

EBA/CP/2020/05

29 May 2020

Consultation Paper

Draft Regulatory Technical Standards on own funds and eligible liabilities

amending Delegated Regulation (EU) 241/2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the council with regard to regulatory technical standards for Own Funds requirements for institutions

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1. Responding to this consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 31.08.2020. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

2. Executive Summary

In the course of the adoption of the “Risk Reduction Measures Package” by European legislators in May 2019, CRR¹ has updated the own funds framework with certain targeted adjustments and to a larger extent with focus on the regime of supervisory prior permission for the reduction of own funds. In parallel, BRRD² has introduced, as part of the existing minimum requirement for own funds and eligible liabilities (MREL), a new core G-SII requirement for own funds and eligible liabilities (internationally known as TLAC).

Previously, the CRR³ mandated the EBA to specify some of the eligibility criteria for own funds and to draft corresponding Regulatory Technical Standards (‘RTS’). The respective mandates resulted in the adoption of Delegated Regulation (EU) No 241/2014 (the ‘RTS on own funds’). As the eligibility criteria have now been amended, albeit to a limited extent, and the rules relating to the own funds permission regime have been changed significantly, in particular with the introduction of the notion of ‘general prior permission’ to the Level 1 text, the RTS on own funds needed amendment to reflect these changes.

The amended CRR also contains several new mandates for the EBA to specify some of the criteria for eligible liabilities instruments, with some conditions derived from the own funds regime, in order to constitute high quality loss absorbing capacity:

- Acquisition of ownership of eligible liabilities must not be directly or indirectly funded by the resolution entity (Article 72b(2)(c) of the CRR);
- Eligible liabilities must not contain incentives to redeem (Article 72b(2)(g) of the CRR);
- Eligible liabilities may only be called, redeemed, repaid or repurchased once the resolution authority has granted prior permission (Article 77(2) of the CRR).

With regard to the permission regime for reducing eligible liabilities instruments, Article 78a(3) of the CRR mandates the EBA to develop RTS to specify:

- The process of cooperation between the competent authority and the resolution authority;
- The procedure, including the time limits and information requirements, for granting an ad-hoc permission;
- The procedure, including the time limits and information requirements, for granting a general prior permission;

¹ Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, OJ L 150, 7.6.2019.

² Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms, OJ L 150, 7.6.2019.

³ 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 L176, 27.6.2013.

- The meaning of ‘sustainable for the income capacity of the institution’.

For some of these aspects, the EBA is explicitly required to ensure full alignment between eligible liabilities and own funds.

To ensure consistency between the two regimes, the EBA will fulfil the new mandates by way of amending the existing RTS on own funds, now also extending to eligible liabilities. The EBA has developed this Consultation Paper (CP) for the draft amended RTS accordingly.

Next steps

This CP is issued for a consultation period of three months. The final draft RTS will be subsequently submitted to the Commission for endorsement before being published in the Official Journal of the European Union

3. Background and rationale

1. In May 2019, European legislators have adopted a series of measures aimed to further strengthen the resilience of EU banks. The “Risk Reduction Measures Package” complements the existing banking framework to lower risks of failure and, where failure is inevitable, to reduce the severity of failure and minimise costs to the tax payer.
2. Part of these risk reduction measures consists in applying targeted adjustments to the own funds framework set out in Regulation (EU) No 575/2013 (‘CRR’) in order to reflect Union specificities and a few broader policy considerations. In parallel, the CRR and Directive 2014/59/EU (‘BRRD’) are amended to implement in the EU the total loss absorbing capacity (TLAC) standard agreed upon for Globally Systemically Important Institutions (G-SIIs) at the G-20 table. ‘Own funds and eligible liabilities’ requirements are set out alongside capital requirements to reinforce loss absorption capacity for banks, both going-concern and in resolution.
3. The EBA has historically been mandated to further specify some of the conditions of the own funds regime. With the introduction of eligible liabilities instruments in the CRR, the EBA is tasked with similar mandates to specify the eligible liabilities regime, in some cases with an explicit obligation for both regimes to be fully aligned. In order to ensure consistency across the spectrum of instruments with similar loss absorption features, it is necessary to approach both sets of mandates together. For this reason, the EBA has chosen to deal with the own funds regime and the eligible liabilities regime in a single set of regulatory technical standards.
4. This consultation paper puts forward draft amendments to Commission Delegated Regulation (EU) No 241/2014 with regard to Regulatory Technical Standards own funds requirements for institutions (‘RTS on own funds’), now also applicable to eligible liabilities instruments. This consultation paper elicits stakeholder views on the design of the new provisions.

1.1 Update of the own funds framework

5. Regulation (EU) No 2019/876 (‘CRR2’) amending the CRR introduces modified terminology to a number of articles setting out the prudential requirements for own funds. For example, the term ‘acquisition of ownership’ replaces ‘purchase’ in the context of eligibility criteria for own funds instruments. Where those changes relate to CRR articles for which further specifications have been provided in the RTS on own funds, the respective RTS provisions have been revised to accommodate for the new terminology used in the Level 1 text.
6. Furthermore, the regime of supervisory prior permission for the reduction of own funds pursuant to Articles 77 and 78 CRR is amended to a significant extent. The requirement to obtain the competent authority’s prior permission is clarified directly in the Level 1 text to additionally apply in the case of reduction, distribution or reclassification of share premium accounts.

7. As another innovation, the CRR now provides for the possibility to grant a general prior permission to institutions for the reduction of own funds for a certain predetermined amount and for a limited period of time. Previously, the notion of ‘general prior permission’ existed already in the RTS on own funds, albeit limited to market-making purposes. With the Level 1 text taking up the concept as well as the preconditions and limits that the RTS specified before, the draft amending RTS as suggested reflects this accordingly.
8. Further amendments to the provisions concerning the prior permission regime for own funds are suggested with a view to codifying existing practice applied by competent authorities.
9. All in all, changes to the provisions of the existing RTS on own funds have been kept to the minimum necessary to align with the changes in the CRR in order to ensure to the greatest extent possible stability of the applicable rules for capital instruments.

1.2 Extension of the standards to eligible liabilities instruments

10. This section sets out general considerations on the extension of the RTS to eligible liabilities. They should be read in combination with the specific considerations and questions inserted, article by article, in the draft RTS in section 4.

MANDATES

11. The draft RTS follow up on mandates laid down by CRR2 in relation to eligible liabilities in three areas:

(1) Direct and indirect funding

Article 72b(2)(c) CRR extends to eligible liabilities instruments an eligibility criterion already applicable to own funds, whereby the acquisition of ownership of the liabilities must not be funded directly or indirectly by the resolution entity. This requirement essentially prevents an institution or resolution entity from issuing to entities with which, in one form or another, it has interdependencies that would create, in case of distress, a feedback loop that would diminish or neutralise the loss relief which the instruments are supposed to offer.

Article 72b(7)(a) CRR mandates the EBA to draft RTS to specify the applicable forms and nature of indirect funding of eligible liabilities instruments. The new specifications must be fully aligned with those existing for own funds.

Article 8 and 9 of the RTS, which already governed direct and indirect funding of own funds, are now amended to also capture eligible liabilities.

(2) Incentives to redeem

Pursuant to Article 72b(2)(g) CRR, liabilities only qualify as eligible liabilities instruments provided they do not include any incentive “for their principal amount to be called, redeemed or repurchased prior to their maturity or repaid early by the institution, as applicable, except

in the cases referred to in Article 72c(3)”. This condition, drawing on an existing criterion for own funds, ensures the permanence of loss absorbing capacity also for eligible liabilities. For example, it precludes clauses that would predictably make it more costly over time for an issuing entity to maintain the funding. The consequences of incentives to redeem for eligible liabilities differ from those for own funds – for eligible liabilities, incentives to redeem lead to a shortening of maturity rather than an outright ineligibility – but the notion itself is identical. This explains why Article 72b(7)(b) CRR mandates the EBA to specify ‘the forms and nature of incentives to redeem’ eligible liabilities, in a ‘fully aligned’ manner with the respective provision for own funds.

Article 20 of the RTS is amended to achieve this outcome.

(3) The permission regime for reducing eligible liabilities instruments

CRR⁴ subjects the reduction of own funds to prior permission of the competent authorities. With CRR2, Article 77(2) extends to eligible liabilities the obligation for institutions to obtain permission before calling, redeeming, repaying or repurchasing instruments. Article 78a CRR sets out the conditions under which the resolution authority must grant the permission. Three grounds for permission are provided: replacement with equal or higher quality at terms sustainable for the income capacity; reduction by an institution which exceeds its own funds and eligible liabilities requirements by a sufficient margin; or replacement necessary to ensure compliance with own funds requirements. Where the prior permission is based on the institution’s own funds and eligible liabilities exceeding the requirements in the CRR and BRRD to a sufficient extent, the resolution authority, in agreement with the competent authority, has to determine the margin over these requirements considered necessary.

General prior permission may be given for a specified period and predetermined amount, subject to criteria to ensure that the conditions for the first two grounds of permission would be met. Before granting a general prior permission, the resolution authority has to consult the competent authority, and once such permission is granted, the competent authority shall be informed accordingly.

Article 78a(3) CRR mandates the EBA to develop RTS to specify:

- (a) the process of cooperation between the competent authority and the resolution authority;
- (b) the procedure, including the time limits and information requirements, for granting an ad-hoc permission;
- (c) the procedure, including the time limits and information requirements, for granting a general prior permission;

⁴ Regulation (EU) No 575/2013 in the version applicable before amending Regulation (EU) No 2019/876

- (d) the meaning of ‘sustainable for the income capacity of the institution’ – which must be “fully aligned” with the RTS on own funds.

These draft RTS implement the above in Articles 32a to 32g.

CONSISTENCY ACROSS OWN FUNDS AND ELIGIBLE LIABILITIES

12. ‘Own funds and eligible liabilities’ requirements are set out alongside capital requirements to reinforce loss absorption capacity for banks, both going-concern and in resolution. While both sets of requirements retain their specific nature and qualities, they are also subject to many identical features (e.g. being directly issued and fully paid up, not being directly or indirectly funded by the institution, not being secured, no incentive to redeem, no acceleration, no set-off etc.). Articles 8, 9 and 20 of the RTS on own funds already specified some of these criteria (indirect funding and incentives to redeem) in relation to own funds. As own funds count both to capital requirements and MREL/TLAC requirements, and to avoid unlevelled playing field between institutions meeting MREL solely with own funds and others, it is essential that common features are approached consistently. Likewise, it is important that the permission regime for eligible liabilities, which pursues essentially identical imperatives as the permission regime for own funds, be subject to broadly similar characteristics.

13. For these reasons, the draft RTS set out provisions on eligible liabilities that are generally as consistent as possible with own funds provisions, and in any event fully aligned where mandated by the CRR.

SCOPE OF THE RTS IN RELATION TO ELIGIBLE LIABILITIES

14. The introduction of TLAC requirements for G-SIIs in the EU intervenes in a context where banks were already subject to institution-specific MREL requirements set-out in the BRRD. G-SII requirements and MREL requirements are now integrated in such a way that G-SIIs are subject to their G-SII requirement as part of their overall MREL requirement⁵ (Article 45d BRRD). Both sets of requirements are further integrated across banks through the definition of common eligibility criteria defined in the CRR⁶, cross-referred in part or in whole by the BRRD for MREL purpose⁷. To the extent the BRRD cross-refers to CRR eligibility criteria covered by these RTS, MREL eligible liabilities are therefore covered as well.

15. As a result, the specifications on direct and indirect funding, incentives to redeem and prior permissions are equally applicable to eligible liabilities for TLAC purpose and for MREL purpose. They are also equally applicable to eligible liabilities for internal TLAC and internal MREL purpose.

⁵ Article 45d BRRD.

⁶ Article 72b CRR.

⁷ Article 45b(1) 45f(2) BRRD.

SPECIFIC CONSIDERATIONS RELATED TO THE SCOPE OF THE PERMISSION REGIME

16. These draft RTS are bound by the scope delineated in the CRR and BRRD. Thus, the permission requirement in Article 78a CRR also applies to MREL eligible liabilities. This means that institutions are required to seek permission to reduce eligible liabilities. They are also required to seek permission a) where eligible liabilities are not subordinated to excluded liabilities, b) in relation to institutions for which MREL does not exceed the loss absorption amount (i.e. institutions without a recapitalisation amount that would be wound up using normal insolvency proceedings); c) for entities for which MREL is waived and d) even when they do not meet the one year maturity requirement anymore. Under the current Level 1 texts it is legally not admissible to simply carve out those situations from the permission regime.
17. Nevertheless, in developing the draft RTS, the EBA has considered whether the impact of the procedural rules on permissions should be relaxed in those four situations.
18. On the one hand, it might be argued that for entities with a recapitalisation amount equal to zero (liquidation entities), for entities for which MREL is waived, and - to an extent – for entities which display a very large surplus, the risk that a reduction leads to MREL breach is limited. The practical impact would be mostly acute for banks that have issued a large number of instruments for general funding purpose that may be MREL eligible and for which permission may be cumbersome.
19. On the other hand, to the extent that those instruments count towards MREL or constitute high quality loss absorbing capacity, it is justified that they should be subject to prudent rules as any other instrument eligible for regulatory purpose.
20. A mitigating factor of the possible impact is that CRR2 introduces much more constraining eligibility criteria for eligible liabilities compared with the original Article 45 of the BRRD. For example, acceleration and set-off are prohibited, write down and conversion references are now compulsory, and the contract must be, as a matter of eligibility, subject to the permission regime. As a result, coming forward it is conceivable that MREL eligible instruments will be designed on purpose to count towards the requirement, while other pari passu instruments that previously might have been 'captured involuntarily' will not meet those requirements and will not be subject to the permission requirement. For example, it is predictable that an entity for which MREL equals capital requirements, will not issue senior instruments that meet all the new eligibility criteria. This consideration reduces the concern of disproportionate impact.
21. This being said, it is recognised that some of the new requirements are grandfathered under the CRR2 and therefore the impact will depend much on the maturity profile of legacy instruments. Another aspect to be considered is that the use of the prior permission regime (and corresponding limits as explained further in this consultation paper) by entities for unsubordinated instruments that are eligible liabilities solely as a result of the grandfathering provisions might be rendered unnecessary by the likely absence of call possibilities in the contractual terms of the instruments which were not designed to be fully eligible liabilities instruments.

Stakeholder feedback on these aspects will be invaluable.

Questions to stakeholders:

Q1. What is the percentage of senior non-preferred and senior preferred liabilities in relation to total liabilities for the institution(s) you represent? Within the senior-preferred layer, what is the percentage of eligible to non-eligible liabilities for this/these institution(s)?

The CRR2 introduces new granular eligibility criteria for eligible liabilities related, inter alia, to acceleration, set-off and netting, reference to write down and conversion etc. and the requirement that the instrument be subject to permission. However, some of these criteria are grandfathered indefinitely for existing instruments (legacy instruments) under Article 72b(2)(n) or Article 494b(3) CRR.

Q2. What is the quantitative significance and maturity distribution, for the institution(s) you represent, of unsubordinated instruments that are eligible liabilities solely as a result of the grandfathering provisions under Article 72b(2)(n) or Article 494b(3) of the CRR, compared to unsubordinated instruments qualifying under their own right as MREL, total MREL eligible liabilities and total liabilities? Do these instruments contain call options?

Q3. Once the stock of legacy instruments described above is exhausted, instruments will only be eligible to MREL if they meet all eligibility criteria, including the new criteria. Do you expect that, as a result, going forward the amount of eligible liabilities as a share of senior instruments, would be narrowed concomitantly with the scope of the permission requirement?

4. Draft regulatory technical standards

For consultation purposes, to note that the text that follows shows changes and amendments compared to the existing RTS on OFs. Any text to be deleted is shown in strikethrough and any amendments in bold print and underlined. This has been done in order to enhance readability of the text and enable stakeholders to easily identify the amendments made and the changes applied and see them in the respective context.

The legal text of the amending Regulation to be officially submitted to the EU Commission is presented separately in an annex to the CP.

In between the text of the draft amended RTS that follows, further explanations on specific aspects of the proposed text are provided, which either offer examples or provide the rationale behind a provisions, or set out specific questions for the consultation process. Where this is the case, the explanatory text appears in a framed box.

COMMISSION DELEGATED REGULATION (EU) No .../..

amending Delegated Regulation (EU) No 241/2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for own funds requirements for institutions

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 648/2012⁸, and in particular third subparagraph of Article 28(5); third subparagraph of Article 29(6); third subparagraph of Article 52(2); fourth subparagraph of Article 72b(7); third subparagraph of Article 76(4); third subparagraph of Article 78(5); fourth subparagraph of Article 78a(3); third subparagraph of Article 79(2) thereof,

Whereas:

- (1) Regulation (EU) No 2019/876 of the European Parliament and of the Council⁹, amended, inter alia, the prudential requirements for own funds as set out by Regulation (EU) No 575/2013 in various aspects. Amongst these are changes of the terminology used in a number of articles. In order to reflect these changes appropriately, the provisions in Commission Delegated Regulation (EU) No 241/2014¹⁰ providing further specification on the articles concerned should be amended in a consistent manner.
- (2) Regulation (EU) No 2019/876 also introduced into Regulation (EU) No 575/2013 new requirements for own funds and eligible liabilities for G-SIIs and material subsidiaries of non-EU G-SIIs, as well as harmonised criteria for eligible liabilities items and instruments for the purposes of complying with those requirements. Some of those requirements should be further specified in this Regulation.
- (3) Regulation (EU) No 575/2013 made the eligibility of own funds instruments conditional on them not being funded directly or indirectly by the institution. Regulation (EU) 2019/876 extended this condition to eligible liabilities instruments, with the difference that, in line with the TLAC standard, it refers to the resolution entity rather than to the institution. Therefore, since Regulation (EU) No 575/2013

⁸ OJ L 176, 27.6.2013, p. 1.

⁹ OJ L 150, 19.6.2019, p. 1.

¹⁰ Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for own funds requirements for institutions (OJ L 74, 14.3.2014, p. 8).

mandates the EBA to draft regulatory technical standards that are fully aligned with the delegated act referred to in point (a) of Article 28(5) of Regulation (EU) No 575/2013, the respective provisions of Commission Delegated Regulation (EU) No 241/2014 which specify the applicable forms and nature of indirect funding for own funds instruments should be amended accordingly to also cover eligible liabilities instruments.

- (4) Rules on direct and indirect funding should capture funding chains maintaining risks within a group, whether they involve an external investor or not. To avoid circumvention of the rules, in order to conclude that capital instruments or liabilities are directly funded by an institution or resolution entity, it should not be necessary that the funding is provided by that institution or resolution entity, as long it is provided by an entity in the scope of prudential or accounting consolidation of the institution or resolution entity, the institutional protection scheme or the network of institutions affiliated to a central body to which it belongs or its scope of supplementary supervision.
- (5) Regulation (EU) No 575/2013 also made the eligibility of additional Tier 1 instruments and Tier 2 instruments conditional upon the absence of any incentive for their principal amount to be redeemed. This criterion has been extended by Regulation (EU) No 2019/876 to eligible liabilities instruments as well, with the difference that incentives to redeem are accepted in the cases referred to in Article 72c(3) of Regulation (EU) No 575/2013. Therefore, and in line with the mandate for the EBA to draft regulatory technical standards that are fully aligned with the delegated act referred in point in point (a) of Article 52(2) of Regulation (EU) No 575/2013, the respective provisions of Commission Delegated Regulation (EU) No 241/2014 should be amended to also cover eligible liabilities instruments.
- (6) The requirements for own funds and eligible liabilities in Regulation (EU) No 575/2013 and in Directive 2014/59/EU of the European Parliament and of the Council¹¹ pursue the same objective of ensuring that institutions have sufficient loss absorption capacity. For this reason, the eligibility criteria for eligible liabilities instruments introduced by that in Regulation (EU) No 575/2013 were extended, with the exception of the subordination criterion referred to in Article 72b(2)(d) of that Regulation, to liabilities eligible for meeting the minimum requirement for own funds and eligible liabilities (MREL) by virtue of the first subparagraph of Article 45b(1) of that Directive. In relation to resolution entities of G-SIIs and Union material subsidiaries of non-EU G-SIIs, Directive 2014/59/EU made the eligibility of liabilities for meeting the MREL, as provided for in Article 45d(1)(a) and (2)(a) in conjunction with the second subparagraph of Article 45b(1) of that Directive, conditional upon their compliance with the eligibility criteria for eligible liabilities instruments, including the criterion that the liabilities may not be funded directly or indirectly by the institution, as set out in that Regulation. Similarly, in relation to entities that are not resolution entities, Article 45f(2)(ii) and (v) of Directive 2014/59/EU also made the eligibility of such liabilities subject to the compliance

¹¹ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

with certain eligibility criteria for eligible liabilities instruments and to the acquisition of ownership of the liabilities not being funded directly or indirectly by the entity that is subject to that Article, respectively. Therefore, the provisions of this Regulation related to direct and indirect funding of eligible liabilities instruments should also be applied in a consistent manner for the purposes of Articles 45b(1) and 45f(2)(a)(v) of Directive 2014/59/EU.

- (7) With regard to index holdings, Regulation (EU) No 2019/876 extended the scope of the prior permission to be granted by the competent authority - allowing an institution to use a conservative estimate of the underlying exposure of the institution to instruments included in indices - to eligible liabilities instruments of institutions. Accordingly, the provisions of Commission Delegated Regulation (EU) No 241/2014 regarding estimates used as an alternative to the calculation of underlying exposures to own funds instruments included in indices being “sufficiently conservative” and the meaning of “operationally burdensome” should be amended to also apply with regard to eligible liabilities instruments.
- (8) Based on a concept previously existing under Commission Delegated Regulation (EU) No 241/2014 and supplementing the prior permission regime for the reduction of own funds, Regulation (EU) No 2019/876 introduced into Regulation (EU) No 575/2013 the possibility to grant to institutions a general prior permission to reduce own funds for a predetermined amount and a limited period of time. Preconditions and limits originally applicable to a prior permission for market-making purposes under that Delegated Regulation would now be embedded in the general prior permission pursuant to the new rules. The respective provisions of this Regulation should be amended to reflect this accordingly.
- (9) Regulation (EU) No 575/2013 requires institutions to obtain prior permission of the resolution authority to effect the call, redemption, repayment or repurchase of eligible liabilities instruments. The permission must be granted subject to a number of conditions, including where the institution replaces the eligible liabilities instruments with own funds or eligible liabilities instruments of equal or higher quality at terms that are sustainable for the income capacity of the institution. For these purposes, the meaning of ‘sustainable for the income capacity of the institution’ and a detailed and comprehensive procedure for granting a permission to reduce eligible liabilities instruments, including the process of cooperation between the competent authority and the resolution authority, should be specified. Since Regulation (EU) No 575/2013, as amended by Regulation (EU) No 2019/876, requires the meaning of ‘sustainable for the income capacity of the institution’ to be fully aligned with its equivalent for own funds, and given that the characteristics for a permission regime for reducing eligible liabilities instruments are broadly similar to the regime envisaged for the permission to reduce own funds, this Regulation should specify the permission regime for eligible liabilities instruments in a manner consistent with the former. In addition, in order to ensure compliance with own funds requirements laid down in Regulation (EU) No 575/2013 and Directive 2013/36/EU, the process of cooperation between the competent authority and the resolution authority should include consultation with the competent authority on the application for permission received by the resolution authority, in a way that enables the competent authority to express an informed view on the consultation, including where its agreement is required for establishing the margin by which the institution’s

own funds and eligible liabilities must exceed its requirements, with an adequate exchange of information and sufficient time to respond to the consultation.

- (10) In order to prevent possible regulatory arbitrage between own funds and eligible liabilities instruments, and to ensure a consistent approach across the EU, the predetermined amount set by resolution authorities when granting the general prior permission to reduce eligible liabilities instruments should be subject to limits. This is without prejudice to the need for the resolution authority, taking into consideration the specific circumstances of the case, to set a lower predetermined amount for a particular institution. In addition, both for own funds and eligible liabilities, in case of a general prior permission, the predetermined amount for which the relevant authority has given its permission should be deducted from the moment the authorisation is granted.
- (11) Regulation (EU) No 2019/876 expands the scope of the temporary waiver that competent authorities may grant to institutions for holdings in a financial sector entity from the deduction requirement where such holdings are deemed to provide financial assistance to that entity with a view to safeguard its viability, to eligible liabilities instruments of an institution. As a result, the provisions of Commission Delegated Regulation (EU) No 241/2014 originally developed for institutions' holdings of capital instruments in financial sector entities should be amended to also apply to institutions' holdings of eligible liabilities instruments in financial sector entities.
- (12) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authority (European Banking Authority) (EBA) to the Commission.
- (13) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council.

HAS ADOPTED THIS REGULATION:

CHAPTER I

Article 1

Subject matter

This Regulation lays down rules concerning:

(a).....

(b).....

(c) the applicable forms and nature of indirect funding of own funds ~~capital~~ instruments, according to Article 28(5) of Regulation (EU) No 575/2013 and eligible liabilities instruments according to Article 72b(7)(a) of that Regulation;

(d).....

(hh) the form and nature of incentives to redeem for the purposes of the condition set out in point (g) of the first subparagraph of Article 72b(2) and Article 72c(3) of Regulation (EU) No 575/2013, according to Article 72b(7)(b) of that Regulation;

(i) the extent of conservatism required in estimates used as an alternative to the calculation of underlying exposures for indirect holdings arising from index holdings and the meaning of operationally burdensome for the institution to monitor those underlying exposures, according to points (a) and (b) of Article 76(4) of Regulation (EU) No 575/2013;

(jj) the procedure, including the limits and information requirements, for granting the permission to reduce eligible liabilities instruments, and the process of cooperation between the competent authority and the resolution authority according to Article 78a(3) of Regulation (EU) No 575/2013;

(k) the conditions for a temporary waiver for deduction from own funds and eligible liabilities to be provided, according to Article 79(2) of Regulation (EU) No 575/2013;

(l)....

(m).....

(n).....

CHAPTER II

ELEMENTS OF OWN FUNDS AND ELIGIBLE LIABILITIES

SECTION 1

COMMON EQUITY TIER 1 CAPITAL AND ELIBLE LIABILITIES ITEMS AND INSTRUMENTS

Subsection 2

Cooperative societies, savings institutions, mutual and similar institutions

Explanatory box for consultation purpose - Article 4

The specific features of mutuals, cooperative societies, savings banks or similar institutions are addressed through specific provisions in the CRR for aspects of the sector related in particular to own funds requirements. In line with the mandate provided in Article 27(2) CRR, the EBA has developed Article 4 of the RTS to specify the conditions according to which competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a cooperative society in the context of own funds requirements. Paragraph 2 of this article lists the type of categories under which an institution's legal status has to fall in order to qualify as a cooperative society.

The drafting below suggests amending Article 4(2) of the RTS to also include credit unions in Lithuania.

For EEA countries, this information is to be found in the EEA Joint Committee decision (Decision No 80/2019) which includes the relevant adaptations to the Commission Delegated Regulation (EU) No 241/2014 as regards the application of that Delegated Regulation to EEA countries.

Article 4

Type of undertaking recognised under applicable national law as a cooperative society for the purposes of Article 27(1) (a) (ii) of Regulation (EU) No 575/2013

1. Competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a cooperative society for the purpose of Part Two of Regulation (EU) No 575/2013, where all of the following conditions in paragraphs 2, 3 and 4 are met.
2. To qualify as a cooperative society for the purposes of paragraph 1, an institution's legal status shall fall within one of the following categories:

- (a) [...];
- (b) [...];
- (k) in Italy: [...]

(kk) in Lithuania: institutions registered as ‘Centrinė kredito unija’ under the ‘Centrinų kredito unijų įstatymas’;

- (l) in Luxembourg: institutions registered as ‘sociétés coopératives’ as defined in Section VI of the law of 10 August 1915 on commercial companies;
- (m) in the Netherlands: [...];
- (n) [...]

Subsection 3
Indirect funding

Explanatory box for consultation purpose – Articles 8 and 9 – extension of rules on direct and indirect funding to eligible liabilities

- As per the CRR, instruments are only eligible to own funds provided “the acquisition of ownership of those instruments is not funded directly or indirectly by the institution”.
- Article 72b(2)(c) of the amended CRR extends this requirement, already applicable to own funds, to eligible liabilities by providing that, for an instrument to be eligible, the acquisition of ownership of the liabilities must not be funded directly or indirectly by the “resolution entity”.
- Article 72b(7)(a) CRR mandates the EBA to specify the applicable forms and nature of indirect funding of eligible liabilities instruments. According to the 2nd subparagraph of that article, the RTS shall be fully aligned with the corresponding provisions for own funds.
- In order to achieve this outcome, a reference to the “resolution entity” has been added to Articles 8 and 9. As a result, the rules of Articles 8 and 9 systematically apply to an “institution or, in the case of liabilities, resolution entity”.
- The rules on direct and indirect funding apply to resolution entities subject to TLAC and/or MREL, but also to non-resolution entities subject to internal MREL and material subsidiaries subject to internal TLAC. This is because, on the one hand, Article 92b CRR on internal TLAC applies to eligible liabilities instruments as defined in Article 72b CRR. On the other hand, a similar prohibition as Article 72b(2)(c) CRR is provided for in relation to internal MREL under Article 45f(2)(a)(v) of the BRRD.
- The aim of the rules on direct and indirect funding is identical for own funds and eligible liabilities. None of them are meant to prevent normal banking transactions in a banking group and such undesired effect has not been reported under the existing RTS provisions. The rules are meant to ensure that entities issue actual loss absorbing capacity and prevent them from issuing instruments which might eventually expose them to their own losses. Having regard to this convergence of objectives, the requirement for full alignment and the limited number of amendments considered, the approach of expanding Article 8 and 9 has been preferred over duplicating the articles applicable to each set of requirements and entities.

- The EBA has considered the impact of extending the existing rules to eligible liabilities on intragroup allocation of eligible liabilities. This led to two considerations.
- The first consideration was the impact of applying the rules on direct funding at the level of subsidiaries, particularly on the flow of funding and liquidity within a group.

Existing rules basically capture funding provided by the issuing entity, via another group entity, possibly to other group entities, for the acquisition of the instruments that are being considered. In addition, to avoid circumvention of the rules, in order to conclude that capital instruments or liabilities are directly funded by an institution or resolution entity, it should not be necessary that the funding is provided by that institution or resolution entity, as long as it is provided by a group entity. Such funding would lead to disqualification of the corresponding amount of eligible liabilities unless the two conditions in Article 8(3)(a) and (b) are met, i.e. a) the transaction is at similar conditions as transactions with third parties, and b) the receiving entity does not have to rely on the distributions or on the sale of the instruments held to support the payment of interest and the repayment of the funding. These conditions are appropriate given that they, in effect, capture funding chains which, instead of providing new loss absorbing capacity, end up feeding losses, in case of failure, to the originating entity. Given that in principle intragroup transactions should be at arms' length, these conditions should be met and the experience in the area of own funds does not point to particular concerns. For example, they would not prevent a subsidiary from depositing liquidity with a parent entity, even if that parent entity holds internal MREL instruments of that subsidiary.

- The second consideration was the impact of applying existing rules on indirect funding to subsidiaries, be they entities subject to internal MREL within a given resolution group, or subsidiary-resolution entities within a multiple-point-of-entry (MPE) group.

Article 9 of the existing RTS leads to disqualification of own funds instruments of an institution to the extent funding has been provided by entity in the prudential scope of consolidation as well as in the accounting scope and supplementary supervision scope of the institution. In relation to a subsidiary, the rule captures funding provided, via external investors, not only by entities within the individual or sub-consolidated perimeter of the subsidiary, but by any entities within the broader consolidated perimeter of the group. This mechanism in effect limits the risk of double counting, at the level of the parent, of instruments issued by a subsidiary and indirectly funded by group entities via external investors, which might not already be fully captured by existing rules on minority interests. This is in spite of the fact that some of those entities may be entitled to directly purchase the own funds instruments of the subsidiary.

In relation to a subsidiary within a single point of entry group where the prudential and resolution groups are identical or closely related, the impact of the above rules is largely convergent with the own funds regime.

In relation to an MPE group, it is acknowledged that by definition resolution groups are different from the broader prudential group, and that a parent resolution entity may purchase the eligible liabilities of a subsidiary resolution entity. However, as explained this asymmetry is also at play for own funds issued by subsidiaries. In order to ensure consistency across own funds and eligible liabilities, and to avoid unlevelled playing field between institutions building their MREL with own funds only and those also relying on

debt instruments, it seems appropriate to apply the existing rules also to subsidiary resolution entities of MPE groups. These rules will not preclude direct purchase of eligible liabilities instruments across resolution groups and therefore will not create any discrimination at the detriment of MPE groups.

Question to stakeholders:

Q4. It is recalled that, as per the mandate to the EBA, the RTS on eligible liabilities for the purpose of indirect funding has to be fully aligned with the one on own funds. Are the interactions and consequences of the rules on direct and indirect funding appropriately described and captured for eligible liabilities and resolution groups?

Article 8

*Indirect funding of capital instruments for the purposes of Article 28(1)(b), Article 52(1)(c), and Article 63(c), **and of liabilities for the purpose of Article 72b(2)(c)** of Regulation (EU) No 575/2013*

1. Indirect funding of capital instruments under Article 28(1)(b), Article 52(1)(c) and Article 63(c), **and liabilities under Article 72b(2)(c)** of Regulation (EU) No 575/2013 shall be deemed funding that is not direct.
2. For the purposes of paragraph 1, direct funding shall refer to situations where an institution **or, in the case of liabilities, resolution entity** has granted a loan or other funding in any form to an investor that is used for the ~~purchase~~ **acquisition of ownership** of ~~its~~ **the institution's** capital instruments **or liabilities**.
3. Direct funding shall also include funding granted for other purposes than ~~purchasing~~ **acquiring ownership of the** an institution's capital instruments **or liabilities of an institution**, to any natural or legal person who has a qualifying holding in the ~~credit~~ institution **or resolution entity**, as referred to in Article 4(36) of Regulation (EU) No 575/2013, or who is deemed to be a related party within the meaning of the definitions in paragraph 9 of International Accounting Standard 24 on Related Party Disclosures as applied in the Union according to Regulation (EC) No 1606/2002 of the European Parliament and of the Council¹², taking into account any additional guidance as defined by the competent authority **for capital instruments, or the resolution authority in consultation with the competent authority for liabilities**.

¹² Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, (OJ L 243, 11.9.2002, p. 1).

if the institution **or, in the case of liabilities, resolution entity** is not able to demonstrate all of the following:

- (a) the transaction is realised at similar conditions as other transactions with third parties;
- (b) the natural or legal person or the related party does not have to rely on the distributions or on the sale of the capital instruments or liabilities held to support the payment of interest and the repayment of the funding.

Article 9

*Applicable forms and nature of indirect funding of capital instruments for the purposes of Article 28(1)(b), Article 52(1)(c) and Article 63(c), **and of liabilities for the purpose of Article 72b(2)(c)** of Regulation (EU) No 575/2013*

1. The applicable forms and nature of indirect funding of the ~~purchase~~ **acquisition of ownership** of ~~an institution's~~ **the** capital instruments **and liabilities of an institution** shall include the following:
 - (a) funding of an investor's ~~purchase~~ **acquisition of ownership**, at issuance or thereafter, of ~~an institution's~~ **the** capital instruments **or liabilities of an institution** by any entities on which the institution **or, in the case of liabilities, resolution entity** has a direct or indirect control or by entities included in any of the following:
 - (1) the scope of accounting or prudential consolidation of the institution **or, in the case of liabilities, resolution entity**;
 - (2) the scope of the consolidated balance sheet or extended aggregated calculation, where equivalent to consolidated accounts as referred to in Article 49(3)(a)(iv) of Regulation (EU) No 575/2013, that is drawn up by the institutional protection scheme or the network of institutions affiliated to a central body that are not organised as a group to which the institution **or, in the case of liabilities, resolution entity** belongs;
 - (3) the scope of supplementary supervision of the institution **or, in the case of liabilities, resolution entity** in accordance with Directive 2002/87/EC of the

European Parliament and of the Council¹³ on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate;

- (b) funding of an investor's ~~purchase~~ **acquisition of ownership**, at issuance or thereafter, of ~~the an institution's~~ capital instruments or liabilities **of an institution** by external entities that are protected by a guarantee or by the use of a credit derivative or are secured in some other way so that the credit risk is transferred to the institution **or, in the case of liabilities, resolution entity**, or to any entities on which the ~~at~~ institution **or resolution entity** has a direct or indirect control or any entities included in any of the following:
- (1) the scope of accounting or prudential consolidation of the institution **or, in the case of liabilities, resolution entity**;
 - (2) the scope of the consolidated balance sheet or extended aggregated calculation, where equivalent to consolidated accounts as referred to in Article 49(3)(a)(iv) of Regulation (EU) No 575/2013, that is drawn up by the institutional protection scheme or the network of institutions affiliated to a central body that are not organised as a group to which the institution **or, in the case of liabilities, resolution entity** belongs;
 - (3) the scope of supplementary supervision of the institution **or, in the case of liabilities, resolution entity** in accordance with Directive 2002/87/EC.
- (c) funding of a borrower that passes the funding on to the ultimate investor for the ~~purchase~~ **acquisition of ownership**, at issuance or thereafter, of ~~an institution's~~ **the** capital instruments **or liabilities of an institution**.
2. In order to be considered as indirect funding for the purposes of paragraph 1, the following conditions shall also be met, where applicable:
- (a) the investor is not included in any of the following:
 - (1) the scope of accounting or prudential consolidation of the institution **or, in the case of liabilities, resolution entity**;

¹³ Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (OJ L 35, 11.2.2003, p. 1).

- (2) the scope of the consolidated balance sheet or extended aggregated calculation, where equivalent to consolidated accounts as referred to in Article 49(3)(a)(iv) of Regulation (EU) No 575/2013, that is drawn up by the institutional protection scheme or the network of institutions affiliated to a central body that are not organised as a group to which the institution **or, in the case of liabilities, resolution entity** belongs. For this purpose an investor is deemed to be included in the scope of the extended aggregated calculation if the relevant capital instrument or liability is subject to consolidation or extended aggregated calculation in accordance with Article 49(3)(a)(iv) of Regulation (EU) No 575/2013 in a way that the multiple use of own funds or eligible liabilities items and any creation of own funds or eligible liabilities between members of the institutional protection scheme is eliminated. Where the permission from competent authorities referred to in Article 49(3) of Regulation (EU) No 575/2013 has not been granted, this condition shall be deemed to be met where both the entities referred to in paragraph 1(a) and the institution **or, in the case of liabilities, resolution entity** are members of the same institutional protection scheme and the entities deduct the funding provided for the ~~purchase~~ **acquisition of ownership** of the capital instruments **or liabilities of the institution**, according to Articles 36(1)(f) to (i), Article 56(a) to (d) and Article 66(a) to (d), **for capital instruments, and according to Article 72e(a) to (d)** of Regulation (EU) No 575/2013, **for liabilities**, as applicable;
- (3) the scope of the supplementary supervision of the institution **or, in the case of liabilities, resolution entity** in accordance with Directive 2002/87/EC;
- (b) the external entity is not included in any of the following:
- (1) the scope of accounting or prudential consolidation of the institution **or, in the case of liabilities, resolution entity**;
- (2) the scope of the consolidated balance sheet or extended aggregated calculation, where equivalent to consolidated accounts as referred to in Article 49(3)(a)(iv) of Regulation (EU) No 575/2013, that is drawn up by the institutional protection scheme or the network of institutions affiliated to a central body that are not organised as a group to which the institution **or, in the case of liabilities, resolution entity** belongs;
- (3) the scope of the supplementary supervision of the institution **or, in the case of liabilities, resolution entity** in accordance with Directive 2002/87/EC.

3. When establishing whether the ~~purchase~~ **acquisition of ownership** of a capital instrument **or liability** involves direct or indirect funding in accordance with Article 8, the amount to be considered shall be net of any individually assessed impairment allowance made.
4. In order to avoid a qualification of direct or indirect funding in accordance with Article 8 and where the loan or other form of funding or guarantees is granted to any natural or legal person who has a qualifying holding in the ~~credit~~ institution, or who is deemed to be a related party as referred to in paragraph 3 **of Article 8**, the institution **or, in the case of liabilities, resolution entity** shall ensure on an on-going basis that it has not provided the loan or other form of funding or guarantees for the purpose of ~~subscribing~~ **acquiring ownership** directly or indirectly of capital instruments **or liabilities** of the institution. Where the loan or other form of funding or guarantees is granted to other types of parties, the institution **or, in the case of liabilities, resolution entity** shall make this control on a best effort basis.
5. With regard to mutuals, cooperative societies and similar institutions, where there is an obligation under national law or the statutes of the institution for a customer to subscribe capital instruments in order to receive a loan, that loan shall not be considered as a direct or indirect funding where all of the following conditions are met:
 - (a) the amount of the subscription is considered immaterial by the competent authority;
 - (b) the purpose of the loan is not the ~~purchase~~ **acquisition of ownership** of capital instruments or liabilities of the institution providing the loan;
 - (c) the subscription of one or more capital instruments of the institution is necessary in order for the beneficiary of the loan to become a member of the mutual, cooperative society or similar institution.

CHAPTER III

ADDITIONAL TIER 1 CAPITAL AND ELIGIBLE LIABILITIES

SECTION 1

Form and nature of incentives to redeem

Explanatory box for consultation purpose - Article 20

Article 72b(7)(b) CRR mandates the EBA to specify ‘the form and nature of incentives to redeem’ in the context of eligibility criteria for EL, in a ‘fully aligned’ manner with the respective provision for own funds.

The text below amends the existing provision of Article 20 to also cover eligible liabilities. The drafting draws on the terminology used in the Level 1 text and uses ‘capital instruments’ and ‘liabilities’ as generic terms before determination of compliance with the respective eligibility criteria, while subsequent RTS provisions use ‘own funds instruments’ and ‘eligible liabilities’ as their corresponding subsets.

Article 20

Form and nature of incentives to redeem for the purposes of Articles 52(1)(g) and 63(h), 72b(2)(g) and 72c(3) of Regulation (EU) No 575/2013

1. Incentives to redeem shall mean all features that provide, at the date of issuance, an expectation that the capital instrument **or the liability** is likely to be redeemed.
2. The incentives referred to in paragraph 1 shall include the following forms:
 - (a) a call option combined with an increase in the credit spread of the instrument if the call is not exercised;
 - (b) a call option combined with a requirement or an investor option to convert the instrument into a Common Equity Tier 1 instrument where the call is not exercised;
 - (c) a call option combined with a change in reference rate where the credit spread over the second reference rate is greater than the initial payment rate minus the swap rate;
 - (d) a call option combined with an increase of the redemption amount in the future;
 - (e) a remarketing option combined with an increase in the credit spread of the instrument or a change in reference rate where the credit spread over the second reference rate is greater than the initial payment rate minus the swap rate where the instrument is not remarketed;
 - (f) a marketing of the instrument in a way which suggests to investors that the instrument will be called.

CHAPTER V

GENERAL REQUIREMENTS

SECTION 1

INDIRECT HOLDINGS ARISING FROM INDEX HOLDINGS

Explanatory box for Articles 25 and 26

Articles 25 and 26 of the RTS deal with indirect holdings arising from index holdings and specify the extent of conservatism required in estimates for calculation exposure used as an alternative to the underlying exposures for the purposes of Article 76(2) CRR as well as the meaning of ‘operationally burdensome’ in Article 76(3) CRR.

Articles 25 and 26 have been amended to reflect changes in Article 76(1), (2) and (3) CRR to now also factor for indirect holdings arising from an index holding which comprises own eligible liabilities instruments of the institution. The drafting draws from the Level 1 terminology and distinguishes between own funds instruments of financial sector entities and eligible liabilities instruments of institutions as per Article 76 provisions.

A reference to Article 92a CRR has been inserted in points (a) and (b) of Article 25(1) to emphasise that only G-SIIs have to deduct eligible liabilities holdings.

The materiality thresholds determined in Article 26(2) as the exposures arising from index holdings now also comprise eligible liabilities.

Question to stakeholders:

Q5. Would you agree that the existing percentage values for the thresholds are still suitable? If not please provide evidence and rationale for having different values.

Article 25

Extent of conservatism required in estimates for calculating exposures used as an alternative to the underlying exposures for the purposes of Article 76(2) of Regulation (EU) No 575/2013

1. An estimate is sufficiently conservative when either of the following conditions is met:

- (a) where the investment mandate of the index specifies that an ~~capital~~ own funds instrument of a financial sector entity or an eligible liabilities instrument of an

institution which is part of the index cannot exceed a maximum percentage of the index, the institution uses that percentage as an estimate for the value of the holdings that is deducted from its Common Equity Tier 1, Additional Tier 1 ~~or~~, Tier 2 items, as applicable in accordance with paragraph 2 of Article 17 or from Common Equity Tier 1 capital in situations where the institution cannot determine the precise nature of the holding, **or, for an institution subject to Article 92a of Regulation (EU) No 575/2013, its eligible liabilities items;**

- (b) where the institution is unable to determine the maximum percentage referred to in point (a) and where the index, as evidenced by its investment mandate or other relevant information, includes ~~capital~~ **own funds** instruments of financial sector entities **or eligible liabilities instruments of institutions**, the institution deducts the full amount of the index holdings from its Common Equity Tier 1, Additional Tier 1, or Tier 2 items, as applicable in accordance with Paragraph 2 of Article 17 or from Common Equity Tier 1 capital in situations where the institution cannot determine the precise nature of the holding, **or, for an institution subject to Article 92a of Regulation (EU) No 575/2013, its eligible liabilities items.**

2. For the purposes of paragraph 1, the following shall apply:

- (a) an indirect holding arising from an index holding comprises the proportion of the index invested in the Common Equity Tier 1, Additional Tier 1 and Tier 2 instruments of financial sector entities **and in eligible liabilities instruments of institutions** included in the index;
- (b) an index includes, but is not limited to, index funds, equity or bond indices or any other scheme where the underlying instrument is ~~an capital~~ **own funds** instrument issued by a financial sector entity **or an eligible liabilities instrument issued by an institution.**

Article 26

Meaning of operationally burdensome in Article 76(3) of Regulation (EU) No 575/2013

1. For the purpose of Article 76(3) of Regulation (EU) No 575/2013, operationally burdensome shall mean situations under which look-through approaches to capital holdings in financial sector entities ~~and~~ **or to eligible liabilities holdings in institutions** on an ongoing basis are unjustified, as assessed by the competent authorities. In their assessment of the nature of operationally burdensome situations, competent authorities shall take into account the low materiality and short holding period of such positions. A holding period of short duration shall require the strong liquidity of the index to be evidenced by the institution.

2. For the purpose of paragraph 1, a position shall be deemed to be of low materiality where all of the following conditions are met:
- (a) the individual net exposure arising from index holdings measured before any look-through is performed does not exceed 2 % of Common Equity Tier 1 items as calculated in point (a) of Article 46(1) of Regulation (EU) No 575/2013;
 - (b) the aggregated net exposure arising from index holdings measured before any look-through is performed does not exceed 5 % of Common Equity Tier 1 items as calculated in point (a) of Article 46(1) of Regulation (EU) No 575/2013;
 - (c) the sum of the aggregated net exposure arising from index holdings measured before any look-through is performed and of any other holdings that shall be deducted pursuant to Article 36(1)(h) of Regulation (EU) No 575/2013 does not exceed 10 % of Common Equity Tier 1 items as calculated in point (a) of Article 46(1) of Regulation (EU) No 575/2013.

SECTION 2

~~SUPERVISORY PERMISSION FOR REDUCING OWN FUNDS~~ **AND ELIGIBLE LIABILITIES**

Subsection 1

SUPERVISORY PERMISSION FOR REDUCING OWN FUNDS

Permission to reduce own funds instruments

This subsection covers the permission regime for the reduction of own funds only. This part has been kept separate from the permission regime for eligible liabilities, which is introduced in a new subsection (see Articles 32a et seq.).

Explanatory box for consultation purpose - Article 27

On the basis of the mandate in Article 78(5)(a) CRR, Article 27 of the RTS specifies further the meaning of 'sustainable for the income capacity of the institution' for the purpose of Article 78(1)(a) CRR. While the mandate under CRR2 remains unchanged, changes have been introduced to Article 78(1)(a) CRR which now also covers the replacement of share premium

accounts. To reflect these changes, Article 27 of the RTS has been amended to encompass the replacement of share premium accounts as well.

Taking into account changes introduced to Article 78(4) CRR, reference in the title of Article 27 of the RTS now is made to Article 78(1)(a) and (4)(d) CRR. Reflecting the fact that the article only deals with the reduction of OFs, while a separate article covers ‘sustainable for the income capacity’ in the context of the reduction of eligible liabilities instruments, reference in the provision itself goes to Article 77(1) CRR only.

Article 27

*Meaning of sustainable for the income capacity of the institution for the purposes of Articles 78(1)(a) **and (4)(d)** of Regulation (EU) No 575/2013*

Sustainable for the income capacity of the institution under point (a) of Article 78(1) **and under point (d) of Article 78(4)** of Regulation (EU) No 575/2013 shall mean that the profitability of the institution, as assessed by the competent authority, continues to be sound or does not see any negative change after the replacement of the instruments **or the related share premium accounts referred to in Article 77(1) of that Regulation** with own funds instruments of equal or higher quality, at that date and for the foreseeable future. The competent authority’s assessment shall take into account the institution’s profitability in stress situations.

Explanatory box for consultation purpose - Article 28

Article 28 of the RTS, on the basis of the EBA’s mandate pursuant to Article 78(5)(c) CRR, specifies the process for an application to carry out an action listed in Article 77(1) CRR.

The title of Article 28 has been changed to mirror changes in the Level 1 text and to better reflect the content of the provision as suggested below. Reference to Article 77 CRR is now limited to paragraph 1 as the provision only covers the process for the reduction of OFs. The reference added to ‘procedure’ reflects the content of paragraph 1, while the term ‘limits’ refers to the predetermined amount for general prior permission to be deducted from the moment the authorisation is granted.

Paragraph 2 of Article 28 determines the moment from which institutions have to start deducting the amounts to be reduced in a corresponding deduction approach. This deduction rule was established already by the former version of Article 28(2) of the RTS and remains largely unchanged. Slight amendments are applied in order to cater for the reduction or distribution of share premium accounts and to render reference to Article 77(1) CRR more precisely.

Further changes in Article 28 relate to the introduction of the notion of ‘general prior permission’ in the 2nd subparagraph of Article 78(1) CRR, i.e. a permission granted in advance

for a certain predetermined amount and for a specified period of time not exceeding one year to take any of the actions set out in Article 77(1) CRR.

For general prior permission, paragraph 3 sets out a deduction rule which differs from the one established by paragraph 2. Regardless of the notion of sufficient certainty, institutions in such case have to deduct the predetermined amount for which the general prior permission is granted from the moment the competent authority's permission is obtained.

Paragraph 4 deals with general prior permissions for reducing own funds where the respective capital instruments are purchased for the purposes of passing them on to the institution's employees as part of their remuneration. The further provisions of this paragraph, i.e. the institutions' obligation to inform competent authorities where this is the case and the clarification in which circumstances deduction is no longer required, already formed part of the current RTS on OFs and have only been moved here from the former Article 29(4) in order to bundle provisions related to deductions in Article 28.

Question to stakeholders:

Q6. Do you consider that the general prior permission as per the 2nd subparagraph of Article 78(1) CRR, with the limits included therein, would be sufficient to cater for permissions to repurchase own funds instruments then to be passed on to employees as part of their remuneration (former Article 29(4) of the RTS), in addition to market making and other repurchase activities? Would you consider any derogations to be needed (in particular in terms of limits and one-year timeframe)?

Article 28

*Process ~~and data~~ requirements **including the limits and procedures** for an application by an institution to **reduce own funds pursuant to** ~~carry out redemptions, reductions and repurchases~~ **for the purposes of Article 77(1) of Regulation (EU) No 575/2013***

1. Redemptions, reductions and repurchases of own funds instruments shall not be announced to holders of the instruments before the institution has obtained the prior approval **permission** of the competent authority.
2. Where ~~redemptions, reductions and repurchases~~ **the actions listed in Article 77(1) of Regulation (EU) No 575/2013** are expected to take place with sufficient certainty, and once the prior permission of the competent authority has been obtained, the institution shall deduct the amounts of own funds instruments to be redeemed, reduced or repurchased **or the amounts of the related share premium accounts to be reduced or distributed, as applicable**, from corresponding elements of its own

funds before the effective redemptions, reductions, ~~or~~ repurchases **or distributions** occur. Sufficient certainty is deemed to exist in particular when the institution has publicly announced its intention to redeem, reduce or repurchase an own funds instrument.

3. **In the case of a general prior permission referred to in the second subparagraph of Article 78(1) of Regulation (EU) No 575/2013, the predetermined amount for which the competent authority has given its permission shall be deducted from the moment the authorisation is granted.**
4. **When applying for a general prior permission for actions listed in Article 77(1) of Regulation (EU) No 575/2013, institutions shall inform competent authorities where the related own funds instruments are purchased for the purposes of being passed on to employees of the institution as part of their remuneration and deduct these instruments from own funds on a corresponding deduction approach for the time they are held by the institution. A deduction on a corresponding basis is no longer required, where the expenses related to any action according to this paragraph are already included in own funds as a result of an interim or a year-end financial report.**
5. Paragraphs 1 ~~and 2~~ **to 4** shall apply at the consolidated, sub-consolidated and individual levels of application of prudential requirements, where applicable.

Explanatory box for consultation purpose - Article 29

On the basis of the mandate in Article 78(5)(c) CRR, Article 29 of the RTS specifies as part of the process that institutions have to submit an application for prior permission before taking any action that Article 77(1) CRR refers to.

As has been done for Article 28, the title of Article 29 has been changed to only refer to Article 77(1) CRR as the article is meant to cover only the submission of applications for reducing OFs.

Together with the introduction of the notion of ‘general prior permission’ in the 2nd subparagraph of Article 78(1) CRR, the limits previously determined by Article 29(3) of the RTS for repurchases for market-making purposes have been taken up by the Level 1 text and are now established as part of the regime for general prior permission. References to ‘appropriate bases of limitation of redemption’ in the title of the Article 29 have been removed accordingly. Similarly, the content of the former paragraph 3 of Article 29 including specification of the limits has been deleted as it is no longer needed.

The EBA understands the drafting intention behind the 2nd subparagraph of Article 78(1) CRR to not limit the general prior permission to market-making but to encompass all other possible circumstances. For this reason, the derogation previously foreseen in paragraph 5 for

immaterial amounts to be called, redeemed or repurchased has been deleted as such cases may now be dealt with via general prior permission.

In the same vein, it is conceived that the regime for general prior permission will also form a proper legal basis for granting permission to repurchase own funds instruments for the purpose of passing them on to employees as part of their remuneration. Consequently, the provision previously contained in the 1st sentence of the former paragraph 4 dealing with such type of permission has been removed. The exception previously foreseen for the deduction of instruments from own funds in such cases, on the other hand, is suggested to remain and form part of Article 28(4) of the RTS.

The former Article 29(2) of the RTS which referred to “a plan to carry out, over a limited period of time, actions listed in Article 77” has been deleted from this article. Its main purpose was to ensure that institutions would provide information on capital planning more generally, where they intended to call, redeem or repurchase more than one instrument over a certain period of time. In order to uphold this notion of ‘capital planning’, point (f) of the first paragraph of Article 30 of the RTS specifying the content of the application to be submitted by institutions has been amended along these terms.

Questions to stakeholders:

Q7. Do you agree that the provision regarding permission for immaterial amounts to be called, redeemed or repurchased (former Article 29(5) of the RTS) is no longer needed? If you disagree please provide a substantiated rationale.

Article 29

*Submission of application by the institution to **reduce own funds pursuant to** ~~carry out redemptions, reductions and repurchases for the purposes of Article 77(1) and Article 78 of Regulation (EU) No 575/2013 and appropriate bases of limitation of redemption for the purposes of paragraph 3 of Article 78 of Regulation (EU) No 575/2013~~*

1. An institution shall submit an application **for prior permission, including general prior permission**, to the competent authority before ~~reducing or repurchasing Common Equity Tier 1 instruments or calling, redeeming or repurchasing Additional Tier 1 or Tier 2 instruments~~ **taking an action referred to in Article 77(1) of Regulation (EU) No 575/2013**.
2. ~~The application may include a plan to carry out, over a limited period of time, actions listed in Article 77 of Regulation (EU) No 575/2013 for several capital instruments.~~

- ~~3. In the case of a repurchase of Common Equity Tier 1 instruments, Additional Tier 1 instruments or Tier 2 instruments for market making purposes, competent authorities may give their permission in accordance with the criteria set out in Article 78 of Regulation (EU) No 575/2013 in advance to actions listed in Article 77 of that Regulation for a certain predetermined amount.~~
- ~~(a) For Common Equity Tier 1 instruments, that amount shall not exceed the lower of the following amounts:~~
- ~~(1) 3 % of the amount of the relevant issuance;~~
- ~~(2) 10 % of the amount by which Common Equity Tier 1 capital exceeds the sum of the Common Equity Tier 1 capital requirements pursuant to Article 92 of Regulation (EU) No 575/2013, the specific own funds requirements referred to in Article 104(1)(a) of Directive 2013/36/EU and the combined buffer requirement as defined in point (6) of Article 128 of that Directive.~~
- ~~(b) For Additional Tier 1 instruments or Tier 2 instruments, that predetermined amount shall not exceed the lower of the following amounts:~~
- ~~(1) 10 % of the amount of the relevant issuance;~~
- ~~(2) or 3 % of the total amount of outstanding Additional Tier 1 instruments or Tier 2 instruments, as applicable.~~
- ~~4. Competent authorities may also give in advance their permission to actions listed in Article 77 of Regulation (EU) No 575/2013 where the related own funds instruments are passed on to employees of the institution as part of their remuneration. Institutions shall inform competent authorities where own funds instruments are purchased for these purposes and deduct these instruments from own funds on a corresponding deduction approach for the time they are held by the institution. A deduction on a corresponding basis is no longer required, where the expenses related to any action according to this paragraph are already included in own funds as a result of an interim or a year end financial report.~~
- ~~5. A competent authority may give its permission in advance in accordance with the criteria set out in Article 78 of Regulation (EU) No 575/2013 to an action listed in Article 77 of that Regulation for a certain predetermined amount when the amount of own funds instruments to be called, redeemed or repurchased is immaterial in relation to the outstanding amount of the corresponding issuance after the call, redemption or repurchase has taken place.~~

2. Paragraphs 1 ~~and 2~~ shall apply at the consolidated, sub-consolidated and individual levels of application of prudential requirements, where applicable.

Explanatory box for consultation purpose - Article 30

On the basis of the EBA's mandate pursuant to Article 78(5)(c) CRR, Article 30 of the RTS details the content of the application to be submitted before carrying out an action listed in Article 77(1) CRR.

The title of the article has been changed to only refer to Article 77(1) CRR as its scope is limited to the submission of applications for reducing own funds.

For the competent authority to be able to determine whether to grant a permission where the institution does not plan to replace the instrument called, redeemed or repurchased, it has to assess whether the institution's own funds and eligible liabilities would, following the transaction, exceed the requirements laid down in the CRR, in Directive 2013/36/EU (CRD) and the BRRD by a margin that the competent authority deems necessary.

Article 30(1)(d) RTS details the exact type of information institutions have to provide along with their application for this purpose. Information to this end was already expected to be provided together with applications for prior permission under the former Article 30 of the existing framework. The drafting suggested below has been specified in more detail and now cross refers in a clear manner to the different prudential requirements set out in the CRR, CRD and BRRD, reflecting also any changes introduced by the European Banking Package to these Level 1 texts. In addition, the information requirement has been expanded to also capture TLAC and MREL requirements.

For a broad overview, point (d)(i) to (viii) of Article 30(1) RTS concerns the capital demand, while point (e) covers the capital supply before and after the transaction. More in detail, point (d)(i) to (viii) of Article 30(2) of the RTS requires the institution to provide information regarding the amounts and percentage corresponding to the following requirements:

- (i) CET1 minimum requirements for Pillar 1) + Tier 1 minimum requirements for Pillar 1 + OFs minimum requirements for Pillar 1 (risk based ratio)
- (ii) CET1 requirements for Pillar 2 (P2R) + Tier 1 requirements for Pillar 2(P2R) + OFs requirements for Pillar 2 (P2R) (risk based ratio)
- (iii) CET1 requirements for the combined buffer requirement;
- (iv) Tier 1 Leverage ratio 3% minimum requirements
- (v) CET1 requirements for Pillar 2 (P2R), Tier 1 requirements for Pillar 2 (P2R), OFs requirements for Pillar 2 (P2R) (Leverage ratio);

- (vi) Tier 1 G-SII Leverage ratio buffer requirement;
- (vii) The Pillar 1 risk-based and non-risk based requirements for own funds and eligible liabilities for G-SIIs (TLAC);
- (viii) MREL requirement in terms of risk based terms and MREL requirement in non-risk based terms.

In point (e), detailing the capital supply, the level and composition of eligible liabilities has been added. This is because the supervisory authority, when considering a request for permission under Article 78(1)(b), is now required to assess whether the own funds and eligible liabilities of the institution would, following the reduction, exceed the requirements in the BRRD and the CRR by a necessary margin. Point (e) caters for the various types of eligible liabilities at resolution entity and non-resolution entity level, including subordinated and non-subordinated instruments.

After that, point (f) requires institutions to provide their own assessment of how compliance with the requirements mentioned in point (d) will be impacted by the action taken in accordance with Article 77(1) CRR. In addition, institutions are requested to provide information on any other action of this kind envisaged over the course of the next three years, hence on their capital planning more generally. This is taking up the notion of 'capital planning' previously contained in the former Article 29(2) of the RTS on OFs.

Point (g) specifies information to be provided when institutions seek the replacement of own funds instruments or the related share premium pursuant to Article 78(1)(a) or Article 78(4)(d) CRR.

Point (h) takes up the former point (d) and requires that institutions provide their own assessment of whether their level of own funds ensures appropriate coverage of risks to which they are or might be exposed in different scenarios.

While point (h) is more qualitative in nature, point (i), finally, concerns information related to the – quantitative - coverage of P2G.

Regarding Article 30(3) to note that the term "sub-consolidated" is absent from Level 1 provisions on MREL and TLAC. Where appropriate, the CRR and SRMR use the term "consolidated" to also capture levels of consolidation different from the prudential group (including resolution group, but also sub-consolidation, in some cases). This is covered for by the use of the term 'where applicable'.

Question to stakeholders:

Q8. Is the information required appropriate? Please specify any change you would make and why. Please consider consistency with the prior permission regime for eligible liabilities instruments.

Article 30

Content of the application to be submitted by the institution for the purposes of Article 77(1) of Regulation (EU) No 575/2013

1. The application referred to in Article 29 shall be accompanied by the following information:
 - (a) a well-founded explanation of the rationale for performing **any of the an actions** referred to in ~~paragraph 1 of Article 29~~ **Article 77(1) of Regulation (EU) No 575/2013;**
 - (b) **whether the permission sought is based on point (a) or (b) of the first subparagraph of Article 78(1) of Regulation (EU) No 575/2013 or whether it is a general prior permission pursuant to the second subparagraph of Article 78(1) of that Regulation;**
 - (c) **where the institution seeks to call, redeem or repurchase Additional Tier 1 or Tier 2 instruments or related share premium accounts during the five years following their date of issuance pursuant to Article 78(4) of Regulation (EU) No 575/2013, how the conditions of that article are met;**
 - (d) **present and forward-looking** information on **the** capital-requirements and capital buffers, **laid down in Regulation (EU) No 575/2013 and Directives 2013/36/EU and 2014/59/EU applicable to the institution. The information shall** covering at least a three year period, **and shall includeing the amounts and percentages corresponding to the following requirements** the level and composition of own funds before and after the performing of the action and the impact on regulatory requirements:
 - (i) **the Common Equity Tier 1 capital requirement laid down in Article 92(1)(a) of Regulation (EU) No 575/2013, the Tier 1 capital requirement laid down in Article 92(1)(b) of that Regulation, and the own funds requirement laid down in Article 92(1)(c) of that Regulation;**

- (ii) **to address risks other than the risk of excessive leverage, the additional Common Equity Tier 1 capital requirement referred to in Article 104a of Directive 2013/36/EU, where applicable; the additional Tier 1 capital requirement referred to in Article 104a of that Directive, where applicable; and the additional own funds requirement laid down in Article 104a of that Directive, where applicable;**
- (iii) **the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU;**
- (iv) **the Tier 1 capital requirement laid down in Article 92(1)(d) of Regulation (EU) No 575/2013, and if applicable any adjustment in accordance with Article 429a(7) of the CRR;**
- (v) **to address the risk of excessive leverage, the additional Common Equity Tier 1 capital requirement referred to in Article 104a of Directive 2013/36/EU, where applicable; the additional Tier 1 capital requirement referred to in Article 104a of Directive 2013/36/EU, where applicable; and the additional own funds requirement laid down in Article 104a of Directive 2013/36/EU, where applicable;**
- (vi) **the Tier 1 G-SII leverage ratio buffer requirements laid down in Article 92(1a) of Regulation (EU) No 575/2013, where applicable;**
- (vii) **the risk-based requirement for own funds and eligible liabilities under Articles 92a(1)(a) and 494(1)(a), or 92b of Regulation (EU) No 575/2013, where applicable, as well as the non-risk based requirement for own funds and eligible liabilities under Articles 92a(1)(b) and 494(1)(b), or 92b of that Regulation, where applicable;**
- (viii) **the minimum requirement for own funds and eligible liabilities referred to in Article 45(1) of Directive 2014/59/EU as required in accordance with Articles 45e and 45f of that Directive, as applicable, and calculated as the amount of own funds and eligible liabilities, and expressed as percentages of the total risk exposure amount of the institution, calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, and the amount of own funds and eligible liabilities expressed as percentages of the**

total exposure measure of the relevant entity, calculated in accordance with Articles 429(4) and 429a of Regulation (EU) No 575/2013;

- (e) **present and forward-looking information on the level and composition of own funds and the level and composition of own funds and eligible liabilities held to ensure compliance, respectively, with the requirements referred to in point (d)(i) to (viii) above before and after performing any of the actions listed in Article 77(1) of Regulation (EU) No 575/2013. The information shall cover at least a three year period and, with regard to liabilities, shall include specifications of the following amounts, as applicable:**
- (i) **liabilities which qualify as eligible liabilities instruments pursuant to Article 72b(2) of Regulation (EU) No 575/2013;**
 - (ii) **liabilities which the resolution authority has permitted to qualify as eligible liabilities pursuant to Article 72b(3) or (4) of Regulation (EU) No 575/2013;**
 - (iii) **liabilities which are included in the amount of own funds and eligible liabilities of resolution entities pursuant to Article 45b(1) of Directive 2014/59/EU;**
 - (iv) **liabilities that arise from debt instruments with embedded derivatives included in the amount of own funds and eligible liabilities pursuant to Article 45(b)(2) of Directive 2014/59/EU;**
 - (v) **liabilities issued by a subsidiary which qualify for inclusion in the consolidated eligible liabilities instruments of an institution subject to Article 92a of Regulation (EU) No 575/2013 pursuant to Article 88a of that Regulation or of a resolution entity pursuant to Article 45b(3) of Directive 2014/59/EU;**
 - (vi) **eligible liability instruments taken into account for the purpose of complying with the requirement for own funds and eligible liabilities for institutions that are material subsidiaries of non-EU G-SIIs pursuant to Article 92b(3) of Regulation (EU) No 575/2013 and for the purpose of complying with the minimum requirement for own funds and eligible liabilities for entities that are not themselves resolution entities, pursuant to point (a) of Article 45f(2) of Directive 2014/59/EU;**

- (f) **the institution's summary assessment on the impact of the action that the institution has planned to take in accordance with Article 77(1) of Regulation (EU) No 575/2013, and any such action that the institution additionally envisages to undertake within a three year period, on compliance with the requirements referred to in point (d)(i) to (viii) above;**
- (g) **where the institution seeks to replace own funds instruments or the related share premium accounts pursuant to point (a) of Article 78(1) or point (d) of Article 78(4) of Regulation (EU) No 575/2013:**
- (i) **information on the residual maturity of the replaced own funds instruments, if any, and the maturity of the own funds instruments replacing them;**
 - (ii) **the ranking in insolvency hierarchy of the replaced own funds instruments and of the own funds instruments replacing them;**
 - (iii) **the cost of the own funds instruments replacing the instruments or the shared premium accounts referred to in Article 77(1) of Regulation (EU) No 575/2013;**
 - (iv) **the planned timing of the issuance of the own funds instruments replacing the instruments or share premium accounts referred to in Article 77(1) of Regulation (EU) No 575/2013;**
 - (v) ~~the impact on the profitability of the institution of a replacement of a capital instrument as specified in~~ **pursuant to point (a) of Article 78(1) or point (d) of Article 78(4) of Regulation (EU) No 575/2013;**
- (h) an evaluation of the risks to which the institution is or might be exposed and whether the level of own funds **and eligible liabilities** ensures an appropriate coverage of such risks, including **outcomes of** stress tests on main risks evidencing potential losses;
- (i) **coverage in terms of own funds of the applicable guidance on the proposed level and composition of additional own funds communicated by the competent authority under Article 104b(3) of Directive 2013/36/EU before and after performing any of the actions listed in Article 77(1) of Regulation (EU) No 575/2013, covering a three year period;**

- (j) any other information considered necessary by the competent authority for evaluating the appropriateness of granting a permission according to Article 78 of Regulation (EU) No 575/2013.
2. The competent authority shall waive the submission of some of the information listed in paragraph ~~2~~1 where it is satisfied that this information is already available to it.
 3. Paragraphs 1 and 2 shall apply at the individual, consolidated and sub-consolidated levels of application of ~~prudential~~ requirements, where applicable.

Explanatory box for consultation purpose - Article 30a

This new Article 30a has been introduced to deal with specific additional information to be provided when applying for a general prior permission. In such case, the institution will need to specify in its application the concrete issuance or issuances that shall be covered by the permission. As a general prior permission shall be granted only for a predetermined amount, with the limits being set by the Level 1 text, the institution seeking the permission will have to provide information on the amounts to be reduced, redeemed or repurchased in order to enable the competent authority to set the predetermined amount.

The drafting of point (b) of paragraph 2 addresses cases in which a Tier 2 instrument to be called, redeemed or repurchased, is partly amortised. In order to clarify that the percentage to be provided should be taken from the still-recognised portion of the respective Tier 2 instrument, the wording 'outstanding' has been added.

Article 30a(3) provides clarification that a general prior permission for market-making purposes may cover own funds instruments still to be issued. This would enable institutions to apply for such permission already before actually having issued the instruments concerned in order to engage in market-making, once the permission has been obtained, right from the date of issuance.

Article 30a

Additional information to be submitted with an application for a general prior permission for actions listed in Article 77(1) of Regulation (EU) No 575/2013

1. **Where a general prior permission pursuant to the second subparagraph of Article 78(1) of Regulation (EU) No 575/2013 for an action under Article 77(1)(a) of that Regulation is sought, the application shall specify the amount of each relevant Common Equity Tier 1 issue subject to the request.**

2. **Where a general prior permission for an action under Article 77(1)(c) of Regulation (EU) No 575/2013 is sought, the institution shall specify in the application:**
 - (a) **the amount of each relevant outstanding issue subject to the request; and**
 - (b) **the total carrying amount of outstanding instruments in each relevant tier of capital.**

3. **An application for a general prior permission for an action under Article 77(1)(a) and (c) of Regulation (EU) 575/2013 for market making purposes may include own funds instruments still to be issued, subject to specification of the information referred to in points (a) and (b) of paragraph 2, as applicable, to be provided to the competent authority following issuance.**

Explanatory box for consultation purpose - Article 31

On the basis of the EBA's mandate pursuant to Article 78(5)(c) CRR, Article 31 of the RTS specifies the timing of the application to be submitted by the institution and the time period for processing such an application.

The drafting suggests to raise the minimum time period that an application for prior permission needs to be submitted in advance from three to four months. This is done to cater for the more complex assessment that the competent authority needs to undertake in order to verify that not only the institution's own funds exceed the respective requirements by the necessary margin but also the institution's eligible liabilities meet this condition. The time period suggested by this drafting is consistent with the timing specified for applications in case of early redemption of eligible liabilities instruments in Article 32f of the draft RTS.

That said, the EBA has observed that the general prior permission pursuant to the second subparagraph of Article 78(1) CRR is limited to a period of one year, which was not the case under the prior permission for market making that competent authorities could grant under the current Article 29 of the RTS and before these provisions were moved to the Level 1 text.

In this context, the EBA is considering whether the time period should be shortened in certain cases. For the first time approval of an application for general prior permission, competent authorities - irrespective of the fact that no formal consultation is required - will need to engage with resolution authorities in order to establish the margin considered necessary, thus necessitating some additional time. The case where an institution applies for the renewal of a general prior permission that has already been granted once by the competent authority, on the other hand, may not necessarily warrant the same level of supervisory scrutiny and/or interaction between authorities.

The added value that a reduction of the minimum time period that institutions need to apply in advance for the renewal of a general prior permission would bring, nevertheless, may be limited in practice. Institutions will know in advance whether they intend to continue any market-making activities for which they have obtained the general prior permission in the year before beyond the validity of this permission. Thus, they will factor into their annual planning the concrete date on which to apply for the renewal of the permission - whether this is 2, 3 or 4 months in advance of the renewal date will mainly have practical implications. However, it could also be considered that the content of the application to be submitted by institutions under Articles 30 and 30a could be reduced in the context of the renewal of a general prior permission.

Question to stakeholders:

Q9. Do you consider the four months deadline appropriate? Would you consider making a difference between the individual permissions pursuant to Article 78(1) points (a) or (b) CRR and the general prior permission pursuant to the 2nd subparagraph of Article 78(1) CRR? In case the four months deadline was kept for first time applications for general prior permission, would you see merit in:

a) shortening the deadline for applications for the renewal of the permission?

b) adjusting the content of the application to be submitted to the competent authority?

Please provide some rationale. Also, please consider consistency with the prior permission regime for eligible liabilities instruments.

Article 31

Timing of the application to be submitted by the institution and processing of the application by the competent authority for the purposes of Article 77(1) of Regulation (EU) No 575/2013

1. The institution shall transmit a complete application and the information referred to in Articles ~~29 and 30~~ **and 30a** to the competent authority at least ~~three~~ **four** months in advance of the date where one of the actions listed in Article 77(1) of Regulation (EU) No 575/2013 will be announced to the holders of the instruments.
2. Competent authorities may allow institutions on a case- by-case basis and under exceptional circumstances to transmit the application referred to in paragraph 1 within a time frame shorter than the ~~three~~ **four** months period.
3. The competent authority shall process an application during either the period of time referred to in paragraph 1 or during the period of time referred to in paragraph 2. Competent authorities shall take into account new information, where any is available and where they consider this information to be material, received during this period. The competent authorities shall begin processing the application only

when they are satisfied that the information required under Article ~~28-30~~ **and, where applicable, Article 30a** has been received from the institution.

Explanatory box for consultation purpose - Article 32

Based on the EBA's mandate pursuant to Article 78(5)(c) CRR, Article 32 under the existing RTS specifies the process to be applied in the case of redemption of shares issued to members of mutual, cooperative societies, savings institutions or similar institutions, including when institutions need to deduct the shares being redeemed.

With the notion of general prior permission being introduced in the Level 1 text, it could be argued that redemptions, reductions and repurchases by cooperative and similar institutions may also be dealt with via general prior permission.

Taking into account that the limits established for general prior permission in the second subparagraph of Article 78(1) CRR would also become applicable, the EBA – due to the nature and specificities of cooperative shares - considers it appropriate to uphold the current limit of 2% as an additional limit as the current framework is deemed to fulfil its purpose of taking into account the specificities of cooperative and alike institutions and function well as it stands. Therefore, it is suggested to maintain the separate provision on the redemption, reduction and repurchase of cooperative shares, including the limit specified therein. In order to distinguish permissions granted in such cases from a general prior permission under the second subparagraph of Article 78(1) CRR, under which cooperative and similar institutions might additionally seek for a permission for market making activities, as the case may be, the wording 'permission in advance' as used in the existing Article 32 of the RTS should remain.

Following this logic, changes suggested for Article 32 of the RTS are limited to the minimum, being mere updates of legal references.

Article 32

Applications for redemptions, reductions and repurchases by mutuals, cooperative societies, savings institutions or similar institutions for the purposes of Article 77(1) of Regulation (EU) No 575/2013

1. With regard to the redemption of Common Equity Tier 1 instruments of mutuals, cooperative societies, savings institutions or similar institutions, the application referred to in Article 29(1); **and** (2) ~~and (6)~~ and the information referred to in Article 30(1) shall be submitted to the competent authority with the same frequency as that used by the competent body of the institution to examine redemptions.

2. Competent authorities may give their permission in advance to an action listed in Article 77(1) of Regulation (EU) No 575/2013 for a certain predetermined amount to be redeemed, net of the amount of the subscription of new paid in Common Equity Tier 1 instruments during a period up to one year. That predetermined amount may go up to 2 % of Common Equity Tier 1 capital, if they are satisfied that this action will not pose a danger to the current or future solvency situation of the institution.

Subsection 2

PERMISSION FOR REDUCING ELIGIBLE LIABILITIES INSTRUMENTS

Explanatory box for consultation purpose - Article 32a – “sustainable for the income capacity”

Among the conditions for an institution to seek permission to replace instruments under Article 78a(1)(a) CRR, the replacement should be “at terms that are sustainable for the income capacity of the institution”. This condition is identical for own funds and eligible liabilities and the EBA is required as per Article 78a(3) CRR to ensure that technical standards in this area are fully aligned.

The sustainability requirement is a prudential safeguard to avoid precipitating a failure as a result of the replacement. This consideration, which presides over the permission regime for own funds, holds true as well for the permission regime for eligible liabilities: even if the replacement of an eligible liabilities instrument with a higher quality instrument may improve its resolvability in case of failure, the replacement cannot be performed at the detriment of the institution’s financial sustainability and consequently its ability to avert failure.

Question to stakeholders:

Q10. It is recalled that, as per the mandate to the EBA, the RTS on eligible liabilities for the purpose of specifying the meaning of sustainable for the income capacity of the institution has to be fully aligned with the one on own funds. Do you see any unintended consequences stemming from the drafting of Article 32a?

Article 32a

Meaning of sustainable for the income capacity of the institution for the purposes of point (a) of Article 78a(1) of Regulation (EU) No 575/2013

Sustainable for the income capacity of the institution under point (a) of Article 78a(1) of Regulation (EU) No 575/2013 shall mean that the profitability of the institution, as assessed by the resolution authority, continues to be sound or does not see any negative change after the replacement of the instruments with own funds or eligible liabilities instruments of equal or higher quality, at that date and for the foreseeable future. The resolution authority's assessment shall take into account the institution's profitability in stress situations.

Explanatory box for consultation purpose - Article 32b - deduction upon obtaining a general prior permission to redeem eligible liabilities

The deduction obligation is an inherent feature of a general prior permission regime. It has been originally introduced in the area of own funds to prevent institutions from operating at a level of capital which fails to reflect that part of that capital is already foreseen to disappear and will not be there any longer to absorb losses. Instead, once the amounts authorised for reduction are already deducted from the own funds, from then on any deterioration in the position of the institution vis-a-vis its requirements will be assessed already factoring in the foreseen reductions.

The same logic is applicable to eligible liabilities. MREL and TLAC must be met at all times, and although a breach of requirements would not mechanically and immediately cause a failure of the institution, it may lead to a number of remedial measures including restrictions of distributions. Following this rationale, the deduction obligation applicable to own funds has been extended to eligible liabilities.

In this context, the EBA has considered whether transitional arrangements should be provided for to cater for the fact that the build-up of eligible liabilities is progressive, with transition periods until 2024 or even later. However, as requirements will only progressively become binding, the impact of a deduction on the risk of breach will also only progressively intensify. In essence, the phase in of new requirements for 'own funds and eligible liabilities' is similar to the phase in of capital requirements in the past, and in that context the deduction of the prior permission for own funds was introduced with immediate effect. Finally, it is recalled that the limits associated to the general prior permission as proposed in this RTS are meant to be maximum limits; the use of these limits can be calibrated in a manner that is deemed appropriate by the institution and the resolution authority with no obligation to use the maximum limit that can be authorised. Where the permission is requested or granted for a lower predetermined amount, the deduction will also be lower.

Question to stakeholders:

Q11. Do you consider the deduction rules appropriate for eligible liabilities? If not, what would be the rationale for departing from the rules applicable for own funds?

Article 32b

Process requirements for an application by an institution to reduce eligible liabilities instruments pursuant to Article 77(2) of Regulation (EU) No 575/2013

- 1. Calls, redemptions, repayments and repurchases of eligible liabilities instruments shall not be announced to holders of the instruments before the institution has obtained the prior permission of the resolution authority.**

- 2. Where the actions listed in Article 77(2) of Regulation (EU) No 575/2013 are expected to take place with sufficient certainty, and once the prior permission of the resolution authority has been obtained, the institution shall deduct the corresponding amounts to be called, redeemed, repaid or repurchased from corresponding elements of its eligible liabilities before the effective calls, redemptions, repayments or repurchases occur. Sufficient certainty is deemed to exist in particular when the institution has publicly announced its intention to call, redeem, repay or repurchase an eligible liability instrument.**

- 3. In the case of a general prior permission referred to in the second subparagraph of Article 78a(1) of Regulation (EU) No 575/2013, the predetermined amount for which the resolution authority has given its permission shall be deducted from the moment the authorisation is granted.**

- 4. Paragraphs 1 to 3 shall apply at the consolidated, sub-consolidated and individual levels of application of requirements for own funds and eligible liabilities, where applicable.**

Explanatory box for consultation purpose - Article 32c - Limits for general prior permission to reduce eligible liabilities

Limits are inherent to a general prior permission regime. Whereas for an ad hoc permission the authority can ascertain the position of the bank vis-a-vis its requirement before and after the reduction, this is not the case for a general permission which will be exercised over a longer period of time and in contingent conditions. This is why, under a general prior permission the systematic control of the authority is only given for a limited period of up to 1 year, and for a “predetermined amount” which is set by the authority.

In order to ensure that the competent authorities set predetermined amounts that are prudent and reasonably consistent across jurisdictions, in the area of own funds the RTS has historically introduced maximum limits for those predetermined amounts, which later on were introduced in the CRR itself. These limits are articulated around a double percentage of: the “relevant issue” (which in practice limits the availability of permissions beyond an amount necessary to ensure liquidity and pricing for a given issue); and either a percentage of the surplus (for CET1) or outstanding stock in the given aggregate (for AT1 or T2). The latter limit establishes a safety margin ensuring that, even if the institution entirely uses up its general permission, all else equal it is unlikely to breach its requirement or substantially deplete its stock of instruments.

The same logic presides over the reduction of eligible liabilities which should be appropriately framed to ensure that the exercise of a general prior permission remains within safe limits. In addition, the EBA has taken into account that MREL-TLAC are introduced alongside own funds requirement with substantial convergence in quality and nature, particularly at the dividing line between Tier 2 instruments and subordinated eligible liabilities instruments. This situation calls for consistency across both aggregates to avoid a cliff effects, particularly at the detriment of institutions meeting MREL with own funds. As a result the draft RTS introduces a system of limits for the reduction of eligible liabilities that is broadly similar in design and calibration as for own funds, with some adjustments.

Concretely, general prior permissions for the reduction of eligible liabilities would be subject to a maximum overall limit of 3% of the total amount of outstanding eligible liabilities instruments. As for own funds, it remains for the authorities to set the predetermined amount having regard to the circumstances of the institution. For example, the resolution authority would consider whether an institution is subject to a subordinated requirement and whether specific limits should be set for the reduction of subordinated instruments. The latter is clarified in a recital.

In setting out this rule, the EBA has considered whether the specific nature of eligible liabilities instruments would justify general prior permissions allowing, beyond market making, for the redemption of entire issues as part of liability management exercises. In this regard it is acknowledged that eligible liabilities are specific in that they do not count at all towards MREL-TLAC in the last year of maturity even though they formally remain eligible liabilities instruments. This contrasts with own funds which are perpetual, or subject to progressive amortisation in the last five years of maturity. As a result, there is a logic in calling eligible liabilities instruments ahead of the last year of maturity rather than running them off until the scheduled term, provided that such calls are allowed under the contractual terms of the instruments, which is unlikely to be the case for unsubordinated instruments that are eligible liabilities solely as a result of the grandfathering provisions. With the above consideration in mind, as part of this draft the limit in percentage of relevant issue is not being extended to eligible liabilities as it would not make it possible to reduce an entire issue. Nevertheless, stakeholder feedback would be invaluable to further substantiate why liability management operations would not be sufficiently covered, as for own funds, via ad-hoc permission and would require general prior permission.

Another reason for not retaining a limit in terms of percentage of a given issuance is that the general prior permission might apply to eligible liabilities which are not instruments or “issues”.

Finally, in reflecting on the need to set up limits for the general prior permission to reduce eligible liabilities, and as explained in the background section of this CP, the EBA has considered in particular the case of entities with a recapitalisation amount equal to zero (liquidation entities). While these entities would be subject to the permission regime for eligible liabilities under the legal provisions of the Level 1 text, it might be warranted to lift the proposed limits for this type of entities, since there would be no supervisory need/expectation that the entity has to be limited in terms of general prior permission to reduce the stock of eligible liabilities. Even in this case, it could be assumed that once grandfathered instruments will have matured, the concerned entities would not need to issue eligible liabilities instruments that would in all cases meet the relevant eligibility criteria, meaning that de facto the scope of the permission regime would also be narrowed concomitantly.

Question to stakeholders:

Q12. Do you agree that general prior permissions should not be confined only to market making? Why would liability management operations not be sufficiently covered, as for own funds, via ad-hoc permissions? Please substantiate based on concrete experience.

Q13. Is the maximum limit of 3% of the total amount of outstanding eligible liabilities instruments sufficient? If not, please explain which percentage value of outstanding eligible liabilities instruments you would suggest and justify based on your experience.

Q14. Would you see some good rationale for exempting certain types of entities from the limits foreseen in Article 32c? Please describe cases and substantiate your rationale.

Article 32c

Submission of application by the institution to reduce eligible liabilities instruments pursuant to Article 77(2) of Regulation (EU) No 575/2013

- 1. An institution shall submit an application for prior permission, including general prior permission, to the resolution authority before taking an action referred to in Article 77(2) of Regulation (EU) No 575/2013.**
- 2. Where a general prior permission under the second subparagraph of Article 78a(1) of Regulation (EU) No 575/2013 is sought, the predetermined amount referred to in the second last sentence of that provision shall not exceed 3 % of the total amount of outstanding eligible liabilities instruments.**
- 3. Paragraphs 1 and 2 shall apply at the individual, consolidated and sub-consolidated levels of application of requirements for own funds and eligible liabilities, where applicable.**

Explanatory box for Article 32d - Information requirements for eligible liabilities

Article 32d is the equivalent of Article 30 but for eligible liabilities. It details the information items which institutions have to provide along with their application.

A similar approach has been retained for both articles and it has been sought to define own funds, MREL and TLAC requirements in a consistent manner.

Point (c) under paragraph 1 concerns the requirements, while point (d) covers the supply of eligible liabilities instruments before and after the action taken in accordance with Article 77(2) CRR. In addition, point (d) attempts to break down the types of liabilities counting for the various requirements and their components by referring to the relevant CRR and BRRD provisions which are different for MREL, TLAC, internal MREL and internal TLAC, and also warrant specific references for subordinated and non-subordinated liabilities and structured notes.

Point (e) concerns institutions' assessment on how compliance with these requirements will be impacted by the reduction.

Point (f) has been complemented to include information on maturity, ranking, cost and timing of the issuance of the replacing instrument, as these are relevant elements in support of a request for permission under point (a) of Article 78a(1) CRR. Similar amendments have been applied to point (f) of Article 30(1) RTS to mirror the information requirements for the reduction of own funds.

Question to stakeholders:

Q15. Do you think the information required in Article 32d is appropriate? Please precise any change you would suggest and why. Please consider consistency with the prior permission regime for own funds.

Article 32d

Content of the application to be submitted by the institution for the purposes of Article 77(2) of Regulation (EU) No 575/2013

- 1. The application referred to in Article 32c shall be accompanied by the following information:**
 - (a) a well-founded explanation of the rationale for performing any of the actions referred to in Article 77(2) of Regulation (EU) No 575/2013;**

- (b) whether the permission sought is based on Article 78a(1)(a), (b) or (c) of Regulation (EU) No 575/2013, or on the second subparagraph of Article 78a(1) of that Regulation;
- (c) present and forward-looking information on the requirements laid down in Regulation (EU) No 575/2013 and Directives 2013/36/EU and 2014/59/EU applicable to the institution. The information shall cover at least a three year period and shall include:
- (i) the risk-based requirement for own funds and eligible liabilities under Articles 92a(1)(a) and 494(1)(a), or 92b of Regulation (EU) No 575/2013, where applicable, as well as the non-risk based requirement for own funds and eligible liabilities under Articles 92a(1)(b) and 494(1)(b), or 92b of that Regulation, where applicable;
 - (ii) the minimum requirement for own funds and eligible liabilities laid down in Article 45 of Directive 2014/59/EU calculated in accordance with Article 45e and 45f of that Directive, as applicable, of that Directive as the amount of own funds and eligible liabilities expressed as percentages of the total risk exposure amount of the relevant entity, calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, and the amount of own funds and eligible liabilities expressed as percentages of the total exposure measure of the relevant entity, calculated in accordance with Articles 429(4) and 429a of Regulation (EU) No 575/2013;
 - (iii) the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU;
- (d) present and forward-looking information on the level and composition of own funds and eligible liabilities held to ensure compliance, respectively, with the requirements referred to in point (c)(i) to (iii) above, before and after performing the action in Article 77(2) of Regulation (EU) No 575/2013. The information shall cover at least a three year period and with regard to eligible liabilities, shall include specifications of the following amounts, as applicable:
- (iv) liabilities which qualify as eligible liabilities instruments pursuant to Article 72b(2) of Regulation (EU) No 575/2013;

- (v) **liabilities which the resolution authority has permitted to qualify as eligible liabilities pursuant to Article 72b(3) or (4) of Regulation (EU) No 575/2013;**
 - (vi) **liabilities which are included in the amount of own funds and eligible liabilities of resolution entities pursuant to Article 45b(1) of Directive 2014/59/EU;**
 - (vii) **liabilities that arise from debt instruments with embedded derivatives included in the amount of own funds and eligible liabilities pursuant to Article 45(b)(2) of Directive 2014/59/EU;**
 - (viii) **liabilities issued by a subsidiary which qualify for inclusion in the consolidated eligible liabilities instruments of an institution subject to Article 92a of Regulation (EU) No 575/2013 pursuant to Article 88a of that Regulation or of a resolution entity pursuant to Article 45b(3) of Directive 2014/59/EU;**
 - (ix) **eligible liability instruments taken into account for the purpose of complying with the requirement for own funds and eligible liabilities for institutions that are material subsidiaries of non-EU G-SIIs pursuant to Article 92b(3) of Regulation (EU) No 575/2013 and for the purpose of complying with the minimum requirement for own funds and eligible liabilities for entities that are not themselves resolution entities, pursuant to point (a) of Article 45f(2) of Directive 2014/59/EU;**
- (e) **the institution's summary assessment on the impact of the action that the institution has planned to take in accordance with Article 77(2) of Regulation (EU) No 575/2013, and any such action that the institution additionally envisages to undertake within a three year period, on compliance with the requirements referred to in point (c)(i) to (iii) above;**
- (f) **where the institution seeks to replace eligible liabilities instruments pursuant to Article 78a(1)(a) Regulation (EU) No 575/2013:**
- (i) **information on the residual maturity of the replaced eligible liabilities instruments and the maturity of the own funds or eligible liabilities instruments replacing them;**

- (ii) **the ranking in insolvency of the replaced eligible liabilities instruments and of the own funds or eligible liabilities instruments replacing them;**
 - (iii) **the cost of the own funds or eligible liabilities instruments replacing the eligible liabilities instruments;**
 - (iv) **the planned timing of the issuance of the own funds or eligible liabilities instruments replacing the eligible liabilities instrument referred to in Article 77(2) of Regulation (EU) No 575/2013;**
 - (v) **the impact on the profitability of the institution pursuant to point (a) of Article 78a(1) of Regulation (EU) No 575/2013;**
- (g) **an evaluation of the risks to which the institution is or might be exposed, in particular whether the level of own funds and eligible liabilities ensures an appropriate coverage of such risks, including outcomes of stress tests on main risks evidencing potential losses;**
- (h) **where Article 78a(1)(c) of Regulation (EU) No 575/2013 applies, demonstration that the partial or full replacement of the eligible liabilities with own funds instruments is necessary to ensure compliance with the own funds requirements with the requirements referred to in point (c)(i) to (iii) above;**
- (i) **any other information considered necessary by the resolution authority for evaluating the appropriateness of granting a permission according to Article 78a of Regulation (EU) No 575/2013.**
2. **The resolution authority shall waive the submission of some of the information listed in paragraph 1 where it is satisfied that this information is already available to it.**
3. **Paragraphs 1 and 2 shall apply at the individual, consolidated and sub-consolidated levels of application of requirements, where applicable.**

Article 32e

Additional information to be submitted with the application for a general prior permission for actions listed in Article 77(2) of Regulation (EU) No 575/2013

1. **Where a general prior permission pursuant to the second subparagraph of Article 78a(1) of Regulation (EU) No 575/2013 for an action under Article 77(2) of that Regulation is sought, the institution shall specify in the application:**
 - (a) **the amount of each relevant outstanding issue; and**
 - (b) **the total amount of outstanding eligible liabilities, including the total amount of outstanding eligible liabilities that meet the conditions of Article 72b(2)(d) or Article 88a of Regulation (EU) No 575/2013.**

2. **An application for a general prior permission for an action under Article 77(2) of Regulation (EU) No 575/2013 for market making purposes may include eligible liabilities still to be issued, subject to specification of the final amounts referred to in points (a) and (b) of paragraph 1, as applicable, to be provided to the resolution authority following issuance.**

Explanatory box for consultation purpose - Article 32f – Timing of the application

On the basis of the EBA's mandate pursuant to Article 78a(3)(c) CRR, Article 32f of the RTS specifies the timing of the application to be submitted by the institution for a permission to reduce eligible liabilities instruments and the time period for processing such an application.

The drafting suggested for Article 32f sets the minimum time period for applying at four months before announcement to noteholders. This is done to allow resolution authorities sufficient time for interaction with the relevant competent authority as prescribed by Article 78a(3)(a) CRR. The drafting suggested is consistent with the time period currently foreseen in the SRB's interim policy on approval for early repayment.

This period of time only runs once a complete application and information has been transmitted.

That said, the EBA has observed that the general prior permission pursuant to the second subparagraph of Article 78a(1) CRR is limited to a period of one year, meaning that if the application period of four months is kept for all cases, institutions, once having obtained a general prior permission, would need to re-apply for the renewal of this permission already 8 months after it was first granted.

In this context, the EBA is considering whether the time period should be shortened in certain cases. For the first time approval of an application for general prior permission, resolution authorities will need to consult competent authorities in order to agree on the margin considered necessary, thus necessitating some additional time. The case where an institution applies for the renewal of a general prior permission that has already been granted once by the resolution authority, on the other hand, may not necessarily warrant the same level of supervisory scrutiny and/or interaction between authorities.

The added value that a reduction of the minimum time period that institutions need to apply in advance for the renewal of a general prior permission would bring, nevertheless, may be limited in practice. Institutions will know in advance whether they intend to continue any market-making activities for which they have obtained the general prior permission in the year before beyond the validity of this permission. Thus, they will factor into their annual planning the concrete date on which to apply for the renewal of the permission - whether this is 2, 3 or 4 months in advance of the renewal date will mainly have practical implications.

However, it could also be considered that the content of the application to be submitted by institutions under Articles 32d and 32e could be reduced in the context of the renewal of a general prior permission.

Question to stakeholders:

Q16. Do you consider the four months deadline in Article 32f appropriate? Would you consider making a difference between the individual prior permission pursuant to Article 78a(1) points (a), (b) or (c) CRR and the general prior permission pursuant to the 2nd subparagraph of Article 78a(1) CRR? In case the four months deadline was kept for first time applications for general prior permission, would you see merit in:

- a) shortening the deadline for applications for the renewal of the permission?**
 - b) adjusting the content of the application to be submitted to the competent authority?**
- Please provide some rationale. Also, please consider consistency with the prior permission regime for own funds.**

Article 32f

Timing of the application to be submitted by the institution and processing of the application by the resolution authority for the purposes of Article 77(2) of Regulation (EU) No 575/2013

- 1. The institution shall transmit a complete application and the information referred to in Articles 32d and 32e to the resolution authority at least four months in advance of the date where one of the actions listed in Article 77(2) of Regulation (EU) No 575/2013 will be announced to the holders of the instruments.**
- 2. Resolution authorities may allow institutions on a case-by-case basis and under exceptional circumstances to transmit the application referred to in paragraph 1 within a time frame shorter than the four months period.**

3. **The resolution authority shall process an application during either the period of time referred to in paragraph 1 or during the period of time referred to in paragraph 2. Resolution authorities shall take into account new information, where any is available and where they consider this information to be material, received during this period. The resolution authorities shall begin processing the application only when they are satisfied that the information required under Article 32d and, where applicable, 30e has been received from the institution.**

Explanatory box for consultation purpose - Article 32g

Article 78a(3)(a) CRR mandates the EBA to specify ‘the process of cooperation between the competent authority and the resolution authority’ in relation to permission to reduce eligible liabilities instruments.

Following the receipt of a complete prior permission application by the institution, the text outlines the procedural steps that the resolution and the competent authority shall follow to ensure their reciprocal consultation and cooperation. The article sets out the core elements of the cooperation process while leaving to authorities some flexibility to tailor the process to their internal procedures and specific circumstances. Where agreement is needed in accordance with Article 78a(1)(b) CRR, the draft article specifies the sequence of actions to be followed, taking into consideration the period needed to provide a response on the complete application received by the institution.

Article 32g

Process of cooperation between the competent authority and the resolution authority when granting the permission referred to in Article 78a of Regulation (EU) No 575/2013

1. **Where a complete application for prior permission, including a general prior permission, is submitted by an institution, the resolution authority shall promptly transmit the application received to the competent authority, including the information referred to in Articles 32d and, where applicable, 32e.**
2. **At the same time of the transmission of the information referred to in paragraph 1, the resolution authority shall make a request for consultation to the competent authority on the application received, which shall include the reciprocal exchange of any other relevant information for the assessment of the application by the resolution or competent authority.**
3. **The competent authority and the resolution authority shall agree on an adequate time limit for providing a response to the consultation referred to in paragraph 2, which shall not exceed three months from the moment of receipt**

- of the request for consultation. The resolution authority shall consider the views received from the competent authority before taking a decision on the permission.**
4. **Where the agreement of the competent authority is required in accordance with Article 78a(1)(b) of Regulation (EU) No 575/2013, the resolution authority shall communicate to the competent authority, within two months from the request for consultation referred to in paragraph 2, the proposed margin by which, following the action referred to in Article 77(2) of that Regulation, the resolution authority considers necessary that the own funds and eligible liabilities of the institution must exceed its requirements.**
 5. **Within three weeks after receiving the communication referred to in paragraph 4 the competent authority shall transmit its written agreement to the resolution authority. In the event that the competent authority disagrees or partially disagrees with the resolution authority, it shall inform the resolution authority within that period, stating its reasons.**
 6. **By way of derogation from paragraph 3, where the agreement of the competent authority is required in accordance with Article 78a(1)(b) of Regulation (EU) No 575/2013, the competent authority shall provide a response to the consultation referred to in paragraph 2 at the same time as the transmission of its written agreement to the resolution authority referred to in paragraph 5.**
 7. **By way of derogation from paragraphs 3 to 6, where the maximum time period for processing the application referred to in paragraph 1 is shorter than four months in accordance with Article 32f(3), the periods of time referred to in paragraphs 3 to 5 shall be agreed between the resolution authority and the competent authority taking into account the relevant maximum time period.**
 8. **The resolution authority and the competent authority shall endeavour to reach the agreement referred to in paragraph 5 in order to ensure that the application referred to in paragraph 1 is processed in any event within the period of time referred to in paragraph 3 of Article 32f.**
 9. **The resolution authority shall communicate to the competent authority without undue delay the decision taken on the permission. The resolution authority shall also inform the competent authority in case of withdrawal of the general prior permission where an institution breaches any of the criteria provided for the purposes of that permission.**
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Section 3

TEMPORARY WAIVER FROM DEDUCTION FROM OWN FUNDS **AND ELIGIBLE LIABILITIES**

Explanatory box for consultation purpose - Article 33

Article 33 of the RTS sets out the meaning of ‘temporary’ for the purposes of Article 79(1) CRR and stipulates the conditions according to which a competent authority may deem holdings to form part of a financial assistance operation designed to reorganise and save a relevant entity.

With CRR2, Article 79(1) has been amended to open the possibility to temporarily waive the application of deduction requirements also for eligible liabilities instruments. To reflect this change in the Level 1 text, Article 33 has been amended and now also refers to new holdings of eligible liabilities instruments.

As in Articles 25 and 26, the drafting draws on the terminology used in Article 79(1) CRR and distinguishes between own funds instruments of financial sector entities and eligible liabilities instruments of institutions.

An additional change is expected to be introduced via the CRR Corrigendum. This relates to the nature of the holdings that competent authorities may deem to be for the purposes of a financial assistance operation. Unlike in the previous version under CRR1, such holdings do not have to be temporary in nature to be suitable for a waiver from the provisions on deductions. This change has been reflected in Article 79(1) CRR, but it needs to be applied consistently also in paragraph 2 of this Article that includes the mandate for the EBA to develop draft regulatory technical standards to specify the concept of temporary [waiver] for the purposes of paragraph 1.

Article 33

*Temporary waiver from deduction from own funds **and eligible liabilities** for the purposes of Article 79(1) of Regulation (EU) No 575/2013*

1. A temporary waiver shall be of a duration that does not exceed the timeframe envisaged under the financial assistance operation plan. That waiver shall not be granted for a period longer than 5 years.
2. The waiver shall apply only in relation to new holdings of **own funds** instruments in ~~the~~ **a financial sector entity or eligible liabilities instruments in an institution** subject to the financial assistance operation.

3. For the purposes of providing a temporary waiver for deduction from own funds **and eligible liabilities, as applicable**, a competent authority may deem the ~~temporary~~ holdings referred to in Article 79(1) of Regulation (EU) No 575/2013 to be held for the purposes of a financial assistance operation designed to reorganise and save a financial sector entity **or institution** where the operation is carried out under a plan and approved by the competent authority, and where the plan clearly states phases, timing and objectives and specifies the interaction between the ~~temporary~~ holdings and the financial assistance operation.

5. Accompanying documents

1.3 Cost-benefit analysis / impact assessment

1. CRR2 amending Regulation (EU) No 575/2013 (CRR) modifies the existing requirements for own funds and introduces new requirements for eligible liabilities. The current RTS on own funds needs to incorporate these changes and be extended to eligible liabilities.
2. Additionally, the CRR2 includes two mandates to the EBA to specify some aspects of the requirements for eligible liabilities. Paragraph 7 of Article 72b of the CRR mandates the EBA to specify:
 - a. the applicable forms and nature of indirect funding of eligible liabilities instruments;
 - b. the form and nature of incentives to redeem that are a condition to qualify a specific instrument as eligible liability.
3. Article 78a(3) mandates the EBA to develop RTS to specify
 - a. the process of cooperation between the competent authority and the resolution authority;
 - b. the procedure, including the time limits and information requirements, for granting an ad-hoc permission;
 - c. the procedure, including the time limits and information requirements, for granting a general prior permission;
 - d. the meaning of 'sustainable for the income capacity of the institution'.
4. As per Article 10(1) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any RTS developed by the EBA shall be accompanied by an Impact Assessment (IA) annex which analyses 'the potential related costs and benefits' before submitting to the European Commission. Such annex shall provide the reader with an overview of the findings as regards the problem identification, the options identified to remove the problem and their potential impacts.
5. For the purposes of the IA section of the Consultation Paper, the EBA prepared the IA with cost-benefit analysis of the policy options included in the regulatory technical standards described in this Consultation Paper. Given the nature of the study, the IA is high-level and qualitative in nature.

Problem identification

6. The existing RTS is aligned with the own funds provisions in the CRR. Some of these provisions have been modified with CRR2 and an amendment of the RTS is necessary to be in line with the new provisions.
7. Additionally, CRR2 and BRRD2 have introduced new own funds and eligible liabilities requirements. Eligible liabilities are defined in the amended CRR. The EBA is mandated to further specify some of those criteria and therefore, the current RTS needs to be extended to eligible liabilities.

Policy objectives

8. The main objective of this RTS is to adapt the existing RTS to the new provisions introduced with CRR2.
9. As a result, the specific objectives are:
 - a. To update the current own funds requirements in line with the amended CRR.
 - b. To define harmonised criteria for qualifying as eligible liabilities with regard to the aspects included in the specific mandates introduced with CRR2 (Paragraph 7 of Article 72b and Article 78a(3))
10. The following can be identified as general objectives:
 - a. To increase the prudence as the specification of the criteria for eligible liabilities in the current RTS will provide more clarity and certainty about eligible liabilities.
 - b. To ensure high quality, stable eligible liabilities available to absorb losses and to reduce recapitalisation costs upon failure
 - c. To ensure consistency across own funds and eligible liabilities instruments where appropriate, and avoid unlevelled playing field between institutions meeting MREL with own funds, and institutions meeting MREL with own funds and eligible liabilities.

Baseline scenario

11. The current RTS contains specifications of requirements for own funds that are now not fully in line with the new or amended provisions introduced with CRR2. Additionally, several criteria underpinning eligible liabilities (indirect funding, incentives to redeem and permission regime) are currently not covered by the level 2 regulation.

Options considered

12. The modification of the current RTS to adapt the specifications of own funds requirements to the provisions in CRR2 is one of its main objectives. Nevertheless, this adaptation is a legal requirement, so no option has been considered. Likewise, provisions on indirect funding, incentives to redeem and sustainable replacement terms for eligible liabilities have been fully aligned with existing own funds provisions in line with the Level 1 text.

13. When drafting the present guidelines, the EBA considered several policy options under three main areas:

1) **Notice period for requesting permission to reduce own funds and eligible liabilities**

Option 1: To maintain the status quo and extend the existing notice period to eligible liabilities (3 months before the planned redemption date)

Option 2: To extend the notice period to 4 months before the redemption date to allow interaction between Competent Authorities and Resolution Authorities

Option 3: To extend the notice period to 4 months before the redemption date keeping some flexibility for specific cases (for example, for requesting the renewal of an existing permission)

2) **Procedure for requesting and granting permission to reduce eligible liabilities**

To define the permission regime, the following areas have been considered:

- Which activities are covered by the general permission regime for eligible liabilities
 - o Option 1: To limit the permission to market making activities
 - o Option 2: To also allow the use of the permission for liability management with some limitations
- Which are the limits of the general permission regime
 - o Option 1: Not to define a limit for the use of the general permission regime
 - o Option 2: To include a limit based on the percentage of the issuance
 - o Option 3: To include a limit based on the percentage of the stock
 - o Option 4: To include a limit based on the percentage of surplus
- To specify a deduction regime in case of general prior permission to reduce eligible liabilities
 - o Option 1: Not to deduct the eligible liabilities covered by the permission
 - o Option 2: To fully deduct those instruments upfront
 - o Option 3: To deduct those instruments with a derogation during the MREL transitional period
- To specify the treatment of senior instruments, and the treatment of liquidation and waived entities.
 - o Option 1: To apply a broad permission regime (same treatment as for other instruments/entities)
 - o Option 2: To apply a broad permission regime with a transitional period
 - o Option 3: To establish adjusted procedural requirements for liquidation and waived entities.

Assessment of the options and the preferred option(s)

14. Regarding the notice period for requesting permission for the reduction of own funds and eligible liabilities, since the MREL requirements are applicable, the assessment for granting permission for the redemption of a specific instrument will require interaction between the Competent Authority (CA) and the Resolution Authority (RA), as the redemption of instruments may have implications in both, the level of capital ratios and the level of MREL. To allow for this interaction, the current 3 months' notice period does not seem sufficient.
15. Nevertheless, the extension of the notice period will imply an extra burden for institutions as they will need to react earlier to request the permission for redemption. This becomes especially important for those cases where the request seeks the renewal of a permission for redemption previously obtained. Considering that the permission, as established in the Level 1 text, may only be granted for a period not exceeding one year, the obligation to request the renewal of the permission at least 4 months in advance of any envisaged action to reduce own funds or eligible liabilities, will imply an additional burden for institutions as there will be a short period of time between requests.
16. The inclusion of some flexibility defining a shorter notice period for requesting the renewal of permission might potentially reduce this burden. Nevertheless, the additional time for interaction between CA and RA would still be needed in these cases. Additionally, the period of 4 months to request the permission is the maximum time that the authorities have to evaluate and grant/reject the permission. The authorities could in any case shorten that period and grant/reject the permission earlier where less time is needed. For these reasons, the preferred option is Option 2: To extend the notice period to 4 months before the redemption date to allow interaction between National Competent Authorities and Resolution Authorities.
17. Regarding the procedure for requesting and granting permission to reduce eligible liabilities, the following areas have been considered:
 - a. Regarding which activities are covered by the general permission regime for eligible liabilities, at this stage and subject to stakeholder feedback, Option 2 would allow other liability management operations in addition to market making. Contrary to own funds which are perpetual and/or subject to progressive amortisation in the remaining years of maturity, MREL is subject to a one year maturity threshold below which instruments are 100% discounted. As a result, there might be increased necessity for institutions to redeem entire issues when approaching the deadline, provided that contractual terms contain call possibilities for the issuer. For this reason, it might be necessary to also allow for general prior permission to redeem beyond market making. Therefore, the preferred option is Option 2: To also allow the use of the permission for liability management with some limitations
 - b. Regarding the limits to apply to the general permission regime, limits are seen as an inherent safeguard to general prior permission. Whereas for an ad hoc

permission, the authority can ascertain the position of the bank vis-a-vis its requirement before and after the reduction, this is not the case for a general permission which will be exercised over a longer period of time and in contingent conditions. In order to keep a prudent approach taking into account that liability management operations would be allowed, the implementation of some limits is necessary to avoid any likely significant deterioration of the MREL and TLAC position of the bank. Although a breach of requirements would not mechanically and immediately cause a failure of the institution, it may lead to a number of remedial measures including restrictions of distributions.

A limit as a percentage of an issuance would preclude redeeming entire issues in the context of a liability management exercise and therefore this limit, currently applicable to own funds, has not been retained. Considering limits in percentage of surplus and in percentage of outstanding eligible liabilities instruments set out as for own funds, taking into account the commonalities between eligible liabilities and AT1/T2 instruments, the latter is the preferred option (Option 3).

- c. Regarding the deduction of eligible liabilities, the deduction obligation for own funds prevents institutions from operating at a level of own funds which fails to reflect that part of the capital may soon disappear and will not be there any longer to absorb losses. The same logic applies for eligible liabilities and therefore, those for which general permission to redeem have been granted, should be deducted from MREL and TLAC eligible instruments. Separately, the MREL requirement will be compulsory by 2024 after the end of the transitional period. Despite the transitional period, the inclusion of the full deduction upfront should not have an undesired effect during the transitional period because, by definition, institutions are not yet required to comply with these requirements at this stage. Additionally, deductions from own funds have been applied similarly during the transitional period in the past. For these reasons, the preferred option is Option 2: To fully deduct instruments with GPP upfront
- d. Regarding, the specification of the treatment of senior instruments, and the treatment of liquidation and waived entities, it may seem unnecessary to subject instruments issued by entities that are not subject to MREL requirements to the tight permission control defined for eligible liabilities issued by other entities as the redemption of the full stock of eligible liabilities will not imply the breach of the MREL requirements for those entities. In the same way, it may not seem necessary to apply the same tight permission control to legacy senior instruments which may be eligible solely during a transitional period as a result of the grandfathering of the new eligibility criteria in the CRR. Nevertheless, the scope of Article 78a of the CRR does not exclude those instruments.

The option of including a transitional arrangement (Option 2) would allow the application of the tight permission control only during the time those instruments

are eligible for MREL. Nevertheless, as the CRR has significantly strengthened the eligibility criteria for MREL, it is likely that going forward a smaller share of senior instruments will fall under the ambit of MREL in the future, concomitantly reducing the scope of the permission requirement. Banks will also be inclined to design their contractual arrangements in a more explicit manner to either meet the MREL requirement (and be subject to permission control) or issue for other purposes (and not be subject to the permission regime).

These considerations reduce the concern over unintended consequence of a broad permission regime for senior instruments and disproportionate impact and for this reason, we would caution against a general watering down. What is more, this option will not solve the problem of instruments issued by entities not subject to MREL requirements. The option of establishing the permission regime with some relaxations for entities not subject to MREL requirements, (e.g. limit up to 100% of the stock of outstanding liabilities) would reduce the excessive burden to these institutions, but a more relaxed regime may not be necessary after the phase out of legacy instruments.

As the scope of Article 78a of the CRR includes senior instruments and instrument issued by entities not subject to MREL requirements (waived entities and entities in liquidation) and it is not clear that the additional burden for those entities/instruments will remain beyond the end of the transition period, it seems unnecessary to deviate from the general permission regime. Therefore, the preferred option is Option 1: To apply a broad permission regime (same treatment as for other instruments/entities).

1.4 Overview of questions for consultation

Respondents are invited to comment in particular on the following questions:

- Q1. What is the percentage of senior non-preferred and senior preferred liabilities in relation to total liabilities for the institution(s) you represent? Within the senior-preferred layer, what is the percentage of eligible to non-eligible liabilities for this/these institution(s)?

The CRR2 introduces new granular eligibility criteria for eligible liabilities related, inter alia, to acceleration, set-off and netting, reference to write down and conversion etc. and the requirement that the instrument be subject to permission. However, some of these criteria are grandfathered indefinitely for existing instruments (legacy instruments) under Article 72b(2)(n) or Article 494b(3) CRR.

- Q2. What is the quantitative significance and maturity distribution, for the institution(s) you represent, of unsubordinated instruments that are eligible liabilities solely as a result of the grandfathering provisions under Article 72b(2)(n) or Article 494b(3) of the CRR, compared to unsubordinated instruments qualifying under their own right as MREL, total MREL eligible liabilities and total liabilities? Do these instruments contain call options?
- Q3. Once the stock of legacy instruments described above is exhausted, instruments will only be eligible to MREL if they meet all eligibility criteria, including the new criteria. Do you expect that, as a result, going forward the amount of eligible liabilities as a share of senior instruments, would be narrowed concomitantly with the scope of the permission requirement?
- Q4. It is recalled that, as per the mandate to the EBA, the RTS on eligible liabilities for the purpose of indirect funding has to be fully aligned with the one on own funds. Are the interactions and consequences of the rules on direct and indirect funding appropriately described and captured for eligible liabilities and resolution groups?
- Q5. Would you agree that the existing percentage values for the thresholds are still suitable? If not please provide evidence and rationale for having different values.
- Q6. Do you consider that the general prior permission as per the 2nd subparagraph of Article 78(1) CRR, with the limits included therein, would be sufficient to cater for permissions to repurchase own funds instruments then to be passed on to employees as part of their remuneration (former Article 29(4) of the RTS), in addition to market making and other repurchase activities? Would you consider any derogations to be needed (in particular in terms of limits and one-year timeframe)?
- Q7. Do you agree that the provision regarding permission for immaterial amounts to be called, redeemed or repurchased (former Article 29(5) of the RTS) is no longer needed? If you disagree please provide a substantiated rationale.
- Q8. Is the information required appropriate? Please specify any change you would make and why. Please consider consistency with the prior permission regime for eligible liabilities instruments.

- Q9. Do you consider the four months deadline appropriate? Would you consider making a difference between the individual permissions pursuant to Article 78(1) points (a) or (b) CRR and the general prior permission pursuant to the 2nd subparagraph of Article 78(1) CRR? In case the four months deadline was kept for first time applications for general prior permission, would you see merit in:
- a) shortening the deadline for applications for the renewal of the permission?
 - b) adjusting the content of the application to be submitted to the competent authority?

Please provide some rationale. Also, please consider consistency with the prior permission regime for eligible liabilities instruments.

- Q10. It is recalled that, as per the mandate to the EBA, the RTS on eligible liabilities for the purpose of specifying the meaning of sustainable for the income capacity of the institution has to be fully aligned with the one on own funds. Do you see any unintended consequences stemming from the drafting of Article 32a?
- Q11. Do you consider the deduction rules appropriate for eligible liabilities? If not, what would be the rationale for departing from the rules applicable for own funds?
- Q12. Do you agree that general prior permissions should not be confined only to market making? Why would liability management operations not be sufficiently covered, as for own funds, via ad-hoc permissions? Please substantiate based on concrete experience.
- Q13. Is the maximum limit of 3% of the total amount of outstanding eligible liabilities instruments sufficient? If not, please explain which percentage value of outstanding eligible liabilities instruments you would suggest and justify based on your experience.
- Q14. Would you see some good rationale for exempting certain types of entities from the limits foreseen in Article 32c? Please describe cases and substantiate your rationale.
- Q15. Do you think the information required in Article 32d is appropriate? Please precise any change you would suggest and why. Please consider consistency with the prior permission regime for own funds.
- Q16. Do you consider the four months deadline in Article 32f appropriate? Would you consider making a difference between the individual prior permission pursuant to Article 78a(1) points (a), (b) or (c) CRR and the general prior permission pursuant to the 2nd subparagraph of Article 78a(1) CRR? In case the four months deadline was kept for first time applications for general prior permission, would you see merit in:
- a) shortening the deadline for applications for the renewal of the permission?
 - b) adjusting the content of the application to be submitted to the competent authority?

Please provide some rationale. Also, please consider consistency with the prior permission regime for own funds.

6. Annex – Amending Regulation

Note of caution

While the consultation paper contains a consolidated version of the revised RTS on own funds and eligible liabilities for ease of review, the RTS will formally be delivered by way of an amending Regulation.

This document is provided as an indication of how the amending Regulation will look like. Note that minor discrepancies may subsist with the consolidated version, which will be addressed before publication.

COMMISSION DELEGATED REGULATION (EU) No .../..

amending Delegated Regulation (EU) No 241/2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for own funds requirements for institutions

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 648/2012¹⁴, and in particular third subparagraph of Article 28(5); third subparagraph third subparagraph of Article 29(6); third subparagraph of Article 52(2); fourth subparagraph of Article 72b(7); third subparagraph of Article 76(4); third subparagraph of Article 78(5); fourth subparagraph of Article 78a(3); and third subparagraph of Article 79(2) thereof,

Whereas:

- (1) Regulation (EU) No 2019/876 of the European Parliament and of the Council¹⁵, amended, inter alia, the prudential requirements for own funds as set out by Regulation (EU) No 575/2013 in various aspects. Amongst these are changes of the

¹⁴ OJ L 176, 27.6.2013, p. 1.

¹⁵ OJ L 150, 19.6.2019, p. 1.

terminology used in a number of articles. In order to reflect these changes appropriately, the provisions in Commission Delegated Regulation (EU) No 241/2014¹⁶ providing further specification on the articles concerned should be amended in a consistent manner.

- (2) Regulation (EU) No 2019/876 also introduced into Regulation (EU) No 575/2013 new requirements for own funds and eligible liabilities for G-SIIs and material subsidiaries of non-EU G-SIIs, as well as harmonised criteria for eligible liabilities items and instruments for the purposes of complying with those requirements. Some of those requirements should be further specified in this Regulation.
- (3) Regulation (EU) No 575/2013 made the eligibility of own funds instruments conditional on them not being funded directly or indirectly by the institution. Regulation (EU) 2019/876 extended this condition to eligible liabilities instruments, with the difference that, in line with the TLAC standard, it refers to the resolution entity rather than to the institution. Therefore, since Regulation (EU) No 575/2013 mandates the EBA to draft regulatory technical standards that are fully aligned with the delegated act referred to in point (a) of Article 28(5) of Regulation (EU) No 575/2013, the respective provisions of Commission Delegated Regulation (EU) No 241/2014 which specify the applicable forms and nature of indirect funding for own funds instruments should be amended accordingly to also cover eligible liabilities instruments.
- (4) Rules on direct and indirect funding should capture funding chains maintaining risks within a group, whether they involve an external investor. To avoid circumvention of the rules, in order to conclude that capital instruments or liabilities are directly funded by an institution or resolution entity, it should not be necessary that the funding is provided by that institution or resolution entity, as long it is provided by an entity in the scope of prudential or accounting consolidation of the institution or resolution entity, the institutional protection scheme or the network of institutions affiliated to a central body to which it belongs or its scope of supplementary supervision.
- (5) Regulation (EU) No 575/2013 also made the eligibility of additional Tier 1 instruments and Tier 2 instruments conditional upon the absence of any incentive for their principal amount to be redeemed. This criterion has been extended by Regulation (EU) No 2019/876 to eligible liabilities instruments as well, with the difference that incentives to redeem are accepted in the cases referred to in Article 72c(3) of Regulation (EU) No 575/2013. Therefore, and in line with the mandate for the EBA to draft regulatory technical standards that are fully aligned with the delegated act referred in point in point (a) of Article 52(2) of Regulation (EU) No 575/2013, the respective provisions of Commission Delegated Regulation (EU) No 241/2014 should be amended to also cover eligible liabilities instruments.
- (6) The requirements for own funds and eligible liabilities in Regulation (EU) No 575/2013 and in Directive 2014/59/EU of the European Parliament and of the

¹⁶ Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for own funds requirements for institutions (OJ L 74, 14.3.2014, p. 8).

Council¹⁷ pursue the same objective of ensuring that institutions have sufficient loss absorption capacity. For this reason, the eligibility criteria for eligible liabilities instruments introduced by that in Regulation (EU) No 575/2013 were extended, with the exception of the subordination criterion referred to in Article 72b(2)(d) of that Regulation, to liabilities eligible for meeting the minimum requirement for own funds and eligible liabilities (MREL) by virtue of the first subparagraph of Article 45b(1) of that Directive. In relation to resolution entities of G-SIIs and Union material subsidiaries of non-EU G-SIIs, Directive 2014/59/EU made the eligibility of liabilities for meeting the MREL, as provided for in Article 45d(1)(a) and (2)(a) in conjunction with the second subparagraph of Article 45b(1) of that Directive, conditional upon their compliance with the eligibility criteria for eligible liabilities instruments, including the criterion that the liabilities may not be funded directly or indirectly by the institution, as set out in that Regulation. Similarly, in relation to entities that are not resolution entities, Article 45f(2)(ii) and (v) of Directive 2014/59/EU also made the eligibility of such liabilities subject to the compliance with certain eligibility criteria for eligible liabilities instruments and to the acquisition of ownership of the liabilities not being funded directly or indirectly by the entity that is subject to that Article, respectively. Therefore, the provisions of this Regulation related to direct and indirect funding of eligible liabilities instruments should also be applied in a consistent manner for the purposes of Articles 45b(1) and 45f(2)(a)(v) of Directive 2014/59/EU.

- (7) With regard to index holdings, Regulation (EU) No 2019/876 extended the scope of the prior permission to be granted by the competent authority - allowing an institution to use a conservative estimate of the underlying exposure of the institution to instruments included in indices - to eligible liabilities instruments of institutions. Accordingly, the provisions of Commission Delegated Regulation (EU) No 241/2014 regarding estimates used as an alternative to the calculation of underlying exposures to own funds instruments included in indices being “sufficiently conservative” and the meaning of “operationally burdensome” should be amended to also apply with regard to eligible liabilities instruments.
- (8) Based on a concept previously existing under Commission Delegated Regulation (EU) No 241/2014 and supplementing the prior permission regime for the reduction of own funds, Regulation (EU) No 2019/876 introduced into Regulation (EU) No 575/2013 the possibility to grant to institutions a general prior permission to reduce own funds for a predetermined amount and a limited period of time. Preconditions and limits originally applicable to a prior permission for market-making purposes under that Delegated Regulation would now be embedded in the general prior permission pursuant to the new rules. The respective provisions of this Regulation should be amended to reflect this accordingly.
- (9) Regulation (EU) No 575/2013 requires institutions to obtain prior permission of the resolution authority to effect the call, redemption, repayment or repurchase of eligible liabilities instruments. The permission must be granted subject to a number

¹⁷ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

of conditions, including where the institution replaces the eligible liabilities instruments with own funds or eligible liabilities instruments of equal or higher quality at terms that are sustainable for the income capacity of the institution. For these purposes, the meaning of ‘sustainable for the income capacity of the institution’ and a detailed and comprehensive procedure for granting a permission to reduce eligible liabilities instruments, including the process of cooperation between the competent authority and the resolution authority, should be specified. Since Regulation (EU) No 575/2013, as amended by Regulation (EU) No 2019/876, requires the meaning of ‘sustainable for the income capacity of the institution’ to be fully aligned with its equivalent for own funds, and given that the characteristics for a permission regime for reducing eligible liabilities instruments are broadly similar to the regime envisaged for the permission to reduce own funds, this Regulation should specify the permission regime for eligible liabilities instruments in a manner consistent with the former. In addition, in order to ensure compliance with own funds requirements laid down in Regulation (EU) No 575/2013 and Directive 2013/36/EU, the process of cooperation between the competent authority and the resolution authority should include consultation with the competent authority on the application for permission received by the resolution authority, in a way that enables the competent authority to express an informed view on the consultation, including where its agreement is required for establishing the margin by which the institution’s own funds and eligible liabilities must exceed its requirements, with an adequate exchange of information and sufficient time to respond to the consultation.

- (10) In order to prevent possible regulatory arbitrage between own funds and eligible liabilities instruments, and to ensure a consistent approach across the EU, the predetermined amount set by resolution authorities when granting the general prior permission to reduce eligible liabilities instruments should be subject to limits. This is without prejudice to the need for the resolution authority, taking into consideration the specific circumstances of the case, to set a lower predetermined amount for a particular institution. In addition, both for own funds and eligible liabilities, in case of a general prior permission, the predetermined amount for which the relevant authority has given its permission should be deducted from the moment the authorisation is granted.
- (11) Regulation (EU) No 2019/876 expands the scope of the temporary waiver that competent authorities may grant to institutions for holdings in a financial sector entity from the deduction requirement where such holdings are deemed to provide financial assistance to that entity with a view to safeguard its viability, to eligible liabilities instruments of an institution. As a result, the provisions of Commission Delegated Regulation (EU) No 241/2014 originally developed for institutions’ holdings of capital instruments in financial sector entities should be amended to also apply to institutions’ holdings of eligible liabilities instruments in financial sector entities.
- (12) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authority (European Banking Authority) (EBA) to the Commission.
- (13) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in

accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council.

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) No 241/2014

Delegated Regulation (EU) No 241/2014 is amended as follows:

(1) The title is replaced by the following:

‘Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds and Eligible Liabilities requirements for institutions’;

(2) Article 1 is amended as follows:

(a) Point (c) is replaced by the following:

‘(c) the applicable forms and nature of indirect funding of own funds instruments, according to Article 28(5) of Regulation (EU) No 575/2013 and eligible liabilities instruments according to Article 72b(7)(a) of that Regulation;’;

(b) the following point (hh) is added:

‘(hh) the form and nature of incentives to redeem for the purpose of the condition set out in point (g) of the first subparagraph of Article 72b(2) and Article 72c(3) of Regulation (EU) No 575/2013, according to Article 72b(7)(b) of that Regulation;’;

(c) point (i) is replaced by the following:

‘(i) the extent of conservatism required in estimates used as an alternative to the calculation of underlying exposures for indirect holdings arising from index holdings and the meaning of operationally burdensome for the institution to monitor those

underlying exposures, according to points (a) and (b) of Article 76(4) of Regulation (EU) No 575/2013;’;

(d) the following point (jj) is added:

‘(jj) the procedure, including the time limits and information requirements, for granting the permission to reduce eligible liabilities instruments, and the process of cooperation between the competent authority and the resolution authority according to Article 78a(3) of Regulation (EU) No 575/2013;’;

(e) point (k) is replaced by the following:

‘(k) the conditions for a temporary waiver for deduction from own funds and eligible liabilities to be provided, according to Article 79(2) of Regulation (EU) No 575/2013;’;

(3) the title of Chapter II is replaced by the following:

‘ELEMENTS OF OWN FUNDS AND ELIGIBLE LIABILITIES’;

(4) In Chapter II, the title of Section 1 is replaced by the following:

‘Common Equity Tier 1 capital and eligible liabilities items and instruments’;

(5) In Article 4(2), a new point (kk) is inserted:

‘(kk) in Lithuania: institutions registered as ‘Centrinė kredito unija’ under the ‘Centrinų kredito unijų įstatymas’;’;

(6) Articles 8 and 9 are replaced by the following:

‘Article 8

Indirect funding of capital instruments for the purposes of Article 28(1)(b), Article 52(1)(c), and Article 63(c), and of liabilities for the purpose of Article 72b(2)(c) of Regulation (EU) No 575/2013

1. Indirect funding of capital instruments under Article 28(1)(b), Article 52(1)(c) and Article 63(c), and liabilities under Article 72b(2)(c) of Regulation (EU) No 575/2013 shall be deemed funding that is not direct.
2. For the purposes of paragraph 1, direct funding shall refer to situations where an institution or, in the case of liabilities, resolution entity, has granted a loan or other funding in any form to an investor that is used for the acquisition of ownership of the institution’s capital instruments or liabilities.

3. Direct funding shall also include funding granted for other purposes than acquiring ownership of the capital instruments or liabilities of an institution, to any natural or legal person who has a qualifying holding in the institution or resolution entity, as referred to in Article 4(36) of Regulation (EU) No 575/2013, or who is deemed to be a related party within the meaning of the definitions in paragraph 9 of International Accounting Standard 24 on Related Party Disclosures as applied in the Union according to Regulation (EC) No 1606/2002 of the European Parliament and of the Council¹⁸, taking into account any additional guidance as defined by the competent authority for capital instruments, or the resolution authority in consultation with the competent authority for liabilities, if the institution or, in the case of liabilities, resolution entity is not able to demonstrate all of the following:
 - (a) the transaction is realised at similar conditions as other transactions with third parties;
 - (b) the natural or legal person or the related party does not have to rely on the distributions or on the sale of the capital instruments or liabilities held to support the payment of interest and the repayment of the funding.

Article 9

Applicable forms and nature of indirect funding of capital instruments for the purposes of Article 28(1)(b), Article 52(1)(c) and Article 63(c), and of liabilities for the purpose of Article 72b(2)(c) of Regulation (EU) No 575/2013

1. The applicable forms and nature of indirect funding of the acquisition of ownership of the capital instruments and liabilities of an institution shall include the following:
 - (a) funding of an investor's acquisition of ownership, at issuance or thereafter, of ~~an~~ the capital instruments or liabilities of an institution by any entities on which the institution or, in the case of liabilities, resolution entity has a direct or indirect control or by entities included in any of the following:
 - (1) the scope of accounting or prudential consolidation of the institution or, in the case of liabilities, resolution entity;
 - (2) the scope of the consolidated balance sheet or extended aggregated calculation, where equivalent to consolidated accounts as referred to in

¹⁸ Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, (OJ L 243, 11.9.2002, p. 1).

Article 49(3)(a)(iv) of Regulation (EU) No 575/2013, that is drawn up by the institutional protection scheme or the network of institutions affiliated to a central body that are not organised as a group to which the institution or, in the case of liabilities, resolution entity belongs;

- (3) the scope of supplementary supervision of the institution or, in the case of liabilities, resolution entity in accordance with Directive 2002/87/EC of the European Parliament and of the Council¹⁹ on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate;
- (b) funding of an investor’s acquisition of ownership, at issuance or thereafter, of the capital instruments or liabilities of an institution by external entities that are protected by a guarantee or by the use of a credit derivative or are secured in some other way so that the credit risk is transferred to the institution or, in the case of liabilities, resolution entity, or to any entities on which that institution or resolution entity has a direct or indirect control or any entities included in any of the following:
- (1) the scope of accounting or prudential consolidation of the institution or, in the case of liabilities, resolution entity;
 - (2) the scope of the consolidated balance sheet or extended aggregated calculation, where equivalent to consolidated accounts as referred to in Article 49(3)(a)(iv) of Regulation (EU) No 575/2013, that is drawn up by the institutional protection scheme or the network of institutions affiliated to a central body that are not organised as a group to which the institution or, in the case of liabilities, resolution entity belongs;
 - (3) the scope of supplementary supervision of the institution or, in the case of liabilities, resolution entity in accordance with Directive 2002/87/EC.
- (c) funding of a borrower that passes the funding on to the ultimate investor for the acquisition of ownership, at issuance or thereafter, of the capital instruments or liabilities of an institution.
2. In order to be considered as indirect funding for the purposes of paragraph 1, the following conditions shall also be met, where applicable:

¹⁹ Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (OJ L 35, 11.2.2003, p. 1).

(a) the investor is not included in any of the following:

- (1) the scope of accounting or prudential consolidation of the institution or, in the case of liabilities, resolution entity;
- (2) the scope of the consolidated balance sheet or extended aggregated calculation, where equivalent to consolidated accounts as referred to in Article 49(3)(a)(iv) of Regulation (EU) No 575/2013, that is drawn up by the institutional protection scheme or the network of institutions affiliated to a central body that are not organised as a group to which the institution or, in the case of liabilities, resolution entity belongs. For this purpose an investor is deemed to be included in the scope of the extended aggregated calculation if the relevant capital instrument or liability is subject to consolidation or extended aggregated calculation in accordance with Article 49(3)(a)(iv) of Regulation (EU) No 575/2013 in a way that the multiple use of own funds or eligible liabilities items and any creation of own funds or eligible liabilities between members of the institutional protection scheme is eliminated. Where the permission from competent authorities referred to in Article 49(3) of Regulation (EU) No 575/2013 has not been granted, this condition shall be deemed to be met where both the entities referred to in paragraph 1(a) and the institution or, in the case of liabilities, resolution entity are members of the same institutional protection scheme and the entities deduct the funding provided for the acquisition of ownership of the capital instruments or liabilities of the institution, according to Articles 36(1)(f) to (i), Article 56(a) to (d) and Article 66(a) to (d), for capital instruments, and according to Article 72e(a) to (d) of Regulation (EU) No 575/2013, for liabilities, as applicable;
- (3) the scope of the supplementary supervision of the institution or, in the case of liabilities, resolution entity in accordance with Directive 2002/87/EC;

(b) the external entity is not included in any of the following:

- (1) the scope of accounting or prudential consolidation of the institution or, in the case of liabilities, resolution entity;
- (2) the scope of the consolidated balance sheet or extended aggregated calculation, where equivalent to consolidated accounts as referred to in Article 49(3)(a)(iv) of Regulation (EU) No 575/2013, that is drawn up by the institutional protection scheme or the network of institutions affiliated to a

central body that are not organised as a group to which the institution or, in the case of liabilities, resolution entity belongs;

(3) the scope of the supplementary supervision of the institution or, in the case of liabilities, resolution entity in accordance with Directive 2002/87/EC.

3. When establishing whether the acquisition of ownership of a capital instrument or liability involves direct or indirect funding in accordance with Article 8, the amount to be considered shall be net of any individually assessed impairment allowance made.
4. In order to avoid a qualification of direct or indirect funding in accordance with Article 8 and where the loan or other form of funding or guarantees is granted to any natural or legal person who has a qualifying holding in the institution or who is deemed to be a related party as referred to in paragraph 3 of Article 8, the institution or, in the case of liabilities, resolution entity shall ensure on an on-going basis that it has not provided the loan or other form of funding or guarantees for the purpose of acquiring ownership directly or indirectly of capital instruments or liabilities of the institution. Where the loan or other form of funding or guarantees is granted to other types of parties, the institution or, in the case of liabilities, resolution entity shall make this control on a best effort basis.
5. With regard to mutuals, cooperative societies and similar institutions, where there is an obligation under national law or the statutes of the institution for a customer to subscribe capital instruments in order to receive a loan, that loan shall not be considered as a direct or indirect funding where all of the following conditions are met:
 - (a) the amount of the subscription is considered immaterial by the competent authority;
 - (b) the purpose of the loan is not the acquisition of ownership of capital instruments or liabilities of the institution providing the loan;
 - (c) the subscription of one or more capital instruments of the institution is necessary in order for the beneficiary of the loan to become a member of the mutual, cooperative society or similar institution.’;

(7) the title of Chapter III is replaced by the following:

‘ADDITIONAL TIER 1 CAPITAL AND ELIGIBLE LIABILITIES’

(8) Article 20 is amended as follows:

(a) the title is replaced by the following:

‘Form and nature of incentives to redeem for the purposes of Articles 52(1)(g), 63(h), 72b(2)(g) and 72c(3) of Regulation (EU) No 575/2013’;

(b) paragraph 1 is replaced by the following:

‘1. Incentives to redeem shall mean all features that provide, at the date of issuance, an expectation that the capital instrument or the liability is likely to be redeemed.’;

(9) Article 25 is replaced by the following:

‘Article 25

Extent of conservatism required in estimates for calculating exposures used as an alternative to the underlying exposures for the purposes of Article 76(2) of Regulation (EU) No 575/2013

1. An estimate is sufficiently conservative when either of the following conditions is met:

- (a) where the investment mandate of the index specifies that an own funds instrument of a financial sector entity or an eligible liabilities instrument of an institution which is part of the index cannot exceed a maximum percentage of the index, the institution uses that percentage as an estimate for the value of the holdings that is deducted from its Common Equity Tier 1, Additional Tier 1, Tier 2 items, as applicable in accordance with paragraph 2 of Article 17 or from Common Equity Tier 1 capital in situations where the institution cannot determine the precise nature of the holding, or, for an institution subject to Article 92a of Regulation (EU) No 575/2013, its eligible liabilities items;
- (b) where the institution is unable to determine the maximum percentage referred to in point (a) and where the index, as evidenced by its investment mandate or other relevant information, includes own funds instruments of financial sector entities or eligible liabilities instruments of institutions, the institution deducts the full amount of the index holdings from its Common Equity Tier 1, Additional Tier 1, or Tier 2 items, as applicable in accordance with Paragraph 2 of Article 17 or from Common Equity Tier 1 capital in situations where the institution cannot determine the precise

nature of the holding, or, for an institution subject to Article 92a of Regulation (EU) No 575/2013, its eligible liabilities items.

2. For the purposes of paragraph 1, the following shall apply:

- (a) an indirect holding arising from an index holding comprises the proportion of the index invested in the Common Equity Tier 1, Additional Tier 1 and Tier 2 instruments of financial sector entities and in eligible liabilities instruments of institutions included in the index;
- (b) an index includes, but is not limited to, index funds, equity or bond indices or any other scheme where the underlying instrument is an own funds instrument issued by a financial sector entity or an eligible liabilities instrument issued by an institution.

(10) In Article 26, paragraph 1 is replaced by the following:

- ‘1. For the purpose of Article 76(3) of Regulation (EU) No 575/2013, operationally burdensome shall mean situations under which look-through approaches to capital holdings in financial sector entities or to eligible liabilities holdings in institutions on an ongoing basis are unjustified, as assessed by the competent authorities. In their assessment of the nature of operationally burdensome situations, competent authorities shall take into account the low materiality and short holding period of such positions. A holding period of short duration shall require the strong liquidity of the index to be evidenced by the institution.’;

(11) SECTION 2 is replaced by the following:

‘SECTION 2

Permission for reducing own funds and eligible liabilities

Subsection 1

Supervisory permission for reducing own funds

Article 27

Meaning of sustainable for the income capacity of the institution for the purposes of Articles 78(1)(a) and (4)(d) of Regulation (EU) No 575/2013

Sustainable for the income capacity of the institution under point (a) of Article 78(1) and under point (d) of Article 78(4) of Regulation (EU) No 575/2013 shall mean that the profitability of the institution, as assessed by the competent authority, continues to be sound or does not see any negative change after the replacement of the instruments or

the related share premium accounts referred to in Article 77(1) of that Regulation with own funds instruments of equal or higher quality, at that date and for the foreseeable future. The competent authority's assessment shall take into account the institution's profitability in stress situations.

Article 28

Process requirements including the limits and procedures for an application by an institution to reduce own funds pursuant to Article 77(1) of Regulation (EU) No 575/2013

1. Redemptions, reductions and repurchases of own funds instruments shall not be announced to holders of the instruments before the institution has obtained the prior permission of the competent authority.
2. Where the actions listed in Article 77(1) of Regulation (EU) No 575/2013 are expected to take place with sufficient certainty, and once the prior permission of the competent authority has been obtained, the institution shall deduct the amounts of own funds instruments to be redeemed, reduced or repurchased or the amounts of the related share premium accounts to be reduced or distributed, as applicable, from corresponding elements of its own funds before the effective redemptions, reductions, repurchases or distributions occur. Sufficient certainty is deemed to exist in particular when the institution has publicly announced its intention to redeem, reduce or repurchase an own funds instrument.
3. In the case of a general prior permission referred to in the second subparagraph of Article 78(1) of Regulation (EU) No 575/2013, the predetermined amount for which the competent authority has given its permission shall be deducted from the moment the authorisation is granted.
4. When applying for a general prior permission for actions listed in Article 77(1) of Regulation (EU) No 575/2013, institutions shall inform competent authorities where the related own funds instruments are purchased for the purposes of being passed on to employees of the institution as part of their remuneration and deduct these instruments from own funds on a corresponding deduction approach for the time they are held by the institution. A deduction on a corresponding basis is no longer required, where the expenses related to any action according to this paragraph are already included in own funds as a result of an interim or a year-end financial report.

5. Paragraphs 1 to 4 shall apply at the consolidated, sub-consolidated and individual levels of application of prudential requirements, where applicable.

Article 29

Submission of application by the institution to reduce own funds pursuant to Article 77(1) of Regulation (EU) No 575/2013

1. An institution shall submit an application for prior permission, including general prior permission, to the competent authority before taking an action referred to in Article 77(1) of Regulation (EU) No 575/2013.
2. Paragraph 1 shall apply at the consolidated, sub-consolidated and individual levels of application of prudential requirements, where applicable.

Article 30

Content of the application to be submitted by the institution for the purposes of Article 77(1) of Regulation (EU) No 575/2013

1. The application referred to in Article 29 shall be accompanied by the following information:
 - (a) a well-founded explanation of the rationale for performing any of the actions referred to in Article 77(1) of Regulation (EU) No 575/2013;
 - (b) whether the permission sought is based on point (a) or (b) of the first subparagraph of Article 78(1) of Regulation (EU) No 575/2013 or whether it is a general prior permission pursuant to the second subparagraph of Article 78(1) of that Regulation;
 - (c) where the institution seeks to call, redeem or repurchase Additional Tier 1 or Tier 2 instruments or related share premium accounts during the five years following their date of issuance pursuant to Article 78(4) of Regulation (EU) No 575/2013, how the conditions of that article are met;
 - (d) present and forward-looking information on the requirements laid down in Regulation (EU) No 575/2013 and Directives 2013/36/EU and 2014/59/EU applicable to the institution. The information shall cover at least a three year

period, and shall include the amounts and percentages corresponding to the following requirements:

- (i) the Common Equity Tier 1 capital requirement laid down in Article 92(1)(a) of Regulation (EU) No 575/2013, the Tier 1 capital requirement laid down in Article 92(1)(b) of that Regulation, and the own funds requirement laid down in Article 92(1)(c) of that Regulation;
- (ii) to address risks other than the risk of excessive leverage, the additional Common Equity Tier 1 capital requirement referred to in Article 104a of Directive 2013/36/EU, where applicable; the additional Tier 1 capital requirement referred to in Article 104a of that Directive, where applicable; and the additional own funds requirement laid down in Article 104a of that Directive, where applicable;
- (iii) the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU;
- (iv) the Tier 1 capital requirement laid down in Article 92(1)(d) of Regulation (EU) No 575/2013, and if applicable any adjustment in accordance with Article 429a(7) of the CRR;
- (v) to address the risk of excessive leverage, the additional Common Equity Tier 1 capital requirement referred to in Article 104a of Directive 2013/36/EU, where applicable; the additional Tier 1 capital requirement referred to in Article 104a of Directive 2013/36/EU, where applicable; and the additional own funds requirement laid down in Article 104a of Directive 2013/36/EU, where applicable;
- (vi) the Tier 1 G-SII leverage ratio buffer requirements laid down in Article 92(1a) of Regulation (EU) No 575/2013, where applicable;
- (vii) the risk-based requirement for own funds and eligible liabilities under Articles 92a(1)(a) and 494(1)(a), or 92b of Regulation (EU) No 575/2013, where applicable, as well as the non-risk based requirement for own funds and eligible liabilities under Articles 92a(1)(b) and 494(1)(b), or 92b of that Regulation, where applicable;
- (viii) the minimum requirement for own funds and eligible liabilities referred to in Article 45(1) of Directive 2014/59/EU as required in accordance with Articles 45e and 45f of that Directive, as applicable, and calculated as the amount of own funds and eligible liabilities, and expressed as percentages of the total risk exposure amount of the institution, calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, and the amount of own funds and eligible liabilities expressed as percentages of the total exposure measure of

the relevant entity, calculated in accordance with Articles 429(4) and 429a of Regulation (EU) No 575/2013;

- (e) present and forward-looking information on the level and composition of own funds and the level and composition of own funds and eligible liabilities held to ensure compliance, respectively, with the requirements referred to in point (d)(i) to (viii) above before and after performing any of the actions listed in Article 77(1) of Regulation (EU) No 575/2013. The information shall cover at least a three year period and, with regard to liabilities, shall include specifications of the following amounts, as applicable:
- (i) liabilities which qualify as eligible liabilities instruments pursuant to Article 72b(2) of Regulation (EU) No 575/2013;
 - (ii) liabilities which the resolution authority has permitted to qualify as eligible liabilities pursuant to Article 72b(3) or (4) of Regulation (EU) No 575/2013;
 - (iii) liabilities which are included in the amount of own funds and eligible liabilities of resolution entities pursuant to Article 45b(1) of Directive 2014/59/EU;
 - (iv) liabilities that arise from debt instruments with embedded derivatives included in the amount of own funds and eligible liabilities pursuant to Article 45(b)(2) of Directive 2014/59/EU;
 - (v) liabilities issued by a subsidiary which qualify for inclusion in the consolidated eligible liabilities instruments of an institution subject to Article 92a of Regulation (EU) No 575/2013 pursuant to Article 88a of that Regulation or of a resolution entity pursuant to Article 45b(3) of Directive 2014/59/EU;
 - (vi) eligible liability instruments taken into account for the purpose of complying with the requirement for own funds and eligible liabilities for institutions that are material subsidiaries of non-EU G-SIIs pursuant to Article 92b(3) of Regulation (EU) No 575/2013 and for the purpose of complying with the minimum requirement for own funds and eligible liabilities for entities that are not themselves resolution entities, pursuant to point (a) of Article 45f(2) of Directive 2014/59/EU;
- (f) the institution's summary assessment on the impact of the action that the institution has planned to take in accordance with Article 77(1) of Regulation (EU) No 575/2013, and any such action that the institution additionally envisages to undertake within a three year period, on compliance with the requirements referred to in point (d)(i) to (viii) above;

- (g) where the institution seeks to replace own funds instruments or the related share premium accounts pursuant to point (a) of Article 78(1) or point (d) of Article 78(4) of Regulation (EU) No 575/2013:
 - (i) information on the residual maturity of the replaced own funds instruments, if any, and the maturity of the own funds instruments replacing them;
 - (ii) the ranking in insolvency hierarchy of the replaced own funds instruments and of the own funds instruments replacing them;
 - (iii) the cost of the own funds instruments replacing the instruments or the shared premium accounts referred to in Article 77(1) of Regulation (EU) No 575/2013;
 - (iv) the planned timing of the issuance of the own funds instruments replacing the instruments or share premium accounts referred to in Article 77(1) of Regulation (EU) No 575/2013;
 - (v) the impact on the profitability of the institution pursuant to point (a) of Article 78(1) or point (d) of Article 78(4) of Regulation (EU) No 575/2013;

 - (h) an evaluation of the risks to which the institution is or might be exposed and whether the level of own funds and eligible liabilities ensures an appropriate coverage of such risks, including outcomes of stress tests on main risks evidencing potential losses;

 - (i) coverage in terms of own funds of the applicable guidance on the proposed level and composition of additional own funds communicated by the competent authority under Article 104b(3) of Directive 2013/36/EU before and after performing any of the actions listed in Article 77(1) of Regulation (EU) No 575/2013, covering a three year period;

 - (k) any other information considered necessary by the competent authority for evaluating the appropriateness of granting a permission according to Article 78 of Regulation (EU) No 575/2013.
2. The competent authority shall waive the submission of some of the information listed in paragraph 1 where it is satisfied that this information is already available to it.
 3. Paragraphs 1 and 2 shall apply at the individual, consolidated and sub-consolidated levels of application of requirements, where applicable.

Article 30a

Additional information to be submitted with an application for a general prior permission for actions listed in Article 77(1) of Regulation (EU) No 575/2013

1. Where a general prior permission pursuant to the second subparagraph of Article 78(1) of Regulation (EU) No 575/2013 for an action under Article 77(1)(a) of that Regulation is sought, the application shall specify the amount of each relevant Common Equity Tier 1 issue subject to the request.
2. Where a general prior permission for an action under Article 77(1)(c) of Regulation (EU) No 575/2013 is sought, the institution shall specify in the application:
 - (a) the amount of each relevant outstanding issue subject to the request; and
 - (b) the total carrying amount of outstanding instruments in each relevant tier of capital.
3. An application for a general prior permission for an action under Article 77(1)(a) and (c) of Regulation (EU) 575/2013 for market making purposes may include own funds instruments still to be issued, subject to specification of the information referred to in points (a) and (b) of paragraph 2, as applicable, to be provided to the competent authority following issuance.

Article 31

Timing of the application to be submitted by the institution and processing of the application by the competent authority for the purposes of Article 77(1) of Regulation (EU) No 575/2013

1. The institution shall transmit a complete application and the information referred to in Articles 30 and 30a to the competent authority at least four months in advance of the date where one of the actions listed in Article 77(1) of Regulation (EU) No 575/2013 will be announced to the holders of the instruments.
2. Competent authorities may allow institutions on a case- by-case basis and under exceptional circumstances to transmit the application referred to in paragraph 1 within a time frame shorter than the four months period.
3. The competent authority shall process an application during either the period of time referred to in paragraph 1 or during the period of time referred to in paragraph 2. Competent authorities shall take into account new information, where any is

available and where they consider this information to be material, received during this period. The competent authorities shall begin processing the application only when they are satisfied that the information required under Article 30 and, where applicable, Article 30a has been received from the institution.

Article 32

Applications for redemptions, reductions and repurchases by mutuals, cooperative societies, savings institutions or similar institutions for the purposes of Article 77(1) of Regulation (EU) No 575/2013

3. With regard to the redemption of Common Equity Tier 1 instruments of mutuals, cooperative societies, savings institutions or similar institutions, the application referred to in Article 29(1) and (2) and the information referred to in Article 30(1) shall be submitted to the competent authority with the same frequency as that used by the competent body of the institution to examine redemptions.
4. Competent authorities may give their permission in advance to an action listed in Article 77(1) of Regulation (EU) No 575/2013 for a certain predetermined amount to be redeemed, net of the amount of the subscription of new paid in Common Equity Tier 1 instruments during a period up to one year. That predetermined amount may go up to 2 % of Common Equity Tier 1 capital, if they are satisfied that this action will not pose a danger to the current of future solvency situation of the institution.

Subsection 2

Permission for reducing eligible liabilities instruments

Article 32a

Meaning of sustainable for the income capacity of the institution for the purposes of point (a) of Article 78a(1) of Regulation (EU) No 575/2013

Sustainable for the income capacity of the institution under point (a) of Article 78a(1) of Regulation (EU) No 575/2013 shall mean that the profitability of the institution, as assessed by the resolution authority, continues to be sound or does not see any negative

change after the replacement of the instruments with own funds or eligible liabilities instruments of equal or higher quality, at that date and for the foreseeable future. The resolution authority's assessment shall take into account the institution's profitability in stress situations.

Article 32b

Process requirements for an application by an institution to reduce eligible liabilities instruments pursuant to Article 77(2) of Regulation (EU) No 575/2013

1. Calls, redemptions, repayments and repurchases of eligible liabilities instruments shall not be announced to holders of the instruments before the institution has obtained the prior permission of the resolution authority.
2. Where the actions listed in Article 77(2) of Regulation (EU) No 575/2013 are expected to take place with sufficient certainty, and once the prior permission of the resolution authority has been obtained, the institution shall deduct the corresponding amounts to be called, redeemed, repaid or repurchased from corresponding elements of its eligible liabilities before the effective calls, redemptions, repayments or repurchases occur. Sufficient certainty is deemed to exist in particular when the institution has publicly announced its intention to call, redeem, repay or repurchase an eligible liability instrument.
3. In the case of a general prior permission referred to in the second subparagraph of Article 78a(1) of Regulation (EU) No 575/2013, the predetermined amount for which the competent authority has given its permission shall be deducted from the moment the authorisation is granted.
4. Paragraphs 1 to 3 shall apply at the consolidated, sub-consolidated and individual levels of application of requirements for own funds and eligible liabilities, where applicable.

Article 32c

Submission of application by the institution to reduce eligible liabilities instruments pursuant to Article 77(2) of Regulation (EU) No 575/2013

1. An institution shall submit an application for prior permission, including general prior permission, to the resolution authority before taking an action referred to in Article 77(2) of Regulation (EU) No 575/2013.

2. Where a general prior permission under the second subparagraph of Article 78a(1) of Regulation (EU) No 575/2013 is sought, the predetermined amount referred to in the second last sentence of that provision shall not exceed 3 % of the total amount of outstanding eligible liabilities instruments.
3. Paragraphs 1 and 2 shall apply at the individual, consolidated and sub-consolidated levels of application of requirements for own funds and eligible liabilities, where applicable.

Article 32d

Content of the application to be submitted by the institution for the purposes of Article 77(2) of Regulation (EU) No 575/2013

1. The application referred to in Article 32c shall be accompanied by the following information:
 - (a) a well-founded explanation of the rationale for performing any of the actions referred to in Article 77(2) of Regulation (EU) No 575/2013;
 - (b) whether the permission sought is based on Article 78a(1)(a), (b) or (c) of Regulation (EU) No 575/2013, or on the second subparagraph of Article 78a(1) of that Regulation;
 - (c) present and forward-looking information on the requirements laid down in Regulation (EU) No 575/2013 and Directives 2013/36/EU and 2014/59/EU applicable to the institution. The information shall cover at least a three year period and shall include:
 - (i) the risk-based requirement for own funds and eligible liabilities under Articles 92a(1)(a) and 494(1)(a), or 92b of Regulation (EU) No 575/2013, where applicable, as well as the non-risk based requirement for own funds and eligible liabilities under Articles 92a(1)(b) and 494(1)(b), or 92b of that Regulation, where applicable;
 - (ii) the minimum requirement for own funds and eligible liabilities laid down in Article 45 of Directive 2014/59/EU calculated in accordance with Article 45e and 45f of that Directive, as applicable, of that Directive as the amount of own funds and eligible liabilities expressed as percentages of the total risk exposure amount of the relevant entity, calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, and the

- amount of own funds and eligible liabilities expressed as percentages of the total exposure measure of the relevant entity, calculated in accordance with Articles 429(4) and 429a of Regulation (EU) No 575/2013;
- (iii) the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU;
- (d) present and forward-looking information on the level and composition of own funds and eligible liabilities held to ensure compliance, respectively, with the requirements referred to in point (c)(i) to (iii) above, before and after performing the action in Article 77(2) of Regulation (EU) No 575/2013. The information shall cover at least a three year period and with regard to eligible liabilities, shall include specifications of the following amounts, as applicable:
- (i) liabilities which qualify as eligible liabilities instruments pursuant to Article 72b(2) of Regulation (EU) No 575/2013;
 - (ii) liabilities which the resolution authority has permitted to qualify as eligible liabilities pursuant to Article 72b(3) or (4) of Regulation (EU) No 575/2013;
 - (iii) liabilities which are included in the amount of own funds and eligible liabilities of resolution entities pursuant to Article 45b(1) of Directive 2014/59/EU;
 - (iv) liabilities that arise from debt instruments with embedded derivatives included in the amount of own funds and eligible liabilities pursuant to Article 45(b)(2) of Directive 2014/59/EU;
 - (v) liabilities issued by a subsidiary which qualify for inclusion in the consolidated eligible liabilities instruments of an institution subject to Article 92a of Regulation (EU) No 575/2013 pursuant to Article 88a of that Regulation or of a resolution entity pursuant to Article 45b(3) of Directive 2014/59/EU;
 - (vi) eligible liability instruments taken into account for the purpose of complying with the requirement for own funds and eligible liabilities for institutions that are material subsidiaries of non-EU G-SIIs pursuant to Article 92b(3) of Regulation (EU) No 575/2013 and for the purpose of complying with the minimum requirement for own funds and eligible liabilities for entities that are not themselves resolution entities, pursuant to point (a) of Article 45f(2) of Directive 2014/59/EU;
- (e) the institution's summary assessment on the impact of the action that the institution has planned to take in accordance with Article 77(2) of Regulation (EU) No 575/2013, and any such action that the institution additionally envisages to undertake

- within a three year period, on compliance with the requirements referred to in point (c)(i) to (iii) above;
- (f) where the institution seeks to replace eligible liabilities instruments pursuant to Article 78a(1)(a) Regulation (EU) No 575/2013:
- (i) information on the residual maturity of the replaced eligible liabilities instruments and the maturity of the own funds or eligible liabilities instruments replacing them;
 - (ii) the ranking in insolvency of the replaced eligible liabilities instruments and of the own funds or eligible liabilities instruments replacing them;
 - (iii) the cost of the own funds or eligible liabilities instruments replacing the eligible liabilities instruments;
 - (iv) the planned timing of the issuance of the own funds or eligible liabilities instruments replacing the eligible liabilities instrument referred to in Article 77(2) of Regulation (EU) No 575/2013;
 - (v) the impact on the profitability of the institution pursuant to point (a) of Article 78a(1) of Regulation (EU) No 575/2013;
- (g) an evaluation of the risks to which the institution is or might be exposed, in particular whether the level of own funds and eligible liabilities ensures an appropriate coverage of such risks, including outcomes of stress tests on main risks evidencing potential losses;
- (h) where Article 78a(1)(c) of Regulation (EU) No 575/2013 applies, demonstration that the partial or full replacement of the eligible liabilities with own funds instruments is necessary to ensure compliance with the own funds requirements with the requirements referred to in point (c)(i) to (iii) above;
- (i) any other information considered necessary by the resolution authority for evaluating the appropriateness of granting a permission according to Article 78a of Regulation (EU) No 575/2013.
2. The resolution authority shall waive the submission of some of the information listed in paragraph 1 where it is satisfied that this information is already available to it.
3. Paragraphs 1 and 2 shall apply at the individual, consolidated and sub-consolidated levels of application of requirements, where applicable.

Article 32e

Additional information to be submitted with the application for a general prior permission for actions listed in Article 77(2) of Regulation (EU) No 575/2013

1. Where a general prior permission pursuant to the second subparagraph of Article 78a(1) of Regulation (EU) No 575/2013 for an action under Article 77(2) of that Regulation is sought, the institution shall specify in the application:
 - (a) the amount of each relevant outstanding issue; and
 - (b) the total amount of outstanding eligible liabilities, including the total amount of outstanding eligible liabilities that meet the conditions of Article 72b(2)(d) or Article 88a of Regulation (EU) No 575/2013.
2. An application for a general prior permission for an action under Article 77(2) of Regulation (EU) No 575/2013 for market making purposes may include eligible liabilities still to be issued, subject to specification of the final amounts referred to in points (a) and (b) of paragraph 1, as applicable, to be provided to the resolution authority following issuance.

Article 32f

Timing of the application to be submitted by the institution and processing of the application by the resolution authority for the purposes of Article 77(2) of Regulation (EU) No 575/2013

1. The institution shall transmit a complete application and the information referred to in Articles 32d and 32e to the resolution authority at least four months in advance of the date where one of the actions listed in Article 77(2) of Regulation (EU) No 575/2013 will be announced to the holders of the instruments.
2. Resolution authorities may allow institutions on a case-by-case basis and under exceptional circumstances to transmit the application referred to in paragraph 1 within a time frame shorter than the four months period.
3. The resolution authority shall process an application during either the period of time referred to in paragraph 1 or during the period of time referred to in paragraph 2. Resolution authorities shall take into account new information, where any is available and where they consider this information to be material, received during this period. The resolution authorities shall begin processing the application only when they are satisfied that the information required under Article 32d and, where applicable, 30e has been received from the institution.

Article 32g

Process of cooperation between the competent authority and the resolution authority when granting the permission referred to in Article 78a of Regulation (EU) No 575/2013

1. Where a complete application for prior permission, including a general prior permission, is submitted by an institution, the resolution authority shall promptly transmit the application received to the competent authority, including the information referred to in Articles 32d and, where applicable, 32e.
2. At the same time of the transmission of the information referred to in paragraph 1, the resolution authority shall make a request for consultation to the competent authority on the application received, which shall include the reciprocal exchange of any other relevant information for the assessment of the application by the resolution or competent authority.
3. The competent authority and the resolution authority shall agree on an adequate time limit for providing a response to the consultation referred to in paragraph 2, which shall not exceed three months from the moment of receipt of the request for consultation. The resolution authority shall consider the views received from the competent authority before taking a decision on the permission.
4. Where the agreement of the competent authority is required in accordance with Article 78a(1)(b) of Regulation (EU) No 575/2013, the resolution authority shall communicate to the competent authority, within two months from the request for consultation referred to in paragraph 2, the proposed margin by which, following the action referred to in Article 77(2) of that Regulation, the resolution authority considers necessary that the own funds and eligible liabilities of the institution must exceed its requirements.
5. Within three weeks after receiving the communication referred to in paragraph 4 the competent authority shall transmit its written agreement to the resolution authority. In the event that the competent authority disagrees or partially disagrees with the resolution authority, it shall inform the resolution authority within that period, stating its reasons.
6. By way of derogation from paragraph 3, where the agreement of the competent authority is required in accordance with Article 78a(1)(b) of Regulation (EU) No 575/2013, the competent authority shall provide a response to the consultation

referred to in paragraph 2 at the same time as the transmission of its written agreement to the resolution authority referred to in paragraph 5.

7. By way of derogation from paragraphs 3 to 6, where the maximum time period for processing the application referred to in paragraph 1 is shorter than four months in accordance with Article 32f(3), the periods of time referred to in paragraphs 3 to 5 shall be agreed between the resolution authority and the competent authority taking into account the relevant maximum time period.
 8. The resolution authority and the competent authority shall endeavour to reach the agreement referred to in paragraph 5 in order to ensure that the application referred to in paragraph 1 is processed in any event within the period of time referred to in paragraph 3 of Article 32f.
 9. The resolution authority shall communicate to the competent authority without undue delay the decision taken on the permission. The resolution authority shall also inform the competent authority in case of withdrawal of the general prior permission where an institution breaches any of the criteria provided for the purposes of that permission.
- (12) In Chapter IV, Section 3 is amended as follows:
- (a) the title of Section 3 is replaced by the following:
‘Temporary waiver from deduction from own funds and eligible liabilities’;
 - (b) the title of Article 33 is replaced by the following:
‘Temporary waiver from deduction from own funds and eligible liabilities for the purposes of Article 79(1) of Regulation (EU) No 575/2013’;
 - (c) In Article 33, paragraphs 2 and 3 are replaced by the following:

‘2.The waiver shall apply only in relation to new holdings of own funds instruments in a financial sector entity or eligible liabilities instruments in an institution subject to the financial assistance operation.

3.For the purposes of providing a temporary waiver for deduction from own funds and eligible liabilities, as applicable, a competent authority may deem the holdings referred to in Article 79(1) of Regulation (EU) No 575/2013 to be to be held for the purposes of a financial assistance operation designed to reorganise and save a financial sector entity or institution where the operation is carried out

under a plan and approved by the competent authority, and where the plan clearly states phases, timing and objectives and specifies the interaction between the holdings and the financial assistance operation.’.

Article 2

Entry into force

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission

The President

On behalf of the President