



EBA/Op/2014/11

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# Opinion of the European Banking Authority on the application of Articles 108 and 109 of Directive 2013/36/EU and of Part One, Title II and Article 113(6) and (7) of Regulation (EU) No 575/2013

## Introduction and legal basis

Article 161(4) of Directive 2013/36/EU<sup>1</sup> (CRD) and Article 508(1) of Regulation (EU) No 575/2013<sup>2</sup> (CRR) require the Commission to review and report by 31 December 2014 to the European Parliament and the Council on the application of Articles 108 and 109 of the CRD and of Part One, Title II and Article 113(6) and (7) of the CRR, respectively.

On 20 December 2013 for the purpose of carrying out those reviews, the Commission asked the EBA to provide technical advice on:

- whether or not the rules governing the levels of application for the requirements specified in Articles 108 and 109 of Directive 2013/36/EU, in particular the exemption regime, are appropriate; and
- whether or not the rules governing the application of Pillar 1 requirements on both individual and consolidated bases, in particular the exemption regime, are appropriate.

The EBA's competence to deliver an opinion is based on Article 34(1) of Regulation (EU) No 1093/2010<sup>3</sup>, as the levels of application of the prudential requirements for credit and investment institutions relate to the EBA's area of competence.

<sup>1</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338)

<sup>2</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

<sup>3</sup> Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

In accordance with Article 14(5) of the Rules of procedure of the EBA, the Board of Supervisors has adopted this opinion.

## General comments

1. The input to be provided to the Commission with this opinion with regard to its two Calls for Advice (CfAs) summarises the views of the EBA in consultation with the competent authorities (CAs). This opinion addresses both CfAs due to the close correlation of the levels of application and waiver regimes for both Pillar 1 (P1) and Pillar 2 (P2) obligations.
2. In order to respond with the necessary technical advice sought from the EBA to assess whether or not the rules governing the levels of application for the requirements are appropriate (specifically the rules on the exemption regime), the EBA used a questionnaire to gather information relating to both CfAs from the national competent authorities. This single opinion addresses both CfAs.
3. In line with the request in the CfAs, this opinion aims primarily at addressing the issue of whether the waivers under P1 and P2 are prudentially justified and whether they should be modified, clarified or more closely aligned. Overall, the EBA suggests that the use of the waivers should be reviewed in the future taking into consideration where and how the waivers will interact with the different recovery and resolution strategies envisaged for each bank and with the new regime on intragroup financial support introduced by the Banking Recovery and Resolution Directive ('BRRD'), in particular with regard to the condition of a free transfer of funds. Furthermore, the conclusions of this report which affect the prudential supervision of investment firms may also need to be reviewed in light of the outcome from the mandate in Article 508(3) CRR, which requires the Commission to report to the European Parliament and Council on an appropriate regime for the prudential supervision of investment firms. This is of particular relevance for the waivers granted in accordance with Articles 15 and 16 CRR which can apply to investment firms. Moreover, the EBA suggests that the Commission consider, in the future, whether the application of waivers at Member State (MS) level in the context of the new Banking Union remains appropriate. Specific comments are found below.
4. The response to the Commission's two CfAs is based upon responses from the 22 competent authorities that responded to the EBA questionnaire, covering over 6000 supervised institutions. The number of entities is composed mainly of credit institutions but also includes investment firms. With regard to remuneration, the response is based on the work of EBA staff and the Subgroup on Governance and Remuneration. Due to the short timeframe, in many cases the EBA questionnaire focused on a qualitative assessment, for example in identifying whether the waivers were prudentially justified. This means that in answering these questions the EBA has collated a number of subjective responses. A degree of caution should therefore be exercised when using the answers to shape future amendments to the CRD and CRR.
5. The central questions asked in the EBA's questionnaire and presented in this document are the following:

- Are the waivers for the level of application of Pillar 1 and Pillar 2 governing the exemption regime in the CRR/CRD justified?
- If not, should they be deleted or modified?
- If yes, should they be extended?

## Specific comments

6. In response to the CfA deriving from Article 508(1) CRR (level of application of Pillar 1 requirements) the EBA notes that the majority of the waivers are supported by competent authorities and are considered prudentially justified. However, as indicated above, there are some areas that could benefit from review in light of other developments. Many of the CRR articles covered by this CfA are fundamental to how the EU regulatory system functions and the basis upon which financial groups are supervised in the EU and, as such, are of great importance to MS. As regards waivers which remove requirements at the solo level, a number of competent authorities expressed their commitment to gathering information and monitoring institutions at solo level, raising questions about the possibility of waiving solo requirements in some circumstances. Although the findings show that some waivers are used in only a few MS, their existence may be essential to the continuation of certain group structures in those MS and they may have a significant local market impact if they are removed. Additionally it is worth bearing in mind that frameworks, such as the EBA's common regulatory reporting framework - COREP, directly reference some of these CRR articles. Therefore any changes to these articles could have wide-reaching consequences and incur costs for institutions, competent authorities (CA) and the EBA itself.
7. In response to the CfA deriving from Article 161(4) CRD (the level of application for the ICAAP (Article 108) and the level of application for the review of the institutions' arrangements, processes and mechanisms (Article 109)), the EBA emphasises the support from competent authorities, in particular with regard to Article 108 waivers, which are not overall considered to require changes although the article itself would benefit from rewording to simplify the text and to align it with the level of application outlined in Article 109. Similarly, the waiver in Article 109 was supported. Some concerns have however been raised with regard to the criteria referred to in Article 7 CRR (to which Article 108 CRD refers). Alignment between the levels of application for Article 108 and Article 109 is broadly encouraged as the requirement for the ICAAP and the obligation for institutions to have arrangements, processes and mechanisms in place are interconnected under the umbrella of P2; by having the levels of application in these articles aligned would enable input into the supervisory review and evaluation process (SREP) to be more aligned. Nonetheless, to avoid an undue burden on small institutions, the requirement for institutions to undertake an ICAAP should be on a proportionate basis. The CfA also sought guidance on the application on a consolidated basis where the EBA has found that there are mixed interpretations, and some further clarification of this term are encouraged.

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# 1. Article 508 (1) CRR

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1. This section discusses the articles which set out the Level of Application of Pillar 1 requirements. The EBA has not had sufficient time to perform a quantitative impact analysis on alterations to the levels of application and exemptions. Further review of this section may be appropriate once the scheduled review of the regime for investment sector firms under Article 508(3) CRR has been completed.

## 1.1 Levels of Application

### 1.1.1 Article 6 CRR – [Application of requirements on an individual basis] – General principles

2. This Article is directly binding on institutions (no CA discretion). The EBA considers that no change is required.

### 1.1.2 Article 11 CRR – [Application of requirements on a consolidated basis] – General treatment

3. This Article is directly binding on institutions (no CA discretion). The EBA considers that no change is required.

### 1.1.3 Article 12 CRR – [Application of requirements on a consolidated basis] – FHC or MFHC with both a subsidiary credit institution and a subsidiary investment firm

4. This Article is directly binding on institutions (no CA discretion). The EBA considers that no change is required.

### 1.1.4 Article 13 CRR – [Application of requirements on a consolidated basis] – Application of disclosure requirements on a consolidated basis

5. This Article is directly binding on institutions (no CA discretion). The EBA considers that no change is required.

### 1.1.5 Article 14 CRR – [Application of requirements on a consolidated basis] – Application of the requirements of Part Five [Transferred Credit Risk] on a consolidated basis

6. This Article is directly binding on institutions (no CA discretion). The EBA considers that no change is required.

### 1.1.6 Article 22 CRR – Sub-consolidation in cases of entities in third countries

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7. This Article is directly binding on institutions (no CA discretion). However, the EBA considers that the purpose of this Article is unclear and it should be reviewed with a view to removing or altering it. In particular the scope of this provision and the provisions in Articles 6 and 11 should be considered together, and the marginal benefit of Article 22 assessed.

#### **1.1.7 Article 23 CRR – Undertakings in third countries**

8. The EBA considers that this Article is necessary to permit global consolidated supervision where there are subsidiaries in non-EEA countries. Therefore no change is required.

## **1.2 The current exemption regime**

#### **1.2.1 Article 7 CRR – Derogation to the application of prudential requirements on an individual basis**

9. This waiver is currently used, sometimes extensively, in 5 MS (although at least 2 others provide for its use but have no cases of its use).
10. The EBA considers that the derogation should not be extended and should not be made mandatory (i.e. it should continue to be granted by CA permission).
11. There may be merit in reviewing this article. However, the market impact of any alterations is likely to be very significant in those MS that permit this derogation and would need to be fully assessed.
12. MS that use the derogation rely on assessments of prompt capital transferability, including parental guarantees. The introduction of additional reporting requirements on the location of own funds within a sub-group may be a useful tool enabling supervisors to monitor the potential impact should unforeseen impediments to transferability arise.

#### **1.2.2 Article 8 CRR – Derogation to the application of liquidity requirements on an individual basis**

13. This provision is relatively new and therefore many MS are currently processing applications for the first time. The prudential rationale is to allow efficient liquidity management within a national jurisdiction.
14. The EBA considers that it is too early to review this article, although there is merit in considering whether reporting on individual liquidity positions should be retained in certain circumstances even when the derogation is permitted, as adequate liquidity buffers at individual level are of great importance.
15. When the Article is reviewed, the impact of the conditions for group financial support established by the BRRD is essential for the assessment of the free movement of funds and should be taken into account.

**(i) Article 113(6) CRR - Calculation of risk-weighted exposure amounts (linked to Article 8(4) CRR)**

16. Most MS who use this Article do not link it to the application of Article 8 (4) CRR. The EBA does not believe Article 8(4) CRR needs to be reviewed at present .

**(ii) Article 113(7) CRR - Calculation of risk-weighted exposure amounts (linked to Article 8.4)**

17. Only one MS uses this waiver and it does not link it to the use of Article 8(4). The EBA has no reason to believe that Article 8(4) needs to be reviewed at the present time.

**1.2.3 Article 9 CRR - Individual consolidation method**

18. This waiver is currently used, sometimes extensively, in 3 MS (although at least 5 others provide for its use but currently have no cases).

19. The EBA considers that the derogation should not be extended and should not be made mandatory (i.e. should continue to be granted by CA permission).

20. The EBA considers that this Article is subject to variable interpretation, particularly as ‘parent institution’ is not a defined term and the type of subsidiary that can be included in such a group is not specified. There may be merit in reviewing this article; the market impact of any alterations is however likely to be very significant in those MS that permit this derogation and would need to be fully assessed.

21. MS that permit the derogation rely on evidence of prompt capital transferability. The introduction of additional reporting requirements on the location of own funds within an individual consolidation may be a useful tool enabling supervisors to monitor the potential impact should unforeseen impediments to transferability arise.

**1.2.4 Article 10 CRR– Waivers for credit institutions permanently affiliated to a central body**

22. This waiver is currently used in 6 MS and covers about 130 institutions. (See also the comments in 2.1.1 regarding the use of Article 108(1)).

23. The EBA considers that the derogation should not be extended and should not be made mandatory (i.e. should continue to be granted by CA permission).

24. Two CAs flagged concerns on the use of this waiver noting that central bodies, and banks permanently affiliated to them, can still fail with significant repercussions for financial stability, indicating that caution should be applied when applying this waiver and that the use of this waiver could undermine the prudential requirements aimed at addressing the risks borne by banks permanently affiliated to a central body.



25. However, the market impact of any alterations is likely to be very significant in those MS who permit this derogation and would need to be fully assessed.
26. Taking these concerns into account, the EBA considers that this waiver should not be altered at the current time, assuming that the linked provision in Article 11(4) CRR (requiring consolidation by the relevant central body) is retained.

#### **1.2.5 Article 15 CRR – Derogation to the application of own funds requirements on a consolidated basis for groups of investment firms**

27. The EBA considers that there should be no changes to this waiver at the current time and that the conditions are appropriate. It is appropriate to have a differentiated treatment for smaller investment firms as due to their lower risk profiles and different activities there is a need to be proportionate.
28. Both Articles 15 and 16 CRR should form part of the overall review of the regime for investment firms under Article 508(3) CRR.

#### **1.2.6 Article 16 CRR – Derogation to the application of the leverage ratio requirements on a consolidated basis for groups of investment firms**

29. As the leverage ratio is not yet operational there is no current information on the use of this derogation. The derogation appears justified as it follows from the application of Article 6(5) CRR although there is a question over whether the relevant CA should have to give explicit permission for institutions to use this derogation.
30. The EBA considers that the conditions are appropriate. It is appropriate to have a differentiated treatment for smaller investment firms. Due to their lower risk profiles and different activities there is a need to be proportionate.
31. Both Articles 15 and 16 CRR should form part of the overall review of the regime for investment firms under CRR Art 508(3).

### **1.3 Possibility for further harmonisation of the rules for credit institutions and investment firms**

32. The EBA considers that appropriate distinctions in the regulation of credit institutions and investment firms should be retained given the difference in size, internal organisation, nature, scope and complexity of the activities carried out by these institutions. The significant diversity of investment firms needs to be taken into account, particularly as many investment firms are Small or Medium-sized Enterprises (SME's). Application of the same requirements as those applying to credit institutions may be too complex and burdensome (e.g. liquidity, leverage, capital buffers, reporting) and may not achieve the underlying aims.

33. There are no reasons to harmonise the relevant derogations and waivers for certain (lower risk) investment firms with the treatment for other institutions. These treatments were agreed or maintained during the CRR negotiations in clear recognition that Basel III, which was designed for banks/deposit-takers, not investment firms, is implemented by the CRD. It is clearly acknowledged in the CRR that the place to review the treatment of investment firms is as part of the wider review of the whole applicable prudential regime for investment firms that the Commission is required to undertake in 2015 under Article 508(3) CRR (as well as the separate reviews required under Article 508(2) for liquidity and Article 498 for commodity derivatives firms).

## 1.4 The criteria for excluding entities from the scope of prudential requirements

### 1.4.1 Article 19 CRR - Entities excluded from the scope of prudential consolidation

34. Nine MS use this waiver although in most cases only a small number of institutions benefit from the exclusions. The use of this waiver is generally limited and tightly controlled. In the majority of cases the rationale was that an institution was of negligible interest, although some waivers have been made on the grounds that inclusion would be misleading. No MS reported use of criterion (a), The Commission might therefore wish to consider its removal. This may also be valid on prudential grounds given that if information is not forthcoming then simply excluding it from prudential consolidation is an imprudent response to the risks that an entity may pose for its group. Four CAs reported having declined requests for this waiver.

35. The EBA considers that as Article 19(1) CRR addresses institutions directly, there would be some benefit in having a requirement for the competent authorities to receive explicit notification when any entities are being excluded under Article 19(1) CRR so that supervisors will know the extent of its use by their regulated groups.

36. The EBA considers that this waiver should remain but that its use should be monitored.

## 2. Article 161 (4)

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37. The CfA deriving from Article 161 (4) focuses on the exemption regime for P2 referred to in Articles 108 and 109 CRD. The EBA has been invited to provide advice on whether or not the waivers are prudentially justified, to consider whether the rules should be harmonised, the treatment of subsidiary undertakings not subject to the CRD prudential requirements and to assess the meaning of application on a consolidated basis.

## 2.1 In the current exemption regime, are the waivers prudentially justified?

### 2.1.1 Article 108(1) paragraph 2

*Article 108(1) paragraph 2: Competent authorities may waive the requirements set out in the Article 73 of this Directive in regard to a credit institution in accordance with Article 10 of Regulation (EU) No 575/2013.*

38. Approximately 249 entities in 6 MS make use of this waiver (around 4%), which allows the competent authorities to grant an exemption for completing the ICAAP to banks permanently affiliated to a central body (Article 10 CRR). The majority of institutions are concentrated in one MS, although the actual number may be slightly higher as some CAs indicated the number of central bodies to which institutions are affiliated in place of the number of institutions applying this waiver, so this number is in fact undoubtedly slightly higher.
39. Two CAs flagged concerns on the use of this waiver. They noted that central bodies, and banks permanently affiliated to them, can still fail with significant repercussions for financial stability. This indicates that caution should be applied when applying this waiver and that use of this waiver could undermine the prudential requirements aimed at addressing the risks borne by banks permanently affiliated to a central body. However, taking these concerns into account, the overall conclusion is that the EBA considers that the waiver does not need to be removed at the current time (see also 1.2.4) but that it should be aligned with the use of this waiver under P1. Doing so would mean that this waiver would only apply to institutions where this has waiver been granted under P1 (see also section 2.5).

### 2.1.2 Article 108(1) paragraph 3

*Article 108 (1) paragraph 3: Where the competent authorities waive the application of own funds requirements on a consolidated basis provided for in Article 15 of Regulation (EU) No 575/2013, the requirement of Article 73 of this Directive shall apply on an individual basis.*

40. Eighty-four institutions in 4 MS (with the majority in one MS) apply ICAAP on an individual basis in line with the waiver referred to in Article 109 (1)(3) (found in Article 15 CRR) which provides a derogation from the application of own funds requirements on a consolidated basis for groups of investment firms.
41. Article 108(1) is not a waiver in itself, but links to the use of the waiver in Article 15 CRR. This link means that institutions which are exempt from applying own funds on a consolidated basis must also undertake their ICAAP on an individual basis. This application is considered prudentially justified as the level of application for the own funds requirement and the ICAAP is consistent. Therefore the EBA does not consider that a change is required. (See also 1.2.5).

### 2.1.3 Article 109(1)

*Article 109 (1): Competent authorities shall require institutions to meet the obligations set out in Section II of this Chapter on an individual basis, unless competent authorities make use of the derogation provided for in Article 7 of Regulation (EU) No 575/2013*

42. Over thirty institutions make use of the reference in Article 109(1) to the waiver in Article 7 CRR allowing institutions not to meet the requirements set out in Section II Chapter 2 of Title VII on an individual basis.

43. The majority of uses are in 2 MS, but there are a number of concerns on the prudential justification of the use of this waiver. In particular, it was noted that despite the conditions for applying the derogation listed in Article 7 CRR, institutions should not be exempt from fulfilling all the arrangements, processes and mechanisms described in Section II, Title V CRD on a solo basis. Some modifications are suggested in Section 2.2.3 (See also 1.2.1).

## 2.2 Suggested modifications to the waivers

44. One general modification suggested for all 3 waivers is to reconsider them in light of the different recovery and resolution strategies envisaged for each bank and with the new regime on intragroup financial support introduced by the Recovery and Resolution Directive (Directive 2014/59/EU - 'RRD'), as this will have implications on how supervisors will approach the application of prudential policy to group structures.

### 2.2.1 Article 108 (1) (2)

45. The waiver referred to under Article 108(1)(2) should be aligned with the application of the waiver under Pillar 1, i.e. it should be applied only if applied under Article 10 under Part I, Title II CRR.

### 2.2.2 Article 108 (1) (3)

46. No further modifications are suggested for the waiver referred to under Article 108(1)(3).

### 2.2.3 Article 109(1)

47. The EBA suggests that Article 109(1) CRD is modified so that institutions are always compliant with at least the general principles established in sub-section 1 (Articles 74 and 75) and also with some of the rules provided for in sub-section 3 as regards governance (e.g. Articles 88 and 91). This is because importance is placed on having 'robust governance arrangements' (Article 74) on an individual basis as they cannot be adequately replaced on a consolidated basis. Indeed, it is considered that the possibility of exempting institutions from risk management rules when the Article 7 CRR waiver is granted may lead to unnecessary risks to financial stability. The adequate distribution of own funds between a parent undertaking and a subsidiary cannot counterbalance the missing risk management at solo level (see also 2.4 for some suggestions).

## 2.3 Extension of the exemption regimes

48. An extension on materiality grounds for Article 108(1) paragraph 2 could be provided, for example adding a materiality threshold for applying Article 15 CRR, based on the proportion of group assets and the share of local market activity (the second to capture entities that are small in relation to the global group but significant to the local market). Nonetheless, the EBA suggests that this waiver (Article 15 CRR) is retained as it is, at least pending the outcome of the Commission's report under Article 508(3) CRR.
49. It appears in addition that there is an omission which should be added together with the Article 7 CRR derogation already included in Article 109 CRD; Article 8 CRR (Derogation to the application of liquidity requirements on an individual basis) should also be included to exempt those institutions where the same waiver has been applied under P1. Where an Article 8 CRR waiver has been granted, the review of an institution's arrangements, processes and mechanisms for those of all or some of its subsidiaries will be addressed as a single sub-group subject to fulfillment of the criteria under Article 8(1) CRR.

## 2.4 Appropriateness of the conditions for the waivers

50. The conditions that institutions are required to meet to benefit from the waivers in Articles 7, 10 and 15 CRR are considered appropriate and sufficiently extensive, although the conditions in Article 7 CRR could be supplemented with criteria along the lines of the points below, notwithstanding the need for a proper assessment of the impact of any such additional criteria:

- the requirement that a uniform methodology for risk identification, risk measurement and management, risk monitoring and reporting on consolidated basis should be established;
- the requirement that the parent institution must effectively be empowered to issue binding instructions to the subsidiaries (e.g. by control agreements); and
- further deepening the detail relating to integrated risk management.

## 2.5 Harmonisation of the rules on application for P2 requirements

### 2.5.1 Alignment of waivers for ICAAP (Article 108 CRD) and for the review of the institutions' arrangements, processes and mechanisms (Article 109 CRD)

51. Article 108 CRD and Article 109 CRD should be aligned due to the interconnectedness of the two under P2 and the fact that the ICAAP and institutions' arrangements, processes and mechanisms are key resources in conducting the SREP assessment of an entity. Currently the ICAAP is calculated (in accordance with Article 108 CRD) at the highest level of consolidation and the exemptions are those firms applying the waivers outlined in Articles 10 and 15 CRR.

The general level of application for ICAAP in Article 108 CRD means that there is alignment between the level of application for P1, ICAAP and the review of institutions' arrangements, processes and mechanisms only where subsidiaries have applied the P1 waiver in Article 7 CRR and as allowed under Art 109(1). However, there are two identified occasions which should also be aligned; (i) where institutions apply the waiver in Article 10 CRR for P1, there may not be alignment with the ICAAP as the use of this waiver is at competent authority discretion (i.e. there may, or may not, be an ICAAP) but the obligations relating to institutions' arrangements, processes and mechanisms are required for such institutions, and (ii) where the Article 7 CRR waiver is not applied at P1 level, the obligations relating to institutions' arrangements, processes and mechanisms (Article 109) are required but not the ICAAP (Article 108 (1) sub-paragraph 1).

52. As an entity's documentation of its ICAAP is a major source of evidence in undertaking the SREP, there is a difficulty in basing the SREP assessment of a solo entity partly on something framed at the group level only. Nonetheless the requirement for ICAAPs on a solo basis should be proportionate, as requiring an ICAAP for every solo entity in a large group would be unbalanced, particularly where the entities are not significant in relation to the rest of the group. The EBA therefore suggests that Article 108 should be simplified and clarified, and also reworded to require that an ICAAP should be required on a consistently proportionate basis at solo level. This could *possibly* be accomplished by basing the level of application of an ICAAP on the concept of significant subsidiaries found in Article 13 CRR ('subsidiaries which are of material significance for their local market'). Additionally, Article 108 CRD should also refer to Article 16 CRR in the same paragraph and in the same way that it references Article 15 CRR. This would mean that where Article 16 is applied under P1, for the derogation to the application of the leverage ratio requirements on a consolidated basis for groups of investment firms, such firms would also need to apply Article 73 on an individual basis to ensure consistency.

### 2.5.2 Alignment of waivers for P2 with P1 waivers

53. The level of application in Articles 108 and 109 CRD together with the application rules for P1 prudential requirements as specified in Part One, Title II CRR should be aligned insofar as the waiving of P1 requirements at the solo level should mean that the requirement for an ICAAP and the requirement for the institutions' arrangements, processes and mechanisms at the solo level are not required. This is currently the case with regards to institutions where the Article 7 CRR waiver has been granted under Article 109(1) CRD, however, streamlining Article 108 is required in order to align the levels of application for P1 and P2.

54. Specifically, Article 108(1) sub paragraph 1 should be amended to require the ICAAP on an individual, but proportionate, basis and Article 108(1) sub paragraph 2 should be reworded to clarify that only where the waiver under Article 10 CRR has been applied for P1 can the requirement in Article 73 CRD be waived for institutions. This would remove the competent authority discretion as mentioned in paragraph 50 which is facilitating inconsistency between the levels of application at the moment. However, as mentioned under 2.5.1, in aligning the P1

and P2 requirements, an element of proportionality should be considered for the ICAAP requirement under Article 108.

### **2.5.3 Treatment of subsidiary undertakings not subject to the CRD prudential requirements Undertakings that should be subject to the obligations in Title VII, Chapter 2, Section II CRD on the basis of Article 109 (2) CRD**

55. There is a desire to have the types of undertakings subject to these requirements clarified in the CRD. More specifically, it is understood that both undertakings that fall within prudential consolidation in accordance with Article 18 CRR are subject to the obligations of Section II. Indeed all entities in the consolidation need to be included so that the consolidated figures are accurate and so that risk management covers all the relevant parts of the group. Furthermore, Article 109(3) provides for an exemption from the requirement of Article 109 (2). The EBA suggests more explicit cross references from the CRD to the CRR where it concerns matters related to the scope and level of application.

### **2.5.4 Obligations to apply to these subsidiary undertakings**

56. As detailed in Article 109(2) CRD, the EBA considers that all obligations in Section II of Chapter 2 in Title VII of CRD should apply unless the conditions of Article 109(3) CRD apply. This means that the obligations for institutions subject to the CRD/CRR are mirrored for the other undertakings referred to in Article 109(2).

57. In terms of how the application should be extended to these undertakings, this should be done on a case-by-case basis and does not need to be specified in the CRD. Nonetheless the consolidating entity and/or the regulated institutions within a group (as appropriate to national regulatory regimes) should have responsibility for developing and monitoring group procedures and practices with which the other subsidiaries in the group should comply. Individual entities in the group should have responsibility for complying with the relevant group procedures and should have specific responsibility to produce and provide accurate information to the consolidating entity.

## **2.6 Clarity of provisions in CRD dealing with consolidated application for the obligations covered by Sections I and II of Chapter 2 in Title VII CRD**

### **2.6.1 Practical experience of dealing with consolidated application in the articles of Sections I and II of Chapter 2 in Title VII CRD**

58. In assessing whether the provisions set out in the CRD dealing consolidated application are sufficiently unambiguous for each of the obligations covered by Sections I and II of Chapter 2 in Title VII CRD, the EBA considered the current practical experience of MS.

59. Overall, the concept of application on a consolidated basis varies depending on the nature of the specific requirement under each article and on the structure of the group subject to

consolidation but, in general, under Articles 108-110 CRD it is understood to mean that the relevant responsible institution for the consolidated application of the CRD (Article 11 CRR) has to assert that all the subsidiaries included the scope of consolidation comply with these provisions. Few CAs noted problems in interpreting these provisions. However, this is also associated with the fact that in a number of cases, there is little experience of, at least, and not limited to, the application under Article 89(2) CRD. It should also be pointed out that the lack of CAs' concerns does not equate to all CAs applying "consolidated basis" consistently. Indeed, feedback from the EBA Subgroup on Remuneration and Governance (SGGR) indicates that there are some inconsistencies amongst CAs on the level of application required under Article 92(1) CRD on remuneration policies and where clarification is sought. That Article requires that the competent authorities should ensure the application of paragraph 2 of the article and Articles 93, 94 and 95 for institutions at group, parent company and subsidiary levels, including those established in offshore financial centres. Recital 67 provides the necessary clarification that this should in fact mean that the provisions should apply at a consolidated level. It is suggested that the necessary clarification be provided directly within the directive.

60. The EBA Subgroup on Remuneration and Governance (SGGR)'s work, in relation to Article 92(2) CRD indicates that there is a lack of clarity on the concept of application on a consolidated basis under this Article in combination with the principle of proportionality.
61. Article 92(2) CRD requires the competent authorities to ensure that the provisions in Articles 92(2) and 94 CRD are applied to the extent that is appropriate to their size, internal organization and the nature size and complexity of their activities. While Article 92(1) and Article 109 seem to be sufficiently clear regarding the scope of application, competent authorities have different views on whether all the provisions should be applied to those firms which fall under the remit of the CRD solely because they fall under the 'scope of consolidation' in the same way as it is applied to institutions directly subject to the CRD. The EBA will issue guidelines on remuneration policies which will include how the principle of proportionality should be applied in these cases. However, it would also be worthwhile clarifying within the CRD how the respective provisions relate to other sectoral legislation (e.g. UCITS and AIFMD).

## **2.6.2 Proposals for clarifying the references to consolidated supervision if applicable**

62. One CA is in favour of introducing a definition of the level of consolidation at which the CRD and CRR are applied, which could be used throughout the CRD and CRR as there are many different wordings in the CRD and CRR which refer to possibly unintended differences in group structures or applications of consolidation. As this concern is not widely shared, the EBA suggests that further work be performed to understand the different interpretations of "consolidated application" before this proposal is actioned.

## **2.7 The extent to which firms are exempted from the obligations in Sections I and II of Chapter 2 in Title VII of CRD**



### **2.7.1 Exemptions from the obligations in Sections I and II of Chapter 2 in Title VII CRD on either an individual or a consolidated basis.**

63. The quantification of exempted firms was undertaken in Section 2.1 above.

## **2.8 Any other issues or inconsistencies identified in the implementation of Articles 108 and 109 CRD**

### **2.8.1 Other concerns on implementing Article 108 and 109 CRD**

64. The following supplementary clarification is suggested with regard to ensuring consistency in Articles 108 and 109 CRD by using standard wording as used in the remainder of the CRD, in particular:

- Article 108(1) CRD uses the wording “competent authorities shall require” with a reference to Article 73 CRD. However, Article 73 CRD uses the wording “institutions shall” in that context.
- Article 108(4) CRD uses the wording “subsidiary institutions”, which is not very logical in this context nor is it common wording in the CRD. It seems that Article 108(4) CRD is intended to apply to the sub-consolidation level set in Article 22 CRR, however, again, the wording is slightly different. Similarly, this could be much more clearly arranged by precise and clearly defined consolidation levels.

This opinion will be published on the EBA’s website.

Done at London, 29 October 2014

[signed]

Andrea Enria

Chairperson

For the Board of Supervisors

## Annex 1 – List of respondents

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### Questionnaire responses received

1	Austria
2	Belgium
3	Bulgaria
4	Cyprus
5	Croatia
6	France
7	Germany
8	Greece
9	Hungary
10	Ireland
11	Italy
12	Lithuania
13	Luxembourg
14	Malta
15	Netherlands
16	Poland
17	Portugal
18	Romania
19	Spain
20	Sweden
21	Slovenia
22	UK

### Other responses received

1	Iceland (EEA)	In the case of EEA countries, the new CRD IV/ CRR framework has not yet been incorporated into the EEA Agreement and we have been notified that at least in the case of Iceland, these have therefore not been
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		<p>transposed into national law. In the case of Iceland, no response to the Questionnaire was submitted except for the following explanation: the regulations are considered to involve the transfer of executive powers that would go beyond the provisions of the Icelandic Constitution. This has delayed the incorporation of the CRD IV /CRR framework into the EEA Agreement. In Iceland, the CRD IV Directive is expected to be transposed through a bill amending the Act on Financial Undertakings, No. 161/2002, scheduled to be submitted to the Althingi (Parliament) in the 2014 spring session. Preparatory work is under way for the transposition of the Regulation which is expected to be transposed through an annex to a regulation adopted on the basis of a provision in the Act on Financial Undertakings.</p>
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