A. Introduction

Deutsche Börse Group (DBG) welcomes the opportunity to comment on EBA's Consultation Paper "Draft Regulatory Technical Standards on Own Funds – Part one (EBA/CP/2012/02)" issued on 4 April 2012.

DBG is operating in the area of financial markets along the complete chain of trading, clearing, settlement and custody for securities, derivatives and other financial instruments and as such mainly active through regulated Financial Market Infrastructure providers.

Among others, Clearstream Banking AG, Frankfurt/Main and Clearstream Banking S.A., Luxembourg, who act as (I)CSD[1], are classified as credit institutions and are therefore within the scope of the EU Capital Requirements Directive (CRD). Clearstream Holding AG acts as a financial holding company under German banking law being recognized by BaFin as the superordinated company. The figures for Clearstream Holding group follow the consolidation provisions set out in § 10a (6) German Banking Act (KWG) and the German GAAP rules based on the German Commercial Code. According to Article 7 of the Seventh Council Directive (83/349/EEC), Clearstream Holding group is exempted from the set up and publication of (sub-) consolidated statutory accounts. Furthermore, Eurex Clearing AG as the leading European Central Counterparty (CCP) is also implicitly affected by the CRD as it is currently treated as a credit institution under German law and, as the future need for a banking license is currently also seen as being necessary in the context of EMIR, it will most likely also be within the full scope of CRD in the future.

As the regulatory capital of the group companies mainly consists of paid up capital, share premium, reserves and retained earnings - which will be classified as common equity tier 1 (hereinafter referred to as "CET1") capital - only a few articles of the proposed RTS are directly affecting our business. We therefore have prepared our comments with particular focus on the effects on our companies in scope of the regulations which are – e.g. related to cost and effort considerations – not comparable to the majority of other banks.

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

[1] (International) Central Securities Depository.

B. Management summary

As mentioned above the proposed RTS is only of limited relevance for the group and its companies. Therefore we have limited our reply to the questions 1, 7 and 18.

With regard to the definitions of foreseeable dividends (Article 2) we miss clarity on the handling of interim dividends, payout ranges for dividends and fixed amounts for dividends or accumulated profits as defined in the dividend / capital policies. The current wording of Article 2 paragraphs 2 – 4 needs some additions and clarifications in that regard.

Related to the determination of interim results in case no interim accounts are set up for other (external) purposes (Article 11 (2) and (3)), the accounting principles for interim accounts as laid down e.g. in IAS 34.28 and subsequent need to be respected. The RTS should by no means impose tighter rules on interim accounts as accounting standards do. Furthermore, as for various reasons consolidated accounts on the group of entities in scope of consolidated supervision might not exist (due to differing scope of consolidation this might be the standard), the preparation of "official" consolidated accounts cannot be in scope of the RTS and therefore this needs to be clearly expressed.

As the relevant accounting standard is according to Article 22 (9) CRR the basis for prudential reporting, any netting of deferred tax assets and liabilities already allowed under the relevant accounting standard needs to be the starting point for regulatory purposes. Therefore the provisions of Article 12 can just clarify additional regulatory options which go beyond accounting netting. Also this needs to be clearly expressed in the RTS itself.

In case the national accounting standard does not force to recognise Deferred Tax assets in the balance sheet (like German GAAP § 274 HGB), we do not agree to be forced to recognise this for regulatory purposes only.

Finally, the scope of Article 31 in conjunction with the underlying legal text of CRR asks for some clarification. We assume, that the ordinary year-end process to set up profit distribution and related tasks is not in scope but rather a reduction of paid up capital and similar instruments.

C. Responses to the selected questions for consultation

TITLE II Elements of own funds

1. Are the provisions on the meaning of foreseeable when determining whether any foreseeable charge or dividend has been deducted sufficiently clear? Are there issues which need to be elaborated further? What would be your definition of foreseeable?

In principle, the provisions of the RTS regarding the deduction of foreseeable charges and dividends are clear with regard to annual dividend payments in most cases. However, with regard to (a) the payment of interim dividends and (b) in case of general capital / dividend policies which do not target for payout ratios but for fixed (maximum / minimum) amounts to be accumulated or to be paid out as profit distribution (dividend) as well as for dividend policies which work with payout ranges instead of fixed / approximate payout rates, the rules are not clear enough. We do want to illustrate some of the specific scenarios where we feel that there is a further need for clarification to grant a uniform implementation and therewith a level playing field and will demonstrate the issues with some examples.

(a) Interim dividends

In case interim dividends are paid (which is not possible in all jurisdictions in the EU and not for all types of corporations) the application of and relation/interaction between the rules of Article 2 paragraphs (2) – (4) are unclear.

1. In case a formal decision on the interim dividend (according to Article 2 (2)) has been taken and based on that decision (potentially even documented in the decision) the part of the interim profit not paid out as an interim dividend is either foreseen by the dividend policy to be paid out with the final dividend or even the dividend policy foresees to cumulate a smaller amount with the annual accounts to be set up at a later point in time, the amount to be deducted from the interim profits is unclear:

> Example 1: Assume an institution reports after 6 months of any business year an interim profit of 90 and a formal decision has been taken to pay an interim dividend of 60.
>
> Following strictly Article 2 (2) of the RTS, an amount of 30 could, by compliance with Article 24 (2) (a) CRR, be included in CET1 capital.

This seems to be true even if the dividend policy would foresee a full distribution of profits and history would proof execution of the policy. We would however consider that the documented dividend policy and history should not allow any increase of own funds in that case.

Example 2 (Example 1 continued): The institution follows a dividend policy according to which a maximum of 20 should be accumulated at year-end. This would mean that it is already foreseeable that a further dividend of 10 will be paid out until year-end out of the interim profits reached so far.

Based on the general requirement of article 24 (2) CRR – to deduct any **foreseeable** dividends – and also in the light of the general precautionary principle, it would not be clear to us whether an amount of 30 could be included in CET1 capital or only a reduced amount of 20.

Furthermore, as the current profit just reflects half a year but the accumulation policy (20) is covering the whole year, the question arises if the intended accumulation needs to be taken into account in full or only on a pro rata basis (i.e. only 6/12th of it) (see also below no. 2).

The example shows, that based on the scenario described, foreseeable dividends to be deducted from accumulated interim profits in the appropriate caption of capital could be 10, 20 or even 30.

The example hopefully clarifies, that specific captions for interim dividends are necessary. We therefore propose to include after the current paragraph 4 a specific paragraph (4a) related to interim profits as follows:

"4a. In case interim dividends are paid, paragraph 2 applies in general. The amount added to the equity however may be reduced taking into account the rules laid down in paragraph 2 and 3 by any amount which can be expected to be paid out from that interim profit with the final dividend for the full business year."

The proposed wording would in the example given above lead to an additional equity of 20.

2. In case a formal decision on the interim dividend (according to Article 2 (2)) has been taken and despite the fact that full interim profit is paid out, profit accumulation of a certain amount or certain portion for full year result might be intended within the documented decision or the dividend policy, the treatment is unclear.

   Note: National law is most likely foreseeing a rule that shareholders need to pay back interim-dividends in case final profit does not justify that payment (due to losses in the remaining period of the business year):

   > Example 3: Assume an institution reports after 6 months of any business year an interim profit of 90 and a formal decision has been taken to pay an interim dividend of 90.
   > Following strictly Article 2 (2) of the RTS, nothing would be included in CET1 capital.
   >
   > But at the same time, this institution follows a dividend policy according to which 20 should be accumulated at year-end. This would mean that in case sufficient profit is made in the second half of the year, part of that profit would be cumulated. However, in case the profit of the second half would not be sufficient, shareholders would have to pay parts of the received interim dividend back or the dividend policy / capital policy would not be fulfilled.

   As a result of the example, even a deduction of the equity by the targeted profit accumulation could be a possible outcome. (Note: in case a payout ratio of less than 100 % is defined in the dividend policy, a similar problem arises). In our view however, this would not make sense as also no deduction for planned dividends for the full year are made at the beginning of the year. In turn, the proposed wording of paragraph 4a should be amended as follows:

   “4a. In case interim dividends are paid, paragraph 2 applies in general. The amount added to the equity however may be reduced taking into account the rules laid down in paragraph 2 and 3 by any amount which can be expected to be paid out from that interim profit with the final dividend for the full business year. **Any reduction of interim profits by interim dividend paid out of income of the current year is limited to the amount of profits for the same period.**”

The proposed wording would in the example given above lead to an unchanged equity.

(b) General capital / dividend policies

Sentence 1 of article 2 (4) of the proposed RTS only refers to payout ratios approved in a dividend policy. Based on the wording, this is supposed to be a fix value or at least an approximate value. However, in practice also fixed (minimum / maximum) amounts to be paid out as dividend or to be (at least) accumulated and/or ranges of payout ratios are commonly used. The following examples show therewith related possible problems.

1. Dividend policies also work with a range of payout ratios. Ratios might change over time and revised policies might deviate from proven history. The payout ratio to be taken for the purpose of Article 2 (3) in case the policy defines a payout range instead of a concrete (approximate) value is not clear to us:

Example 4: The dividend policy has been recently updated and the targeted dividend range has been lifted to a range of 50 – 70%. Historical dividend payout ratios are in the range of 30%-40% with an average over the last three years of 35%.

Assume that the institution reports after 6 months of any business year an interim profit of 90 and no interim dividend is foreseen.

Following strictly Article 2 (3) and 2 (4) of the RTS, the amount to be deducted should equal the amount of interim profit multiplied by the dividend payout ratio according to paragraph 4, which shall be determined on the basis of the dividend policy. However, there is no guideline how to handle the targeted range prior to any (formal) dividend decision. In principle, both the 50% minimum or the 70% maximum (or even the media value of 60%) could be used. Clarification is needed in any case.

As the usage cannot be clearly derived from the policy itself, also the usage of the historic values following sentence 2 of article 2 (4) is – due to an existing dividend policy – (1) in principle not applicable and (2) due to the change in dividend intention not

useful (Note: Also in case of reductions of the payout ratio, the same problem occurs).

The example shows, that based on the scenario described, no determination of the foreseeable dividend to be deducted from the interim profit is possible.

We hope that the example clarifies that specific guidelines for payout ranges are also necessary. We therefore propose to include a new sentence 1a in paragraph 4 as follows:

"1a. Where the payout ratio defined in the policy does not contain a fix value but a payout range, the upper end of the range is to be used for the purpose of paragraph 2; where the payout ratio is fixed with an approximate value, the value of the approximate payout ratio is to be increased by 5 per cent points – capped at 100 per cent."

The mark up of 5 per cent points is proposed in order to avoid replacing ranges by approximate values (in the middle of the range).

The proposed wording would in the example given above a deduction of 70% of the interim profit, i.e. 63.

2. In the case an absolute amount (minimum / maximum) is used within the dividend policy for profit accumulation or dividend payout, the current proposal does also not give guidance how to proceed. In case no dividend decision is taken, no payout ratio is fixed but a properly approved dividend policy exist, the current proposal is not applicable:

Example 5: An institution follows a duly approved dividend policy according to which an amount of 90 should be accumulated at year end. Assume this institution reports after 6 months of any business year an interim profit of 60 and no interim dividend is foreseen. The average dividend payout ratio of the last three years has been 40%.

As there is no formal dividend decision under Article 2 (2) but a formal dividend policy without a defined payout ratio, the application of Article 2 (3) and (4) does also not deliver a solution (see also argumentation for Example 4).

The example shows, that based on the scenario described, no determination of the foreseeable dividend to be deducted from the interim profit is possible.

As a result of the example we propose to include an additional sentence 1b in paragraph 4 of Article 2 as follows:

"1b. In case the approved dividend policy does foresee fixed, maximum or minimum amount for either profit accumulation or dividend distribution, the pro rata amount for the period of the interim or year-end profit to be paid out (with a maximum possible) or accumulated (with the minimum possible) according to the policy is put in relation to the profit in question to build the payout ratio; in case combinations of "fixed" amounts and pay-out ratios are defined in the dividend policy, the sum of both is to be used."

In the example given above, the proposed wording would lead to a payout ratio of 75% and a corresponding deduction of the interim profit of 45.

7. Are the provisions on the deductions related to losses for the current financial year, deferred tax assets, defined pension fund assets and foreseeable tax charges sufficiently clear? Are there issues which need to be elaborated further?

Deductions of losses for the current financial year

Article 11 (2) in relation to Article 11 (3) of the RTS requires that institutions which do not close their financial accounts shall determine their income and expenses under the same process and on the basis of the same accounting standards as the one followed for the year-end financial report.

In practice and also based on available accounting standards like IAS 34, this requirement should not lead to a full closing including a full update of all accounting assumptions (e.g. discount rates, pension assumptions etc.). In that regard especially the guidelines given in IAS 34.29 and subsequent should be considered and - in order to avoid referring to IAS or any other accounting standard - content wise be included in Article 11 (3).

Based on that, there seems to be no need to add paragraph 4 as this is part of ordinary year-end process.

Furthermore, as some groups under consolidated supervision are (e.g. according to the directive 86/635/EEC) not obliged to set up consolidated statutory accounts or the supervisory group of companies differs from the statutory group, it needs to be clarified that Article 11 is not introducing the obligation to set up a full set of accounts but derives the necessary information based on consolidated figures set up for regulatory purposes only using the accounting processes and rules to the extent possible and necessary. In other words, it needs to be clear that Article 11 is not introducing the obligation to set up consolidated accounts in the sense of the accounting rules for the companies in scope of consolidated supervision.

Deductions of deferred tax assets that rely on future profitability

In general, applicable accounting standards already foresee the netting of deferred tax assets and liabilities under specific conditions (e.g. IAS 12.74). In this context, we would also like to refer to the ongoing initiative of the European Parliament to synchronise the conditions for (regulatory) netting in Article 35 (3) (a) and (b) CRR with the requirements of IAS 12.74 (we recommend having a final wording which is referring to accounting standards as a generic reference only and including similar rules in other accounting standards).

As the applicable accounting standard is the relevant basis already under Article 22 (9) CRR, it needs to be clarified that the net amount of deferred tax assets as shown in the balance sheet has to be used for the purposes of Article 12 of the RTS. In this context, regulatory netting as allowed under Article 35 (3) only provides an **additional option** which allows to go beyond accounting standards. In other words, regulatory netting according to Article 35 (3) is only a further alternative for deferred tax assets and deferred tax liabilities which are not netted under applicable accounting standards. In any case it has to be ensured that the regulatory netting rule remains a subordinated rule at any time.

Deferred tax assets not recognized in the balance sheet

In case the relevant accounting standard does not make the recognition of deferred tax assets mandatory (e.g. German Commercial Code § 274 HGB) this should not lead to an adjustment of the financial figures for the purpose of prudential or other supervisory reporting. As Article 14 (1) requires full recognition of tax assets and liabilities, there is potential room for misinterpretation. As tax assets are related to income and not to charges, they are clearly not in focus of the regulation. In order to avoid misinterpretation, the text of paragraph 1 and/or 4 should explicitly state that effects of tax assets not recognised according to the accounting standard do not lead to any adjustment for prudential reporting.

18. How would you assess the impact of the proposed timing of 3 months for the submission of the application (Article 31)?

First of all we would like to mention, that the references to Article 72(b) CRR in Article 28 to 31 of the RTS are not correct. The references should capture the entire Article 72 CRR (see also Article 73 (3) (c) CRR).

According to our current understanding the prior consent of the competent authority for one of the actions listed in Article 72(a) CRR in connection with Article 73 CRR as well as Article 28 to 31 of the RTS is limited on CET1 instruments as defined in Article 24 (1)a CRR in relation with Article 26 CRR. As a consequence, CET1 items as defined in Article 24 (1) (b)-(f) CRR do not fall under the requirements of Article 72(a) CRR. In this case, the proposed timing of 3 months for the submission of such an application seems appropriate. In our view, the proposed timing would only cause massive problems regarding the set up of statutory accounts, if the requirements of Article 72(a) CRR also had to be applied to CET1 items as defined in Article 24 (1) (b)-(f) CRR. In that case, preparation of statutory accounts, decision on distributions to shareholder, regulatory approval process and legal deadlines for the approval of statutory accounts would hinder each other.

We therefore kindly ask to clarify the topic within the text of Article 31.

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Eschborn

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