Q01. Are the provisions on the meaning of foreseeable when determining whether any foreseeable charge or dividend has been deducted sufficiently clear? Are there issues which need to be elaborated further? What would be your definition of foreseeable?

The aim of the determination of the deduction of the foreseeable charges and dividends is to estimate that part of the net income which will be retained and function as stable capital in the long-run.

For operational purposes, we would welcome additional clarity on the degree of formality that is required for a management decision to determine the foreseeable dividend. In particular, such decision amending the payout policy would have to be reported to the competent supervisory authority (who shall be entitled to require evidence, such as proceedings from the institution's management), but not necessarily disclosed publicly as it is privileged information.

The expected dividends amount would be reduced, if the application of the dividend payout policy or of the distribution rate actually paid over the last two to three years would lead the CET1 ratio, calculated on a legal entity basis or on a consolidated basis, to fall in the range of the applicable conservation buffer, extended by countercyclical and systemic buffer requirements, as appropriate.

Additionally, in the "average payout method" it should be clarified whether consolidated profits or statutory profits are to be taken into account (this should depend on the financial communication of the bank, which is generally consistent). It may happen that in the former years for specific reasons the payout ratio was volatile. In our view the evaluation of the foreseeable dividend must target to assess the stable payout ratio and the effect of specific one-time factor should be filtered out.

There are Member States, where variable remuneration (bonuses) are recognised as expenditures, even for some of the persons who have relevant influence on risk-taking while in other member States where a dividend bonus to employees is compulsory by law. In our view the corresponding expected amount should be included in the calculation of the foreseeable dividend, unless it is already taken into account in the P&L. Finally, the notion of "exceptional dividends" is too vague and will only lead to confusion (exceptional dividends should not be a part of the computation at all). We suggest deleting the last sentence of paragraph 4 of Article 6.

On a related matter (inclusion of interim profits in Common Equity Tier 1), asking that the competent authority must check that all necessary deductions have been made before consenting the inclusion of interim of year end profits in CET1 might create problems in case there are time misalignments between the need to include profits to CET1 for regulatory reporting purposes and the moment when deductions are actually accounted for and approved by the competent authority, in particular for banks with a higher frequency of reporting than closing accounts. In the same vein, the expression "under any other adjustments" might leave the door open to a high degree of discretion by the authority. To this extent, provisions must be more specific, also in terms of timeframe for the approval procedure, than the proposed formulation.

Moreover, there are 27 different national company law regimes, whose rules on dividend distribution differ substantially. These rules cannot be addressed by the "one-size-fits-all" EBA approach. Until a European company law regime is established, only national administrative practice will be able to take account of features specific to national company law.

In case of interim-year profits the foreseeable charges and dividends in our view should follow the time-proportionate approach.

Regarding the definition of distributable items, we support the draft in defining them based on statutory accounts and applicable national laws.

Q02. Are the provisions on the applicable forms of indirect funding of capital instruments sufficiently clear? Are there issues which need to be elaborated further?

The scope of restriction could be extended to entities not included in prudential consolidation and in the supplementary supervision in accordance with directive 2002/87/EC, but included in accounting consolidation. Moreover, any entity where the issuer institution directly or indirectly has control, but the entitiy for some reason nevertheless is not included in the consolidation, should be prohibited too, to participate indirect funding, by extending funds to a person in order to purchase the parent institution's share.

The RTS should also clarify that "normal" situations should not be penalized, as the provision in Article 26 is clearly directed at regulatory arbitrage attempts: for instance, if a 100% controlled subsidiary lends its excess cash to its mother company in the normal course of business and not as a consequence of capital transactions, this should not be interpreted as an indirect funding by the subsidiary of the purchase by its mother of capital instruments.

For instance, a purchase of shares by a "sister" company should be considered as an indirect funding of capital instruments if both the following conditions are met (i) the institution has funded the "sister" company via a third party or thanks to a loan that is not at arm's length conditions; (ii) the institution and the "sister" company are not included in the same consolidated supervision.

The distinction between "direct" and "indirect" funding is not sufficiently clear in our opinion, nor is the consequence (if any) of such distinction. It is in our view a judgemental issue that could, in some cases, lead to tough discussions between the regulatory authority and the institution.

We agree that the case mentioned under point c) is an indirect funding, which is undesirable, but from the part of the credit institution is very difficult to control. While the goal of financing a person more or less can be monitored, primarily in the corporate sector, it is impossible to ban in the loan agreement that the borrower should not provide funding to anybody for purchasing the capital instruments of the institution. The more external relations the borrower has, the less possible is to detect such a chain of financing. We suggest to clarify this in the text by stating that if the institutions voluntarily creates such a situation or was aware of it at initiation, then it should detract from the regulatory capital the instruments concerned.

Point d) is even more difficult to control, because in this case the goal of the loan is something else, not the purchase of capital instruments.

Our view is that it should be clarified how far the institution needs to go to take into account this notion of indirect funding, without it being unreasonable operationally burdensome. We would even suggest to keep the concept aside or at least to restrict it very clearly.

Q03. How do you assess the provisions on related parties in particular the requirement to assess that, on an on going basis, the related party has sufficient revenues?

The definition of "sufficient" revenues to repay interests on funding does not seem specific enough. In addition, it may be very difficult to demonstrate that a related party would have such "sufficient"

revenues, and this may raise legal issues (as the institution should not have access to information on the related party's other sources of income, for confidentiality reasons). Requiring that the funding is made fully at arm's length should be a necessary condition and a reasonable assurance that there is no regulatory arbitrage.

Since in point d) the case is that the funding is provided not for the purchase of capital instruments, but for other goals, normal lending standards applicable to the persons mentioned in the point should be used. If the client qualifies for retail treatment, sufficient revenues are assessed at time of the loan decision and when the client is in payment arrear. Only material corporate or non-retail loans should be monitored on an on-going basis, but at least with a yearly frequency. Sufficient revenues of the client should be understood without the income earned from the credit institution concerned.

Q04. Are the provisions on the limitations on redemption of own funds instruments sufficiently clear? Are there issues which need to be elaborated further?

While we support the EBA approach to the limitations on redemption of own funds instruments, we are concerned by its legal implementation, as in some cases (as stated in the text) a change of national law may be required. We recommend suggesting transitory measures to be applied until such change occurs. Where redemption is regulated by law, until the legislation will change the limitation on redemption, namely deferral and/or payment restrictions cannot be exercised by the relevant management body of the co-operative or savings bank, but only by the relevant supervisory authority.

Q05. How would you assess the impact of documenting decisions on redemptions?

As an internal decision to limit redemption is typically quite a tough decision for a bank to make, we feel an obligation to document it should not be systematic (as it will only make the decision even more troublesome), and limited to the cases when it is required by the competent authority for some reason. This can e.g. be the case as some forms of limitation, e.g. the deferral of the redemption, will be a contingent liability for the institution in some Member States, by the relevant national accounting rules.

At any rate, the decision should ensure that the limitation should be based on transparent principles and should not favor specific persons compared to its shareholder category.

Q06. How would you assess the cost impact of including in the provisions of the instruments criteria as listed in paragraphs 2 and 3?

Apart from the administrative costs for the technical implementation vast costs will arise from the following fact: Investors own an instrument with an obligatory right to demand repurchasing under certain circumstances. Legally they cannot be forced to abstain from that claim. Hence, in order to bring the investors to accept modified (and declined!) contractual provisions the institutions will have to pay a compensation in some way. The level of such compensation cannot be calculated exactly in advance. However, it will ruin a former constitutive feature.

In some Member States in the co-operative banking sector any changes with respect to features of the co-operatives shares, if it is not regulated by law, may require the redemption of the outstanding shares and the release of new ones. Even where it is not the case, the change in the statute of the co-operative bank must be accepted by the general meeting of the members and with regard to redemption it is not sure that such a change could be accepted by each small co-operative bank, if there is no regulatory constraint. Moreover, if the deferral or temporary ban on redemption by the institution would be only

reflected in the statute of the co-operative banks, there could be relevant one-time costs for the institution of convincing the members of the co-operative bank to accept such a change.

Q07. Are the provisions on the deductions related to losses for the current financial year, deferred tax assets, defined pension fund assets and foreseeable tax charges sufficiently clear? Are there issues which need to be elaborated further?

We would like some clarification on the inclusion of foreseeable charges linked to variable remunerations in the interim profits.

We welcome the fact that the netting between Deferred Tax Assets (DTA) and Deferred Tax liabilities (DTL) do not seem dependent on the accounting representation.. In other words, in order for the netting between DTA and DTL to be applicable, it seems that, there is no need to explicit netting in the balance sheet (i.e. "net" DTA), rather DTA and DTL can remain represented as "gross " values and be netted for regulatory purposes (provided the other conditions set in Article 12 of RTS are met).
We would draw the attention to point 3 of Article 14 of RTS which is not clear, as the relationship with foreseeable taxes does not seem apparent, and calls for the same reservations as point 7 of Article 2.

Regarding pension fund assets that are exempt from deduction, it should be clarified (i) that, in consistence with IFRS standards, this extends to the assets where the surplus can be refunded, used instead of future contributions or used to cover the deficit of another plan; and (ii) that in the case of pension funds being accounted for on a gross basis (showing separately assets and liabilities), only net assets should be deducted.
According to the provision a prior consent is to be granted only when the access to the assets is *immediate.* One interpretation of the provision might be that the assets shall be accessible at all times. Given that a board decision may be required to access assets in a pension fund some time is needed in between the prior consent of the competent authority and the access to the assets. To reflect this in the RTS a possible solution might be to be replaced *immediate* with *without delay*. This condition should only apply when assets are to be refunded (not used to reduce future contributions or to cover the deficit of another plan, as in these cases a temporal condition makes no sense).

Finally, we would like further clarification on the condition laid out in paragraph 1 of Article 14: IFRS-based accounts clearly fill that condition, but it is unclear which other GAAP will be deemed equivalent to IFRS in that respect.

Q08. Are the provisions on the types of capital instruments of financial institutions, third country insurance and reinsurance undertakings, and undertakings excluded from the scope of Directive 2009/138/EC in accordance with Article 4 of that Directive that shall be deducted from the following elements of own funds sufficiently clear? Are there issues which need to be elaborated further?

Q09. How would you assess the impact of operating a deduction from Common Equity Tier 1 items?

[Q 8 & 9] We feel that the wording of the standard suggests that all "capital" instruments (including dated subordinated instruments) are to be deducted from CET1, except if the issuing financial institution is supervised as under CRR1 (i.e. if an associate is located in a country that does not implement Basel 3, all subordinated debt issued by this associate would be deducted from CET1, not

Tier 2). As a result, the standard would be in contradiction with the level 1 text which clearly stipulates that the deduction approach is to be "corresponding".

Furthermore, it is inconsistent to advocate demanding eligibility criteria for EU institutions (which we do not contest) but to consider that instruments issued by non-EU institutions or by EU financial institutions which do not meet those criteria carry the same level of risk as Common Equity Tier 1. We suggest to review the wording to make it consistent with the text, which in this respect fully derived from the Basel recommendations. Only capital instruments which are recognized as prudential own funds, where applicable, and/or may be deemed equivalent to a tier or category defined by CRR (for non credit institutions or credit institutions of third countries, this equivalence should be based upon the criteria listed by CRR), should be subject to deduction.

As an alternative to the criteria listed by CRR which in general would not apply to unregulated financial institution, the BSG suggests that the corresponding deduction approach be based upon subordination, with equity being regarded as equivalent to Common Equity Tier 1, deeply subordinated debt to Additional Tier 1 and subordinated debt to Tier 2.

For third countries insurance and reinsurance undertakings, the BSG recommends some further clarifications regarding undertakings eligible to the treatment mentioned at Art.16(3) and (4) of the draft ITS. In particular, in compliance with the general principle set out above, non common equity paid in capital instruments (preference shares, subordinated liabilities, subordinated mutual member accounts) possibly included in Tier-1 as per regulation applicable to the insurance undertakings should be deducted from Tier-1 and not from CET1, following the treatment set out at Art. 55(b) of the CRR.

Q10. Are the provisions related to the requirements for cooperative networks sufficiently clear?

Article 46 (3) b) originally would relate to the co-operative networks, which are regulatory recognised institutional protection schemes in accordance with Article 108(7) of the CRR, it is not for co-operative groups under Article 9, which is to comply with the CRR on a consolidated level. However, Article 108 (7) (presently CRD Article 80(8)) does not require for supervisory recognition that the protection scheme should draw up consolidated accounts for the system, as a whole, it leaves the choice also to present aggregated accounts, provided that the double gearing of capital should be avoided. Consequently, it should be emphasized that the institutional protection schemes use the consolidation methods, but they are not constrained to draw up consolidated accounts. There are some institutional protection schemes recognised by the supervisors which draw up consolidated accounts for using the preferential 0% risk weighting for intra-scheme exposures, but there are some others which comply only by drawing up aggregated accounts where the double gearing of capital is excluded. As the supervisory recognition under the present CRD requires consolidated or aggregated accounts for the scheme once a year, the frequency for consolidation mostly is a yearly one. When in a Member States there is more than one institutional protection scheme, those are not necessarily subordinated to each other, typically they are independent each other. For this reason the condition in point Article 18 point g) in most cases are unacceptable and obstacle the application of the Article 46 (3) of the CRR in practice.

Q11. Would you agree on the types of incentives to redeem as described in paragraph 2? Should other types of situations be considered as incentives to redeem?
The text seems comprehensive. It could be advisable to insert a revision clause to keep up with any new market developments.

Q12. Are the provisions on the procedures and timing surrounding a trigger event and the nature of the write-down sufficiently clear? Are there issues which need to be elaborated further?
We welcome the clarification that the write-down may be either permanent or only temporary. As in other parts of the text, it would be preferable to limit the recognition of Additional Tier 1 to the "foreseeable" amount of Common Equity Tier 1 to be generated in the event of a write-down.
For operational purposes, the RTS should state that a conservative estimate of the amount of CET1 needed to restore the CET1 ratio to the trigger level should be computed, in order for the write-down to occur as quickly as possible: this could be done by identifying the main sources of decrease in the CET1 and increase in the RWA since the last regulatory reporting (for instance unrealized losses on securities, surge in risk and as a result risk-weighted assets in a particular sector etc.), computing an estimate of the shortfall of CET1 when incorporating these effects to the last solvency ratios computed, and grossing-up the resulting amount by 10% to cover for non-identified variations.

We are puzzled by the prohibition of distribution on Additional Tier 1 while the amount is written down (Article 20 3a), as distributions on shares or CET1 instruments may still be paid during this period. This amounts to making Additional Tier 1 holders worse off than those shareholders which were present in the institution before the fall of the ratio.
The demand and pricing for T1 with temporary write down features will likely be impacted, as investors will not like the disadvantage for instruments with temporary written down features. We argue that if amounts are available for distribution, the ability to make (partial) T1 coupons should not be excluded. The amount should be subject to the constraints on T1 coupon (i.e. MDA restrictions), but the bank should be able to choose to pay T1 coupons rather than distributions to the shareholders.

Q13. How would you assess the impact of the provisions to be applied to temporary write-downs and write-ups?
The RTS is too restrictive in compelling write-ups to be discretionary. This will not be consistent with the 27 company laws and debt security laws that coexist across the European Union[1] and may lead to competitive distortions or to institutions being prohibited from issuing out of their head offices (which is clearly not a goal of the new regulatory framework).
We feel that what matters is to preserve the institution's capacity to proceed to a capital increase once it is in a difficult situation, so that any contractual clause that makes "previous" Additional Tier 1 holders worse off than "new" shareholders and does not hinder recapitalisation should not disqualify the instrument. In addition, any amount available for distributions and write-ups should meet the

[1] For instance, the tax regime for additional Tier 1 instruments differs among jurisdictions in Europe. In a number of jurisdictions write-down is considered as a cancellation of debt in absence of return to good fortune provision and generates taxable profit. The existence of a pre-determined write up clause entails that in case of return to "normal", the write up should take place automatically in accordance to certain conditions to be defined and upon approval of the competent authority. This write up automatism makes possible not considering the write down event as a cancellation of debt, and therefore makes the taxation of write down less likely.
As another example, under some jurisdictions contracts that derive from the RTS may be deemed leonine and have no legal enforceability.

requirements imposed by capital buffers (i.e. coupon payments and write-ups should be restricted when the buffers are not met, but not if dividend payments to existing shareholders are allowed).

An automatic write-up should also be allowed as it gives T1 holders more certainty, and also to avoid any negative tax impact (see footnote). The write up could take place automatically in accordance to certain conditions to be defined and upon approval of the competent authority. The write-up must be subject to the constraints and should not hinder recapitalization.

With respect to the amounts available for write-ups, these should include all surplus Common Equity Tier 1 generation, without limitation to profits (for instance a reversal of unrealized losses, or disposals that lead to a reduction of risk-weighted assets).
To elaborate on the example provided by EBA, profits (and other sources of surplus Common Equity Tier 1 generation) of preceding years "attributable" to Additional T1 holders should also be available for write-ups. Indeed, in as much as distributions may be made out of earnings from previous years, in the example provided shareholders essentially keep all of the 100 profit made in year 1 as they are incorporated into retained earnings and will eventually be distributed to them, while Additional Tier 1 holders will never have a claim on the 29 profit attributed to them. As a result, in year 2 the amount available for write-ups before MDA should be 54 (not 25).

Q14. Are the provisions on indirect holdings arising from index holdings sufficiently clear? Are there issues which need to be elaborated further?
To this end, rather than a generic provision, EBA should try clarifying in detail the circumstances in which the approach would be acceptable, i.e. not "operationally burdensome". For instance, it could be assumed that the share of relevant entities in the reference index is less than x% or total exposure of index holdings is less than x% of total own funds.

The draft RTS refers to the investment mandate to determine whether a capital instrument of a relevant entity cannot exceed a maximum percentage of the index. In our views, the draft RTS could also mention valuable alternatives approaches. For example the maximum percentage could also be derived from the index which is replicated by the fund; the institution should be able to explain the calculation of this maximum percentage as well as the tier of capital to which the deduction is applied.

Finally, especially regarding the identification of indirect holdings and synthetic holdings by an institution of own Common Equity Tier 1 instruments, CET 1 instruments of financial sector entities etc. (Art 33 CRR), the impact of operating a deduction can be substantial; banks need a clarification on how far have they have to go to identify required deductions. Additionally a clarification seems necessary regarding the wording "synthetic holdings" (insofar no double gearing of equity exists): a derivative instrument is not necessarily combined with a cash outflow. Regarding the materiality of operating the deductions, the question is whether the benefits cover the costs of these requirements; to avoid arbitrage in that area, supervisors have all instruments in Pillar II to intervene.

Q15. How would you assess the meaning of operationally burdensome and which circumstances would be considered as operationally burdensome?
The BSG suggests clarifying in detail the circumstances in which the "structure-based" approach would be acceptable, i.e. when the look-through approach is "operationally burdensome". For instance, it could be assumed that the share of relevant entities in the reference index is less than x% or total exposure of index holdings is less than x% of total own funds.

In general, EBA should further specify the used indefinite legal terms such as “low materiality”, “low” (net exposure), “short duration”, “strong materiality” etc..

Q16. How would you assess the cost of conducting look-through approaches vs structure-based approaches for the treatment of indirect holdings arising from index holdings?

In case of assets with underlying exposures the use of the look-through approach is far from being a general practice for all institutions in the Member States. They are burdensome and costly for several institutions, primarily for the small ones. We favour the possibility of the structure-based approach which is based on the investment mandate of the index and to follow it, is more simple than the look-through approach

Q17. How would you assess the levels of the thresholds for market making purposes (identical for hybrid instruments to the ones provided by CEBS/EBA guidelines on hybrid instruments published in December 2009) for competent authorities to give a prior consent (Article 29)?

The thresholds, applied on a net basis, are acceptable and consistent with the current practice. Please note there is a typo in point 3 (a) of Article 29 (“3%” and “10%” are misplaced).

It would be worth clarifying the circumstances under which competent authorities may lower the limits indicated in points (a) and (b) of Art. 29 (3) and Art. 32 (2) of the draft RTS.

We understand that operations where capital instruments are redeemed and immediately replaced by capital instruments of the same quality are outside the scope of this standard, as per Article 72 1. of the CRR such operations will be granted permission by competent authorities.

Q18. How would you assess the impact of the proposed timing of 3 months for the submission of the application (Article 31)?

We do not think necessary to systematically include the over-exhaustive information referred to in Article 30 in the applications (it will probably be time-consuming for all stakeholders and to no use), except obviously if required by the supervisor, who could for that purpose define a materiality threshold. The timing is fine and welcome as it grants a uniform European perspective and a level playing field.

However, the proposed processing time of three months appears quite lengthy compared to some current situations. During a three months period there may occur changes that are not insignificant. Given this our suggestion is that the competent authority should always have the possibility to allow institutions to transmit an application within a time frame shorter than three months.

[...]

3. 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 3 months period.

Q19. How would you assess the levels of the thresholds for the non-materiality of the amounts to be redeemed for mutuals, cooperative societies or similar institutions (Article 32)?

We welcome the alignment between all types of institutions. We support that in the case of non-joint stock companies a net approach should be applied.

Q20. The EBA is considering setting a time limit the waiver shall not exceed. This time limit would be set up at a maximum of 5 years and a lower time limit could also be considered. Which time limit, within a maximum of 5 years, would you find appropriate?
The time limit of five years seems a minimum and thus there seems no reason to reduce it (if anything, an increase would be welcome).
In addition, the authorities that may to approve the plan should be defined more broadly (they might include supervisory authorities, resolution authorities, the relevant ministry…). Furthermore, this RTS should not be too restrictive *ex ante* (as is the case in the proposed draft), as during stressed times authorities may want to be able to use this exemption as broadly as possible to make rescue of distressed institutions more attractive and preserve taxpayers' money.

Q21. Would you assess the limit on the amount of assets set at 0.5% of the average total assets of the special purpose entity over the last three years as appropriate?
The limit seems fine; however, to accommodate smaller institutions which are likely to issue small amounts of instruments per SPE, the EBA could consider setting the limit as the maximum between 0.5% of assets and 0.5 M EUR.
We seize the opportunity to seek clarification on the fact that, in consistency with the Basel text, where the conditions are met for instruments issued out of SPEs to be qualifying, they should be treated as if issued directly by the institution (i.e. not subject to the computation described in CRR's article 79).

Q22. How would you assess the impact of setting the limit at 0%, meaning keep only the possibility offered by paragraph (a)?
Again, we draw attention to the variety of corporate and tax laws across the EU to advise against taking radical positions. We also wish to make a remark on **Article 7** of the draft RTS (meaning of distributable items for the purposes of determining the amount available to be distributed to the holders of own funds instruments of an institution): we would like clarification that this is to be understood as an economic requirement and that the spirit is more important than the letter. In particular, for Additional Tier 1 instruments that are legally debt (and for which coupons may not be paid "out of" distributable items as these are reserved for shareholders), we suggest including in these instruments a clause stating that if coupons are higher than statutory distributable items, then the institution will be prohibited from paying the amount of coupons thus exceeding distributable items.
We understand from the explanatory text that the EBA is aware of the issue.

Furthermore, we understand that the removal of the so-called filter on debt securities measured at fair value on the balance sheet was initially devised by the Basel Committee as the latter believed that IFRS 9 would be introduced by the time Basel 3 was enacted. As things are, it is unlikely that this introduction will occur before 2015. We therefore strongly suggest to the EBA that they make a recommendation to accommodate the situation during this time, for instance by maintaining the filter until IFRS 9 is in place, and take into account the IASB's latest update on securities measured at Fair value through OCI to reflect on a lasting solution to avoid own funds volatility.