DEUTSCHE BÖRSE GROUP

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Secretariat to the Supervisory Board
Public consultation on harmonising options and
discretions of NCAs to less significant institutions
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Public Consultation on harmonising the exercise of options and discretions by NCAs in relation to less significant institutions

CS/JH

Dear Madam or Sir,

Deutsche Börse Group (DBG) welcomes the opportunity to comment on the "Recommendation on common specifications for the exercise of some options and discretions available in Union law by NCAs in relation to less significant institutions" and the "Guideline on the exercise of options and discretions available in Union law by NCAs in relation to less significant institutions" issued on 03 November 2016.

DBG is operating in the area of financial markets along the complete chain of trading, clearing, settlement and custody for securities, derivatives and other financial instruments and as such mainly active with regulated Financial Market Infrastructure (FMI) providers.

Among others, Clearstream Banking S.A., Luxembourg, and Clearstream Banking AG, Germany, who act as (I)CSD as well as Eurex Clearing AG as the leading European Central Counterparty (CCP), are also credit institutions and are therefore within the scope of the European Capital Requirements Directive (CRD) and Capital Requirements Regulation (CRR). Clearstream subgroup is supervised on a consolidated level as financial holding group. Currently, all of our group entities are less significant institutions.

1. General comments

In general, GDB supports the approach of the ECB to foster the harmonisation of supervisory practices for less significant institutions within the EU wherever reasonable and GDB is also supportive towards the aim to establish thereby a level playing field within the Union. Overall, we agree with most of the proposed elements the ECB is considering for the determinations of certain discretions and options.

Regardless of our general support on unified rules wherever reasonable and possible, we nevertheless want to point out that in order to facilitate the appropriate regulation and supervision of institutions of different sizes and business models (e.g. the specialised business activities of the FMIs within our group) an adequate level of proportionality needs to be considered and some room for discretion should be left for the competent authorities. As such, we honour the efforts made by the ECB especially with regards to the draft recommendation not to propose harmonised rules for all aspects included in the ECB Guide for SIs but to leave room for discretion and proportionality to the NCAs with regards to the supervision of LSIs.

Although the guideline and recommendation are directed towards competent authorities only, the provisions are creating some uncertainty at the institutions level on the applicability of (a) national rules for institutions or (b) ECB guidance respectively. We refer to our comments under point 2 on Large Exposures as a good illustrative example. It should be noted that in practise, national competent authorities will to the extent possible only refer to the ECB guidelines instead of incorporating the content in their own framework.

The proposed guideline and recommendation related to less significant institutions refer to a large extent only to the respective rules for significant institutions and the respective underlying ECB framework (although – as stated above – not covering the whole universe of the rules laid down for SIs). As such, any change in the relevant areas related to the rules for significant institution will automatically apply to less significant institutions unless dedicated treatment is applied or corrections in the references are made at the same time. Furthermore, while for significant institutions **one** comprehensive document with all relevant information has been created, the current ECB proposal for less significant institutions will spread the relevant information across the rule books for less significant institution **and** for significant institution. This makes it more complex for less significant institutions to check the applicable rules.

In addition, while we do not have an objection to apply the rules for significant institutions **in the current context** also to less significant institutions we oppose the approach to link those formally in this direction.

As such we strongly recommend to the ECB to have a guideline and recommendation for less significant institutions as one comprehensive document each with full text instead of a frame document with reference to other documents. Making the rule set for less complex institutions more complex than for significant institutions is turning the principle of proportionality upside down. If at all a link of rules may be feasible, it should be set up the other way around, i.a. linking the rules for significant institutions to the ones for less significant institutions and adding additional rules where deemed necessary or appropriate.

Due to the short consultation period our arguments may not be presented to a full extent and not with all details considered. As such, we kindly ask to consider our comments as not completed and are happy for further discussion if deemed useful.

2. Comments on the draft guideline

Overall, we have limited comments to the draft guideline of the ECB "on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions" (draft guideline). However, our comments and concerns raised in conjunction with the ECB "regulation on the exercise of options and discretions available in Union law" (regulation (EU) 2016/445 (ECB/2016/4) - ECB regulation) related to the Large Exposure exemptions remain valid.[1] We therefore repeat those adjusted to the final wording of the ECB regulation.

Large exposure exemptions – Article 6

According to Article 493 paragraph 3 CRR **Member States** (as opposed to NCAs in Article 400 paragraph 2 and 3 CRR) may fully or partially exempt certain exposures as also listed in Article 400 paragraph 2 CRR from the application of the exposure limit stipulated in Article 395 paragraph 1 CRR. In using this option to our understanding the conditions of Article 400 paragraph 3 may be surpassed.

Member States implement such rules in a variety of ways depending on the legal framework of the different member states. They may include some of the exemptions in the national law or another piece of national regulation (regulation, ordinance, circular etc.). This may be done in the course of the ordinary legislative process or a delegated act which potentially may be issued by the competent authority based on specific delegated powers to do so.

The decision not to use a dedicated option given may be done by (i) explicitly excluding this choice in the legislative text (not very common if used at all) or alternatively (ii) explicitly stating the opposite rule, (iii) mentioning the non-usage of the choice in the reasoning of the legislative proposal or by (iv) simply be quiet on the choice. Furthermore, national law may delegate the determination of the choice to the competent authority which may then execute the choice according to Article 493 paragraph 3 CRR and not based on Article 400 paragraph 2 CRR.

As a consequence of the different possibilities to exercise the option by Member States it may be unclear, how the documentation of the choice is to be read:
Explicit choice not to use the option or a non-usage of the option.

With regards to the option under Article 493 paragraph 3 CRR in our view it seems to be clear, that it is more than likely that all Member States have exercised the option in the one or the other way. Germany for example has issued a regulation to execute the options which has been implemented by the ordinary legislative process using both chambers of the parliament and based on an explicit rule in the

[1] https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/od_comment_12.pdf

banking act to issue such details in a delegated regulation. Contrary, e.g. Luxembourg has in principle delegated the powers to the competent authority, which has issued in this competence a binding regulation.

Any choice that would have not been taken by either Germany or Luxembourg (in the examples give above) therefore in our view would rather document that the option was exercised as being not used on purpose.

In this context, it is still unclear to us, how the non-execution of the option by the Member State is to be proven in order to fulfil the condition of Article 9 paragraph 7 of the ECB regulation and therefore Article 9 paragraphs 1 to 6 would have to be applied.

In addition to our formal comments above, we also want to comment on the content of Article 9 ECB:

- Article 400 paragraph 2 as well as Article 493 paragraph 3 CRR give the possibility to exempt all exposures listed in these paragraphs fully or partially. As such, we clearly oppose the limitation of Article 9 paragraphs 1 and 2 ECB regulation which only exempt 80 % of the relevant exposures. Although we understand that different member states have partially also limited the exclusion of such exposures, we do not share this view and kindly ask the ECB to reconsider the limitations of the rules. The level 1 text for good reasons has given the possibility for full exemptions and without a comprehensive reasoning the ECB should not limit this possibility.

3. Comments on the draft ECB Recommendation

Also with regards to the draft recommendation of the ECB on "common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institutions" (draft recommendation) we do want to remind our comments already raised in the consultation for the "ECB Guide on options and discretions available in Union law" (ECB Guide).[2] As our comments are limited overall and some of our comments in the 2015 consultation have been taken up in the final documents, we summarise our key concerns below. Related to the complexity of the document we once more want to point out that back referencing should not be the preferred choice but rather a comprehensive recommendation document should be issued. This, however, would not prevent from an annex showing differences and common treatment of rules between SIs and LSIs. The ruling mainly via a table in the annex referring to parts of the ECB guide in our view is even worse compared to the chosen path of the draft guidelines.

(1) Part II: Options and discretions for which a specific approach for less significant institutions is recommended

a) Liquidity waivers at cross border level

Although the header suggests a dedicated treatment for LSIs, chapter II, paragraph 1.2 of the draft recommendation is referring back to the ECB Guide. Factually we do not see a real difference to the text related to SIs.

b) Exposures in the form of covered bonds

In our view the proposed treatment for LSIs is more restrictive than the one for SIs. We disagree to such an approach and rather ask the ECB to be more precise in the wording in the ECB Guide. A mere "intention" is not sufficient to get legal certainty.

(2) Part III: Options and discretions exercised on a case-by-case basis for which a common approach should be taken in relation to all credit institutions

Capital waivers - Section II, Chapter 1 § 3 ECB Guide

Corporate law in the member states varies as the legal form of institutions does. In addition, some member states recognise in principle all members of the management body (split in the different roles as executive or supervisory members) equally. Consequently, there is no unique role implemented of a leader of the executive management or CEO. Furthermore, there is no definition of a "CEO" in

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[2] https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/od_comment_12.pdf

CRD IV / CRR or the related level 2 legislative texts. As such, we clearly propose to replace the signature requirements for the CEO / CEOs with the signature requirements of two members of senior management (as defined in Article 3 paragraph 1 No. 9 CRD IV). This is also true for other parts of the ECB Guide.

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We hope our comments are seen as a useful contribution to the discussion and will be considered in future issuances.

Yours faithfully,

Jürgen Hillen
Executive Director

Marisa Ranft
Regulatory Specialist