EUROPEAN CENTRAL BANK

BANKING SUPERVISION

PUBLIC CONSULTATION

Draft Addendum to the ECB Guide on Options and Discretions available in Union Law

Template for comments

Institution/Company

Austrian Federal Economic Chamber, Division Bank and Insurance

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First name

[redacted]

Surname

[redacted]

E-mail address

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Telephone number

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

In each comment, please indicate:

- 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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Template for comments

Name of Institution/Company	Austrian Federal Economic Chamber, Division Bank and Insurance
Country	Austria

Comments

Draft Addendum	Issue	Article	Comment	Concise statement why your comment should be taken on board
☒	General		Choose one option	In general we welcome the approach by ECB to align the conditions and criteria for strengthening a transparent and effective approval process. In this context we highlight the importance to do so without setting new or additional regulation which are not based on or covered by level 1 regulation set by EU legislators; rather by giving a detailed insight into ECB's decisions where necessary and requested by the legislator.
☒		429	Clarification	While the explanatory notes of the consultation paper refer to the

specific Recitals 91 and 92 of the Regulation (EU) 575/2013 (CRR) as well as those of the Delegated Regulation (EU) 2015/62, it fails to mention the most important consideration with respect to the topic at hand, i.e. the justification for Art 429 (7) CRR included in the explanatory memorandum to the Delegated Act on the leverage ratio.

The Commission states in this regard: While the changes proposed in this delegated act are generally aligned with the Basel revised standards on the LR, one of those changes addresses a 'Union specificity' that is not addressed by those standards. This specificity stems from the fact that, compared to the Basel framework, the CRR has a broader scope of application. The CRR applies to all banks (and investment firms) established in the Union, at both consolidated and individual level, while the Basel framework applies only to (large) internationally active banks, generally at consolidated level. This broad scope of application applies both for risk-based capital requirements and LR-related requirements under the CRR. However, unlike the risk-based capital requirements, the LR-related requirements do not currently foresee a specific treatment of intragroup exposures when institutions apply the CRR at individual level. In order to align the two, this delegated act therefore foresees, subject to approval from the competent authority and subject to certain conditions, the possibility to exclude intra group exposures when the LR rules are applied at individual level. The application of the LR at individual level to intragroup exposures, when risk-based capital requirements are not applied at this level, would not be consistent with the role of

the leverage ratio as a backstop to the risk-based capital requirements. This is particularly relevant for co-operative banking groups that have many smaller entities affiliated to a central body.

This statement clearly indicates the intention of the Commission (and – as a result – the delegated regulation) to align the specific treatment of intragroup exposures in the calculation of risk-weighted assets (i.e. the zero-risk weighting of specific exposures) with their treatment in the leverage ratio calculation (i.e. the exclusion of these same exposures from the exposure measure). As noted by the Commission, not excluding the intragroup exposures from the leverage ratio would make it impossible for the leverage ratio to act as a backstop; in fact, in all institutions with intragroup exposures of a non-negligible size, the leverage ratio would likely become the binding constraint if the exposures were not excluded from the calculation in parallel to the zero-weighting for the calculation of risk-based capital requirements.
Besides this issue is not only relevant for co-operative banking groups but also other types of banking groups operating centralised liquidity and funding management for a number of subsidiaries. It is especially important for all types of Institutional Protection Schemes.

Though, in this context we also emphasize that in Art 429 CRR there should only be provided a mere legal option for institutions (and not a legal obligation) not to include exposures within an IPS in the calculation basis of the LR (as already laid down in Art 429

			(7) CRR for intra-group-exposures). In our view, there should be no deviation in the exposures considered under either Art 113 (6) CRR or Art 429 (7) CRR, these should be identical. This also implies that the assessment of the exclusion under Art 429 (7) CRR should follow the assessment under Art 113 (6) CRR so as not to create inconsistencies of treatment; which is also clearly indicated by the CRR text of Art 429 (7) CRR itself as it refers only to the conditions set under Art 113 (6) CRR, without any indication of separate or additional conditions that need to be considered when applying Art 429 (7) CRR. As a result, there cannot be any additional assessment criteria for the authorisation under Art 429 (7) CRR compared to those used under Art 113 (6) CRR. Therefore, we believe that the criteria stipulated for the authorisation under Art 429 (7) CRR are not appropriate, as the ECB only provides further specification for the assessment of compliance with Art 113 (6) (c), (d) and (e) CRR in its consultation and does not propose to expand the list of assessment criteria under Art 113 (6) CRR.
☒		113/6	Clarification	Here we want to refer to our general remark above. Any approval conditions should be defined without setting new or additional regulations that are not based on or covered by level 1 regulations set by EU legislative power. Unfortunately we can identify several (draft) conditions that are going (far) beyond an in-detail formulated approval process as it would be necessary and is most welcome too.

I.e. when it comes to the conditions set under (iii) for Art 113 (6) (c) CRR (page 5) it is stated that “consistent” systems are used. It should be clearly defined what is meant by “consistent” as even within a group of institutions there are always those entities that are following different and/or more specialized business activities. That implies that “consistent” in the meaning of a “one-size-fits-all” approach would be an inappropriate approval condition, especially when in parallel it focuses on business lines and portfolios. Therefore we would suggest to extent the guide by a list of indicators that needs to be considered when checking an institution’s internal systems and their appropriateness to fulfil the (approval) conditions.

As ECB we also see the need for an appropriate documentation when it comes to an approval process in the context of Art 113 (6) CRR. Nevertheless, the list of documents, starting at page 6, seems to be excessive and under certain conditions without any additional benefit, for example (viii). When there is a legal opinion stating that no obstacles to fund transfer or repayment of liabilities exist as formulated under (vii), what would be the additional output of a statement by the legal representatives stating the same content? As every statement in this manner can only reflect a current situation but is never able to look into the future, these potential obstacles would also be part of any supervisory survey after approving the application of Art 113 (6) CRR. The same situation with similar questions (just in the scope of all conditions set in the (draft) paper) would be created when Art 113 (6) CRR shall be applied for an initially approved but now

				extended group of institutions. The question should be raised where a full list of conditions can be applied more efficiently to result into an appropriate and meaningful output. Therefore we urge ECB to find an appropriate balance between input (costs, efforts and other resources) and its potential outcome, which is always to be kept in mind when setting a supervisory action.
☐			Choose one option	
☐			Choose one option	
☒	Materiality assessment for additional collateral outflows for downgrade triggers	Art 30/2 delegated Act	Amendment	1. The materiality assessment is based on "total outflows". It is unclear whether total outflows refer to weighted or unweighted outflows and whether total outflows refer to gross outflows or net outflows (i.e. after taking inflows into account). This should be clarified in the Guide. 2. In general, the 1%-threshold is considered considerably too low given that only "material" outflows are to be captured. The threshold should be raised to at least 5%. 3. The process of notification of material outflows to ECB is unclear. It should be clarified in the Guide that regular reporting of relevant outflows based on DA LCR-templates (combined with 100% outflow rate if deemed material by the credit institution or with 0% outflow rate if not deemed material by the credit institution) is sufficient to fulfil the notification requirement.
☒	Inflow Cap	Art 33/2	Clarification	The draft Addendum comprehensively addresses the potential

Exemption	delegated Act	danger of regulatory arbitrage between waiver and inflow cap exemption when combining Art 33/2- and Art 34-applications. However, from the discussion in the Addendum it does not become clear, based on which liquidity position such danger would exist. In essence, considering two entities (parent, subsidiary), two cases can be distinguished: a. parent is liquidity providing/subsidiary is liquidity receiving or b. vice versa. The liquidity providing entity receives inflows from on- or off-balance sheet items which could be exempted from the inflow cap. Consider a situation between a parent and a subsidiary where the subsidiary is the liquidity-providing entity (i.e. places monies with the parent and receives inflows from these placements) and the parent is the liquidity-receiving entity (i.e. receives monies with corresponding outflows). In such cases the subsidiary could apply for an inflow cap exemption for such intra-group inflows with lower liquidity buffer requirements and respective improvements in its solo LCR. The solo LCR situation for the parent remains the same (no improvement in LCR). This is different to the waiver situation, where the LCR would be calculated for both entities (parent, subsidiary) together and the waiver LCR would be different from (i.e. would typically be higher than) the solo LCR of the parent. Where is regulatory arbitrage by applying for the Inflow Cap Exemption in this case? The addendum also makes multiple references to Art 34 in the context of regulatory arbitrage. But given that Art 34 is strictly limited to off-balance sheet items, i.e. to the undrawn portion of received lines, and does not refer to (more material) on-balance

				sheet items, the danger of regulatory arbitrage seems (very) limited. More transparency on the cases that ECB has identified where such regulatory arbitrage could arise would be helpful to better understand the issue. Based on the current version in the draft Addendum the regulatory arbitrage issue remains unclear.
☒	Inflow Cap Exemption	33/2 delegated Act	Deletion	We make reference to the sentence on p.8 “In this regard, the ECB would consider it appropriate to fully exempt from the cap only those intragroup inflows that are also subject to a preferential treatment under Article 34 of Commission Delegated Regulation (EU) 2015/61”. Given the limited scope of Art 34 (only received lines) this would mean that only inflows from received lines would be subject to the inflow cap exemption. We strongly oppose this view which is not in line with the scope of Art 33/2 lit a DA LCR. Art 33/2 lit a DA LCR refers to intra-group inflows from both, on- and off-balance sheet items and is not limited to off-balance sheet items. The sentence should be deleted.
☒	Inflow Cap Exemption	33/2 delegated Act	Deletion	We make reference to the penultimate paragraph on p. 9 “In cases where the conditions for an Article 8 waiver cannot be met for reasons that are not under the control of the institution or the group, or where the ECB is not satisfied that an Article 8 waiver may actually be granted, the JST will consider instead the possibility of granting a combination of the preferential treatment under Article 34… and the exemption to the cap on inflows …” This sentence introduces a hierarchy of applications. In first instance, banks have to apply for a waiver and only if a waiver approval is not possible, banks are allowed to apply for an inflow cap exemption. We strongly oppose such application hierarchy

				as it is neither justified from a regulatory/legal perspective (neither CRR nor DA LCR contain any hint to such hierarchy; quite to the contrary, both applications are treated equally) nor from an economic perspective (see discussion above regarding regulatory arbitrage issue). The paragraph should be deleted. No application-hierarchy should be introduced by ECB.
☒	Inflow Cap Exemption	33/2 delegated Act	Deletion	We make reference to (2) on p. 10 “Where the exemption under Article 33(2) of Commission Delegated Regulation (EU) 2015/61 is not requested in combination with a preferential treatment pursuant to Article 34 of Commission Delegated Regulation (EU) 2015/61, the JST will still consider the potential impact of this exemption on the LCR of the institution and its liquidity buffer, and the type of intragroup inflows that would be exempted from the 75% cap.” It remains unclear, what is meant by “the JST will … consider”. Does it mean that JST will not give approval to inflow cap exemption applications simply based on the fact that the buffer requirement would be deemed to be too low? Would it mean that JST prescribes a minimum liquidity buffer irrespective of the fact that exemptable inflows would allow a lower buffer requirement? We oppose any such kind of approach as it is not in line with Art 33/2 DA LCR. The sentence should be deleted.
☒	inflow Cap Exemption	33/2 delegated Act	Deletion	We make reference to the list of requirements listed on p. 10. Requirement (iii) which forces banks to receive an ECB approval for any contractual change in the underlying agreements is deemed to be too harsh. The requirement should be deleted or at least changed in a way that notification to ECB of any changes would be sufficient.

☒	Inflow Cap Exemption	33/2 delegated Act	Deletion	We make reference to the following sentence on p. 13 “In this case, other intragroup deposits could benefit from the exemption only where, in accordance with national law or other legally binding provisions regulating groups of credit institutions, the deposit-receiving entity is obliged to hold or invest the deposits in Level 1 liquid assets as defined in letters (a) to (d) of Article 10(1) of Commission Delegated Regulation (EU) 2015/61.” The requirement to hold received monies in the form of Level 1 assets should be removed as it is arbitrary and not in line with Art 33/2 lit b DA LCR which does not specify such requirement. An Art 113/6-approval should be sufficient to receive an Art 33/2 lit b DA LCR-approval.
☒		33/2 Delegated Act	Clarification	Art 33 para 2 Del Reg (EU) 2015/61 (LCR) Again, we refer to our general remark above. Any approval conditions shall be defined without setting new or additional regulations that are not based on or covered by level 1 regulations set by EU legislative power. The (draft) conditions formulated by ECB are not just far reaching and going beyond the conditions that can be seen as covered by level 1 text, but in addition ECB seems to assume that every applicant intents to use several conditions of the CRR and/or Delegated Regulation 2015/61 in an improper way. We see the need for a careful consideration of certain applications but, again, Art 33 para 2 lit b) of LCR is already referring to the conditions set in Art 113 (6) & (7) of CRR. As already outlined under the conditions set for applying Art 429 (7) CRR above, there cannot be any additional assessment criteria for the authorisation under

				Art 33 para 2 lit b) of LCR compared to those used under Art 113 (6) CRR. Therefore, we highlight that the criteria stipulated for the authorisation under Art 33 para 2 lit b) of LCR are inappropriate and not in line with the legislative intension incorporated with the level 1 text. In general we also want to pinpoint our concerns about conditions set by an authority to apply a certain regulation intended to provide some ease under certain circumstances for regulated entities. It would be highly questionable if these conditions tend to foil the eligible regulation.
☒		Art 93 (6) CRR	Amendment	Initial Capital Requirement on going concern: The ECB intends to exercise the option in Article 93(6) of the CRR and to determine the policy on the exercise of that option, including the potential development of more detailed specifications, following an assessment of specific future cases. In our view the option in Art 93 para 6 CRR should be handled individually by the national authority without any determination by the ECB. Because this provision refers to very small institutions with very specific national circumstances and should therefore be no matter of the Single Supervisory Mechanism.
☒	LCR	Chapter 5 Liquidity 14. Cap on Inflows	Amendment	In two provisions (page 12 (iii) and page 14 (iii)) an exception of the inflow cap is provided if the terms of the contractual agreement governing the deposit cannot be changed substantially without prior approval of the ECB. This provision may apply to inflows in groups and within an IPS. We are wondering how this provision could be implemented in practice.

		Hence every single substantial change of the contractual agreement would have to be approved by the ECB. Experiences with certain provisions where a prior approval of the competent authority is already foreseen have shown that in certain cases it is difficult to receive any approval within a certain timeperiod, that is oriented at an institution's day-to-day business. Therefore we urge that with the extended conditions for this approval no future changes of this kind (contractual agreement) would be possible anymore. Therefore we would ask the ECB to render (and justify) why the ex-ante approval is forseen and to reconsider a limitation of these provisions at least to certain circumstances (if any).
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