EUROPEAN CENTRAL BANK

BANKING SUPERVISION

Template for comments

Public consultation on revisions to the ECB's policies concerning the exercise of Options and Discretions (O&Ds) in Union law

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General comments

The EACB welcomes the possibility to comment on the ECB package on its approach to options and discretions available in EU law. It is evident that gaining clarity regarding the ECB expectations on the use of the options and discretions in light of the adoption of the banking package (CRR3 and CRD6) is of paramount importance. We hope that the feedback provided will contribute to meaningful changes in the O&Ds final policy framework.

However, it is not clear which are the reasons that led to numerous changes in approach that go even beyond the new regulatory environment. The EU banking system, and cooperative banks in particular, repeatedly proved to be resilient - even during the financial turmoil that hit markets in 2023. This evidenced the overall fitness of the regulatory framework to ensure financial stability at that moment. We should also note that the overall policy debate in the EU is moving towards the principles of simplification and competitiveness. With this background, several of the ECB's proposals set out in the draft Guide, especially regarding those options and discretions already available before the new banking package, are rather set to determine an unjustified increase in complexity and costs - weighing down on overall capacity to e.g. effectively allocate capital.

We would like to underline the following aspects in particular:
The absence of proportionality regarding the new approach set out by the ECB in Chapter 2, and especially the proposed interpretation of the meaning of Art. 49(1) CRR included at page 28, paragraph 6 - which would extend the risk weighting of insurance holdings assets within a conglomerate to AT1 and Tier 2 instruments.
The expression "all own funds-equivalent instruments" is ambiguous, and seem to refer to AT1 and AT2 instruments. This can hardly be in line with the general aim of the Danish compromise and the substantial supervision of conglomerates as outlined under the FICOD.
The risk weighting system was also set up to counter the non-neutrality of deductions of insurance subsidiaries with high quality capital on banks' CET1. The Danish compromise aims to take into account the risk diversification of the bancassurance business model which has been proven many times. It therefore results in a certain reduction of what would be an algebraic sum of CET1 equity of banking and insurance entities for a conglomerate.
On the other hand, on the subordinated debt, there is no prudential gain expected nor obtained. If a conglomerate issues Additional Tier 1 or Tier 2 insurance for its insurance company, it is a matter of ensuring the benefits of a single signature within the conglomerate or of prices. Currently the impact of a deduction by type of AT1 ot Tier 2 instruments is neutral and there is no prudential advantage to favor one solution or the other: issue by the bank and transfer to insurance or direct issue by insurance. A prudential treatment of AT1 and Tier 2 in RWAs would instead lead to regulatory incentives.
In the EU, the regulation applied for the supervision of financial conglomerates is more advanced than in other jurisdictions, consistently with the Joint Forum’s recommendations. It requires internal control mechanisms and risk management procedures across bank and insurance activities. It enables solvency to be assessed after eliminating all intragroup capital and in light of all the banking and insurance risks taken at the consolidated level. The existing conditions for granting the non-deduction envisage that supervisors imperatively require integrated risk management. The new rule would imply a kind of disintegrated management of finance due to the creation of a loophole which will lead to favoring issuance by insurers.
We, therefore, do not see the reason for these additional constraints for the banks. We suggest to refrain from revisint the existing approach, at the very least the current stock of AT1 and Tier 2 transactions should be preserved through a grandfathering. Banks would have undoubtedly avoided any impact on CET1 from the start if this revision had been foreseeable.

Furthermore, we would also recommend a careful re-evaluation of several proposals dedicated to Institutional Protection Schemes (IPSs). In this area, we noted that certain choices are either non-practical (e.g. in the area of liquidity, stress testing, considerations regarding an institution leaving the IPS), unclear (e.g. definition of certain indicators), or even go beyond the primary legislation (e.g. in the area of funds available to the IPS, notice period to end the IPS).

Finally, with regard to the trading book, we see that particularly for the exemptions the boundary section is overly complex and redundant with respect to the demonstration of trading intent across various paragraphs. We are concerned that the proposed approach would result in a dramatic and unjustified expansion of the transactions requiring supervisory pre-approval.

Template for comments

Public consultation on revisions to the ECB's policies concerning the exercise of Options and Discretions (O&Ds) in Union law

ECB Guide on Options and Discretions under Union law

Please enter all your feedback in this list.
When entering feedback, please make sure that:
- each comment deals with a single issue only;
- you indicate the relevant article/chapter/paragraph, where appropriate;
- you indicate whether your comment is a proposed amendment, clarification or deletion.

Deadline:

ID	Section	Page	Type of comment	Detailed comment	Concise statement as to why your comment should be taken on board
1	Section II, Chapter 1, No. 15	23	Deletion	Reference is made to the following item: *"However, the ECB may consider exercising the option set out in Article 24(2) on a case-by-case basis, if duly justified from a supervisory perspective." (Deletion of the text).* The previous decision of the ECB to not exercise this option under Art. 24(2) CRR should be upheld, allowing banks to continue reporting to the supervisor in line with their national accounting standards. We encourage the ECB to avoid a case-by-case decision, as proposed by the new text as it would have a disproportionate effect on smaller banks. In Member States allowing the use of n-GAAP, the valuation of off-balance-sheet items and the determination of own funds in accordance with IFRS is associated with high processing and IT costs.	Institutions for which the national regulation requires the use of n-GAAP should continue to be allowed to use n-GAAP for prudential purposes. The valuation of off-balance-sheet items and the determination of own funds in accordance with IFRS is associated with high processing and IT costs, with disproportionate impact on smaller banks.

2	Section II, Chapter 2, No. 5	28	Deletion	Reference is made to the following item: "In cases where the credit institution plans to submit a request to the ECB for such permission, the ECB will grant a permission, covering all own funds-equivalent instruments, provided that the CRR criteria and appropriate disclosure requirements are met." The expression "all own funds-equivalent instruments" is ambiguous, and seems to refer to AT1 and Tier 2 instruments. This can hardly be in line with the general aim of the Danish compromise and the substantial supervision of conglomerates as outlined under the FICOD. The risk weighting system was also set up to counter the non-neutrality of deductions of insurance subsidiaries with high-quality capital on banks' CET1, a risk weighting of AT1 and Tier 2 like CET1 instruments would imply that issuances via the insurance company are ultimately favoured. The Danish compromise aims to take into account the diversification of the bancassurance business model which has proved to be beneficial over time. The proposal set forward in the draft Guide leads to risk weight instead of deduction of holdings of non-CET1 instruments issued by insurance covered by Article 49(1). This is a material change of the current framework and leads especially to an increase of CET1 consumption. We believe that the Article 49(1) relates to total own funds or only CET1, and that this interpretation applied by the majority of financial conglomerates and authorities did not require reconsideration. Firstly, this article is part of the subsection “exemptions from and alternatives to deduction from Common Equity Tier 1 items” and authorisations already given focus on CET1. Secondly, the Article’s last paragraph states that “The method chosen shall be applied in a consistent manner over time”. Thirdly, extension to AT1 and T2 would be inconsistent with Article 56 and 66 that request those instruments to be deducted from bank’s own funds. Thus, this proposal would entail the adaptation of the Level 1 text which falls within the exclusive competence of legislator. Moreover, this would be consistent with the origin and the aim of the Danish compromise. Furthermore, the CRR rules implemented by Article 49.1 have been secured by the following paragraph: "the method must be applied consistently over time". The national authorities accepted the request of the banks that initiated the desired exemption, i.e. a treatment exclusively dedicated to CET1, by means of official letters which were then validated by the ECB, which took over these prerogatives in 2014. Such an approach should be upheld.	The new requirements for the non-deduction of insurance holdings are not practical and give rise to regulatory arbitrage, favouring issuances via the insurance company rather than being neutral.

3	Section II, Chapter 2, No. 16.	32-33	Deletion	According to the CRR3, the competent authority can allow an institution to subtract either of the amounts mentioned in Article 84(1) point (a)(i) or (ii), provided the institution demonstrates to the authority's satisfaction that the additional minority interest can absorb losses at the consolidated level. In section II, Chapter 2, No. 16, the ECB Guide requires losses of all other group undertakings to be borne by instruments issued by another subsidiary and owned by persons not included in the consolidation. This implies that the instrument should cover losses of affiliates (sister companies) of the issuing subsidiary as well. In our understanding, this does not align with the EU legislator's intention, which is to ensure that losses of the respective subsidiary (with minorities) are proportionately borne by minority shareholders at the consolidated level. When this is ensured, it should be possible to use the group's capital requirements for allocation, even if the subsidiary's capital requirements are lower. The requirement should be limited to proving that minority shareholders are actually bearing losses incurred at the subsidiary level on a pro rata basis, ensuring those losses are also borne by third parties.	We encourage the ECB to reconsider the proposal included in Chapter 2, no.16 as it would not meet the aim of the CRR rules. Instead, it would be more proprotionate to apply the requirements as outlined in art.84(1), 85(1), 87(1) CRR.
4	Section II, Chapter 3, No. 3	33-34	Deletion	For some banks that have not had a trading book until now, structured issues in the own liabilities have been classified in banking book without splitting the embedded option, their back-to-back hedging products are also included in banking book. If exemption cannot be applied for these structured issues without splitting the embedded option and their back-to back hedges, these banks would be required to implement a trading book without any trading intent or residual market risk exposure, which would create an unnecessary burden. We suggest removing the following sentence from the relevant paragraph: "*– the ECB considers this to be especially relevant for the requirements in Article 104(2), point (i), of the CRR, including the splitting of instruments,*" or adding a specification such as "***unless the institution could prove the absence of trading intent***"	The ECB should exclude instruments referred to in Article 104(3)(h) of the CRR (own liabilities) from the priority order set out in the second paragraph of Section II, Chapter 3, No 3.

5	Section II, Chapter 3, No 3	36	Amendment	CRR3 Article 104(4) provides that the ECB shall approve a derogatory classification in the banking book where the institution has effectively demonstrated the absence of trading intent or hedging of a position with trading intent. Items (iv), (v) and (vi) from the second sub-paragraph indicate that banks should submit: (iv) an impact assessement on own fund requirements (v) the intended accounting treatment and estimate of the account value (vi) the expected position size and impact on risk metrics Apart from the intended account treatment mentioned in item (v), the other items are not relevant for the required demonstration. Furthermore, this may suggest that two requests with similar rationale but different impacts/metrics may be treated differently, which would go against the level 1 text. Finally, providing such metrics and impact assessments is quite burdensome and as mentioned above, provide limited added value for the processing of such requests.	The basis for a derogation to the presumptive trading book classification is to demonstrate an absence of trading intent (or hedge of an exposure with trading intent) to the satisfaction of the supervsiroy authority. The ECB Guide is listing a number of items which are not relevant for the demonstrattion and potentially quite burdensome to produce. Therefore, they should be removed from the derogation file.
6	Section II, Chapter 3, No. 3	34	Clarification	According to the Draft Guide, any referenced instrument must be designated as a trading book instrument "when it is first recognised on the books of an institution". Our understanding is that only new positions in such instruments, recognised on the institutions' books from the date of application of the amended Article 104 CRR, shall be considered, and existing positions shall continue under their current classification. This should be more explicitly stated.	In our view, only newly recognised positions from the date of application of the amended Article 104 CRR shall be generally designated to the trading book.
7	Section II, Chapter 3, No. 3	34	Clarification	We believe the Guide should clarify whether listed equities that are participations pursuant to the applicable accounting standard are generally considered to be classified as trading book positions. If that were to be the case the Guide should also clarify that listed equities that are eligible for the deduction exemption under Article 49(2) or (3) CRR or falling under the grandfathering provision of Article 495a(3) CRR do not generally require ECB approval to be included in the banking book.	We consider these provisions to be lex specialis, taking precedence over the requirements outlined in Article 104 CRR (as amended).
8	Section II, Chapter 3, No 4	36	Deletion	Reference is made to the following item:"The ECB is of the view that separate requests should be submitted for each hedge fund". This request is not aligned with the time-to-market of the activity and would also be quite burdensome to implement from an operational perspective.	The conditions for classifying exposures to hedge fund should align with those applied to Collective Investment Undertakings (CIUs) under Article 104(8).
9	Section II, Chapter 3, No 4	36-38	Clarification	It is unclear whether the provisions included in the paragraph apply specifically to the direct holding of hedge fund shares or to all types of exposures, including derivatives.	A clarification is needed whether it applies to the direct holding of hedge fund shares, or whether it extends to other exposures.

10	Section II, Chapter 3, no 3(ii)(a) and (iii)(a)	35	Deletion	Reference is made to the following item: "if the scope of application covers Article 104(2), point (d), of the CRR and the business objective is the hedging of banking book positions, the internal classification of derivative instruments as hedging instruments throughout their lifetime". Derivatives from the banking book intended for hedging exposures, without trading intent and initiated outside of the trading desk, should naturally be classified under the banking book. Requiring individual or group derogations for these types of products would impose an unnecessary operational burden.	Demonstrating “hedge effectiveness” should be permissible based on different concepts, such as the CRR credit risk mitigation framework for RWA hedges in the banking book, economic hedging for non-RWA hedges, the IRRBB framework for IRRBB hedges, or the mandate of the ALM function of the bank.
11	Section II, Chapter 3, no 3	35	Clarification	Reference is made to the following item:*"For the purposes of assessing the institution's request pursuant to Article 104(4) of the CRR, the ECB will consider the following: […]* *vii) how the institution ensures that relevant positions under the discretion provided for in Article 104(4) of the CRR are managed by units responsible for non-trading book management that are separate from units responsible for trading book management* ***if the institution applies Article 325(1)(b)" (Inclusion of the bold text.)***	The requirement of having separate units responsible for non-trading book and trading book management seems to relate to the requirements under art 104b(1) CRR [calculating the own funds requirements for market risk in accordance with the approach referred to in Article 325(1), point (b)], referring to the internal model approach. As such, we understand that, according to the CRR, the requirement would not be applicable to institutions not applying the internal model approach. Therefore, as a clarification, it should be included 'if the institution applies Article 325(1)(b)' to to Subsection (vii) of Paragraph 3 of Chapter 3 of Section II on Page 35 of the ECB OND GL.
12	Section II, Chapter 4	57	Deletion	The amendment is acceptable in general, however the footnote “This applies to both financial and non-financial support measures by the IPS.” should be deleted.	Unlike financial measures, non-financial measures are not support from the IPS, which can be made subject to conditions.
13	Section II, Chapter 4, (3) lit. (ii)	57	Amendment	We recommend the deletion of the proposed new sentence or an alternative formulation of the second half-sentence as follows: "… and an appropriate but significantly shorter period of time for liquidity measures…"	Proven IPS practice has shown that necessary support measures have been and can be granted at any time within a reasonable period of time. The current wording “in a timely manner” is therefore sufficiently clear and appropriate. The IPS internal regulations are designed accordingly. However, it is not helpful to use vague formulations to create a supposedly more specific definition. In particular, the wording “no more than a few days” can lead to an unnecessary restriction of the flexibility of the IPS in cases where a longer period of time would be possible, though. In cases where action must be taken as quickly as possible - i.e. within “a few days” - the IPS will do so anyway.

14	Section II, Chapter 4	57-58	Deletion	Reference is made to the following item: "Stress scenarios should adequately cater for material idiosyncratic and systemic risks. In this context, the IPS should also consider (i) the extent to which internal spill-over effects between IPS entities resulting from potential support cases will exhaust the IPS support capacity, and (ii) how the IPS, when confronted with an extreme support case depleting its support capacity, would ensure that all its members and the IPS as a whole continue to comply with regulatory requirements." These additional specifications regarding the IPS stress test introduce unnecessary complexity and higher requirements, reducing the truthfulness and reliability of the results. The negative effects in a stress test are calculated across each and all institutions. The assessment of regulatory compliance of the IPS and its members should be kept in mind for analysing the stress test results but should not be part of the parametrisation of the stress scenario itself. Also, these new sentences reduce the flexibility needed to design stress test scenarios forcing to create scenarios unreal. In this sense, it should be remembered the EBA/GL/2018/04 paragraph 79 “Institutions should ensure that stress testing is based on severe but plausible scenarios and the degree of severity should reflect the purpose of the stress test…” The newly added sentences could be a hurdle to comply with the requirements established in the abovementioned Guidelines.	The provisions regarding the stress test across IPS is already sufficient. The wording “internal spill-over effects between IPS entities” and the link towards the regulatory compliance is unclear and should be deleted. Besides this would also not in line with the basis to determine the minimum target level of the funds (cp. II.4 (3) lit. (iv) ponit c).
15	Section II, Chapter 4	58	Deletion	Reference is made to the following item: *"However, this does not imply that the collection of funds according to the respective national transposition of the DGS Directive is also sufficient also for IPS purposes. To allow for targeted and proactive intervention by the IPS, it must set up a segregated ex-ante fund exclusively for IPS purposes".* No additional requirements that are not strictly included in Art. 113 (7) CRR and the requirements of the DGSD should be imposed from the ECB, also considering the open negotiations regarding the legislative proposal connected to CMDI.	No additional requirements regarding the deposit guarantee scheme that are not strictly included in Art. 113 (7) CRR and of the DGSD should be imposed by the ECB. If the recognition of an IPS as a DGS requires the fulfilment of the requirements of Art. 113 (7) CRR and the requirements of the DGSD, the possibility of recognition cannot be linked to additional requirements that are not set out at the same level (level 1 legislation).
16	Section II, Chapter 4	59	Deletion	The addition with reference to “based on clear indicators triggering proactive decision-making by the IPS” should be deleted.	A link between clearly defined indicators and IPS measures in the sense of a trigger does not do justice to the matter, particularly in the area of monitoring. There is a lack of individual consideration of qualitative factors in particular, which can be decisive for the further development of the institution.

17	Section II, Chapter 4, No 7	60	Deletion	Reference is made to the following item: *"The ECB is of the view that, when a single IPS member wishes to leave an IPS, that member should ensure that both it, and the IPS that it is leaving, continue to comply with regulatory requirements, even after it has left the IPS."* It is not clear how a credit institution is supposed to ensure that an IPS it is about to leave complies with regulatory requirements and vice versa. This kind of assessment would require extensive knowledge about the financial means and condition of the system of the two or multiple parts involved, which is not possible after the exit of the IPS, given strict confidentiality. If the ECB would like to proceed in this direction, it should carefully evaluate instruments indicated in the legislative text and compare burdensome and operational risks with possible benefits.	Such new obligations between IPS and members that are leaving it are not possible in practice. The member leaving the IPS also has no means of ensuring that the IPS complies, even if it had the relevant knowledge.
18	Section II, Chapter 4, No 7	60	Deletion	Reference is made to the following item: "In exceptional circumstances the IPS and its members, in agreement with the competent authorities, may shorten this period." This does not comply with Article 113(7) point (f) od the CRR which states that "members of the institutional protection scheme are obliged to give advance notice of at least 24 months if they wish to end the institutional protection scheme".	The provision does not comply with Article 113(7) point (f) of the CRR and should therefore be deleted.
19	Section II, Chapter 4, No. 10	61	Deletion	Reference is made to the following item: "Article 113(7), point (i), of the CRR provides that the adequacy of the systems referred to in Article 113(7), points (c) and (d), is approved and monitored at regular intervals by the relevant competent authorities". It should be noted that no “approval” is associated with monitoring and that “at regular intervals” only refers to monitoring and not to regular renewal of the permit. Regarding the approval, only when the requirements for recognition are no longer met, it would have to be revoked. Under the current darft, it might be interpreted that approval is granted periodically.	Clarification regarding approval in accordance to article 113 (7) CRR.
20	Section II, Chapter 2, No. 5	61	Deletion	Reference is made to the following item*: " To allow for a thorough monitoring of IPSs consisting of a combination of significant and less-significant institutions concerning compliance with Article 113(7), points (c) and (d), of the CRR, it is important that both authorities – the ECB and the NCA concerned – have access to the same information needed to properly assess the risk situation of the affected IPS member."* The second sentence would entitle the ECB to request the same information as the NCA from now on. This passage should be deleted.	The cooperation between the ECB and NCA with regard to the supervision of LSIs and SIs is regulated in the SSM Regulation and offers the ECB and NCA every opportunity to obtain the information required for supervision directly (from the institutions) or indirectly (via the NCA). However, this does not mean that the same information must always be available at the ECB as at the NCA, nor that the institutions should replicate the reporting.

21	Section II, Chapter 2, No. 5	61	Clarification	Reference is made to the following item: "The ECB expects that IPS members quantify at least annually the benefits connected with the IPS membership and its impact on key regulatory figures". It would beneficial to clarify the concept of "key regulatory figures". In our understanding, they would comprise the capital ratio. In addition, the quantification of those reliefs can also be done by the IPS itself and afterwards reported to the IPS members. This might also be specified to avoid misleading interpretations. It is broadly recognized that members of an IPS show a lower risk profile. Regulations concerning DGS and SRF contributions allow for lower contributions for IPS members as a recognition of the risk mitigating role played by the IPSs. Since we understand that the Supervisory Review and Evaluation Process (SREP) carry out by supervisory authorities should also consider the IPS membership for the determination of P2R and this information is not provided to IPS members, it would not be possible to comply with the proposed expectation unless that information is made available for these entities.	Clarification that "key regulatory figures" refers to the capital ratios. Compliance with the proposed expectations would require Competent Authorities to provide further information to IPS members.
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