German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

on EBA-Consultation “Draft Regulatory Technical Standards on own funds and eligible liabilities”

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Comments on EBA Consultation Paper on Draft Regulatory Technical Standards on own funds and eligible liabilities

I. General Remarks

1. Exempting institutions that can be wound up using normal insolvency proceedings (insolvency institutions)
In the draft under consultation, the intention in derogation of existing practice is to extend to all institutions the obligation to obtain permission to reduce eligible liabilities. This extension is extremely problematic, because it would mean that also such institutions would be subject to the permission regime that according to the resolution plan of the resolution authorities would not be resolved but liquidated as part of normal insolvency proceedings (insolvency institutions). Over and above the capital/own funds requirements, these entities are not required to maintain eligible liabilities. In a crisis situation, no bail-in is foreseen for these institutions, which would require a separate stock of eligible liabilities instruments.

We do not consider a requirement to obtain permission in these cases understandable, as it is not taken into account that insolvency institutions do not even have to maintain such instruments at all. An obligation to obtain permission cannot therefore be in line with the spirit and purpose of the provisions of the CRR II and BRRD II and is also not consistent with current practice of the SRB and national resolution authorities such as BaFin as per the identical legal basis in the CRR II. These have exempted insolvency institutions from the permission regime.

With regard to the proportionality principle and the simplifications for smaller institutions just agreed as part of CRR II, the EBA's proposal is worrying. As the EBA does explain, in future, institutions can intentionally not comply with some eligibility criteria when issuing instruments in order to remain outside the scope of application of the permission regime. Such an approach is hardly appropriate, since, for example, in the event of its classification as an insolvency institution being withdrawn, the institution would then have to take on/issue eligible liabilities anew.

The aforementioned remarks apply to waiver institutions too.

2. Equal treatment of instrument classes
We do not consider it necessary to structure the regulations for eligible liabilities identically with the requirements for own funds. From our point of view, precisely these are not comparable situations as a reduction in capital ratios has totally different consequences from non-compliance with MREL obligations. Admittedly, the latter could influence an institution's resolvability, but a reduction in capital ratios has a much more serious, direct impact on the institution and thus for the financial market too. One should consider also that capital instruments and eligible liabilities – especially preferred senior instruments without an explicit subordination agreement – differ significantly from each other with regard to their quantity, further use for liquidity steering, average maturity and target investors. Hence, in our opinion, a greater sense of proportion should be applied when structuring the redemption/repurchase conditions and the particularities of the respective classes/types of instruments taken into account.

What is more, it is only the definition of "sustainable for the income capacity of the institution" (Art. 78a (3) (d) CRR) to be defined by the EBA that Art. 78a (3) CRR which requires that the format of the applicable provision / delegated act for capital instruments be aligned. As only this individual provision has been highlighted, one must assume that the lawmaker certainly sees scope for differing provisions as far as the other regulations are concerned.

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3. Exemption for preferred senior issues

At the time of issuance, for example, capital/own funds instruments must have a minimum period to maturity of five years and are usually issued with long tenors or are even available for an unlimited period. In comparison, "classic" bonds and debentures (usually preferred senior instruments or, for grandfathering reasons, non-preferred senior issues) have significantly shorter durations and, coupled with this, shorter roll-over periods and a completely different ratio of the amount of annual maturities to buybacks/redemptions, as besides serving to meet MREL requirements they also ensure funding or are used for liquidity management. Particularly for liquidity management purposes, institutions need greater flexibility for these instruments than for own funds items. For the investor, a preferred senior issue is ultimately something explicitly different than an AT1 instrument. In the design of the investment as a deposit or promissory note loan, greater flexibility from the issuer is expected, for example, fulfilling a desire for early repayment - even if contractually excluded. An investor will hardly understand why the bank is not prepared to accommodate him/her in an emergency situation (e.g. the Corona crisis) and to return deposits before maturity.

Against this background we do not consider it appropriate to apply (almost) the same rules to all classes of instruments. The capital market differentiates strictly between different asset classes, for which there are also differing market expectations regarding tenor or flexibility. For both issuer and investor, an AT1 issue is something completely different from a non-preferred senior issue, a preferred senior issue or even a long-term deposit. These differences are not taken sufficiently into account in the present RTS. In our opinion, particularly for preferred senior issues and deposits, greater degrees of freedom are required. The instruments should be completely excluded from the authorisation process and the deduction rules.

4. Inclusion of existing instruments (grandfathering provisions)

The draft RTS defines very broadly the scope of application of MREL-eligible liabilities covered by the redemption/repayment/repurchase permission. We clearly reject the inclusion of existing/legacy instruments for a number of reasons. On the one hand, we see in such a multi-year retroactive effect of the supervisory requirements a clear violation of the institutions’ protection of legitimate expectation. Unlike the regulations for own funds, the total volume of MREL-eligible liabilities in the existing/legacy portfolio includes a considerable portion of the institutions’ liabilities side, i.e., also instruments used for refinancing and liquidity management. Subjecting these MREL instruments, including longer-term deposits, which may have been issued / onboarded years ago, to a quasi ad hoc permission regime and a maximum buyback/redemption volume of 3% of the total MREL volume on the entry into force of the final RTS, poses the institutions with costly ad hoc adjustments to their processes. It also means interference in previous MREL planning and control and in the ability to deal in the market, since in order to comply with the 3% framework with a lead time of several months, individual items may have to be removed from the MREL calculation and replaced with new MREL-eligible issues. Both effects have a negative impact on MREL ratios.

For all non-resolution entities with minimum MREL requirements at individual level, it would even mean that they would have to submit applications for repurchase/redemption permission for eligible liabilities issued to non-group third parties before the introduction of the internal MREL concept to which CRR II and BRRD II refer. Insolvency institutions would either have to file applications for redemption authorisations for MREL liabilities that they do not need to meet the minimum requirements or immediately remove liabilities from MREL eligibility in order to avoid filing an application. The same procedure would be con-

ceivable for resolution entities too, so that in the event of a significant over-fulfilment, individual instruments are excluded from the MREL portfolio in order to reduce the MREL portfolio affected by the application, which would have to be monitored. We consider the effects described to be incompatible with the institutions' protection of legitimate expectation in the regulatory/prudential requirements.

5. Limits for insignificant (de minimis) amounts / notification procedure

Overall, we consider the process of repurchase/redemption approvals to be disproportionately burdensome for both banks and supervisory/resolution authorities. As far as we know, prior permissions requested by banks for equity market making/management in own funds instruments represent only a very small percentage of total equity capital. And with regard to eligible liabilities too, the risk of non-compliance with the required MREL ratios, given the shorter duration of these instruments, is more likely to lie in inadequate planning/implementation of funding activities, liquidity management or a general market disruption than in repurchases or other redemptions. In view of the conservatively estimated annual maturities of around 20% of total eligible liabilities, the repurchases/redemptions requested are surely of secondary importance.

We would therefore welcome a process that within insignificant (de minimis) limits allows institutions that over-fulfil the own-funds and/or MREL requirements to waive prior application and instead implement a retrospective notification procedure. The de minimis limits could be tied to RWA, e.g. 0.1% of RWA for own funds instruments and 0.25% - 0.5% of RWA for eligible liabilities. Over-fulfilment of the requirement could be based on the MDA or M-MDA threshold, e.g. by over-fulfilment of at least 100 bp. We firmly believe that the supervisory monitoring process would thus be both practicable and, by virtue of the low level of de minimis limits and the normal course of scheduled maturities, adequately conservative and carefully structured.

6. Adoption of transitional provisions

With a view to the consultation period for the draft RTS until 31 August 2020, followed by coordination of possible amendments to the draft RTS and the "endorsement" by the Commission, it is reasonable to assume that finalization and therefore certainty as to what requirements will be asked of the banks will not be available until the 4th quarter of 2020 at the earliest. However, as the draft RTS calls for a four-month application period, it can now already be established for the institutions for which the Single Resolution Board (SRB) is responsible that applications for next year still need to be made on the basis of the transitional provisions set out in the "MREL Addendum to the SRB 2018 MREL policy" as per the updated version of 25 June 2019. In addition, the "SRB Addendum to the SRB 2018 MREL Policy" includes only eligible liabilities which meet the requirements of Art. 72b CRR in full. In comparison, the RTS draft captures a significantly larger group of eligible liabilities. This means that a situation could arise in which the institutions did have permission for repurchases under the SRB Addendum, but which applies only to part of the eligible liabilities included in the final RTS and the repurchase application pursuant to the definitive RTS is still in the approval process. Against this background, transitional provisions should be included in the draft RTS that ensure that even during an ongoing approval process for the repurchase of eligible liabilities institutions continue to be able to operate or, in general, entry into force should not take place until the application for 2022. Otherwise, the institutions either could not make any repurchases or they would risk a violation of CRR provisions. Furthermore, we ask that permission already granted under the SRB addendum can, if necessary, be treated as a first application so as to reduce the application documentation and approval time for the application under the definitive RTS.

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7. Reporting of utilisation of general prior permissions
As part of the general prior permissions granted in recent months, the ECB has called on the institutions to submit regular reports of their usage of prior permissions at level of individual issues and ad hoc notifications of the first repurchase in a new issue. In this, the ECB invokes it rights to information in the SSM regulation. It is our understanding that this involves a request that will in future apply to all institutions with general prior permissions.

In our view, such a reporting regime – precisely for the market making/management volumes, which in comparison to total own funds, are very small – contradicts the EBA's undertaking to slim down reporting overall. Regardless of that, we regard full-scale implementation of such a requirement by means of notifications as the wrong approach. Should the EBA be of the view that such reporting is necessary, then it should be incorporated in the RTS too. If, on the contrary, this is not considered necessary, then it should be required (by any authority) only in justified one-off cases, but not as a general obligation.

8. Subsequent amendment of Art. 14 of the RTS because of adjustment regarding software deduction
The amendments to the CRR included in the risk reduction package regarding the reduction of intangible assets (software) pursuant to Art. 36 (1) (b) CRR in conjunction with the corresponding RTS according to Art. 36 (4) CRR mean that in future the total amount of intangible assets will no longer be required to be deducted from CET 1. This change necessitates clarification in Art. 14 (3) (b) of the RTS on own funds[1]. We request the addition of the following **in heavy type**:

„b) the amount of associated deferred tax liabilities **pursuant to Art. 37 CRR** arising from **deducted** intangible assets and from defined benefit pension fund assets."

II. Question for consultation

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

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

NA

[1] COMMISSION DELEGATED REGULATION (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions

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

NA

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

Definitely. The permission regime would limit banks' freedom to choose their refinancing if certain instruments (eligible deposits, preferred senior) became subject to it.

Should the EBA expect institutions to issue fewer MREL-eligible instruments in future if necessary, because of the permission regime, this would have to be critically assessed for a number of reasons:

- The creation of an additional class of instruments would no longer be understandable for client/consumer. There would be an increased tendency for instruments to be bail-in-eligible, but not MREL-eligible. This could not be communicated to the general public.
- Assuming that insolvency institutions increasingly issued such "non-MREL instruments": If such an institution were then still to be resolved pursuant to BRRD, it would be seriously lacking MREL capital. In the interests of ensuring a smooth resolution, this approach is therefore not to be recommended.

The permission obligation should thus be significantly reduced in order to avert the aforementioned effects and not to endanger consumer protection.

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

Article 8 / Article 9 of the RTS draft: while we are aware of the EBA's mandate, the implementation should nonetheless not overlook the fact that eligible liabilities differ significantly from own funds instruments, particularly with regard to the number of issues, the types of investor and denominations. We see as especially problematic the regulations that affect bank customers. It is our understanding that the concept of direct funding includes the following constellations:

The bank makes a (securities) loan to a customer. In its securities account – with a high level of overcollateralisation – the customer holds bonds/debentures/debt instruments issued by the bank that meet the criteria for eligible liabilities. For own funds instruments, banks have solved the conflict arising therefrom by excluding them from the hypothecation agreement and collateral-eligibility calculation already at

the contract stage. As a rule, only own shares (treasury stock) were affected. An extension of this approach to eligible liabilities is theoretically possible. It is, however, difficult to convey to customers that bonds/debentures debt instruments issued by third-party institutions (with corresponding default risks) can be considered as collateral, but not the debt instruments issued by their own bank.

Even a permanent monitoring of a customers' securities accounts to apply the rules by means of an appropriate reduction in volume of direct funding of own funds / eligible liabilities is still doable for the manageable number of own funds instruments, but for the significantly higher number of debt instruments means considerable operational cost and effort.

We therefore consider it necessary that such situations, where customer asset investment (and not the bank's funding) is at the forefront, be excluded from the regulations for direct funding. For such situations, however, there should be introduced at least a de minimis provision according to which stock exchange listed debt instruments up to an amount of, say, EUR 500k per customer who at the same time has taken out a loan be not considered direct funding.

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

NA

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

From the explanatory box for consultation purposes on Article 28 we understand that with regard to remuneration, the EBA did not want to change the content of the current RTS (Article 29 (4)). On p.31 the EBA accordingly states "(…) have only been moved here from the former Article 29(4) in order to bundle provisions related to deductions in Article 28". In particular, the proposed new RTS still says "deduct these instruments from own funds on a corresponding deduction approach for the time they are held" (Article 28 (4)). However, since the proposed new Article 28 (4) combines the remuneration topic with "When applying for a general prior permission (…)" (beginning of the first sentence of the proposed new Article 28 (4)), it becomes confusing. For a prior permission and a general prior permission, the proposed paragraphs Article 28 (2) and (3) clearly specify that the approved amount has to be deducted once the permission has been obtained. For the remuneration case in the proposed new Article 28 (4), this leads to the impression that the instruments held have to be deducted in addition to the general deduction of the predetermined amount for the general prior permission and that the remuneration buybacks also have to be included in, and monitored against, the limit of the predetermined amount of the general prior permission. Therefore, please ensure that the remuneration topic (current Article 29 (4)) is not mixed up with the general prior permission and that the institution can apply for a separate employee remuneration permission as under the current Article 29 (4) (for which under the current practice no euro amount is granted but permission allowing the buyback etc. of e.g. a certain number of shares), under which only

the instruments actually held need to be deducted and that such remuneration cases do not have to be included in, and monitored against, the limit of the predetermined amount of the general prior permission. For this purpose, we recommend using the wording of the current Article 29 (4).
Finally, please note that it is typical that employees receive an award of e.g. a number of shares, and not of an EUR-amount as share-equivalent in order to participate in the risks and opportunities of the bank. As a consequence, the bank has a delivery obligation of a certain number of shares, and hence a purchase requirement for this number of shares. Therefore, it is preferable that applications for permission for share buybacks with respect to remuneration could continue to ask for approval of a maximum number of shares instead of a euro amount. This would avoid seeking approval of an uncertain projection relying on a future share price assumption.

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

We understand Art. 30 of the draft RTS for the application for a general prior permission as meaning that in future applications of all securities issues affected by these have to be listed explicitly. In this regard, there could, in our opinion, certainly be cases that are not covered by the general prior permission. Additional permission to cover immaterial redemptions or reductions analogous to the provision of Art. 29 (5) of the current RTS is in our view entirely reasonable. We would welcome the retention of this provision and the extension to eligible liabilities.

In addition, we consider the continuation of a general prior permission without an individual application for a relative immaterial amount advisable, so that the authorities can act with flexibility, as the extensive widening of the permission regime would mean they would be overwhelmed. Alternatively, for such "immaterial (de minimis)" cases, a notification procedure is conceivable.

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

Article 30 draft RTS: We consider the information required by the supervisory authority too extensive. This is all the more so since the supervisory authority already has a large amount of information requested via the existing COREP or MREL reporting. It should also be borne in mind that the validity of the prior permission granted is now limited to one year and that the requested information must therefore be provided on an annual basis. The renewed submission of these data would be a clear case of double collection of information already available.

In particular, with regard to the requested planning figures for the next three years, we see no need for such a strict requirement. Banks usually update their multi-annual planning (MYP) once a year. The preparation of multi-annual planning is a complex process within the bank and is also the subject of committee decisions. The multi-annual planning is forwarded to the supervisory authorities in a timely manner after approval by the bank's committees. Planning figures in addition to the last MYP submitted to the supervisory authority are not available in the bank at the time of application.

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We would welcome it if, as part of the application, the resubmission of multi-annual planning was dropped. Should, from the supervisory point of view, a resubmission be necessary, it must be made clear in the RTS that this is the bank's annual updated multi-annual plan and that no further update is required at the time of application. Assuming that separate applications must be submitted for own funds instruments and eligible liabilities and that as soon as eight months after the approval of an application for prior permission a new application must be submitted, the latter is not doable.

In this context, we would also like to address a point relating to Article 30a of the draft RTS: according to our understanding of the draft Art. 30a of the RTS, prior permission is no longer granted for a single class of capital. Rather, the application must list individually all the issues (of instruments) concerned. Assuming that in future, prior permission will not be applied for all issues of a capital class, this process will increase the monitoring burden with regard to compliance with the prior permission.

We therefore ask that the possibility of applying for an entire class of capital be maintained. This solves the problem too, addressed by the regulator in Article 30a (3) of the draft RTS, of market making in issuances which were issued after the application had been submitted. Given a period of four months between submission and permission, it is difficult for institutions to assess at the time of application the extent to which they will actually bring out new issues in the coming 16 months, as this is highly dependent on market conditions.

Also, with regard to the identical requirement for eligible liabilities, a procedure in which all issuances must be listed individually seems to us to be hardly expedient, given the number of issuances concerned.

In the case of applications for entire capital classes, the relevant individual issues are available to the regulator via the banks' disclosure or through the SRB's liability data reporting (LDR).

For us, it is, as regards content, unclear why prior permission should not always apply to all instruments of a capital class that are outstanding, thus impede, for example, the market-making in new issues without any discernible prudential benefits.

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

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

We generally consider a four-month application deadline as disproportionately long for permission with a validity period of one year. This is all the more the case, given the volume of information that has to be submitted with an application. So, in this regard we welcome the efforts to shorten the application period for follow-up/subsequent applications and call for a processing time of one month.

However, we consider the long application deadline for individual applications for the redemption or reduction of individual issues to be more problematic. These are driven, among other things, by current market developments, but also by fixed contractual termination agreements and, in the case of eligible liabilities, possibly also by requests from customers holding an eligible debt instrument or even a longer-term deposit. Any extension of the application / permission periods will result in less flexibility and responsiveness by the banks. With a four-month approval period, the market trends will in many cases have changed in such a way that the planned redemption/repurchase is no longer in the bank's interest. Even a customer who asks the bank to repurchase/redeem its promissory note loan or to repay his deposit in the event of urgent liquidity needs (e.g. in the event of an unforeseeable Corona-related works closure) will not normally be able to wait four months for a decision. In this respect, a long authorisation period will force banks to apply for significantly more prior permissions, which due to the related deduction obligations will have a negative impact on the corresponding ratios. For a solution that we consider practicable, we refer to our proposal to introduce a de minimis rule with a notification procedure.

In addition, in this context, we would also like to point out once again our position already stated under General Remarks that total alignment of the regulations for own funds and eligible liabilities is not necessary and possibly not appropriate. There are considerable differences between both groups that the RTS does not sufficiently take into account. Art. 78a (3) S. 2 CRR, moreover, provides for total alignment only for the definition of the term "at terms that are sustainable for the income capacity of the institution".

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

Applying the same mechanism for own funds to eligible liabilities creates a disproportionate burden for banks, as eligible liabilities, unlike own funds, do not absorb losses in a business-as-usual or crisis situation but only in the extreme case of a resolution. Thus, mandating RAs to assess any reduction with a view on the long-term profitability seems like a case of goldplating. In addition, the assessment by the RA is not well defined and leaves room for interpretation.

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

Deducting eligible liabilities at the point of receiving permission is highly inappropriate and disproportionate. The purpose of MREL is to have sufficient own funds and eligible liabilities, for which a complex calculation is used and a dedicated regime for handling violations is in place. In addition, the introduction of an M-MDA and the ineligibility of own funds used for buffer requirements for MREL act both as safeguards and buffers above MREL to ensure that sufficient capacity for loss-absorption and recapitalization is available at all times. Deducting any amounts above that not only ignores the different qualities and riskiness of the instruments in question (CET1, AT1 and T2 instruments as the first instrument classes to bear losses vs. eligible liabilities that are senior in nature and rank above all own funds) but also reduces the complex bank-specific calculation of MREL with its complex add-ons, buffers and group-specific adjustments to absurdity. It is a core task of resolution authorities to set MREL high enough so that it suffices to recapitalize a bank. This is the very nature of MREL, governed by the specific laws and policies for MREL.

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Thus, there is neither a need nor a mandate for EBA to go beyond this and interfere by means of an automatic deduction. No prudency is added by deducting the amounts under the permission regime.

By means of not granting permission to redeem early, the resolution authorities already have the ability to prevent an early redemption. Yet the automatic deduction would

i) forcibly violate proportionality
ii) unduly interfere with the existing MREL requirements by effectively increasing them through the back door and
iii) unduly limit banks' flexibility in managing their refinancing/funding freely and in reaction to changing market conditions.

It should be added that for the transitory time between the entry into force of the revised CRR provisions and the publication of the RTS, the SRB refrained from demanding automatic deduction for to the above-mentioned reasons.

Another practical case that would be relevant were if an instrument were to be replaced by a similar instrument, the MREL contribution would have to be deducted when permission is granted (irrespective of whether it involved a general prior permission or an individual application), while the replacement could be executed only with a certain delay (of at least several days) after the approval (for administrative and processing reasons). Thus, timewise there would inevitably be a gap during which a bank's MREL capacity is effectively reduced, which would exacerbate risk, despite the fact that it is the goal of the regime to prevent this.

If at all, the deductions should not be required until permission is actually used and the instrument repurchased on a permanent basis. As banks could, alternatively, proceed to submit staggered applications for ad hoc permissions to reduce, even weekly or monthly, this would mean a huge administrative workload for the resolution authorities, which they could hardly tackle.

Should the EBA nevertheless consider a deduction for both non-preferred senior and preferred senior instruments necessary, a regulation would in our view definitely have to be included to the effect that repurchase limits for preferred senior instruments could also be deducted from these and only repurchase limits for non-preferred senior instruments have to be deducted from this class. Such a differentiation can be significant with regard to compliance with the subordination requirements set out by the resolution authorities.

With regard to the scope of application of the deduction circumstances for eligible liabilities, the following contradiction arises in addition with regard to insolvency institutions: for these institutions, the MREL ratio is limited to the extent that no other eligible liabilities need to be maintained beyond the own funds requirements, cf. Art. 45c (2) subpara 2 BRRD. In addition, the reporting and disclosure requirements relating to MREL do not generally apply to them, Art. 45i (4) BRRD. This means that these institutions do not have any stock of instruments from which the amount to be repaid could be deducted, at least one possible stock is not shown separately. The proposals for deduction are therefore currently not compatible with the regulations of the BRRD. This is another argument that insolvency institutions should not be covered by this RTS in the context of the permission procedure for reducing eligible liabilities.

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

We do not agree because the drafting of the requests and the processing by the RAs would take far too long to handle matters flexibly. Take, for example, a case where an individual investor who has bought an eligible instrument as a private placement approaches the bank with a request for early redemption. This customer expects an instant response. Preparing an application and receiving approval form the RAs would take weeks, so that neither the creditor's interest to receive a swift answer nor the bank's interest to offer customer-oriented solutions is satisfied. Note that all of this does not affect or endanger MREL or loss-absorption capacity, as MREL has to be maintained at all times and a breach would in any case have to be notified by the bank.

Rather, the general approval framework should allow institutions to implement both market making/maintenance activities and redemptions/buy-backs/terminations of MREL-eligible liabilities without economic restrictions. In contrast to the management of own funds instruments, decisions in liability management must be taken in the short term, taking into account current market conditions and as part of liquidity management. A permission decision would therefore have to be requested and made within 1-2 days.

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

If general prior permission is intended to include also replacements under very similar conditions, it would be advisable to increase the limit to allow banks to manage their liabilities more freely. There is no downside risk for the resolution authorities here, as permissions could always be denied or granted only for a lower amount. However, a principle maximum limit unnecessarily narrows banks' as well as resolution authorities' leeway in finding proper solutions for granting maximum freedom while also safely ensuring MREL compliance.

The application of the 3% ratio to be applied to own funds, which is quite understandable when repurchasing own funds instruments, but which, from a practical point of view, puts the possible repurchase amount for MREL far too low, is problematic for the following reasons too: CET1, AT1 and Tier2 instruments have been issued in the past and are also currently issued mainly in large volumes, where early repurchase is usually not considered and is not economically viable either, so that the 3% ratio is sufficient for the management of possible market making obligations of an issuer. MREL liabilities, on the other hand, include many issues that have a right of termination. For some institutions, such liabilities represent a large share of the total volume of existing MREL liabilities, which is well above 3%. A grandfathering provision would be appropriate here, as indicated in the "Explanatory box" for Art. 32b of the TS draft.

The argument that in their final year prior to maturity MREL instruments do not count any more as eligible liabilities and are therefore exempt from the 3% rule (see "Explanatory box to Art. 32c TS draft") is not apparent to us. Nor is this conclusion to be found in the wording of the proposed Art. 32c of the draft RTS, which focuses precisely on these instruments. We ask for clarification in this regard.

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Furthermore, it would be desirable to have clarification on what basis the 3% limit is calculated - at the time of application, at the time of approval (but this can then be only a forecast estimate) or based on the last official reporting day?

We consider necessary, moreover, clarification of which specific eligible liabilities are to be included in the basis for calculating the 3% limit and, therefore, how the term "outstanding eligible liabilities instruments" is defined. We expect that the relevant amount / value must be the “outstanding amount” (less accrued interest) as defined, inter alia, in Commission Implementing Regulation EU 2018/1624, Annex II, thus the same value as considered for the calculation of the amount eligible for MREL / TLAC. Nonetheless we would appreciate a clarification in this regard as well.

With regard to the 3% limit, the provisional implementation of Art. 78a CRR by means of the “MREL Addendum to the SRB 2018 MREL policy of the SRB”, which set the limit at 1% TREA, could also be invoked at a superordinate level. Apparently, the SRB considers this limit to be sufficient to protect the resolvability of institutions. In our opinion, the EBA should be guided by this.

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

From the comments already made in the general remarks, to which we expressly refer here, we reject the inclusion of insolvency institutions for which no resolution measures have been set out in the resolution plan in the scope of application of the permission process. The same applies to waiver institutions.

For insolvency institutions with a minimum MREL requirement at individual level, the inclusion in the repurchase permission requirement and the proposed extension to legacy holdings of MREL-eligible liabilities means that, despite a significant over-fulfilment of the MREL minimum requirements, they would have to submit permission applications and install appropriate monitoring systems solely to comply with the supervisory requirements for withdrawals/repurchases of individual liabilities.

In this context, the following aspect should be noted too: As already noted re Article 32b RTS draft (Q11) with regard to the deduction obligations, we consider an application and thus also a deduction obligation on a separate basis by class of eligible liabilities (preferred senior and non-preferred senior instruments) necessary, should the inclusion of preferred senior instruments be retained.

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

The information requested pursuant to Art. 32d of the RTS draft is, for the most part, information not previously required by the SRB. It is incomprehensible why such a mass of information is being requested. This does not seem appropriate to us in view of the risk of a permission granted. The decision whether an institution has sufficient MREL-eligible liabilities can, in our opinion, be adequately made with confidence on the basis of information provided by the “MREL Addendum to the SRB 2018 MREL policy of the SRB”.

In particular, the information to be provided in (a) constitutes a purely qualitative requirement as to the reasons for the submission of the application. In this respect, it would be desirable if this could be explained more precisely, what is considered to be a "well-founded explanation", since the previous requirement for the presentation by the banks, but also for the assessment by the authorities, leaves a considerable margin of discretion.

For insolvency institutions, which are not subject to any obligation to hold eligible liabilities, the request for information would, if they were to continue to be subject to the permission regime, be arbitrary, disproportionate and unnecessary in all respects.

In addition, we refer also to our comments on Q8, Art. 30 RTS. The information request pursuant to Art. 32d RTS is far too detailed as well. The provision for a three-year prognosis is disproportionate, as institutions regularly provide such information as part of their MREL reporting (at least in the banking union). Considering the small amounts of total MREL capacity within the scope of these deliberations, this would effectively set up a whole new reporting process that is error-prone and duplicates existing MREL reporting, which seems unsubstantiated given the fact that MREL compliance is already ensured by regular reporting to RAs.

With regard to Art. 32e RTS we want to point out that it is not limited to market making. It is the very nature of a general prior permission to cover all kinds of liabilities, incl. those that may not even have been issued at the time of applying for said permission, also for example private placements. Consequently, it is not only illogical to request a full list but simply impossible. A list of outstanding liabilities is provided regularly to the RAs through the annual resolution reporting (CIR, LDR for the banking union). We also refer to our comments on Art. 30a RTS.

In addition, we take into account the requirement under Art. 32d (1) lit. g), the evaluation of the risks including outcomes of stress tests on main risks evidencing potential losses does not seem appropriate since many other risk buffers and other risk mitigation instruments (e.g. M-MDA) are already in place. Furthermore, the risk assessment can be adequately made with confidence on the basis of information provided by the “MREL Addendum to the SRB 2018 MREL policy of the SRB” as well as provided within the regular quarterly EBA reporting starting from June 2021.

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

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

We refer to our answer to Q9, Art. 30f RTS. In addition, it is advisable to have some lead time, and we also welcome the shortening of the deadline for renewals of existing permissions. Much more important,

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however, is the point in time when the bank is informed about the outcome of a decision. Resolution authorities must commit to providing feedback fast and inform the bank with sufficient leeway about the outcome of the permission so that there is sufficient time to respond. There should be time in the process to check and allow (time for) a resubmission if problems were identified in a first application.

Besides the shortening of the lead time for follow-up applications, the amount of documentation to be submitted should be sufficient to provide the qualitative information and an update of the documents already submitted with regard to the new amount requested and the period of time requested for the permission, as this would restore the transparency of information for the resolution and supervisory authorities to the status when the original application was submitted.

With regarding to Art. 32e RTS, we do see a risk here for unnecessary complications in the back and forth between authorities. Given the relatively low amounts and their removal from actual loss-absorption in comparison with own funds, such cumbersome processes are in no proportion to the effort they require and the risks they cover.

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