

“Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 90(2) of the proposed Capital Requirements Directive (CRD IV) (EBA/CP/2013/11)”

## A. Introduction

Deutsche Börse Group (DBG) welcomes the opportunity to comment on EBA's consultation paper “Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 90(2) of the proposed Capital Requirements Directive (CRD IV)” - EBA/CP/2013/11 - issued on 21 May 2013<sup>1</sup>.

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 providers.

Among others, Clearstream Banking S.A., Luxembourg (CBL) and Clearstream Banking AG, Frankfurt/Main (CBF), who act as (I)CSD<sup>2</sup> as well as Eurex Clearing AG as the leading European Central Counterparty (CCP), are classified as credit institutions and are therefore within the scope of the European Capital Requirements Directive (CRD). Clearstream subgroup is supervised on a consolidated level as a financial holding group.

However, all group entities in scope of CRD/CRR are offering limited banking activities ancillary to their function as Financial Market Infrastructure (FMI). In order to operate as a Financial Market Infrastructure and in line with the dedicated regulatory framework (e.g. EMIR(FN) or the CPSS-IOSCO Principles for Financial Market Infrastructures (FN)) as well as generally recognised business practices, the business model of our group entities is risk averse, does not include a trading book / proprietary trading, allows loan business in general only in connection with settlement, clearing and custody activities for very short periods and on a collateralised basis. The business risk is in turn not driven by the volatile balance sheet volumes being mainly comprised of cash collateral and cash deposits to fulfil payment obligation within a recognised securities settlement system but from operational risk which is governed by high automated processes and proper risk policies given single individuals only limited – if at all – room to take risk.

This paper consists of general comments (part B) and a part which contains our responses to the questions for consultation (part C).

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<sup>1</sup> In our responses we refer to the final articles of the Capital Requirements Directive (Directive 2013/36/EU), in the following CRD IV

<sup>2</sup> (International) Central Securities Depository

“Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 90(2) of the proposed Capital Requirements Directive (CRD IV) (EBA/CP/2013/11)”

## **B. General Comments**

Directive 2013/36/EU (CRD IV) stipulates already in the recitals (recital 66) but also in the rules on corporate governance and remuneration (e.g. article 92 paragraph 2 sentence 2) the application of the remuneration rules (and other provisions) based on proportionality. As a consequence, size, internal organisation and the nature, scope and complexity of the activities need to be taken into account. While article 2 of the draft RTS reflects for the internal identification process the principles of proportionality to some extent, this is not true for the conditions set out in article 3 which apply to all kinds of institutions in the same manner regardless of the business model or size. Furthermore, already the need to perform an internal assessment according to article 2 of the draft technical standard annually in any case does not sound proportional to us.

Small institutions, institutions with simple business models, risk averse institutions etc. ask for an even more proportional, being less complex process and a more standardised and focussed application of process to identify categories of staff with material impact on the institution's risk profile.

In our view, the principle of proportionality was better reflected in section 1.2 of the CEBS Guidelines on Remuneration Policies and Practices from 10. December 2010 (“CEBS Guidelines”) based on CRD III (FN).

In order to reach an appropriate level of proportionality we propose following amendments to particular technical standard:

- a) to add an additional paragraph 3 to article 1 of the draft RTS as follows:  
“Institutions that have a low risk profile with regards to risk impacts of single employees as a consequence of its specific size, internal organisation, nature, scope and complexity of its business activities are not obliged to perform an internal identification process according to article 2. Institutions are in general expected to be a “low risk profile institution” if there balance sheet volume on the last three balance sheet dates on average did not exceed 10 billion Euro; on group level the general threshold is 40 billion Euro. In addition, institutions may qualify themselves as “low risk profile institution” based on a thorough and well documented analysis of its activities and the inherent risk which is to be updated at least annually. Competent authorities are empowered to challenge both the size and the internal analysis based classification as “low risk profile institution” based on their own risk assessment.”

“Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 90(2) of the proposed Capital Requirements Directive (CRD IV) (EBA/CP/2013/11)”

b) to add a paragraph 1a to article 3 of the draft RTS with the following content:

“For low risk profile institutions

(a) paragraph 1 point (c) only applies in case staff member has been awarded total gross remuneration of EUR 250,000 or more in one of the two preceding financial years or his total gross remuneration is equal or greater than the lowest annual total gross remuneration that was awarded in that year to a member of staff who performs professional activities for the same entity and who is a member of the senior management.

(b) paragraph 1 point (d) only applies in case

(i) staff member has been awarded total gross remuneration of EUR 250,000 or more in one of the two preceding financial years or his total gross remuneration is equal or greater than the lowest annual total gross remuneration that was awarded in that year to a member of staff who performs professional activities for the same entity and who is a member of the senior management.or

(ii) the business unit accounts on average over the last three completed business years for at least 20 % of gross revenues of the institution.”

c) In addition, we disagree to the proposed categories in article 3 paragraph 1 points (e) and (f) of the draft RTS not only for “low risk profile institutions” but also in general. We therefore comment on this further down in our reply to questions Q1 and Q2.

d) Finally, we do not see the need to take out article 3 paragraph 1 points (a) and (b) as well as point (g) and (h) of the draft RTS even for “low risk profile” institutions. However, the reference in article 3 paragraph 1 point h. to point f. needs to be removed based on our comment c) above. Members of the management body and member of the senior management influence by nature the risk profile of an institution and major activities in trading can be regarded as having a material influence as well.

The generic assumptions that staff members as defined in article 3 paragraph 1 points (c) – (f) have a material influence on the risk profile of the institution and the remuneration system could set in all cases material incentives to take substantial risks within the defined responsibilities seems to be over simplistic. This is leading to a sensible classification only in combination with the internal analysis. However, in case of institutions which are not “low risk profile

“Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 90(2) of the proposed Capital Requirements Directive (CRD IV) (EBA/CP/2013/11)”

institutions”, the generic assumptions for categories of staff as defined in article 3 paragraph 1 points (c) and (d) of the draft RTS seems to be reasonable and in synch with the intension of the rule. Taking into account additional quantitative measures as proposed above, the general classification seems to be acceptable also in case of “low risk profile institutions”.

The proposed new threshold for “low risk profile institutions” in the amount of EUR 250, 000 as part of the new proposed paragraph 1a of article 3 is set at a level of 50% of the amount reflected in article 3 paragraph 2 point (c) of the draft RTS and will in our view allow to reflect a proportionality principle in an adequate manner.

Article 92 paragraph 2 sentence 2 CRD IV does not refer to high income per se as being an indicator to identify categories of staff having material impact on the risk profile. Also the request to EBA in article 94 paragraph 2 to draft the current RTS does not include the option to define high income per se or being (in a small and low risk profile institution) one of the top earners as a possible driver of having material impacts on the risk profile. We will comment in more detail on this in our reply to questions Q5- Q6.

Article 3 paragraph 2 of the draft RTS defines quantitative criteria to identify possible impact on the risk profile. While this approach is explicitly required by CRD IV, we disagree with the imperative in article 3 paragraph 2 of the draft RTS (“shall be identified”) in combination with rather vague text in article 4 of the draft RTS giving the option to deny material impact on the risk profile. We do not understand why a fix amount of EUR 75,000 for variable remuneration is set while that said amount can be taken into account in particular as a reasoning for exclusion (see article 4 point (b) of the draft RTS). Furthermore, the reference in article 4 point (b) of the draft RTS on differences between the levels of remuneration is vague, potentially misleading and putting the quantitative figures as set in article 3 paragraph 2 of the draft RTS in general in question.

As a consequence, we disagree with content of article 4 point b. of the draft RTS as this should simply give the option to offset the quantitative criteria by the internal analysis as defined in article 2 of the draft RTS and suggest rewording as follows:

“b. the staff member in fact does not have a material impact on the institution’s risk profile, taking into account the staff member’s authorities and duties.”

“Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 90(2) of the proposed Capital Requirements Directive (CRD IV) (EBA/CP/2013/11)”

### **C. Responses to the questions for consultation**

#### **1. Is the list of specific functions listed appropriate or should additional functions be added?**

The organisational set up of institutions is by no means unique and the structure, processes and responsibilities are cut differently for each and any institution. This includes also – especially depending on size and structures as well as risk profile of the institution – possible outsourcing of activities or simple usage of third party advise / support (not being regarded as outsourcing of core activities and therefore to be seen different). As a consequence of this, there is no unique naming convention for functional units and there is differing content or degree of responsibility for these functions which makes it difficult to define respective areas in a generic way. Furthermore, activities like legal affairs or taxation are often performed by external advisors only. The impact of any function other than those being named in article 3 paragraph 1 point (c) (and potentially (d)) on the risk profile is furthermore highly depending on the size, internal organisation and the nature, scope and complexity of the activities of the institution. As these aspects are requested by article 92 paragraph 2 CRD IV to be taken into account when defining the members of staff having material impact on the risk profile, we totally disagree to fix any staff member for a dedicated function in article 3 paragraph 1 other than those being laid down in article 3 paragraph 1 points (c) and (d). The identification of further function can only be done in the internal analysis. In case EBA wants to stress the importance of certain dedicated functions, it should be included in article 2 (e.g. to add a point in paragraph 3 like follows: “the importance of staff members heading functions within the institution with responsibility for human resources, information technology, business continuity, ...”). We have taken out the functions legal affairs and taxation for the purpose that such functions are often performed by external advisors only (see above) and the functions budgeting and economic analysis as we disagree with their specific influence on the risk profile and therefore cannot see any reason to make them being mentioned explicitly.

As result we propose to delete article 3 paragraph 1 point (e).

“Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 90(2) of the proposed Capital Requirements Directive (CRD IV) (EBA/CP/2013/11)”

2. Can the above criteria be easily applied and are the levels of staff identified and the provided threshold appropriate?

The authority of staff to commit to credit risk exposures might represent the criteria where staff could have a material impact on institutions risk profile. However, this criteria is strongly dependant on type of credit exposures (with refer to maturity, loan purpose, commitment and collateral etc.), on individual business model of concerned institutions. It is only dependant on the individual freedom to grant loans within a clear defined credit policy and on the standardisation of the processes and types of loans offered. In our case only “settlement” loans with very short maturity (mainly intraday only) and in general on a collateralised basis only to highly creditworthy regulated counterparties (mainly banks) are granted. In order to secure efficient financial markets, the amounts granted are nevertheless quite substantial even on a loan by loan basis.

As again the nature, scope and complexity of the underlying loan business is the main driver to identify the possible impact of individual staff members influence on the risk profile, we consider this aspect being better placed in the internal analysis and therefore it might be added as a further point in article 2 paragraph 3 of the draft RTS.

Therefore we propose to delete article 3 paragraph 1 point f. and to introduce the material content within article 2.

Furthermore, the proposed threshold of 0.25 % of Common Equity Tier 1 capital as an absolute term in our view is only potentially fitting to some institutions while for others differing quantitative ratios with regards to Equity and / or absolute volumes etc. might fit better. When the credit competence is included in article 2, it therefore should only ask to define appropriate quantitative threshold (e.g. the one currently included in the draft RTS) and to document the reasoning for the chosen threshold but should refrain from defining the thresholds as being binding quantitative ones.

3. Can the above criteria be easily applied and are the levels of staff identified and the provided thresholds appropriate?

No comments

“Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 90(2) of the proposed Capital Requirements Directive (CRD IV) (EBA/CP/2013/11)”

4. a) Is this criterion appropriate to identify risk takers?  
b) Are the thresholds set in the criterion appropriate?  
c) What would be the number of staff members identified in addition to all other criteria within the RTS?  
d) What would be the additional costs of implementation for the above criterion if an institution applies Article 4 in order to exclude staff from the group of identified staff?

- a) In combination with the possibilities to waive the criterion based on the internal analysis (article 4 draft RTS, see our comment above) and taking into account our above stated concerns on appropriate considerations of proportionality we in general can agree to thresholds proposed.
- b) Please see answer a)
- c) No material impact and only a limited number of staff – if at all
- d) We do not expect major cost. However, any policy and any report needs to be implemented, maintained and its proper application needs to be controlled. We furthermore want to point out, that the upcoming rules on remuneration will have impacts on the overall remuneration structure across the industry and we expect in general the demand for higher fixed salaries of applicants which will have influences on the cost of the identification process for members of staff with possible impact on the risk profile.

5. a) Can the above criterion be easily applied?  
b) Would it be more appropriate to use remuneration which potentially could be awarded as a basis for this criterion?  
c) What would be the difference in implementation costs if the potentially awarded remuneration would be used as a basis?

- a) While we see some benefits in taking the relationship of gross remuneration of individual staff members in comparison with members of the management body or the senior management, we cannot see why a higher income for a member of staff compared to staff member as defined in article 3 paragraph 1 points (c) and (e) to (h) is indicating a material influence on the risk profile. The same argument is true with regards to those members of staff which have been identified with the internal process according to article 2. We therefore propose to reduce the reference to article 3 paragraph 1 points (a), (b) and (d) taking our proposed addition for article 3 paragraph 1a into account. In any case, if our proposal to increase the reflection of the principle of

“Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 90(2) of the proposed Capital Requirements Directive (CRD IV) (EBA/CP/2013/11)”

proportionality will be considered in the final RTS, the reference to article 2 in that case needs to be phrased in an appropriate manner.

- b) No comment
- c) No comment

6. Can the above criterion be easily applied and are the threshold and the levels of staff identified appropriate?

As stated in part B of this paper, we cannot see the basis for a general suspicion that high income per se is an indicator for influence on the risk profile. However, the amount of EUR 500,000 seems to be chosen sufficiently high in current times (i.e. it might have to be reviewed taking inflation into account) to take proportionality into account. Furthermore, the amount seems also to be high enough to give at least an indication of a possible influence on the risk profile. Nevertheless, we kindly ask to consider to give either the option to falsify with the internal analysis (via article 4 of the RTS) or move it entirely into article 2 to make it a mandatory analysis part of the internal analysis. Our preference would be article 4.

7. Can the above criteria be easily applied and are the levels of staff identified appropriate?

While we would not see a problem to apply the rule, we have nevertheless concerns on the content. Taking our generic comments on the scope of the RTS (high income is not an indicator per se and the scope is not to identify high income receivers but member of staff with possible material impact on the risk profile) as well as on proportionality into account, we cannot agree to the proposal in its generic value. As this is supposed to come in addition to article 3 paragraph 2 point (c) it will only come into effect in case the 0.3 % of staff includes members of staff which earn less the EUR 500,000 total gross remuneration and (taking the article 3 paragraph 2 point (a) into account) are also not entitled to “high” possible variable remuneration. In turn, this will mostly hit managers / senior experts in small to medium sized institutions with total gross salaries being substantially below EUR 500,000. This to our understanding would not be in line with the principles of proportionality. Therefore, while agreeing (taking the comments made into account) with the principles of the proposals made in article 3 paragraph 2 points (a) and (c) of the draft RTS, we kindly ask to remove point d completely.



“Draft Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 90(2) of the proposed Capital Requirements Directive (CRD IV) (EBA/CP/2013/11)”

8. Are there additional criteria which should be used to identify staff having a material impact on the institutions risk profile?

No

9. Could you indicate whether all the main drivers of direct costs from the RTS have been identified in the table above? Are there any other costs or benefits missing? If yes, could you specify which ones?

No comments

10. For institutions, could you indicate which type of costs (a, b, c, d) are you more likely to incur? Could you explain what exactly drives these costs and give us an indication of their expected scale?

No comments

11. Do you agree with our analysis of the impact of the proposals in this CP? If not, can you provide any evidence or data that would explain why you disagree or might further inform our analysis of the likely impacts of the proposals?

No comments

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We hope our comments are seen as a useful contribution to the discussion and final issuance on the respective RTS is reflecting our comments made.

Eschborn

21 August 2013

Jürgen Hillen

Matthias Oßmann