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Dear Mr. Farkas,

DB response to Draft Guidelines on failing or likely to fail, triggers for use of early intervention measures and minimum list of qualitative and quantitative recovery plan indicators under the Bank Recovery and Resolution Directive (BRRD)

Deutsche Bank (DB) welcomes the opportunity to comment on the European Banking Authority's (EBA) consultation papers related to these three sets of draft Guidelines. We would like to refer you to our response to the EBA's draft Guidelines for common procedures and methodologies for the supervisory review and evaluation process (SREP), given the various linkages between them and these above-mentioned BRRD Guidelines. We respond to each consultation's questions individually in the annex, but overall we would like to highlight the following key points:

- **Guidelines on failing or likely to fail** - We welcome the proposed list of elements to consider when making a determination, but these should be more forward-looking to take into account the institution's ability to address the situation. In addition, as the decision is ultimately at the relevant authority's discretion, we believe there is further work beyond the Guidelines that the EBA can do to support harmonisation and transparency of approach to triggering resolution, by promoting dialogue between home and host authorities.
- **Guidelines on early intervention triggers** - We welcome the effort to promote awareness and enhance transparency in the process for early intervention. This framework needs to be based on an interactive dialogue between the bank and the competent authority and to be aligned with banks' specific recovery plan escalation frameworks. It is important to ensure early intervention is not a rigid regime under which every situation is addressed with a predetermined set of regulatory actions, as circumstances and decision-making processes may vary significantly from case to case.
- **Guidelines on recovery plan indicators** - We support the overall approach in the draft Guidelines, which is aligned with DB's group recovery plan. We agree that the purpose of these indicators is to help define the point at which banks have to consider and decide either for or against taking action under their recovery plan. These indicators should not automatically result in specific recovery actions, but rather in the initiation of the bank's crisis management decision-making processes where senior management are responsible for identifying and addressing problems when they arise. Lastly, recovery planning needs to be integrated with banks' existing risk management, governance processes and infrastructure, to encourage a consistent approach to decision-making.

Please do not hesitate to let us know if you have questions about our responses or wish to discuss any of these issues further.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Daniel Trinder'.

Daniel Trinder
Global Head of Regulatory Policy



Annex I: Draft Guidelines on failing or likely to fail

Question 1: Do you have any general comments on the draft Guidelines for determining that an institution is failing or likely to fail?

The draft Guidelines are generally appropriate, especially where they build on the SREP. However, we would flag - as we have before - the need for greater transparency on communicating SREP scores to banks whilst safeguarding the confidentiality of such scores. This will help banks to avoid requiring early intervention and, ultimately, resolution. We therefore also underline the importance of maintaining a continuous open dialogue with individual banks throughout the SREP review process, as well as in relation to the early intervention process.

We strongly welcome the statement in the guidelines that a determination that an institution is failing or likely to fail does not automatically lead to resolution and that no single element should automatically lead to the determination that a bank is failing or likely to fail. We also appreciate the recognition that macro-economic developments and market indicators should always be used in conjunction with other indicators, but suggest the elements should also consider the institution's prospects for recovery and whether the failing or likely to fail determination is therefore temporary in nature. Requiring authorities to conduct (and therefore also document) a more "forward-looking" analysis will be important to avoid potential legal challenges, given the determination involves a high degree of discretion for the relevant authority.

This discretionary nature also means coordination between authorities is key, especially given the complexity of potentially having two authorities involved in each country involved.. As such, we also strongly welcome Title III on consultation and information exchange between competent authority and resolution authority. However, even in a simple cross-border resolution, with one host jurisdiction, there could be four authorities each making an independent determination. This significantly increases complexity with regards to decision-making at the point of resolution, and could even make agreement on the group resolution plan more challenging, if there is a lack of transparency on approach to resolution triggers between home and host authorities. Therefore, we suggest that the EBA goes further and also addresses coordination between home and host authorities. This also helps to avoid the risk that different triggers in different jurisdictions could result in disorderly resolution due to time inconsistency. This coordination will be as important in the case of a single point of entry as a multiple point of entry resolution, as the home authority will be reliant on the host authority to support their resolution action, even within the EU.

Question 2: Do you consider the level of detail of these draft Guidelines to be appropriate?

Yes, but as described above, we believe they should also address coordination between home and host authorities. Furthermore, we believe that the EBA Resolution Committee could promote such transparency and coordination. For example, it could encourage authorities to publish high level statements with more detail about their approach to such determinations, to help investors and firms better understand when resolution may occur. For example, the German BRRD implementing law empowers the Ministry of Finance to issue more detailed conditions for resolution, while the Bank of England recently published a document on its approach to resolution; these are very helpful developments. In addition, in the context of resolution planning, the EBA should also encourage authorities to discuss ex-ante as part of the group resolution planning process the circumstances under which they would consider a specific bank to be failing or likely to fail, and the point at which resolution action is likely or possible.

Question 3: Do you consider the examples provided in Box 2 to be sufficiently clear and providing useful guidance?

Yes, we agree that hypothetical examples are useful. However, we suggest that, rather than including them in the final Guidelines, alongside or shortly after their publication the EBA could consider publishing a complementary document which includes a high level description of different Member States' approaches to deciding whether to place banks into resolution, including any



variation in “failing or likely to fail” determinations and examples of when resolution may not apply. This would help promote transparency and support coordination between authorities.

Question 4: Do you have any comments on the proposed specification of circumstances which should be taken into account by the competent authority in determining that an institution is failing or likely to fail?

We agree these are the right elements to look at but suggest they should be rephrased to be more forward-looking, based around the banks’ ability to reverse the situation in a sufficiently timely way. For example, the SREP score should not be sufficient on its own to invoke resolution, nor should the valuation. The element based on whether the recovery plan has failed should be further specified to avoid subjectivity. For example, rephrasing to read “the institution has activated its recovery plan and has exhausted all recovery measures that can feasibly be deployed in the current market circumstances in the relevant timeframe, in particular where the activation...” etc. Without the authority demonstrating robustly that it has considered whether there are no possible private sector alternatives, it potentially opens up the decision to legal challenge.

In addition, we are concerned that while the resolution and supervisory authorities are generally required to coordinate, there is a lack of continuity between the two determinations. In addition, as not all Member States will require an additional determination by the resolution authority, we suggest combining sections 2. & 3. and framing the objective elements that the resolution authority should take into account as: i) its own analysis of those considered by the competent authority and ii) the additional elements on capital position, liquidity position and other requirements for continuing authorisation. This limits repetition, promotes continuity in the process and supports the requirement for coordination between the two authorities when determining if a bank is failing or likely to fail.

Question 5: Do you reckon that a significant decrease in asset value can be predefined in a quantitative manner? If yes, which threshold would you suggest for that purpose?

No. Apart from anything else, we disagree that point (e) relating to results of asset quality reviews is an appropriate element to include in these Guidelines. Any negative results will have to be incorporated into the capital position of the bank and should only result in a bank being considered failing or likely to fail when this would result in the outcomes described under 23. Point (e) is therefore redundant. It also overrides supervisory processes, which are the appropriate approach to reflecting outcomes of asset quality reviews in capital position. We also believe that no quantitative threshold for a significant decrease in asset value should be set, as it may not reflect that a bank is failing (e.g. if sufficient capital to cover the loss is available). In any case, what is a significant decrease will depend on the individual bank and authority’s approach to risk appetite and management.

Question 6: Do you have any comments on the proposed specification of objective elements related to capital position which should be taken into account by the resolution authority in determining that an institution is failing or likely to fail?

As described above, we believe 24. points (a)-(d) can be covered by combining section 3 with section 2, and replacing them with “Where relevant under national law, the resolution authority should base its determination on the same elements as the competent authority, as far as these are known to the resolution authority”. Then, elements (f)-(j) are an additional set of elements relating to capital position that either the competent or resolution authority should consider, depending on responsibilities in national law. As described above, we believe element (e) should be deleted as it is redundant and overrides supervisory processes.

We agree that points (f)-(j) cover the right elements, but to make them more forward-looking, we suggest that “Additional elements ... when carrying out this determination include” should be rephrased to read “Additional elements should be considered by the relevant authority when



carrying out this determination, insofar as they would result in depletion of the capital position to the point that it would infringe the institution's own funds requirements and the institution is unable to address this in the relevant timeframe. Where relevant to the characteristics of the institution, these additional elements should include..." etc. Point (h) should align with point (j) and specify "significant non-temporary adverse developments".

Question 7: Do you have any comments on the proposed specification of objective elements related to the liquidity position which should be taken into account by the resolution authority in determining that an institution as [sic] failing or likely to fail?

We believe the language in paragraph 26 needs to be strengthened to be more forward-looking about the prospects for recovery. This would also better reflect how the regulatory liquidity buffers operate under the CRR, which sets out the requirements for firms to have a plan for the timely restoration of their liquidity position where they breach either the LCR or the NSFR. As such, we suggest rephrasing the two bullet points to "Indefinitely incapable of meeting regulatory liquidity requirements, including requirements imposed according to Article 105..." and "indefinitely unable to pay debts and liabilities as they fall due", This reflects that a breach of liquidity requirements may lead to a firm being unable to pay debts and liabilities, but this does not mean that they are failing or likely to fail, as management action or use of liquidity reserves could restore them.

As under capital position, sections 2 & 3 should be merged to reduce repetition and promote coordination and continuity. If so, points (a)-(c) would be deleted as redundant. Paragraph 27 should also be amended to read "Additional objective elements that should be considered by the relevant authority for the purposes of the determination that the institution is indefinitely incapable of remediating a breach of its regulatory liquidity requirements or paying its debts and liabilities as they fall due include..." etc. Point (d) is also largely redundant given it largely replicates paragraph 26. If (a) is retained it should be clarified to say "critical risks and indicators within the liquidity assessment of the SREP process".

Points (e)-(k) would then be the additional elements the relevant authority should consider. In order to make these more forward-looking, some changes are necessary. Point (e) should amend "significant non-temporary adverse evolution of the institution's liquidity buffer" to add "which would render the institution indefinitely incapable of paying its debts and liabilities as they fall due". Assessments should be obliged to consider the bullet points, so "shall consider" should be used.

Point (g) should also refer to "a significant non-temporary adverse evolution" and also require the assessment to consider the bullet points. The final bullet point should specify "any irrevocable contingent obligation". Likewise, point (h) should be "experiencing any non-temporary difficulties".

Finally, point (i) should specify significant rating downgrades "of more than three notches", as grounds for a determination of failing or likely to fail should exceed the LCR downgrade scenario.

Question 8: Do you have any comments on the proposed specification of the circumstances, related to governance arrangements, which should be taken into account by the resolution authority in determining that an institution is failing or likely to fail?

We believe that governance arrangements are appropriate to include, as serious weaknesses in this area may justify withdrawal of authorisation, but we consider that in all cases, not only "most", this should be in conjunction with other objective elements related to capital and liquidity. For governance weaknesses to justify withdrawal of authorisation, the Guidelines should specify that this should always be in conjunction with material deteriorations in the capital and liquidity position, although it may be the case that own funds and liquidity requirements are not yet breached.

We agree with the first two objective elements under Governance arrangements in paragraph 30, but the third element is currently very subjective. We appreciate that the EBA has included Box 2 to try and specify key "material deficiencies" in governance further, but these are very general and



not necessarily linked to risk of failure. More objective and more consistent with the overall approach of the draft Guidelines would be to link this third element to the SREP score for internal governance and institution-wide controls. We therefore suggest rephrasing as “an accumulation of material deficiencies in key areas of governance arrangements, resulting in a SREP score of 4 for internal governance and institution-wide internal controls, where this would have serious prudential impact on the institution”. Box 2 should not then be necessary.

Question 9: Do you have any comments on the proposed specification of the circumstances, related to the institution’s operational capacity to provide regulated activities, which should be taken into account by the resolution authority in determining that an institution is failing or likely to fail?

We agree that lack of operational capacity to provide regulated activities can lead to bank failure, as the resulting loss of trust can trigger “runs”. However, in order to justify withdrawal of authorisation, as required in the level 1 text, as with governance arrangements these elements should usually have to be linked to weaknesses and material deterioration in the capital and liquidity position.

We strongly welcome the recognition that these circumstances and events should only be considered where they are not contingent and cannot be addressed in a timely manner. However, they should only be considered to justify withdrawal of authorisation where they would also result in a loss of customer confidence and “runs”. As such, we suggest adding to “the institution becomes unable to make or receive payments” that this should be “on a non-temporary basis, and thereby unable to conduct its banking activities in the foreseeable future, leading to a loss of market and depositor confidence”.

Question 10: Do you agree with our analysis of the impact of the proposals in this Consultation Paper? 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?

We do not have any material comments on the cost-benefit analysis and impact assessment.



Annex II: Draft Guidelines on triggers for use of early intervention measures

Question 1: Do you have any general comments on the draft Guidelines on triggers for the use of early intervention measures?

DB generally agrees with the approach taken in the draft Guidelines, however, we would like to reiterate our support for the provisions in paragraph 7 confirming that breaching the triggers does not automatically mean the authority should apply early intervention measures, but that this will prompt competent authorities to further investigate and assess the urgency of the situation.

Additionally, we would encourage adding additional language to the Guidelines that helps ensure that the early intervention process is based on a continuous and open dialogue between the home supervisor and the institution involved to ensure any supervisory assessment and potential actions are aligned with the firm's recovery plan escalation process and the implementation with specific recovery measures initiated by the firm.

Question 2: Do you consider the level of detail used in the draft Guidelines to be appropriate?

We agree with the level of detail used in the draft Guidelines, however, we would appreciate more clarity regarding the details of the valuation information referred to in paragraph 10 that competent authorities are supposed to gather when an overall SREP assessment score of 4 is assigned.

Question 3: Do you have any comments on the proposed specification of early intervention triggers based on the outcomes of SREP?

Even though we support the integration of the regulatory early intervention process with the SREP scoring methodology, we would flag the need for greater transparency on communicating SREP scores to banks whilst safeguarding the confidentiality of such scores. This becomes significantly more important in a stage of early intervention. Also, as stated earlier in this response, we would stress the importance of maintaining a continuous open dialogue with individual banks throughout the SREP review process, as well as the related early intervention process.

In addition, we would like to alert the EBA to the uncertainty that currently exists on the communication and governance procedures between competent authorities and resolution authorities (in the case these are different regulatory authorities) in the early intervention stages. Regulatory authorities need to establish clear procedures to ensure an integrated regulatory intervention process. More importantly, both the SREP and the regulatory intervention framework need to be coordinated with the individual institutions' internal recovery plan escalation framework to ensure consistency and predictability of action and accountabilities.

Question 4: Do you have any comments on the proposed approach to use material deterioration or anomalies in key indicators in deciding whether there is a need to apply early intervention measures?

DB supports the use of material deterioration or anomalies in key indicators as triggers for further investigation by supervisory authorities. However, we would reiterate our support for the provisions in these guidelines confirming that breaching these triggers should not lead to the automatic application of early intervention measures.

As for the authority granted to competent authorities related to the immediate application of early intervention measures in the interest of time for certain circumstances under paragraph 25, we would suggest additional language to confirm that any immediate application of early intervention measures needs to be closely coordinated with the individual bank in question and only take effect after the failure of the bank's internal recovery plan escalation framework and implementation of recovery measures.



Question 5: Do you have any comments on the proposed description of significant events that should be considered as possible triggers for the decision whether to apply early intervention measures?

Whereas we generally support the use of operational risk indicators for risk management related purposes, we question the need to include some of the illustrative examples of significant events as outlined on pages 15 and 16 of the proposed guidelines, in particular related to the examples of adverse court ruling, negative results of investigations and tax litigations. We would suggest removing these as significant events that should be considered as possible triggers upon which to determine whether early intervention measures should be applied, given that the decision to consider applying early intervention measures should be based on a more comprehensive assessment of risk exposures related to such events.

We would also suggest fully aligning the terminology and definitions used in these Guidelines with the EBA Regulatory Technical Standards on assessment methodologies for the Advanced Measurement Approaches for operational risk under Article 312 of Regulation (EU) Number 575/2013 once these have been adopted to ensure these examples are aligned with banks' individual operational risk frameworks.

Question 6: Do you agree with our analysis of the impact of the proposals in this Consultation Paper? 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?

We do not have any material comments on the cost-benefit analysis and impact assessment.



Annex III: Draft Guidelines on recovery plan indicators

Question 1 - Do you agree with the inclusion of both quantitative and qualitative indicators for recovery planning purposes?

Yes, we agree that a bank's escalation framework for recovery planning purposes should include both quantitative and qualitative indicators, which is aligned with the approach DB has taken in regards to its group recovery plan. The purpose of recovery indicators is to help a bank's recovery and resolution governance committee and the bank's senior management determine whether to take mitigating actions, execute individual recovery measures and/or invoke the recovery plan. This recovery escalation framework, including the recovery indicators framework, has been embedded in DB's overall risk management and risk appetite framework – an approach that should be considered for these guidelines as well.

DB's group recovery plan escalation framework follows a gradual process consisting of various types of recovery indicators. We would suggest adjusting the Guidelines to reflect the gradual nature of recovery plan escalation frameworks as well as a clear separation, especially between indicators that reflect an early warning stage and more definite recovery triggers.

Question 2 - Do you consider that there are other categories of indicators apart from those reflected in the draft Guidelines which should be included in the minimum list of recovery plan indicators?

From DB's perspective, the categories of indicators in this article are comprehensive and sufficient. We would, however, suggest including an additional category covering operational indicators.

Generally, we welcome the EBA's approach, which sets minimum high level requirements and largely avoids a prescriptive approach. We however encourage also applying the proposed gradual approach to the definition of categories and their relevance and positioning in the escalation process. We see this as advantageous to the recovery process, as e.g. market and macroeconomic indicators have a significantly higher value to early warning indicators as they do in identifying the triggering of the recovery mechanism. A category of operational risk indicators (e.g. internal or external loss events) could further add to a comprehensive assessment and therefore could be included.

We would however flag that some of the indicators are repetitive or consider less sensitive metrics such as the CET1 ratio versus the total capital ratio.

Question 3 - Do you agree with the list of specific recovery plan indicators included in Annex I, Section C, or would you propose to add other indicators to this Section?

Although we agree with the overall indicator categories listed in Section A and B of Annex I, our view is that the specific recovery plan indicators should be derived from the institution's individual escalation process in the context of its recovery plan. We feel a set of different indicators to the ones described in Section C, Annex I, could still serve as relevant to the defined categories in Sections A and B. These indicators should be embedded in the bank's risk and recovery frameworks. Recovery triggers, risk drivers, early warning indicators as well as macro indicators and peer indicators could be stages of escalation and timely monitoring to be included in a bank's recovery plan. These categories could include both quantitative and qualitative indicators, as they are embedded in DB's overall risk management and risk appetite framework and in some cases are also used for regulatory monitoring (for instance on capital and liquidity adequacy). Given that the overall recovery plan escalation process and the framework of quantitative and qualitative indicators have various dimensions and are tailored to institution-specific vulnerabilities and risks, we do not see beneficial value in prescribing specific indicators per category, as outlined in Annex I, Section C. This is especially our perspective on the specific list of indicators as defined under categories 5 (Market based indicators) and 6 (Macroeconomic indicators), as for these category a



wide set of indicators is available and banks shall have the discretion to include their own indicators to monitor these categories.

Lastly, it may be worth clarifying in Annex I of the draft Guidelines whether all specific indicators listed under section C of the table are subject to rebuttable presumption or just those listed under section 5 and 6.

Question 4 - Do you consider that these Guidelines should establish the threshold for each quantitative recovery plan indicator to define the point at which the institution may need to take recovery measures to restore its financial position?

We strongly advise against setting thresholds for the quantitative recovery indicators, given that these would not take into account the bank's individual risk profile, business model, organisational structure and specific vulnerabilities. As stated earlier in this response, a bank's individual recovery plan escalation framework is integrated in the bank's overall risk management and risk appetite framework to ensure a bank's management can consider the full range of risks and options it may face in a situation of financial distress. Any thresholds for quantitative recovery indicators could interfere with the bank's own ability to recover in an event of stress and would lead de facto to new minimum regulatory thresholds, which is not the purpose of these draft guidelines.

Question 5 - Do you agree with our analysis of the impact of the proposals in this Consultation Paper? 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?

We agree with the assessment of the impact of the technical options under area A (Categories of recovery plan indicators), C (Nature of the recovery plan indicators) and D (Thresholds for the quantitative recovery plan indicators). However, for B (Minimum list of recovery plan indicators), while we understand the need for the EBA to provide guidance on specifying the types of recovery plan indicators to ensure consistency and comparability across the bank specific recovery plans, we would prefer to see the list of specific indicators included as an illustrative list, with special emphasis on refraining from defining specific indicators for the proposed categories 5 (market based indicators) and 6 (macroeconomic indicators) as outlined in our response to question 3.