POSITION PAPER

ESBG Response to the EBA Consultation Paper on Draft Regulatory Technical Standards on Own Funds – Part one (EBA/CP/2012/02)

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The European Savings Banks Group (ESBG) welcomes the opportunity to comment on the first set of Draft Regulatory Technical Standards (RTS) on Own Funds elaborated by the EBA (EBA/CP/2012/02).

The three-month consultation period was appreciated and the ESBG strongly urges the EBA to grant the same timeline for the upcoming consultations as only a sufficient time span can guarantee the quality of the answers given to the consultation.

As an introductory statement, the ESBG would like to reiterate that the Basel III framework was set up for large, internationally active banks. However, the CRR/CRD IV package will be applied to all banks in Europe (roughly 8,200 financial institutions) irrespective of their size, complexity and business models. ESBG is convinced that this one-size-fits-all approach is inappropriate. Given the diversity of the European banking landscape, it is indispensible to ensure that national specificities are taken into account within the CRR/CRD IV package through a proportionate application of its provisions.

ESBG believes that the only way to achieve this assurance is to call for a proportionate application of CRR/CRD IV, similar to the approach adopted by the European Parliament in its ECON vote on 14 May 2012[1]. This approach includes adjusting the key provisions contained within the legislative proposals - and in particular the ones on own funds addressed in these RTS - to be proportionately applied according to an institutions' nature, size, complexity and the riskiness of its activities. This proportionality principle will be illustrated by concrete answers and examples in this document (please see pages 2, 3, 5, 7 and 15).

In this context, the ESBG would like to point out two issues, related to the upcoming EBA RTS, which are of paramount importance for the savings and retail banks:

- On the basis of Article 25 2. (a) CRR, the EBA has the mandate to develop draft 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 mutual, cooperative society, savings institution or similar institution for the purposes of this Part. The ESBG advocates for letting the national authorities specify these conditions exclusively, as far as it is concerned to mutual, cooperative society, savings institution, as the legal status of savings banks varies from one Member State to another and is precisely defined by the national jurisdictions. (It would be highly appreciated by the ESBG that such a consideration be taken into account in the EBA RTS developed in this regard, as it would constitute an application of the proportionality principle due to the nature of savings banks, which is legally determined at national level.) Thus, the EBA RTS should be limited to criteria concerning "similar institutions".

[1] This approach is also stipulated in Article 29 of the Solvency II Directive (2009/138/EC): "*Member States shall ensure that the requirements laid down in this Directive are applied in a manner which is proportionate to the nature, scale and complexity of the risks inherent in the business of an insurance or reinsurance undertaking'. 'The Commission shall ensure that implementing measures take into account the principle of proportionality, thus ensuring the proportionate application of this Directive, in particular to small insurance undertakings.'*

- With regards to the list of CET1 eligible instruments which may be published by the EBA (Article 24 4. CRR), the ESBG would like to attract attention to the difficulty of such an exercise; indeed, it appears challenging to ensure the resilience of the system without entailing a crowding out that too narrow a definition of CET1 instruments could cause. Establishing an exhaustive list of CET1 eligible instruments does not appear to be the right solution all the more as the Basel Committee has decided to follow a principle-based approach, drawing the adequate conclusion from the diversity of existing forms of own funds. Should any list be finally established by the EBA, the following instruments have to be, in ESBG's opinion, inserted: silent participations, cooperatives certificates of investment, and equity certificates. Such consideration would recognise that the diversity of the tools currently used by the savings and retail banks to carry out their activities deserves in this context the application of the proportionality principle.

The comments made by the ESBG on the submitted RTS follow the order of the Articles of the CRR; general comments are made on the RTS developed on the basis of these articles, accompanied with precise answers to the questions raised in the consultation.

Article 6

The reference to IFRS in Article 6 1. (d) RTS is not acceptable even when the introductory caveat that only the content of the corresponding provision shall be taken into account is considered. In order to have a neutral provision the content of paragraph 9 of IFRS has to be taken over in this regulation in its original wording and its appropriateness has to be discussed. The current proposal penalises institutions which do not use IFRS.

The ESBG suggests defining 'funding', as liability and not as equity. Equity would be treated under Article 33 1. (g) CRR ('reciprocal cross holding'), which would be the corresponding requirement for holdings in terms of equity.

Regarding the 'purpose', it should be clearly stated that the burden of proof should lie with the competent authority. As those provisions are mainly objective criteria, based on the subjective criterion of the 'purpose', the basic assumption should be that such a purpose does not exist unless otherwise proved by documentation or similar.

Furthermore the direct funding should also constitute an artificial inflation of own funds to be regarded as inadmissible, as certain situations may arise where direct funding may have a legitimate and justifiable cause. Here we refer to Article 33 1. (g) CRR, which covers a similar situation concerning reciprocal cross holdings.

Article 6 1. (c)

It should be clarified that the 'purpose' should be with all related parties in the chain: the original borrower, as well as the intermediary borrower(s), as well as the investor should have the same 'purpose'.

Article 6 1. (d) (ii)

The necessity for a related party to have sufficient revenues on an ongoing basis would exclude potential clients holding considerable amounts of other equity which could be sold to repay the funding without having to rely on revenues on an ongoing basis.

Therefore the wording of this provision should be amended so as to support the payment of interest and repayment of funding without recourse to the distributions of the capital instruments held shall be sufficient, regardless by which means this is managed.

Q 03: The explanations to Article 6 1 (d). and Article 6 4. (b) RTS seem to be misplaced in the context of Article 6. Article 6 explicitly regulates "indirect funding". The mandate of Article 26 3. (a) CRR is limited to this. However, Article 6 1. (d) refers to funding to natural or legal persons with a qualifying holding or being a related party which are not to be treated within this RTS as they do not constitute indirect funding. This is also valid for the cases treated in Article 6 4. do not belong to indirect funding, since indirect funding contains the interposition of a third party. These cases constitute a direct transfer from a client to the institution or vice versa and thus direct funding. This is why these explanations are not contained within the basis of the mandate of the EBA. Therefore Article 6 3. (b) and Article 6 4. RTS should be deleted.

Article 11

Q 07: Concerning the deferred tax assets, in order to make clearer the requirements of national tax laws for the conversion of the deferred tax assets into claims on the central governments described in article 36 2. (c), the EBA should clarify, in its final RTS, that it would be enough that such conversion operates only in one of the three events foreseen in said article (loss, insolvency or liquidation) without being necessary that it operates in each and every one of them. This clarification would avoid uncertainties on the scope that the reforms of the different national tax laws may require for making effective this specific exemption of the deduction from CET1, if so desired.

The rationale to impose a deduction of certain deferred tax assets from CET1 is that, under certain conditions, deferred tax assets might not have any realisation value (e.g. should the institution be liquidated). Accordingly, once a national tax rule guarantees the realisation value in events such as insolvency and liquidation, the deduction of these deferred tax assets from CET1 is not justifiable.

Because it would result in a disproportionate requirement, it is important to avoid the interpretation that for the purposes at hand, the conversion into claims on the central government of deferred tax assets should always operate in the case of losses. In many circumstances deferred tax assets still maintain a realisation value even in the case where losses are incurred: hence, losses can be of an extraordinary nature, can be non-recurrent, or can be incurred for amounts which are low or that do not generate a risk of insolvency or liquidation. For instance, it would not make sense that a national tax law has to recognise the conversion into a claim on the central government of such deferred tax asset if there is a loss of a low amount, if this tax law already recognises such conversion in the events of either insolvency or liquidation. Of course conversion of a deferred tax asset into a claim on the central government in the case of losses should be an option that a government may decide to use, but not mandatory in itself.

Furthermore, in the case of credit institutions, the liquidation of the company and insolvency proceedings are often simultaneous. Although it is theoretically possible that any of these situations takes place separately it should be enough from a prudential point of view that the tax rules provide for the transformation in only one situation to ensure the effectiveness of the capital.

Liquidation needs not always to be accompanied by an insolvency procedure, as it is possible that the net equity is sufficient to meet the demands of depositors and satisfy all remaining creditors, regardless of the rank of their claims. In any case, if liquidation is not accompanied by an insolvency proceeding, and the tax legislation does not provide for the conversion into a claim of deferred tax assets in this scenario, the proceeds from the realisation of assets (not including the mentioned deferred tax assets) should be sufficient to repay all debts of the entity. Therefore, the fact that the deferred tax assets have not been converted into a claim is not relevant from a prudential point of view because only the ordinary shareholders will be affected.

With respect to insolvency proceedings, it can be observed that unlike the business of any company in other economic sectors, the activity of a credit institution is based on the confidence of depositors and other creditors and, once this has disappeared, its viability as an independent entity is extremely difficult. Thus, if insolvency is not a triggering event, the possible intervention by the public sector, taking control of the entity, should be resolved in a short period of time with the liquidation of the said entity or their transfer, conveniently capitalised, to private hands. In the first case, the deferred tax assets would become claims on the central government, in the second, would retain its value realisation, because the injection of new capital will enable future profits.

With regards to the defined pension fund assets, the international accounting standard IAS 19, which deals in particular with the accounting treatment of defined benefit pension plans, will be subject to significant changes which will come into force from the 1st January 2013.

Indeed, the accounting for defined benefit pension plans will be severely impacted as the right to use a so-called corridor method will be removed and the pension should appear in full in the balance. Under the current IAS 19, companies can choose between recognising actuarial gains and losses in defined benefit pension plans on an ongoing basis, or to estimate the changes in other income and expense in profit or to use the corridor method.

The removal of the pension corridor will make it extremely difficult for financial institutions that have large negative estimates to meet the capital requirements if the whole effect shall be charged to equity at the time of implementation of the revised IAS 19. Because of the significant decline in the discount rate over the past year, it seems likely that most financial institutions which use IFRS and are not already recognising actuarial gains and losses in equity will have negative estimates.

The new regulation for capital adequacy includes openings for transitional rules where deductions have not been required/adopted in existing regulation. The IAS 19 impact will have a substantial impact on core equity and, combined with other restrictions and deductions, might be burdensome for some institutions considering the capital position. The deduction related to pensions is one item that is subject to transitional rules and will be phased in over five years for capital adequacy. The impact following pension obligations can be regarded as related and, where not previously implemented, should also be subject to transitional rules. Transitional rules will have a less volatile impact on own funds and should be in line with previous local rules/treatment.

As this evolution will have major negative effects in terms of capital for numerous credit institutions, the ESBG advocates for transitional provisions with regards to capital adequacy for banks in order to take into account that the recognition in equity of unamortised actuarial losses on pension obligations are spread over several years, keeping in line with the opportunities in the new international capital adequacy. Exemptions in this regard could be made with reference to article 33, 451 1. (a) and 458 2. (a)(i) CRR. It should also be noted that recital 85 proposes "to introduce additional transitional provisions relating to the treatment of actuarial gains and losses in measuring defined benefit pension liabilities of institutions".

Article 14

Article 14 3.

The ESBG strongly advises against implementing any administrative procedures in view of a consent by the supervisory authority or similar. This should be left to the current supervision process.

Article 14 4.

The last sentence should be deleted. The proposal to apply IFRS to banks that calculate their eligible capital on the basis of local GAAP cannot be accepted. This should be left to the local GAAP regime, as the application of the proportionality principle implies taking into account the national leeways let to less complex entities as savings banks.

Articles 15 to 17

Q 08: The ESBG understands that the corresponding deduction approach is always applicable where the entity in question would be classified as a 'financial institution' under Article 4 3. CRR, irrespective of whether this leads to supervision of a single entity or at a group level, and also irrespective of whether the entity is in fact subject to supervision (or e.g. where an exception according to CRR is applicable).

With regards to the assessment, if the financial institution is subject to prudential requirements equivalent to those applied by institutions under the CRR, the ESBG assumes that the EBA will publish a list of all countries that have similar prudential regimes in place. Otherwise the assessment, if the corresponding deduction approach can be applied, is not economically feasible and in some cases just impossible to conduct. The same holds true for a list, to be published by EIOPA, with all countries that have a similar prudential regime in place for insurance and reinsurance undertakings.

The ESBG assumes that the current lists of countries, being certified of having a comparable supervisory system, set up by the competent national supervisory authorities will be valid and applicable as long as the EBA has not published a binding list.

The ESBG understands that, for holdings in capital instruments of institutions within the meaning of Article 4 4. CRR, the corresponding deduction approach will apply.

The ESBG also understands that, for holdings of capital instruments in insurance undertakings (not subject to Article 17 RTS), the corresponding deduction approach will apply.

Article 18

Q 10: The provisions related to networks from one hand are not sufficiently clear, and from the other hand are not in line with the CRR. It has to be ensured that the RTS do not exceed the obligations of CRR (especially Article 108 7.) or of its recitals. In every case it has to be ensured that the terminology in the RTS corresponds to that of the CRR.

Article 18 (a) RTS refers to 'prudential consolidation' although Article 108 7. CRR does not recur to this wording, set up in Article 10 CRR. Furthermore the wording 'prudential consolidation' is not defined in the CRR. The ESBG suggests using wording that is consistent with the CRR.

With regards to Article 18 (b) RTS, the ESBG strongly advocates for the possible inclusion of an aggregation method as indicated in Article 108 7. CRR as one of the possible calculation methods. The ESBG defends a consolidation/aggregation method comprising only of the solo levels of those companies which entered into a contractual cross-guarantee scheme as required by Article 108 7. CRR, as only these companies bear the liability of the guarantee. Other companies are not included in the circle of companies for the zero risk weight. Any deviation from the system set up in Article 108 7. CRR could lead to serious frictions, and thus has to be avoided.

The provisions in Article 18 (d) are redundant, as the question is already dealt with in Article 46 3. CRR.

Article 18 (g) RTS foresees that in case there are several institutional protection schemes in a (cooperative) network, the conditions laid down in the RTS shall apply to each of those schemes. This demand also goes beyond the conditions laid down in Article 46 CRR and thus should be cancelled.

If networks were to be forced to have multiple consolidated reports they would be discriminated against compared with groups of institutions. The latter has to prepare only one consolidated financial statement - notwithstanding the particular structure of the group. Consequently, Article 18 (g) RTS should be cancelled.

In any case Article 18 (g) should be complemented as follows: "Where an institutional protection scheme is organised in a way that the protection mechanism according to the statutory liability arrangement consists of different levels, this scheme is to be considered as one scheme."

General comments on Articles 19 to 22

Incentives to redeem are too prohibitive with regards to the desired conversion to equity (and hence a positive step towards a better quality of capital and recapitalisation).

The alternative to write-down/write-up, as currently proposed, does not adhere to burdensharing according to the capital waterfall.

Article 19

The Commission proposal foresees a write-down or conversion into CET1 capital for all additional Capital Tier 1 and Tier 2 instruments for all institutions. The GHOS paper only suggests it for internationally active banks and SIFIs. Therefore the Commission should adopt the GHOS approach, i.e. that provisions requiring such instruments to be written-down or converted into common equity should be limited to systematically relevant institutions.

The issue of a temporary write-down, which would come along with the possibility for a 'write-up', has also to be properly assessed.

Besides, in order to allow harmonised and objective legal frameworks for all market participants the ESBG strongly suggests to determine potential bail-in measurements (write-down/write-up, conversion) by law (statutory approach) and not in the terms and conditions of the respective instrument (contractual approach).

Article 19 2. (b)

An option to convert to equity at a specific point in time with a certain strike (similar to convertibles) is, in our view, not really an incentive to redeem and should therefore be allowed.

Articles 20 to 22

Q 12: Further details to the interaction of write-down/write-up in relation to equity holders (e.g. Article 20 3. (f)) are required.

Q 13: With regards to the cancellation of AT1 payments while a write-down is in effect, the ESBG is of the opinion that there is a significant problem with this requirement ("AT1 coupon stopper"), when considered together with (i) the prohibition on common dividend stoppers (Article 50 (b) CRR) and (ii) the limitation on AT1 write-up to its proportionate share of total Tier 1 capital (Article 20 3. (e) RTS). These issues are further exacerbated if write-ups are discretionary, which in theory could lead to a situation where an AT1 instrument is never written back up and never makes any further coupon payments, even though common dividend payments have resumed.

Taken together, these three restrictions structurally put AT1 holders in a worse position than shareholders, thus distorting the hierarchy of the capital structure. AT1 holders would realise losses earlier than equity holders and resulting in lower coupon payments and principal losses while at the same time equity holders could potentially receive dividends again.

However, our understanding is that the EBA's intention is that, during a write-down, AT1 should function similarly to common equity, but not worse than it.

To give an example of a scenario where such a problem might arise, consider a bank that has recovered such that it is now within the 4th (i.e. highest) quartile of the Capital Conservation Buffer (CCB). In this situation, the Maximum Distributable Amount (MDA) would be 60% of current period profits. However, the "proportionate share of total Tier 1 capital" limitation may be considerably lower (say, 20%). In this situation, the write-up of the AT1 would be limited to 20% of current profits, leaving 40% of "spare" MDA. With an AT1 coupon stopper, but no common dividend stopper, the bank would be free to use some/all of this spare MDA to pay a common dividend, but would automatically be prohibited from paying a partial coupon on the written down amount of the AT1.

Two important structural elements may reconcile these conflicts:

1. prioritise the writing up of AT1 over any type of Tier 1 distributions (CET1 or AT1), to the extent permitted by other regulatory constraints (e.g. the proportionate share of total Tier 1 capital). This would mean that if a bank exercised its discretion not to write up its AT1 to the fullest extent possible (i.e. because it wanted to conserve even more CET1), it would also be appropriate not to make any Tier 1 distributions. In this way, AT1 holders are not treated any worse than CET1 in relation to distributions (although shareholders may benefit from a disproportionate share of retained profits). The bank is retaining loss absorbing Tier 1 capital on its balance sheet rather than paying out distributions, which is presumably desirable from a prudential standpoint.

The ESBG would not consider this to be a form of CET1 stopper; Article 50 (b) CRR only prohibits CET1 stoppers as a consequence of not making distributions on AT1, rather than as a consequence of a principal write-down). We do not consider this to hinder recapitalisation since all profits are being kept within Tier 1 capital and common shareholders are benefitting from the increased book value arising from the substantial retention of earnings that is occurring in parallel with the write back of the AT1.

2. do not apply an AT1 coupon stopper aside from in point 1 above. This would mean that the bank would have discretion either to retain any "spare" profit (either excess MDA or general profit outside the CCB) or to make (partial) distributions on CET1 or AT1, subject to normal discretion and limitations. Again, this puts AT1 and CET1 on an equal footing with regard to distributions.

Article 20

Example of write up mechanism (ANNEX):

The calculation model in Article 20 3. (e) RTS in conjunction with the Annex is still hardly comprehensible and not very transparent. Moreover, there are serious doubts concerning the practicality of this method.

In ESBG's opinion, the example in the ANNEX of the EBA RTS for a write up mechanism according to Article 21 3. needs further clarification:

As a general remark, according to our interpretation of the CRR and CRD IV, the example does not reflect the regulations and directives mechanisms properly for the calculation of the MDA:

- Pursuant to Article 131, the MDA depends on the position of the bank relative to its combined capital buffer requirements. According to Article 123 CRD IV and Article 87 CRR, CET1 only contributes to the combined capital requirements to the extent that it is not required to meet the minimum requirements for Tier 1 and Total Capital not covered by AT1 and/or Tier 2.

In case an institution operates with an 'efficient capitalisation' as it holds exactly 1.5% AT1, then any common equity created from a write-down of AT1 will be required to refill that AT1 to meet the Tier 1 minimum ratio.

- More importantly, the EBA's example tests the combined capital buffer at the start of each annual period, which unnecessarily penalises AT1 holders relative to the profit generated in that period. However, interim profits may lift an institution into a different quartile for MDA purposes. The calculation of the MDA factor as per CRD IV Article 131 4. (b) would only apply for the portion of profits falling into the applicable combined capital buffer quartile. [E.g. interim profit might be sufficient to fill any residual amount to lift the institutions into the second quartile, hence any remaining profit contributing with a factor of 20% to the MDA. In case the profit is even high enough for the 80% retention to lift the institution into the third profile, then any further residual profit would contribute even with a factor of 40% to the MDA. In the EBA's worked example, the institution has started from the first quartile, hence a factor of 0% would have been applied.] Therefore the ESBG asks for clarification that any write-down or write-up should only occur after the interim or year end profit has been reviewed according to Article 24 2.

Article 21

The ESBG agrees in general with the provisions laid out in Article 21 RTS.

Article 21 (a)

The actions that lead to a trigger event, and to what extent this trigger event will be remedied immediately by measures already in place (hence not requiring a write-down) should be considered. In such a case, the institution shall liaise with the competent authority whether such write-down has to occur. The reason is that in such a situation already intended measures would cure the situation and a write-down could actually have a negative effect on the institution.

Article 21 (d)

The maximum period of 1 month should not be reduced in any case. The ESBG would be more in favour of deleting this provision.

Article 21 (f)

The definition of an 'independent review' should be clarified.

Article 22

Article 22 1.

Regarding the immediate information of the instruments holders, the ESBG suggests to wait for the determination of the amount to be written-down (Article 21 (c)) and to inform the holders afterwards.

Article 22 2.

No indication is given about the 'usual practices'.

Article 25

Q 14: Concerning Article 25 RTS, indirect holdings arising from index holding, the following questions have to be addressed: What is meant in Article 25 1. RTS by "index" in the context of CRR? Does it mean only official indices or is "index" used in a broader sense to cover each vehicle or scheme which is composed of different assets? The indices in the second sentence confuse more than they explain, since especially the indices of credit derivatives are rather unusual forms.

As a result, the ESBG supports the inclusion of the most obvious indices (mentioned in Article 25 5.: equity index or bond index) in this sentence as a clarification. Moreover, the ESBG is of the opinion that 'indices of credit derivatives' do not make much sense - it is hard to imagine what they relate to. CDS-indices may be common. However, it is hard to see how an investment in such indices (long position) should always be deducted from capital as an indirect or synthetic holding. We would expect that for instance a CDS that relates to bonds issued by a financial sector entity would not necessarily lead to an indirect/synthetic holding of instruments issued by that financial sector entity that has to be deducted from own funds - namely when such bonds do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments.

Article 25 5.

The wording "Depending on the nature of the index (equity index or bond index)" sounds confusing. Why/to what extent does the application depend on the nature of the index? One would assume that a corresponding deduction approach has to be applied in any case. Therefore the ESBG recommends to either delete the first part of the sentence ("depending on the nature of the index (equity index or bond index)") or to start with the general principle and then add an explanation on different types of indices ("The deduction shall be operated on a corresponding deduction approach. Depending on the nature of the index (equity index or bond index), the index may invest in (provide examples).")

Article 26

Q 15: Regarding Article 26 RTS it has to be kept in mind that the addressee of the RTS primarily are the supervisors. The RTS shall define when a competent supervisory authority can accept estimation based on the investment principles of a fund, since the more exact alternative solution would be 'operationally burdensome'. The proposals for clarification of this vague legal concept are heading in the right direction. However, the EBA uses vague legal concepts to define this vague legal concept without defining the sooner to an appropriate extent, so that an equal application of the legislation cannot be ensured. This is why the RTS does not supply further clarification, when a 'low materiality' can be declared in Article 26 1. RTS. It also remains unclear when the net exposure can be defined as 'low' in the sense of Article 26 2. (a) RTS and what constitutes a 'holding period' and 'strong liquidity' in Article 26 2. (b). Especially concerning the consideration of appropriateness in Article 26 2. (b), substantiating figures could be named to ensure an equal application of the legislation.

A clarification on the alternative to a direct look-through in cases where the underlying exposures are unknown would be even more useful than for index securities (Article 25 RTS), where the underlying investments are always more or less transparent. This can be different for investments for instance intransparent (specifically non-UCITS) funds. The clarification could be added in the CRR. Moreover, such an alternative should not depend on additional requirements such as the 'operationally burdensome' concept of Article 71 CRR/Article 25 RTS. This is due to the fact that if there is a lack of transparency, nobody is able to look through the underlying exposure.

Article 27 to 33

Regarding these ITS, it is of paramount importance to ensure that a sufficient degree of flexibility is granted to the national supervisors in order to enable them to react appropriately to certain specific circumstances. A highly prescriptive approach should therefore be avoided to ensure that supervisors can carry out their tasks in an effective manner.

Article 27

The deletion of the last sentence would be welcome, as the ESBG does not see any additional use to refer to stress tests if the main rule requires equal quality as a minimum.

Article 28

The ESBG would suggest deleting Article 28 "Process and data requirements for an application by an institution to carry out redemptions, reductions and repurchases - under Article 72 (b) of the

CRR”. Instruments shall be taken into account as regulatory capital as long as the instrument is existent and the money is in the bank. If the EBA would stick to this proposal banks should be allowed to take into account any replacement instrument even though it has not been issued, especially in cases where the regulator requires a replacement for a call to be approved.

Article 28 1.

Moreover, the provision which consists of not announcing an expected redemption, reduction or repurchase of own funds instruments before approval may contradict requirements of the Market Abuse Directive. This should be checked carefully.

Another question arises in relation to ‘publicly announced’ buybacks where – at the date of announcement – the final amount is not clear. The ESBG recommends an exemption for these buybacks.

Article 29

Article 29 1.

The word ‘early’ should be inserted: “The institution shall submit an application (…) before (…) calling, redeeming early or repurchasing Additional Tier 1 or Tier 2 instruments”. Otherwise, any redemption of a dated Tier 2 instrument at its maturity would need the submission of an application.

Article 29 3. (a)

The reference to the ‘excess amount’ does not make much sense in this context. Therefore the ESBG would be in favour of deleting this reference. Generally it should refer to the level of 5% as foreseen in the current legislation for market making.

Article 29 4.

For the sake of legal clarity, the thresholds should not be subject to any lowering. Therefore the ESBG advocates for the deletion of Article 29 4. RTS.

Article 29 5.

Information about ESOP and MSOP of the supervisory authority seems to be burdensome in terms of administration and should therefore be removed. The usefulness of Article 29 5. RTS is not obvious; therefore, the entire paragraph should be erased.

Article 30

The ESBG generally agrees that institutions should provide the competent authority with the rationale and the impact of an action listed in Article 72 CRR. However, the content and depth of that information should be appropriate compared with the level of impact of such action. For example, to always ask for a 3-year capital plan might be disproportionate.

A confusion seems to be made here: on the one hand, the buyback/redemption theme, and on the other hand, the market maker exemption. These two themes should not be mixed up with regards to the determination of documents' requirements.

Article 31

Article 31 1.

Q 18: A 3-month period as mentioned in Article 31 1. RTS seems to be very long. If necessary, one month should be appropriate for the processing of the application.

It has to be taken into account that if the period is so long, rumours might possibly be spread, leading to corresponding effects on the market.

Besides, additional Tier 1 and Tier 2 instruments will typically have an investor notification period of at least one month. When added to the proposed 3-month regulatory notification period, this could result in an application needing to be made at least four months in advance of an actual redemption date, which is quite a lengthy period, especially in volatile markets. This is why the ESBG would instead propose a regulatory notification period of one month, thus giving a total period from regulatory application to potential redemption of two months.

Article 31 2.

It is also cumbersome that the processing of the application shall begin only when competent authorities are satisfied that they have received the information required. This could arbitrarily prolong the submission period. The ESBG therefore proposes a change in paragraph 2. Furthermore the reference in paragraph 2 should be to Article 30.
"2. The competent authority shall process an application during the period of time referred to in paragraph 1. Competent authorities shall take into account new information, if any and if deemed material, received during this period. The processing of the application shall begin only when competent authorities have received from the institution ~~are satisfied that~~ the information required under Article 30 ~~28 has been received from the institution~~."

Article 31 3.

Moreover, it remains questionable if the opening clause in Article 31 3. RTS establishes enough flexibility. The ESBG suggests deleting the words "and under exceptional circumstances" in Article 31 3. RTS, so that the competent supervisory authorities, after consulting the institution, always have the possibility to reduce the period.

Article 32

The reference to the 'excess capital' should be removed here too (see above comments at Article 29).

Article 38

As far as the grandfathering provisions are concerned, all existing capital instruments, even the pre-CRD II ones, should be grandfathered over a transitional period of at least ten years.

Indeed, being granted more time to adapt capital instruments would correspond to a specific need of the savings banks due to their size. Besides, the choice made in the past in terms of capital instruments was linked to their activities. Taking this into account would come close to the application of the proportionality principle.

About ESBG (European Savings Banks Group)

ESBG – The European Voice of Savings and Retail Banking

ESBG (European Savings Banks Group) is an international banking association that represents one of the largest European retail banking networks, comprising of approximately one-third of the retail banking market in Europe, with total assets of over €7,470 billion, non-bank deposits of €3,400 billion and non-bank loans of €4,000 billion (31 December 2010). It represents the interests of its members vis-à-vis the EU Institutions and generates, facilitates and manages high quality cross-border banking projects.

ESBG members are typically savings and retail banks or associations thereof. They are often organised in decentralised networks and offer their services throughout their region. ESBG member banks have reinvested responsibly in their region for many decades and are a distinct benchmark for corporate social responsibility activities throughout Europe and the world.

ESBG - Association internationale sans but lucratif/Internationale vereniging zonder instoogmerk/ International not-for-profit association

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