DEUTSCHE BÖRSE GROUP

Deutsche Börse Group Response

to EBA/CP/2021/07

"Draft Guidelines on common assessment methodology for granting the authorisation as credit institution under Article 8(5) of Directive 2013/36/EU"

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A. Introduction

Deutsche Börse Group ("DBG") welcomes the opportunity to comment on EBA's consultation paper "Draft Guidelines on common assessment methodology for granting the authorisation as credit institution under Article 8(5) of Directive 2013/36/EU" – EBA/CP/2021/07 – issued on 10 March 2021 (in the following referred to as "Draft Guidelines").

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 acts as a provider of regulated Financial Market Infrastructures ("FMI").

Within DBG, according to applicable national law, the following four legal entities are in scope of the European Capital Requirements Regulation ("CRR"): Eurex Clearing AG, located in Germany, classifies as credit institution and one is of the leading European Central Counterparties ("CCP"), Clearstream Holding AG ("CH"), located in Germany and acting as a pure financial holding company for the credit institutions and the (I)CSDs Clearstream Banking AG, located in Germany, and Clearstream Banking S.A., located in Luxembourg. Clearstream Group with CH as superordinate company is supervised on a consolidated level as a financial holding group.

We share EBA's view that a harmonised assessment methodology for granting authorisation is crucial for ensuring a level playing field for new entrants to the market. Therefore, we generally support a common assessment methodology, outlining aspects to be considered. We particularly support emphasising a proportionate as well as technology neutral and innovation-friendly approach and appreciate the additional clarification provided regarding specific cases resulting from mergers and acquisitions.

Notwithstanding this, we consider the specification of the single elements of the definition of a credit institution as set out under letter (a), point (1) of Article 4(1) CRR as too far reaching, potentially jeopardising funding of corporates and other entities via the issues of (corporate) bonds. Through sharing EBA's understanding of the single elements of the definition of credit institution as part of the Draft Guidelines, EBA is exceeding its mandate as outlined in Article 8(5) of Directive 2013/36/EU (CRD) and raising uncertainties.

This document at hand outlines our general comments on the Draft Guidelines. As we generally agree with the clarification provided through the Draft Guidelines, we only comment on the scope as outlined under Part 5 "Authorisation as credit institution under letter (a), point (1) of Article 4(1) CRR and its scope" of the Draft Guidelines.

B. General comments

Q1: Are subject matter, scope of application and definitions appropriate and sufficiently clear?

While we consider the subject matter and scope as sufficiently clear, we are of the opinion that the specification of the definition of credit institution as outlined under part 5 of the Draft Guidelines are not appropriate.

According to para. 6 of the Draft Guidelines, the guidelines shall, in accordance with CRD, apply to all cases defined in letters (a) and (b), point (1) of Article 4(1) CRR. Those cases are being specified in greater detail as part of the Draft Guidelines "without prejudice to any further harmonisation that will be set out in Level 1 texts".

The definition of what is to be considered "to take deposits or other repayable funds from the public and to grant credits for its own account" has been anchored by Member States in national legislation considering national peculiarities as well as further implications leading to certain (well-reasoned) limits and discrepancies. Despite its limited competence and existing national specifications, EBA asks competent

authorities to consider a common understanding of core aspects on the elements of the definition of credit institution, as outlined under point (1) of Article 4(1) CRR, which we oppose.

We particularly consider the extension of “other repayable funds”, as outlined in para. 52, to include “financial instruments which possess the intrinsic characteristic of repayability” as disproportionate and inexpedient, as it might negatively impact capital market-based funding. Arguing, “that such notion should include bonds and other comparable securities such as negotiable certificates (not nominative) of deposits, provided these are continually issued by the credit institution” broadens the understanding of “other repayable funds” as outlined in recital 14 of the CRD, which states that “The scope of measures should therefore be *as broad as possible*, covering all institutions whose business is to receive repayable funds from the public, whether in the form of deposits or in other forms such as the continuing issue of bonds and other comparable securities [...]”[1].

The broadening of the understanding of the expression “other repayable funds” in the Draft Guidelines could lead to the classification of corporate bond issuers as credit institutions. Depending on the national requirements related to the classification as credit institution, the mere business of “deposit taking” understood as taking “other repayable funds” suffices to mandatorily request authorisation as credit institution leading to the application of the CRR and national transposition of CRD. Moreover, considering that corporates might be affected simultaneously also by the extended understanding of “granting credit” as outlined under para. 54 of the Draft Guidelines, classification as credit institution according to point (1) of Article 4(1) CRR might result consequently.

We hold the view that such a wide understanding of “other repayable funds” as outlined under para. 52 would be detrimental since enterprises outside the financial sector (corporates) would then no longer be able to raise money on the capital market to refinance themselves.

According to the Draft Guidelines, the issuance of corporate bonds falls under the expression “other repayable funds” as bonds “possess the intrinsic characteristic of repayability”. Understanding the expression “as broad as possible” leads to the result that companies which so far are not considered institutions would conduct deposit-taking business and hence qualify as institutions solely due to the issuance of corporate bonds.

Since obtaining a banking license is not viable for enterprises in the corporate sector, they would have to turn to issuer banks to issue bonds on their behalf, which would create cluster risks in the banking sector since all issuances would concentrate on the banks. Accordingly, companies’ financing options via the capital market would unnecessarily become more complicated potentially leading to a decrease in capital market-based funding.

To avoid such unintended consequences, EBA should explicitly exclude the issuance of corporate bonds from the definition of deposit-taking activity in any further future consideration on the harmonisation of the definition of “deposits” and “other repayable funds”, e.g. as is the case under the German Banking Act.

The German legislator emphasized in the history of the German implementation of legislative acts (e.g. Investment Services Directive[2], Capital Adequacy Directive[3] and BCCI Follow-up Directive[4]) by the 6th amendment to the German Banking Act (ger:6. KWG Novelle):

“Industrial companies should continue to be able to finance themselves directly on the capital market by issuing bearer or negotiable bonds without becoming credit institutions.”[5]

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[1] Emphasis added.
[2] Directive 93/22/EEC of May 1993 on investment services in the securities field.
[3] Directive 93/6/EEC of 15 March 1993 of on the capital adequacy investment firms and credit institutions.
[4] Directive 95/26/EC of the European Parliament and of the Council of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC concerning credit institutions, Directives 73/239/EEC and 92/49/EEC concerning non-life insurance, Directives 79/267/EEC and 92/96/EEC concerning life assurance, Directive 93/22/EEC concerning investment firms and Directive 85/611/EEC concerning undertakings for collective investment in transferable securities (UCITS) with a view to reinforcing prudential supervision.
[5] BT-Drs. 13/7142, 63.

Consequently, deposit-taking business was defined as the acceptance of third-party funds as deposits or other unconditionally repayable funds from the public, unless the repayment claim is embodied in bearer bonds or registered bonds (section 1 para. 1 sentence 2 no. 1 of the German Banking Act).The legislative intention behind this sectoral exemption was to foster the direct financing of industrial companies on the capital market without the need for intermediation by state-licensed banks.[6] Fostering the growth of European capital markets is still one of the major goals of the European Capital Markets Union and should not be jeopardised by unintendingly limiting the possibility of corporates to issue bonds.

Exempting corporate bonds from the definition of “deposits or other repayable funds” would not contradict the legislator’s intention to capture a preferably large scope of activities as outlined in recital 14 of CRD. Credit institutions usually perform deposit-taking business in other forms where the repayment claim does not fall within the above-mentioned exemption.

Moreover, such an exemption would be in line with para. 55 and 56 of the Draft Guidelines, requiring competent authorities to carefully assess, whether the applicant’s business intention is indeed carrying out the business as a credit institution. Broadening the understanding of the definition as a credit institution would inevitably lead to entities requestion authorization as credit institution without intending to primarily provide banking activities on a continuous basis.

Finally, we would like to refer to the practice of assessing the need for an authorisation as credit institution used before 1997: Prior to the extension of the term deposit-taking business though adding “other repayable funds”, the definition of deposit-taking business was determined by the typical characteristics taken from the business practice of credit institutions. The question of whether an enterprise accepts third-party funds as deposits and thereby engages in banking business was therefore decided on the basis of an assessment of all the circumstances of the individual case, taking into account the commercial banking view[7]. This also secured free access to the capital market and barrier-free financing options for industrial companies and might be considered for a future approach for a common assessment methodology.

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We are at your disposal to discuss the issues raised and proposals made if deemed useful.

[6] BaFin Leaflet on deposit-taking as of 11th March 2014 under II.
[7] BVerwG NJW 1985, 929, 930.