EBA/CP/2012/02
CONSULTATION PAPER ON DRAFT REGULATORY TECHNICAL STANDARDS ON OWN FUNDS

POSITION PAPER SUBMITTED BY RAIFFEISEN BANKING GROUP AUSTRIA

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?

Provisions are sufficiently clear. We do not see any issues to be elaborated further. We do not have a proposal for the definition of foreseeable.

*Comment on **Art 4 RTS** on Capital instruments of mutuals, cooperative societies, and similar institutions*

We would like to point out that the recent proposals from the Council as well as the EP have deleted the legal basis for this RTS. In case the legal basis remains we would comment as follows:

- There is no need to reiterate the wording of Art. 26(1)(i) CRR with respect to loss absorption in **Art. 4(1)(b) RTS**. We suggest to delete subpara (b).

- Wording of **Art. 4(2)(c) RTS** is not covered by the CRR, as Art.26(1)(h)(iv) CRR provides for an exemption for distributions based on fixed percentages as long as the distribution is covered by the distributable profit and does not represent a preferential distribution. We suggest to delete subpara (c).

- **Art. 4(3) RTS** : For the loss absorbence capacity of an instrument the limitation to the nominal value of that instrument in case of redemption is not relevant. What matters is only the event of insolvency or liquidation. Therefore the case of redemption is not mentioned in Art 27 (4) CRR. We suggest to delete the word "redemption" in Art 4 (3) as well.

- Furthermore it should be clarified, that the provision in **Art 4 (3) RTS** that this limitation applies to the same degree to all holders of all Common Equity Tier 1 instruments is without prejudice of the institution's possibility to recognize non voting CET 1 instruments beneath the cooperative shares as long as the conditions according to Art 27 (4) a and b of the CRR in the recent Council proposal are met. (The alternative for a cooperative issuing cooperative shares and non voting CET-1 instruments would be to cancel in its statutes the limitation to the nominal value of cooperative shares also for the event of redemption; this would obviously be counterproductive: Art 27 (2) b CRR requires the ability to limit the redemption of cooperative shares. In this respect the limitation of the redemption to the nominal value of the instrument is one of the most important and most common features of cooperative shares, because it reduces the incentive for members to call for redemption).

*Comment on **Art 5 RTS** on Market Stress*

We would like to point out that the recent proposals from the Council as well as the EP have deleted the legal basis for this RTS. In case the legal basis remains we would comment as follows:

Mutuals, cooperative societies and similar institutions per definition only have limited access to capital (not liquidity) as they can (if at all) only revert to their members and have no access to capital markets. Thus the term "capital" should be deleted.

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?

- We need a clear definition of "funding". The wording in **Art 6(1) RTS** "loan or other funding in any form" could be misleading, because it could be understood in a way also encompassing the donation of equity. We understand "funding" in the sense of liabilities and not equity. Equity would be treated under Art 33 (1) (g) CRR ("reciprocal cross holding"), this would be the correspondent requirement for holdings in equity. The difference is not so much in the treatment (Art 26 CRR: no qualification as CET-1 / Art 33: deduction) but in the conditions as Art 33 (1) (g) requires that the competent authority considers the reciprocal cross holding to have been designed to inflate artificially the own own funds of the institution. This condition would lose all impact, if every reciprocal cross holding were a direct or indirect funding. Therefore we would suggest the following wording:

  "Direct funding means situations where an institution has granted a loan or other funding in any form with <u>the exception of holdings</u> to an investor, for the purpose of the purchase of its capital instruments. The applicable forms and nature of indirect funding of the purchase of an institution's capital instruments shall include the following: "

- In many cases, especially in connection with inter bank lending, the ultimate use of funds will not be controllable by the lending entity. The burden of proof in **Art. 6(1)(c) RTS** should thus only be transferred to the lending bank in certain cases. We would suggest the following wording:

  "funding of a borrower that passes the funding on to the ultimate investor for the purchase, at issuance or thereafter, of an institutions capital instruments, <u>in case there is evidence that funds were deliberately lended to artificially increase own funds of the borrower (e.g. comparable amounts, close timing, etc.)</u>"

Q03. How do you assess the provisions on related parties regarding the necessity to assess on an on-going basis that the related party has sufficient revenues?

- Wording of **Art. 6(1)(d)(ii) RTS** is too strict with respect to the ability to repay the respective loans out of revenues. The necessity for a related party to have sufficient revenues on an ongoing basis would exclude borrowers holding considerable amounts of other assets 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 to that effect that the ability to support the payment of interest and the repayment of the funding without recourse to the distributions of the capital instruments held shall be sufficient, regardless by which means this is managed. We suggest the following wording:

  "the natural or legal person or the related party does not have to rely on the distributions of the capital instrument, to support the payment of interest and repayment of the funding"

- Wording of **Art. 6(1) RTS** is too strict with respect to intra-IPS cash flows especially as central institutions have to provide cash-clearing operations within the IPS acc. to Art. 46(3)(b)(i) CRR. Such operations should be treated as other intragroup transactions. IPS should thus also be exempted in a new **Art. 6(2)(a) RTS**. We would suggest the following wording:

  "(a) The investor is not included in the scope of prudential consolidation of the institution or in the scope of the supplementary supervision of the institution in accordance with Directive 2002/87/EC or in the institutional protection scheme according to Art 108(7)"

- We appreciate that the purpose of mutuals, credit cooperatives and similar institutions to provide loans for members is acknowledged in **Art. 6(4) RTS.** Wording of Art. 6(4) nevertheless is overshooting as in some jurisdictions or in some cooperatives loans are also given to non-members, so you need not be a member to receive a loan, although there is a strong expectation that you become a member. In other cases the amount of cooperative shares increases with the loan amount, so it may be necessary to subscribe more capital instruments whereas for achieving membership the subscription of one Cooperative share would be sufficient. We would therefore suggest the following wording:

  "With regard to mutuals, cooperative societies and similar institutions, where there is an obligation *or a tradition* for a customer to subscribe capital instruments in order to receive a loan, that loan is not considered as a direct or indirect funding under the conditions that:

  (a) the amount of the subscription is not material;
  (b) the purpose of the loan is not the purchase of an institution's capital instrument;
  (c) the subscription *of at least one* of the institution's capital instruments is necessary in order for the beneficiary of the loan to become a member of the mutual, cooperative society or similar institution. "

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

Provisions are sufficiently clear. We do not see any issues to be elaborated further.

Q06. How would you assess the cost impact of including in the provisions of the instruments criteria as listed in paragraphs 2 and 3? (Please note that the CRR requires in point (b) of Article 27 (2) that where the refusal by the institution of the redemption of instruments is prohibited under applicable national law, the provisions governing the instruments shall give the institution the ability to limit their redemption).

As the provisions governing the instruments are part of the statutes in the case of member shares we will have some discussions when we alter the statutes, but we do not assume, that the members would quit because of that alteration. Their readiness to subscribe more shares could be diminished.

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?

Provisions are sufficiently clear.

- It can not be accepted to apply IFRS for banks calculating their eligible capital on the basis on local GAAP. This should be left to the local GAAP regime. With respect to **Art. 14(2) RTS** we suggest to replace reference to Reg. 2002/1606/EC by reference to Reg. 86/635/EC.

- With respect to **Art. 14(3) RTS** we are strongly pleading not to implement any administrative procedures in view of a consent by the supervisory authority or similar. This should be left to the ongoing supervision process.

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?

- As presently no list of prudential regimes of third countries equivalent to that applied in the Union prepared by EBA, published on EBA's homepage, is available to safeguard a level playing field among Member States **Art. 15(3)(a) RTS** in combination with **Art. 15(4) RTS** will create fundamental disincentives to invest in:
  - AT1 and T2 instruments issued by 3rd country institutions and
  - Any own funds or subordinated instruments issued by financial institutions not included in prudential consolidation and not subject the CRR (e.g. minority interest in leasing companies)

  as these will be deducted from CET1 only, thereby neglecting the corresponding deduction approach.

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

- We would like to point out that the recent proposals from the EP have cancelled the legal basis for this RTS. Furthermore the recent proposals from the council as well as the EP have explicitly allowed aggregation instead of consolidation.

- Wording of **Art. 18(a) RTS** is not covered by the CRR. Art. 46(3)(b)(v) CRR only requires a consolidated balance sheet and not consolidated accounts. It furthermore refers to Art. 108(7)e CRR which even allows aggregated numbers as long as multiple gearing is avoided. Only decentralized groups permanently affiliated to a central body acc. to Art.9 CRR are subject to prudential consolidation. Art. 18(a) ignores the difference in substance and treatment between an IPS acc. to Art.46(3)(b) CRR and a group acc. to Art.9 CRR. We suggest to delete subpara (a).

- We do not think that "concerning the IPS as a whole" in Art. 108(7)(e) CRR justifies to include entities which themselves are not members of the IPS as they do not profit from the privileges granted in Art. 46(3)(b) and Art. 108 (7) CRR. We therefore suggest to delete the following wording of **Art. 18(b) RTS**

  "as well as their subsidiaries and their holdings in relevant entities. To determine if a relevant entity meets the definition of a subsidiary, the holdings of all the members and their own subsidiaries shall be considered together."

- Wording of **Art. 18(f) RTS** is not covered by the CRR. It seems to provide only for the deduction method in case of overlapping IPS. Avoiding deduction is what the whole Art 46 (3) CRR is all about. So without clarification, we are afraid, that the wording of subpara (f) would miss the central purpose of Art 46 (3) CRR. As long as multiple gearing is avoided acc. to Art. 108(7)(g) CRR there is no legal basis to exclude proportionate consolidation. To avoid multiple gearing of own funds in a three level network with more than one IPS, it is sufficient to have a full consolidation for two levels and a proportionate consolidation of the holding for the third level. This is a special case of proportionate consolidation that should not be subject to the limits of Art 16 CRR. We therefore suggest to explicitly allow proportionate consolidation or aggregation in subpara (f):

  "(f) for the purpose of point (b), all capital instruments held by entities which are part of the consolidated report referred to in point (a), in other relevant entities which are not part of the consolidated report, shall be deducted from the consolidated own funds in accordance with Articles 33, 53 and 63 of the CRR. <u>Where institutional protection schemes interact according to Article 46(3) point (b) and (c) CRR competent authorities may on a case-by-case basis permit, that holdings in relevant entities which participate in another institutional protection scheme can be consolidated by proportional consolidation</u>"

- Wording of **Art. 18(g) RTS** is not covered by the CRR. As long as multiple gearing is avoided acc. to Art. 108(7)(g) CRR there is no legal basis for a consolidation of different IPS within the same cooperative network. See comments on consolidations methods in Art. 18(a) RTS. We suggest to delete subpara (g)

Q11. Would you agree on the types of incentives to redeem as described in paragraph 2 of article 19? Should other types of situations be considered as incentives to redeem?

- An option to convert to equity at a specific point in time with a certain strike (similar to convertibles) acc. to **Art. 19(2)(b)** in our view is not an incentive to redeem. We suggest to delete subpara (b).

- From today's perspective Art. 19(2)(a) and (c)-(e) are sufficient. Future misuse will have to be tackled by amending their wording. **Art. 19(2)(f)** contains the unspecified term "in a way which suggests". This leaves ample space for interpretation and would require time consuming consultation with the local regulator before issuing AT1 instruments. This again is not in the interest of local regulators as it would make them liable to any damages arising from undue time delays or leakages. We suggest to delete subpara (f).

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?

- Presently is not clear which instruments will be subject to which treatment at which point of time. Will AT1 and T2 have the same trigger event or will they be different? As far as AT1 is concerned provisions are sufficiently clear. Based on the BCBS press release of 13 Jan 2011 which requires point of non viability (PONV) language for all AT1 and T2 instruments, however, we miss clarification on T2 instruments.

- Will the PONV be the same as the trigger event acc. to Art 51 (a)(ii) CRR? How does this fit to the point of entry into resolution and bail-in rules? Proposal for the Crisis Management Directive (CMD) suggest that bail-in triggers for T2 and subordinated debt are below the CRR trigger event.

- On the other side EBA itself recommended that relevant banks need a core tier1 ratio of 9% to remain viable in times of crises and suggested that state aid might be necessary as an instrument of last resort to achieve this goal. State-aid, however, acc. to the CMD is a trigger event for bail-in and thus a lot higher than the trigger event in the CRR. Under this aspect all trigger events required by CRR below an amount of 9% become meaningless from an investor's point of view as the PONV is considered to be considerably higher and any write-up to 5,125% does not help.

- How does all of this fit to local insolvency law?

- How will all of it fit to the rules of protection of property of the ECHR? Is saving tax payer's money a sufficient reason to at least partially expropriate equity, AT1 and T2 investors before an institution is insolvent in order to save other debt investors?

- As far as the immediate information of the holders of the instruments acc. **Art. 22 RTS** is concerned we would rather plead to wait for the determination of the amount to be written down acc. to **Art. 21(c) RTS** and inform the holders afterwards. Any other procedure would mean to inform the holder about the fact that a trigger event has happened, but being unable to tell him how much is written off/down.

Q13. How would you assess the impact of the provisions to be applied to temporary write-downs and write-ups?

- As long as risk allocation between the different own funds instruments (and maybe even junior debt) is not clear in detail even equity markets will be reluctant to invest. Consequently cost impact on issuers for any equity and debt instrument will remain high.

- The example in the Annex clearly shows that AT1 investors will receive dividends later than equity investors as a distributable profit has to be shared between equity and AT1 investors acc. to **Art. 20(3)(e) and (f) RTS**. However, profit allocated to AT1 investors cannot be distributed as long as the amount written-down is not written up again, while there is no write-up barrier for equity investors. This would mean to put AT1 investors at a disadvantage to equity investors.

- The intention to allocate more risk to AT1 investors than to hybrid capital investors pushes out fixed income investors who cannot take equity risk. Although this might be intentional for structured investment vehicles (SIVs being a part of the shadow banking system), it is not so for insurances and pension funds. On the other hand equity investors might be inclined to invest into real equity rather than AT1instruments.

Q14. Are the provisions on indirect holdings arising from index holdings sufficiently clear? Are there issues which need to be elaborated further?

Provisions are sufficiently clear. We do not see any issues to be elaborated further.

Q15. How would you assess the meaning of operationally burdensome and which circumstances would be considered as operationally burdensome?

We do not consent with the definition of "operational burdensome" in **Art. 26 RTS** as „low materiality" is not defined. In order to reduce operational burdens we propose to exempt index holdings from the look through approach that do not breach the large exposure limits.

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?

See question 15 above.

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)?

- We see no additional use to refer to stress tests if the main rule requires replacement by equal or higher quality own funds when applying for the consent to reduce own funds. In case of a regulated group a joint risk assessment will be too long to carry out capital markets transactions with the necessary speed. We plead for the deletion of the last sentence **Art. 27 RTS** and the intermediate sentence “as assessed by the competent authority”.

- **Art. 28(1) RTS** requiring to delay the announcement of an expected redemption, reduction or repurchase of own funds instruments before approval may contradict requirements of the Market Abuse Directive (MAD). This should be checked carefully.

- The reference to the excess amount in **Art. 29(3)(a) RTS** does not make much sense in the given context. We believe that it rather should refer to the level of 5% as given in the current legislation for market making (Art.19-24a of Directive 77/91/EWG which was reinforced by 2006/68/EG). Therefore we would plead to delete this reference.

- For the sake of legal clarity the thresholds should not be subject to any lowering. Therefore we plead for the deletion of **Art. 29(4) RTS**.

- Information about ESOP (Employee Stop Option Program) and MSOP (Management Stop Option Program) of the supervisory authority seems to be burdensome in terms of administration and should therefore be skipped. We do not see any additional use for **Art. 29(5) RTS** anyway. Therefore the whole paragraph should be skipped.

- **Art. 30 RTS** confused the buyback/redemption issue and the market maker exemption. This should be considered in terms of determination of documentation requirements.

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

Prediction of market movements over such a time span is virtually impossible and will effectively jeopardize transactions which in fact improve CET1 ratios and were encouraged by EBA within the 9% exercise. Such transactions should rather be effected within 4 weeks. Longer periods will increase the danger of leakage.

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)?

The levels fit quite well.

Q20: The EBA is considering setting a time limit that the temporary waiver from deduction from own funds 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?

Given the present situation we believe that the maximum time limit of 5 years is appropriate.

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 amount of 0,5% is appropriate as accrued interest on the investment is also constituted by the investment.

Q22. How would you assess the impact of setting the limit at 0%, meaning keep only the possibility offered by paragraph (a)?

Setting the limit at 0% does not make sense to us as cost for running the SPV (auditors, lawyers, directors) should be borne by the SPV. The SPV will thus need a certain amount of extra cash not dedicated to redemption or coupon payments.

Vienna, 28 June 2012