

## Deutsche Börse Group Response

to EBA/CP/2019/16

**“Draft Regulatory Technical Standards on the criteria to define managerial responsibility and control functions, material business units and a significant impact on their risk profile, and other categories of staff whose professional activities have a material impact on the institution’s risk profile”**

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Contact: Marija Kozica  
Telephone: +49 (0) 69 211 - 17178  
Telefax: +49 (0) 69 211 - 13315  
Email: [marija.kozica@deutsche-boerse.com](mailto:marija.kozica@deutsche-boerse.com)

## A. Introduction

Deutsche Börse Group (“DBG”) welcomes the opportunity to comment on EBA’s consultation paper “Draft Regulatory Technical Standards on the criteria to define managerial responsibility and control functions, material business units and a significant impact on their risk profile, and other categories of staff whose professional activities have a material impact on the institution’s risk profile” – EBA/CP/2019/16 - issued on 19 December 2019 (in the following referred to as “Draft RTS”).

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 as a provider of regulated Financial Market Infrastructures (“FMI”).

Within DBG, according to applicable national law, the following four legal entities are in scope of the specific requirements on remuneration (such as the identification of Risk Takers) stipulated in the European Capital Requirements Directive (“CRD”) respectively the European Capital Requirements Regulation (“CRR”): Eurex Clearing AG (“ECAG”), located in Germany, classifies as credit institution and one is of the leading European Central Counterparties (“CCP”), Clearstream Holding AG (“CH”), located in Germany and acting as pure financial holding company for the credit institutions and the (I)CSDs Clearstream Banking AG (“CBF”), located in Germany, and Clearstream Banking S.A. (“CBL”), located in Luxembourg. Clearstream Group with CH as superordinate company is supervised on a consolidated level as a financial holding group.

However, all group entities in scope of CRD/CRR are offering limited banking activities ancillary to their function as FMI. In order to operate as a FMI and in line with the dedicated regulatory framework (e.g. EMIR or CSDR) as well as generally recognised business practices, the business model of DBG entities is risk averse, does not include a trading book / proprietary trading, allows loan business in general only in connection with settlement, clearing and custody activities for very short periods and on a collateralised basis. The business risk is in turn not driven by the volatile balance sheet volumes being mainly comprised of cash collateral and cash deposits to fulfil payment obligation within a recognised securities settlement system but by operational risk which is governed by highly automated processes and proper risk policies given single individuals only limited – if at all – room to take risk.

This document at hand contains in Part B our general comments on the Draft RTS, while Part C contains our responses to the questions raised in the consultative document.

## B. General comments

The principle of proportionality is being stipulated throughout the CRD and CRR and was further strengthened with the revised banking package by, among others, introducing terms of “small and non-complex institution” (point 145 of Article 4 CRR) and “large institution” (point 146 of Article 4 CRR). Recital (3) of the Draft RTS refers to the principle of proportionality, which should also be applied to the identification of staff whose professional activities have a material impact on the institution’s risk profile.

While we generally consider the introduction of binding minimum criteria for identifying relevant staff as reasonable, we are of the opinion that selected aspects of the Draft RTS do not relate to the institution’s size, internal organization, nature, and complexity of its activities. Particularly the definition of managerial responsibility as outlined in Article 2 as well as the qualitative criteria defined in Article 6 paragraph 1 of the Draft RTS are too broad, leading most likely to a considerable increase in identified staff, irrespective of the persons’ actual impact on the institution’s risk profile. The already extensive definition of managerial responsibilities, including staff members *reporting* to accountable heads of business units or control functions (Article 2 lit. b of the Draft RTS) is leveraged further by Article 6 paragraph 1, containing areas and activities generally not considered having a material impact on the institution’s risk profile. To name just one example,

performance of economic analyses (Article 6 paragraph 1 lit. d *ibidem*) do not impact the institutions risk profile as such, as they should constitute an objective assessment. In contrast to this, decisions by accountable staff members or senior management, based on such economic analyses might have a material impact on the institution's risk profile.

While we consider a clear limitation to staff members directly accountable towards the management for defining managerial responsibilities as the most appropriate approach to clearly, comprehensively and consistently identify staff having a material impact on the institution's risk profile, we encourage EBA to consider the possibility to exclude specific institutions from applying selected criteria when proved reasonable. Particularly small and non-complex institutions should have the opportunity to request a derogation from the criteria of Article 2 lit. b in conjunction with Article 6 paragraph 1 of the Draft RTS, when the institution can prove that the respective criteria do not fit the institution's size, internal organization, nature, and complexity and are not suitable to identify the respective staff having material impact on the institution's risk profile.

In order to determine identified staff comprehensively and ensure consistency across institutions and supervisory practice, further clarification on selected points is demanded and outlined in greater detail in the following.

### **C. Responses to the question for consultation**

- Question 1: Are the subject matter, scope and level of application within Article 1 appropriate and sufficiently clear?

The Draft RTS amend Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (in the following referred to as "CRD V") with regard to the definition of managerial responsibility, control function, material business units and Risk Takers. Article 92 paragraph 3 of CRD V already outlines categories of the staff who shall be identified as Risk Taker. This includes members of the management body and senior management, staff members with managerial responsibility over the institution's control functions or material business units as well as staff members entitled to significant remuneration and having significant impact on a material business unit's risk profile. The future RTS would gain in clarity of expression if the identification criteria set out in Article 92 paragraph 3 of CRD V were also included in the text of the Draft RTS. This would enhance transparency, avoid cross-checking two sub-sets of criteria (CRD V and RTS) and would result in one single exhaustive list of criteria in one single document, like the RTS currently in force.

The Draft RTS do not mention the (expected) date of application. We assume that the Draft RTS would first apply as of performance year 2021 for the identification of 2021 Risk Takers. Vice versa we assume that the Draft RTS will not apply for performance year 2020 firstly to avoid the application of two different sets of criteria for the identification of Risk Takers in one performance year and secondly to ensure that staff members who would be identified according to the new set of criteria may be informed on their identification at the beginning of the performance year. It is highly recommended that the effectiveness date of the new RTS is analogous to the application date of CRD V to ensure consistency and to avoid management challenges.

Regarding Article 1 paragraph 2 in conjunction with Article 7 paragraph 1 lit. b of the Draft RTS concerning the identification of the 0.3% highest earners, it is our understanding that this criterion is only applied on individual level, i.e. on the level of the institution performing the process to identify Risk Takers. In this respect, this criterion would neither be applicable on a consolidating group level nor to subsidiaries of the institution. It would be appreciated if EBA clarifies this understanding.

Regarding Article 1 paragraph 2 in conjunction with Article 7 paragraph 1 lit. a of the Draft RTS concerning the identification of staff members with a total remuneration of minimum EUR 750,000 in the preceding financial year it is understood that this criterion shall be applied both on individual (institution) level and on consolidated (group) level. On individual institution level, it is our understanding that in case a staff is employed by another legal entity (no institution) in the same consolidation scope and renders services to the institution performing the process on the identification of Risk Takers, this criterion is not applicable. Furthermore, in case a staff member receives remuneration from several legal entities within the same consolidation scope, only the remuneration awarded by the institution performing the process on the identification of Risk Takers calculated on a full-time equivalent basis is relevant for the application of this criterion. However, when applying Article 7 paragraph 1 lit. a on group level, all remuneration awarded to staff by all legal entities within the group's consolidation scope shall be considered. It would be appreciated if EBA clarifies this understanding.

➤ Question 2: Are the definitions within Article 2, 3 and 4 appropriate and sufficiently clear?

To our view the definition of managerial responsibility (cf. Article 2 of the Draft RTS) is too broad and not sufficiently transparent due to the lack of reference to decision making power, duties and authorities of the staff member in relation to the institution's risk profile. In practice this definition might extend the amount of identified Risk Takers inappropriately compared to the status quo as non-executive employees (e.g. team leaders with tasks coordinating responsibilities but without any authorities for approving/vetoing budgets or for legally representing the company externally) as well as general coordination functions (e.g. head of project offices) might be identified solely due to their reporting line to the management body (n-1 reporting line) respectively to the management level below the management body (n-2 reporting line). According to the assigned authorities and duties, the professional activities of these functions are in general not considered to have a material impact on the institution's risk profile. It would be appreciated if EBA specifies the definition of managerial responsibility, clarifying that the above-mentioned cases do not fall in scope of Article 2 of the Draft RTS.

Concerning the definition of control functions stipulated in Article 3 of the Draft RTS in conjunction with Article 92 paragraph 3 lit. b of CRD V, it is not sufficiently clear to whom the control functions shall provide the objective assessment of the risks, reporting or assurance. The RTS currently in force (in particular Article 3 paragraph 4 of the RTS currently in force) are more precise in that aspect outlining that staff members, who are accountable and responsible towards the management body for compliance, internal audit and risk controlling, shall be identified. Furthermore, it is not sufficiently clear which other control functions except of risk management, internal audit and compliance shall be identified under this criterion as no further definition is provided in the RTS. Therefore, and in line with the RTS currently in force, it is proposed to focus this identification criteria solely on the staff members accountable and responsible towards the management board for risk management (in the sense of the 2nd line of defence), internal audit and compliance.

Concerning the definition of material business units, there are no further comments.

➤ Question 3: Are the qualitative criteria within Article 6 appropriate and sufficiently clear? Having in mind that the qualitative criteria are comparable to the ones included in the RTS currently in force, respondents are asked to focus on the amended criteria within points 1 and 6.

In practice, the application of Article 6 paragraph 1 of the Draft RTS in conjunction with the definition of managerial responsibility stipulated in Article 2 of the Draft RTS would lead to a significant increase in the number of identified Risk Takers in comparison to the RTS currently in force, as not only the heads of the named functions (n-1) but also their direct reports (n- 2) would be identified. Particularly within functions actually considered being support functions, such as taxation or finance, the application of this criterion leads

to a significant increase of Risk Takers covering also employees who are not ultimately responsible for those function. Compromising such staff members as identified staff would increase the operational burden without creating corresponding benefits in the management of underlying risk. Considering the general intention of the criteria, that those staff members whose professional activities in a certain function have a material and ultimate impact on the institution's risk profile, shall be identified irrespective of their organizational allocation or management level and considering the RTS currently in force, it is proposed to refine Article 6 paragraph 1 of the Draft RTS either in "the staff member is directly accountable towards the management body (...)" or in "the staff heads a function responsible for (...)".

While we consider a clear limitation to staff members directly accountable towards the management for defining managerial responsibilities as the most appropriate approach to clearly, comprehensively and consistently identify staff having a material impact on the institution's risk profile, we encourage EBA to consider the possibility to exclude specific institutions from applying selected criteria when proved reasonable. Particularly small and non-complex institutions should have the opportunity to request a derogation from the criteria of Article 2 lit. b in conjunction with Article 6 paragraph 1 of the Draft RTS, when the institution can prove that the respective criteria do not fit the institution's size, internal organization, nature, and complexity and are not suitable to identify the respective staff's material impact on the institution's risk profile.

Article 6 paragraph 1 lit. b refers to the staff member with managerial responsibility for "the adequacy and appropriateness of accounting procedures", while the RTS currently in force refer to the "head of finance including (...) budgeting". It shall be noted that in practice budgeting is rather allocated to the controlling department, while accounting might rather refer to a different department which is responsible for accounting procedures in line with legal requirements (such as IFRS). Therefore, it is proposed to provide further clarification which function shall be identified.

Referring to Article 6 paragraph 1 lit. h ("the staff member has managerial responsibility for providing information technology or security"), we would like to highlight further that, depending on the organizational structure of the institution, the responsibilities for information technology and information security might be allocated to different staff members and not assigned to one individual staff member. Article 3 paragraph 9 of the RTS currently in force solely foresee the identification of the staff member responsible for information technology. It would be appreciated if EBA clarifies which IT function(s) shall be covered by this criterion.

Furthermore, it is not sufficiently clear which person is to be identified under Article 6 paragraph 1 lit. i ("the staff member has managerial responsibility for managing outsourcing arrangement of critical or important functions"). Does this criterion refer to the designated outsourcing coordinator who is responsible for ensuring the setup of a comprehensive outsourcing framework in line with regulatory requirements and for regular reporting to the management body?

We would like to highlight that in practice the responsibility to manage outsourcing arrangements (including outsourcing arrangements of critical or important functions) is spread across multiple members of staff, including such without any decision-making power but deep knowledge on the respective function being outsourced. Often, each (critical or important) outsourcing arrangement is management by a dedicated, so called, business owner, while the outsourcing framework is operated by so called outsourcing coordinators. Typically, both roles are not equipped with comprehensive decision-making power. As outsourcing of different functions, including intra-group outsourcing, is generally increasing while the definition of critical or important functions is interpreted increasingly conservative, identification of all business owners of outsourcing arrangements of critical or important functions would considerably increase the number of identified staff, notwithstanding that business owner generally have no impact on the institutions risk profile. We seek further clarification by EBA on how to apply this criterion considering the unintended effects outlined above.

Concerning the qualitative criteria Article 6 paragraphs 2 to 6, there are no further comments.

- Question 5: Are the provisions within Article 7 appropriate and sufficiently clear?

Article 7 paragraph 1 of the Draft RTS states “[...] members of staff shall be deemed to have an *impact* on an institutions risk profile [...]”. In contrast to Article 7 paragraph 1 targeting the identification of staff having an *impact* on the institutions risk profile, Article 92 CRD focuses on the identification of staff whose professional activities have a *material* impact on the institution’s risk profile. We assume that Article 7 paragraph 1 of the Draft RTS is meant to target identification of staff having a *material impact* on the institution’s risk profile instead of just *impact*. We ask EBA to amend the wording of Article 7 paragraph 1 of the Draft RTS to target material impact or provide further clarification on the applicability of Article 7 for identifying staff having no material impact on the institutions risk profile.

Moreover, as already outlined as part of our answer to question no. 1, we seek further clarification on the application of Article 7 paragraph 1 lit a and b of the Draft RTS on consolidated vs. legal entity level (please refer to our answer to question no.1).

- Question 6: Are the provisions within Article 8 appropriate and sufficiently clear?

For the calculation of the remuneration threshold according to Article 93 paragraph 3 lit. c point (i) of CRD IV, institutions should take into account the average total remuneration of all members of the management body (in its management and supervisory function) as well as of the senior management (cf. Article 8 paragraph 1 of the Draft RTS). To our understanding this requirement refers to companies with a one-tier structure. Conversely, in Germany the two-tier structure with a clear separation of responsibilities between the Executive Board (similar to the management body in its management function) and the Supervisory Board (similar to the management body in its supervisory function) is prevailing. In practice, Supervisory Board members generally do not receive performance-related remuneration, but attendance fee for the participation at committee meetings, or they do not receive any compensation at all for their Supervisory Board mandate as they are employed by another legal entity within the group. This generally also applies to staff representatives, who receive, if any, an attendance fee for their mandate, while the fixed and variable remuneration they receive from the institution is generally not related to their Supervisory Board mandate.

Considering this practice and the two-tier structure for institutions located in Germany, it is our understanding that Supervisory Board members who do not receive fixed or variable remuneration for their mandate, but (if any) an attendance fee, shall not be considered in the calculation of the remuneration threshold. It would be appreciated if EBA provides clarification on this aspect.

- Question7: Considering that the RTS will apply to all credit institutions, are there specific provisions within the RTS that would not be appropriate to be applied to small and noncomplex institutions and should be replaced by different provisions? Where this is the case, respondents are provided to make concrete examples of issues created and alternative approaches that would ensure that all staff whose professional activities have a material impact on the risk profile of the institution are identified.

While we generally consider the introduction of binding minimum criteria for identifying relevant staff as reasonable, we are of the opinion that selected aspects of the Draft RTS do not relate to the institution’s size, internal organization, nature, and complexity of its activities. Particularly the definition of managerial responsibility as outlined in Article 2 as well as the qualitative criteria defined in Article 6 paragraph 1 of the Draft RTS are too broad, leading most likely to a considerable increase in identified staff, irrespective of the persons’ actual impact on the institution’s risk profile. This will affect particularly small and non-complex institutions excessively. The already extensive definition of managerial responsibilities, including staff

members reporting to accountable heads of business units or control functions (Article 2 lit. b of the Draft RTS) is leveraged further by Article 6 paragraph 1, containing areas and activities generally not considered having a material impact on the institution's risk profile. To name just one example, performance of economic analyses (Article 6 paragraph 1 lit. d ibidem) do not impact the institutions risk profile as such, as they should constitute an objective assessment. In contrast to this, decisions by accountable staff members or senior management, based on such economic analyses might have a material impact on the institution's risk profile.

While we consider a clear limitation to staff members directly accountable towards the management for defining managerial responsibilities as the most appropriate approach to clearly, comprehensively and consistently identify staff having a material impact on the institution's risk profile, we encourage EBA to consider the possibility to exclude specific institutions from applying selected criteria when proved reasonable. Particularly small and non-complex institutions should have the opportunity to request a derogation from the criteria of Article 2 lit. b in conjunction with Article 6 paragraph 1 of the Draft RTS, when the institution can prove that the respective criteria do not fit the institution's size, internal organization, nature, and complexity and are not suitable to identify the respective staff having material impact on the institution's risk profile.

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We are at your disposal to discuss the issues raised and proposals made if deemed useful.

Marija Kozica

Pascal Alexander Burgett