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Committee of European Banking Supervisors
Mrs. Danièle Nouy, Chairman
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Date 19/10/2007
Ref. ACO/yma
Subject **Removal of national discretions in the CRD**
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Dear Mrs. Nouy,

National discretion is recognized as a major and emblematic hurdle towards the goal of creating a single EU financial market. EU cross-border banking groups are confronted with a multitude of supervisory divergent national requirements. Ensuring compliance with all of these requirements entails a multiplication of cost and effort without significant added value.

During the adoption of the Capital Requirements Directive, Fortis Bank has called for the removal of all the national discretions. In 2005, we actively participated in the exercise of the European Banking Federation to identify and draw up a proposal to CEBS¹. We therefore deem it important to remove, as a matter of principle, all national discretion in order to achieve supervisory convergence, and further harmonization in Europe.

Moreover, being a direct member, Fortis Bank fully supports the positions of the European Financial Services Roundtable², and the Operational Network Platform³, calling for a removal of national discretions.

¹ List of discretions analysed by FBE Sub-Group on National Discretions, EBF Letter, 10 February 2005

² Monitoring Progress in EU Prudential Supervision, A REPORT BY THE EFR - SEPTEMBER 2007

³ Actions to be taken to improve the Supervision of EU Cross-border banks from an operational point of view, Operational Network Platform, 15 June 2007

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In this respect, we welcome the call of the European Commission to remove them, and the efforts from CEBS to streamline the list. Fortis Bank therefore would like to submit its contribution directly to CEBS questionnaire. Please find attached our response, as well as the explanation of the methodology followed in filling in the CEBS template. As a summary, we ask for the following:

to keep		to remove	
a) in present form	0	a) remove completely from CRD	
b) for supervisor to decide on case-by-case basis	0	aa) immediately	20
c) subject to mutual recognition (<i>exclusive competence of one single national supervisor or of a joint college of supervisors</i>)	6	bb) after transition period	9
d) as option for credit institutions	27	b) transform into general rule and removing the other option(s)	69
TOTAL	33	TOTAL	98

Yours truly,

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Director Basel 2 Coordinator.

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General Manager.

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Attachment A

METHODOLOGY FOLLOWED TO FILL IN THE CEBS TEMPLATE

1. LIST OF NATIONAL DISCRETIONS

The starting point is the CEBS questionnaire as stated on its website. We have added a serial number.

Some national discretions were left out of CEBS questionnaire. We have included them by inserting them under the right area and by adding a letter to the initial serial number.

We have not enclosed the so-called “implicit national discretions”⁴ resulting from room left to Member States for divergent interpretation, nor the so-called “Gold-plating”, when Member States create additional requirements, going beyond the EU rule. These “implicit national discretions” and “gold-plating” will be the subject of a separate document.

2. HEADING “3. CLASSIFICATION OF OPTIONS AND DISCRETIONS

We experience several times that same solutions, same redrafted texts are classified by different experts under different classifications. Therefore, we explain how we have proceeded to classify under the different headings of CEBS questionnaire.

2.1. Heading “To remove”

2.1.1. The target is to remove all the national discretions

As in our answer, we propose to *remove all the national discretions*, we will therefore systematically prefer the column “To remove”.

A national discretion is removed either by:

- *“b) transform into a general rule”*, i.e. by replacing the existing CRD text allowing a national option or discretion by a new or amended text imposing one single EU-wide rule without any allowance for national divergence.
- *“a) remove completely from CRD”*, i.e. by deleting the related text or portion of text from the CRD.

2.1.2. Institutions need time to adapt their systems and processes

The CRD is already in force and institutions will switch-over at latest on 1 January 2008 from CAD1 to CRD. Therefore, institutions were obliged to take into account the national discretions as they are today and have already adapted their systems and processes to this reality.

⁴ By opposition to the “explicit national discretions” as stated in the Directive and for the largest part taken over in the CEBS list.

Once the competent authorities will have removed the national discretions, *institutions will need some time* (possibly one or two years) to adapt their systems and processes. Both “b) transform into a general rule” and “aa) remove immediately)” should take into account this time.

2.1.3. Transitional measures

The CRD text provides for transitional measures, i.e. that a transition period is granted with some temporary options & exemptions, or with temporary relaxation of some requirements.

- CRD provides *EU-wide transitional measures* giving the needed flexibility for the transition from CAD1 to CRD. The majority of the transitional measures are EU-wide single rule, but some are national discretions⁵. These which are national discretions should be transformed into EU-wide single rule. We have classify these national discretions under the heading “*b) To remove – Transform into general rule*”
- CRD lets to the discretion of the *national authorities to depart temporary from the EU-wide single rule*⁶. Our preferred solution would be to remove immediately these national discretions. But we are realistic. We don’t expect the concerned Member States to give up immediately these derogations to the EU-wide rule and we do not ask to generalise these derogations to the whole EU. Thereby, we have classified these national discretions under the heading “*bb) To remove after transition period*”.
- The distinction between “remove *immediately*” and “remove *after a transition period*” is probably not so critical. Some “remove immediately” could be reclassified into “remove after a transition period” without serious impact on the implementation of the overarching target of removing all national discretions.⁷

2.2. Heading “a) To keep in the present form”

Heading “b) To keep for supervisor to decide on case-by-case basis”

As we want to get rid of all national options and discretions, we will never use these two headings.

⁵ For instance, articles 154.2 and 154.3 let to the competent national authorities to reduce temporary the length of the minimum period for the use test. For credit institutions applying the advanced approaches on a unified basis and delivering one single application to their consolidating supervisor, divergent national use tests requirements are inconsistent with the “unified basis” and the application of article 129.

⁶ Best known cases are : Grandfathering for equity exposures (Material equity exposures existing at end 2007 may be handled in STA in place of IRB for a period of 10 years) ; Definition of default (90 days past due may be brought up to 180 days)

⁷ For instance, the derogation to the EU-wide rule for residential real estate (Line 29B, Annex VI, part 1, point 49) and for commercial real estate (Line 29G, idem point 58)

2.3. Heading “c) To keep - Subject to mutual recognition”

2.3.1. Rewording into “exclusive competence”

This heading may be misleading. The purpose is certainly not to allow national authorities keeping their national options or discretions in place. The European Financial Single Market would in this case remain fragmented for ever. In this context, mutual recognition may be dangerous as it will further crystallize the national options and discretions and made their removal more difficult.

This heading should be reworded as *“Transform the national option or discretion into the exclusive competence of one single supervisor (or a joint college of supervisors)”* and therefore this heading should better be put under the column “To remove”.

The exclusive competent supervisor (or joint college) is just applying the EU-wide rule to the specific context of its country, in order to take into account the local market characteristics. In this context, “Mutual recognition” means the recognition of the exclusive competence of the concerned supervisor (or joint college of supervisors) and that their decisions are binding for all other (European) supervisors and institutions.

We have stipulated under heading “to keep- subject to mutual recognition”, which is the exclusive competent supervisor following these criteria:

- Consolidating supervisor
- (Host) supervisor of the institution (subsidiary)
- Supervisor of the country where the borrower is registered.
- Supervisor of the country where the collateral is located

2.3.2. EU joint process

We have taken over the joint process recommended by CEBS in its Standards on ECAI⁸.

- For local ECAI active only in one Member State, the local competent authority shall recognise the ECAI and shall carry out its own mapping between the ECAI and the CRD credit quality steps. Other national competent authorities shall endorse this recognition and mapping without proceeding to further investigation on their own.
- For ECAI active in more than a Member State or for internationally active ECAIs, the concerned EU competent authorities shall jointly carry out the recognition of the ECAI and the mapping between the ECAIs ratings and the CRD credit quality steps. Other national competent authorities shall endorse this recognition and mapping without proceeding to further investigation on their own.

⁸ CEBS guidelines on the recognition of external credit assessment institutions – 20 January 2006

- For the recognition of the equivalence of third countries and an EU-wide recognition of the decisions of competent authorities of these third countries, the concerned EU competent authorities shall jointly carry out the recognition of the equivalence and of the decisions. Other national competent authorities shall endorse this recognition without proceeding to further investigation on their own.

2.3.3. Review clause

- It is worth noticing that the “Exclusive competence of one single supervisor (or a joint college of supervisors)” removes the national option or discretion, but that it does not avoid to a certain extent the fragmentation of the EU.
- Therefore, we propose that CEBS is mandated to review in a few years all the “Transform the national option or discretion into the exclusive competence of one single supervisor (joint college of supervisors)” in order to reduce their number, either by transforming them into one single EU-wide general rule without any national specific national application, or to remove them entirely.
- We refer also to the “EBF laundry list for changes to the CRD” sent by EBF to the European Commission, and more particularly to the three proposed amendments aiming to introduce in the CRD the EU joint process.

2.3.4. Applied classification

To comply with CEBS classification, we have classified the *“Exclusive competence of one single supervisor (or a joint college of supervisors)” under the heading “c) To keep – Mutual recognition”, even if no national discretion or option is kept.*

2.4. Heading “d) To keep as option for credit institution”

2.4.1. Proportionality

We believe that proportionality and flexibility are key principles, enshrined in the CRD:

- CRD applies to credit institutions and to investment firms. CRD applies to all institutions, from the large cross-border integrated multi-business groups to the smallest national or local entities specialised in one segment. Some Member States extend the CRD scope to companies active in leasing, factoring, asset management,...
- Competent supervisors require from large systemic institutions that they adopt sophisticated approaches and that their risk management meets high standards in line with their peer institutions. More particularly large institutions are encouraged but not obliged to adopt the most advanced approaches.

- On the other hand, CRD provides for the smallest institutions some specific simplified rules or a relaxation of some rules.

Some of these proportionality and flexibility rules are currently national options or discretions. They should all be transformed into one single EU-wide general rule. Proportionality and flexibility in favour of the institutions should be identical in all Member States and not subject to divergent implementation by the Member States.

Therefore, the “Transform into general rule” supersedes the “Option of the institution”. The first priority is to ensure one single EU-wide rule and to remove any national option or discretion. Simultaneously, all concerned institutions active within the EU have the same flexibility, eliminating any fragmentation of the EU or competitive distortions.

2.4.2. Option of the institution

The “Option of the institution” is subject to supervisory scrutiny. We may distinguish:

- Option for institution subject to mandatory permission of the competent supervisor⁹
- Option for institution subject to supervisory scrutiny that the CRD requirements are met¹⁰.
- Option for institution subject to the institution meeting the CRD eligibility criteria¹¹
- Option for institution not subject to specific conditions

We have classified under “To keep – Option for institution”, only those items which are formulated as “Credit institutions (or institutions or investment firms) may”.

All other formulations are classified under “To remove – transform into general rule”

3. HEADING “5. HOW IMPORTANT IS THIS OPTION/DISCRETION FOR YOU” **HEADING “6. DOES THE DIVERGENT EXERCISE OF OPTIONS AND DISCRETIONS BY NATIONAL AUTHORITIES HAVE ANY IMPACT IN YOUR BUSINESS**

Heading 5 is not applicable as we want to get rid of all the national discretions. We don’t ask for any national exception or derogation to be kept.

Heading 6 has already been commented in length.

- National options and discretions conduct to a fragmentation of the European Union, to additional hurdles for institutions operating

⁹ For instance, institutions opting for the advanced approaches (FIRBA or AIRBA; AMA) on a unified basis have to submit a formal request to their consolidating supervisor, supported by a full application folder, and the decision will be taken in the framework of article 129.

¹⁰ For instance, options of institutions are subject to meeting the listed conditions of the CRD and the effective respect of these conditions is subject to supervisory scrutiny

¹¹ For instance, several rules are relaxed in favour of small institutions if they meet some size criteria

cross-border, to a lack of transparency of the regulatory and supervisory framework.

- National options and discretions allow national authorities and local institutions to raise new intra-EU national barriers and to protect themselves from an increased competition. National options and discretions jeopardise the benefits that the customers (individuals, enterprises, public sector entities) are in right to expect from the European Financial Single Market.
- Large cross-border integrated banks are the most powerful drivers of the integration of the European financial market, including for retail. They want to operate with one single EU-wide rulebook. This EU-wide rulebook should be transparent, should give legal certainty, should eliminate national divergent interpretation or implementation, should avoid useless legal sophistication or prescriptiveness, should limit as much as possible the supervisory compliance cost. National options and discretions are at odds with this EU-wide rulebook.

4. **HEADING “7. WHAT ARE THE POSSIBLE SOLUTIONS TO ACHIEVE CONVERGENCE”**

We have preferably proposed an amendment to the text of the directive.

Where appropriate, we have given the way forward to achieve the removal of the national discretion.