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*The EBF is committed to supporting EU policies to promote the single market in financial services in general and in banking activities in particular. It advocates free and fair competition in the EU and world markets and supports the banks' efforts to increase their efficiency and competitiveness.*

## **EBF PRELIMINARY COMMENTS ON THE DRAFT RTS ON THE UNIFORM APPLICATION OF THE CALCULATION METHODS UNDER ARTICLE 6.2 OF THE FINANCIAL CONGLOMERATES DIRECTIVE (JC/CP/2012/02)**

### **ON THE PROCESS**

Due process requirements have not been met in several respects.

- The three supervisory agencies launched their consultation in 29 August 2012, specifying that it runs until 5 October 2012 and that “*comments submitted after the deadline, will not be processed*”. This means that the consultation period is restricted to about one month.

This is not in accordance with EBA’s “*Public Statement on Consultation Practices*” of 25 September 2012 which state that EBA will allow those consulted adequate time to respond, according to the complexity of the issue and the time available. The EBA will generally aim at allowing a three-month consultation period for public consultation, unless reasons exist to the contrary, for example an external timetable is imposed or the measure requires urgent action. It is a basic principle of European Administrative Law that administrative agencies need to comply with the rules that they have set for themselves (“*Patere legem quam ipse fecisti*”).

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The Consultation nowhere makes mention of reasons to the contrary which would require the consultation period to be restricted to one month. We believe that, under European Administrative Law, agencies which claim that there would be cogent reasons justifying any departure from their internal rules, are obliged to be specific on these .

- The Consultation Paper explains in its introduction that the proposed RTS have been based on the European Commission's legislative proposals for the CRR/CRD IV and have also taken into account major changes subsequently proposed by the revised texts produced by the Council of the EU and the European Parliament, during the ordinary legislative procedure .

The Consultation paper does not, however, include any reference whatsoever to documents that are publicly available clarifying to respondents which texts precisely have been taken into consideration when preparing the ITS. We believe this to be another flaw in the process.

### **ON THE SUBSTANCE**

#### **1) Article 6 (2) of the proposed ITS goes beyond the mandate conferred by the CRR**

The draft RTS under consultation is based on the mandate contained in Article 46 (4) of the CRR and Article 139 of CRD IV.

The mandate given in Article 46 (4) of the CRR is "*to specify the conditions of application of the calculation methods listed in Annex I, Part II and Article 228(1) of Directive 2002/87/EC for the purposes of the alternatives to deduction referred to in paragraph 1 and point (a) of paragraph 3.*" It follows that the proposed ITS are not expected to modify the conditions of application which have been enshrined in the Directive 2002/78/EC.

The second paragraph of Annex I to the Directive 2002/87/EC is unambiguous as to the conditions of application which apply: it states that "[...] *Member States shall allow their competent authorities, where they assume the role of coordinator with regard to a particular financial conglomerate, to decide, after consultation with the other relevant competent authorities and the conglomerate itself, which method shall be applied by that financial conglomerate.*" Clearly, this paragraph requires the coordinator to decide on the method of consolidation only after having consulted the other competent authorities involved and the financial conglomerate itself.

The process which is being proposed in Article 6 (2) of the proposed ITS deviates from the process which the text of Annex I imposes: the proposed ITS states that "*(f)or the purpose of Article 6(2) and Annex I to the Directive, for a banking led conglomerate, where Article 46 (1) of the CRR is applied, the coordinator, after consulting with other competent authorities*

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*concerned, shall decide the most prudent method to be applied by the financial conglomerate*". According to this scenario, the financial conglomerate does not need to be heard.

Article 6 (2) of the ITS, as proposed, is, therefore, *contra legem*.

### **2) Article 4 (b) of the proposed ITS goes beyond the mandate conferred by the CRR**

Article 4 of the proposed ITS confirms the principle that, for all entities of a financial conglomerate, own funds, in excess of sectoral solvency requirements, shall be considered available to absorb losses elsewhere in the financial conglomerate, "provided that there are no practical, legal, regulatory, contractual or statutory impediments to the transfer of funds or repayment of liabilities across conglomerate entities in due course".

Article 4 (b) specifies in this regard that, for the purpose of assessing the transferability of funds to entities subjected to CRR, "in due course" shall mean no later than, three calendar days with no impediments on the coordinator requiring a faster transfer if necessary.

We do not believe the proposed timeframe to be in accordance with what the Annex I of the Directive 2002/78/EC requires. The Annex exclusively deals with "capital adequacy" (as demonstrated by the title of the Annex itself). It contains an explicit reference to excess capital in stating that "*when calculating own funds at the level of the financial conglomerate, competent authorities shall also take into account the effectiveness of the transferability and availability of the own funds across the different legal entities in the group, given the objectives of the capital adequacy rules*". It clearly follows that, according to the Directive, the transferability of funds across conglomerate entities is not a liquidity issue. The main objectives of the Directive 2002/78/EC are to ensure that there is no double counting and that capital is available within the financial conglomerate "in due course" i.e. within a delay consistent with the circumstances. Consequently, the conglomerate must be in a position to demonstrate to its coordinating supervisor (with an action plan if necessary) that such a transfer responds to the situation and that it doesn't affect durably its sectoral solvency.

Article 4 (2) of the ITS, as proposed, is, therefore, *contra legem*.

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