing decisions or non binding acts, without the possibility to modify the existing regulatory frame through substantive regulatory measures.

2. Doubts of legality of the proposed ECB's regulation on O&Ds

2.1. General aspects

Against this background, the draft ECB's Regulation on the exercise of options and discretions in Union law (Draft Regulation) raises serious doubts of legality. The Draft Regulation moves from the assumption that options and discretions (O&Ds) where power is granted to the supervisor fall under ECB's competence. It also distinguishes between 'general' (applicable to all banks) and 'case-by-case' (bank-specific) O&Ds. ECB's High Level Group (HLG) has analysed the current national implementation and practice and, in the light of HLG's results, ECB's Supervisory Board has decided that a regulatory intervention was needed with respect to several O&Ds.

The policy lines agreed at Supervisory Board level, imply *inter alia* an intervention on two O&Ds, provided by, respectively, **Article 471(1)** and Article 478(3) of regulation No. 575/2013, the Capital Requirements Regulation (CRR). With specific regard to Article 471(1) CRR, ECB acknowledges that such provision 'allows banks not to deduct their holdings in insurance subsidiaries until 2022'. Nonetheless, ECB envisages to **severely reduce the phase out period from 2022 to 2018** (see *Public consultation on a draft Regulation and Guide of the European Central Bank on the exercise of options and discretions available in Union law*).

At the same time, ECB states that Article 49(1) CRR gives competent authorities the option to allow banks, on a case-by-case basis, not to deduct their significant holdings in insurance undertakings. However, with respect to Article 49(1) CRR, ECB recognises that a full deduction of insurance holdings would have a significant impact on bank-led conglomerates in the SSM; therefore, ECB opts for **not intervening on Article 49(1) CRR**, and 'to allow non-deduction', simply 'enhancing disclosure requirements'.

ECB's Draft Regulation raises **criticism** in several respects.

- First, as said, **ECB has not been granted with regulatory power** in the SSM. It follows that ECB could not utilise the legal basis provided by Article 4(3) SSM Regulation for enacting new banking rules that intervene on, and modify, the pre-existing substantive legal frame. Otherwise ECB will act *ultra vires*, affecting the institutional and normative balance established by the EU legislator in both the SSM Regulation and CRR.

- Second, this is even clearer if one considers that CRR regulates O&Ds in a detailed way. Rules enacted by the EU legislator in this respect are clear and specific; they have to be (and have been) consistently implemented at national level through *ad hoc* implementing measures taken by the competent national authorities. As such, these rules are source of rights and legitimate expectations for all interested parties. Pursuant Article 4(3) of SSM Regulation, ECB's mandate is to **apply** these rules (as well as the national implementing measures), **not to modify** them (this is further confirmed by the fact that, pursuant to CRR, implementing regulatory measures should be adopted by the Commission in the form of delegated act).

- Third, Article 471(1) CRR derogates to Article 49(1) allowing competent authorities to authorise banks not to deduct their shareholdings in insurance companies. Thus, Article 471(1) is conceived as a specific derogation operating within the material scope of another derogation (i.e. Article 49(1)). Article 471(1) has to be implemented through measures taken by national competent authorities.

  It is submitted that, **intervening on Article 471(1) CRR (while not envisaging any intervention on Article 49(1) CRR), ECB is violating fundamental principles of the EU legal order**. In particular, ECB's approach appears to be inconsistent with the principle of protection of acquired rights, legitimate expectations and equality of treatment.. In this respect, it should be recalled that, being subject to the rule of law, ECB shall take due respect of those principles. The same Draft Regulation acknowledges it where it recognises that '[i]n exercising options and discretions, the ECB, as the competent authority, should take account of the general principles of Union law, in particular equal treatment, proportionality and the legitimate expectations of supervised credit institutions' ('whereas 8 of Draft Regulation). In addition, the SSM Regulation – that is the basic law of the ECB's Draft Regulation - underlines that the SSM Regulation must be construed in a way to fully respect the fundamental rights and to observe the principles recognised in the Charter of Fundamental Rights of the European Union (see 'whereas' 86).

  That having been said, two points can be emphasised.

  (i) ***Acquired rights and legitimate expectations***. As a derogation providing for a precise phase out period (until 2022), Article 471(1) - when implemented through national acts - is a **source of rights** for all interested parties. Consequently, when exercising its supervision prerogatives, EBC shall respect those acquired rights, as provided by the relevant EU legislation, in accordance to general principles of the EU legal order and to legal criteria recalled by the same ECB.

  Indeed, according to a well established case law, new rules cannot be applied to (and in prejudice of) 'situations originating and becoming definitive under the previous legislation which create acquired rights' (see, to this effect, Case 68/69 *Brock* [1970] ECR 171, paragraph 7; Case 143/73 *SOPAD* [1973] ECR 1433, paragraph 8; Case 270/84 *Licata v ESC* [1986] ECR 2305, paragraph 31 and *Centeno Mediavilla and Othersv Commission*, paragraph 62). Thus, '[a] right is considered to be acquired when the event giving rise to it occurred before the legislative amendment' (see *Centeno Mediavilla and Others v Commission*, paragraph 63).

Furthermore, 'any economic operator on whose part the national authorities have promoted reasonable expectations may rely on the principle of the protection of legitimate expectations' (*ex multis*, Case C-201/08, 10 September 2010, *Plantanol*, ECLI:EU:C:2009:539).

The Draft Regulation clearly disregards those principles. Article 471(1) CRR sets a period of time during which the 'deduction rule' is not to be applied. As recognised by the same ECB the very purpose of the norm is allowing 'banks not to deduct their holdings in insurance subsidiaries **until 2022'**, so providing them with legal certainty **until that date** and granting them with an adequate and predefined time-window for their capital budgeting. In such a context, ECB's Draft Regulation intervenes *ex post* on a situation already regulated by previous rules. Moreover, it pretends to modify exactly what the norm wanted to ensure to all interested parties: i.e. the **stability of a given regime over a given period of time**. By doing so, Draft Regulation substantially denies the rights that the parties based on Article 471(1) and affects their legitimate expectation on the duration and predictability of the O&Ds regulatory frame.

(ii) ***Equality of treatment***. As said, the Draft Regulation provides for ECB's intervention only on O&Ds set forth by Article 471(1) and not on O&Ds set forth by Article 49(1). As far as O&Ds based on Article 49(1) are concerned, ECB's Supervisory Board has decided to keep the *status quo*: i.e. all decisions taken in this respect by national competent authorities before November 4, 2014, will continue to apply. Such **disparity of treatment** is objectively unjustified. Indeed, if ECB correctly respects rights and legitimate expectations of the interested parties with regard to O&Ds provided by Article 49(1) CRR, *a fortiori* it should respect O&D based on a more specific derogation like the one set by Article 471(1). Such a disparity of treatment will lead to a substantial *discrimination* among banks: in particular between those subject to Article 49(1) CRR, for which the *status quo* is preserved, and those subject to Article 471(1) CRR, for which a radical change is envisaged. This will affect the level playing field and will end up in a breach of the principle of equality of treatment.

In the light of the above, it can be concluded that intervening on Article 471(1) CRR (while not envisaging any intervention on Article 49(1) CRR), ECB is violating fundamental principles of the EU legal order; . in particular, ECB's approach is inconsistent with the principle of protection of acquired rights, legitimate expectations and equality of treatment.

2.2. Further observations

Recital (80) of the CRR, which **intended to ensure a "*level playing field*",** identifies one of the CRR's aims as being *to strengthen the way those financial conglomerates rules* (in particular those relating to "double counting") *shall apply to bank and investment firm groups, ensuring their robust and consistent application*. It also provides that ***any further***

changes that are necessary will be addressed in the review of the Financial Conglomerates Directive.

These principles are implemented through Articles 49 and 471 of the CRR, as follows:

- Article 49 establishes the rules for the "*deduction of own fund instruments*" held by an institution in a financial sector entity (i.e. an insurance undertaking), if both of them belong to a **financial conglomerate**. In particular it provides that *the competent authorities may permit institutions not to deduct the holdings of own funds instruments of a financial sector entity*, provided that some of the conditions laid down therein are met.

- Article 471 establishes that *during the period from 1 January 2014 to 31 December 2022, competent authorities may permit institutions (*banks*) not to deduct holdings in insurance undertakings ... where the following conditions are met: ... The equity holdings …. shall ... be risk weighted at 370%.*

Hence the CRR makes express provision for *competent authorities* (whoever they are) to permit institutions which do not form part of a financial conglomerate and which have holdings in insurance undertakings, if certain requisites similar to those for conglomerates are met (Article 49), not to deduct their holdings but to risk weight them at 370% for a grandfathering period to run from 1 January 2013 to 31 December 2022.

The CRR, which is the European legislation directly applicable in all Member States, through the above-mentioned provisions, ultimately:

- ratified the "level playing field" between financial conglomerates and institutions (banks) with holdings in investment companies;

- allowed the competent authorities to permit risk weighting of holdings provided in particular that certain levels of control and financial analysis are in place at the financial institution (bank);

- established that the grandfathering period should apply to holdings in insurance undertakings owned by the institution (bank) *as from 31 December 2013 and for the period running from 1 January 2014 to 31 December 2022*.

Nowhere in the CRR is provision made that other authorities can reduce or modify the terms established by the CRR itself. Any eventual change by the ECB regarding the terms would thus be in evident conflict with the regulatory scheme established on this matter by the CRDIV/CRR and with its rationale. In particular, any eventual change in the above-indicated terms by the ECB:

- cannot be based on the SSM, which does not alter the regulatory provisions laid down by the CRR;

- would alter what is currently provided by Articles 49 and 471 and would also compromise *the level playing field* and the spirit of the Danish Compromise, benefiting in this case entities which form part of financial conglomerates (which would continue to be able to apply the provisions of Article 49 of the CRR) to the detriment of other non-conglomerate institutions;

- considering that the ECB Regulation shall apply exclusively with regard to those credit institutions classified as 'significant', it would also compromise *the level playing field* between institutions that are part of a financial conglomerate, significant institution and non-significant institutions, creating three different approach for the insurance holdings. Rules stated by primary rules should apply in the same way for all the institutions.

- would render vulnerable, moreover, the legitimate expectations by institutions, that have already planned and targeted their capital requirements on the basis of the current regulations;
- such a development would be in breach of recital (80) of the CRR, which stipulates that *any further changes that are necessary will be addressed in the review of Directive 2002/87/CE*, thus deferring any revision on the subject of mixed banking and insurance groups and their respective holdings to the reissuance of primary regulations (EU directives or regulations);
- such changes would also appear to be contrary to the provision of the *Lamfalussy report* committees process and the later *de Larosière report*, which identified the independent authorities (currently the ESMA, EBA and EIOPA), comprising the European System of Financial Supervision (ESFS) as the only bodies authorized to provide interpretations of European regulations (*level 3*).

What is set forth above, evidently, is not relevant only with reference to Articles 49 and 471 of the CRR, but is consistent with the consolidated principle according to which European regulations are directly applicable in the individual member states and can only be amended by the bodies that approved them, in this case the European Parliament and Council.

As said the ECB is now interpreting the regulation instituting the Single Supervision Mechanism (SSM - Regulation 1024/2013) in an unorthodox manner, availing itself of the faculty to amend the provisions of the CRR, without the authority to do so and in any case without a prior primary-level legislative intervention nor a consultation with the EBA.In this regard it is worth noting that the SSM regulation confirms under recitals 19 and 34 that "*nothing in this Regulation should be understood as changing the accounting framework applicable pursuant to other acts of Union and national law*" (see CRR regulation directly applicable in the individual member states) and that "*Where the relevant Union law is composed of Regulations and in areas where, on the date of entry into force of this Regulation, those Regulations explicitly grant options for Member States, the ECB should also apply the national legislation exercising such options*" (i.e. Bank of Italy circular no. 285 and related deeds). Furthermore, as already mentioned, Article 4 of the SSM regulation provides that the ECB that the ECB may adopt regulations only to the extent necessary to organize or specify the arrangements for the carrying out of the tasks conferred on it.

Nowhere in the SSM regulation is the ECB authorized to issue "ECB regulations" (as in this case) which could alter the terms laid down in the CRR (such as by shortening the term from 2022 to 2018). Instead, the ECB is exclusively authorized to revoke acts that were issued by a previous competent authority, if such revocation is justified.

Article 471 of the CRR clearly states that "… *during the period from 1 January 2014 to 31 December 2022, competent authorities may permit institutions not to deduct equity holdings in insurance undertakings ... where the following conditions are met: ...*". It is thus evident that, even if the ECB is acknowledged as the competent authority legitimately empowered to take the decision, while it may grant or rescind exemptions based on review of the conditions laid down, but it is not authorized to change the timescale of application laid down by first-ranking European regulations which can only be altered by regulations of the same ranking.

In the light of the above, it can be concluded that CRR intended to to ensure a level playing field that cannot be altered by a unilateral regulatory intervention of the ECB.

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Università degli Studi Roma Tre
Centro di Eccellenza in diritto europeo

EJC - *Roberti & Associati*