POSITION PAPER

ESBG response to the EBA consultation on the Amended Regulatory Technical Standards (RTS) on own funds and eligible liabilities

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We welcome the opportunity to comment on the amended Regulatory Technical Standards (RTS) on own funds and eligible liabilities. We would like the EBA to consider the following reflections.

A. General Comments to the Consultation Paper ('CP')

While we see that EBA intends to establish comparable procedures for own funds an eligible liabilities we **do not understand** that the **EBA proposes** for every part of this reviewed RTS the **strictest, most bureaucratic** and **undifferentiated option** (while alternative solutions as outlined in the accompanying documents are not considered) so that the **scope is extended to a maximum** (regarding liabilities covered and institutions in scope) without granting flexibility to the authorities. This would lead to an extreme time pressure for banks and huge additional burden on both banks and authorities. Thus, we **recommend** establishing a **proportionate, flexible** and **phased-in approach**.

In addition, this extension is extremely problematic, as it would also make subject to the permission regime institutions that would be **wound up and liquidated** in the course of regular insolvency proceedings (institutions with MREL requirement not exceeding the loss absorption amount). These institutions are not subject to any MREL requirements other than the capital adequacy requirements (MREL quota) and therefore do not have to hold any eligible liabilities. In the event of a crisis, **no bail-in is envisaged for these institutions**, for which a separate portfolio of eligible liabilities would be required.

An obligation to obtain a prior permission for these entities cannot therefore correspond to the wording and the purpose of the provisions of CRR II and BRRD II, nor does it correspond to the current practice of the SRB and national resolution authorities.

The EBA's proposal is also not considering the **proportionality principle**, and the relief for smaller institutions that has been provided by the CRR II. It is true that, as the EBA points out, institutions will in future deliberately be unable to meet individual recognition criteria when issuing instruments, in order to remain outside the scope of the authorization procedure. However, such a positioning hardly seems appropriate, since, for example, if the classification of an institution suitable for insolvency were to be removed, the institution would then have to build up eligible liabilities anew.

Our **key concerns** regarding this draft RTS can be summarized as follows:

<u>Own funds:</u>

- In general, we do **not agree** that the **timeline** for authorities **to grant permission** should be **extended to 4 months**. The current 3-month decision period should be kept and **in specific cases** a **shorter period** should be defined/**applicable**.

- In case the decision is not granted/renewed by competent authorities within the time period foreseen, **at least the permission for market making purposes should remain valid**.

- In case of own funds, the repurchase of **immaterial amounts** and **remuneration repurchases** should **be kept separately** and **not be included** in the general prior permission regime (including the **time frame** and **limits** proposed). To establish a proportionate approach, the decision period should be shortened in case of immaterial amounts and the necessity of an annual renewal should cease.

- The **treatment** of **amortized Tier 2 instruments** must be **clarified.**

- In case of an own funds applications, the detailed breakdown of eligible liabilities is overshooting **and the information requested** should be **reduced.** For **annual renewals, simplifications** should be granted, in particular with respect to renewal of market making permissions.

- According to Art 28 (3) of the draft RTS, in case of a general prior permission, the **predetermined amount** permitted by the relevant authority must **be deducted from the moment the authorization is granted**. Notwithstanding the general concerns regarding the deduction requirement, in case that the institution decides not to renew the general prior permission, the permission expires at the end of the one-year period. The RTS should clarify that in this case the deduction from own funds is no longer required and the institution can re-include the amounts in own funds without the need to execute any further steps.

Eligible liabilities:

- The **scope** of the permission regime needs to **be reduced**:
  - (i) the extension of the permission regime to all eligible liabilities (also for non-subordinated) is contradicting the wording and legal definitions in the CRR II, since the Art. 77 and 78a CRR II explicitly refer to eligible liabilities instruments, which are defined only in Art. 72b CRR II and include a subordination requirement in Para 2, letter (d).
  - (ii) Only eligible liabilities used to fulfil MREL should be subject to the permission regime, this holds true regarding the operational burden for issuances which are not necessary to fulfil the MREL requirements and for institutions that have no MREL requirement and/or where MREL does not go beyond own funds requirements (where no recapitalization amount is defined)
  - (iii) **the strict permission regime should apply only for subordinated liabilities**. This would not only be in line with the current supervisory practice (current SRB permission regime), but also with the wording of Art. 78a CRR II that refers to the term eligible liabilities instruments. The conditions for a liability to be classified as eligible liabilities instrument can be found in Art. 72b CRR II and also contain the subordination clause (Art. 72b (2) (d) CRR II).
  - (iv) In case other eligible liabilities (other than subordinated liabilities) are to be covered by the permission regime, it should be **covered in a significantly "lighter" form e.g. by a separate general prior permission** that is **not subject to annual renewal** and that should be granted by the authorities within a **shorter timeframe**. **3% (or higher) limits** should apply separately for eligible subordinated and non-subordinated liabilities.
  - (v) **Instruments** that are **grandfathered** and **instruments** that are **not MREL eligible** (i.e. that do not meet the 1-year maturity requirement) should in any case **be excluded from the permission regime.**

- Should non-subordinated eligible liabilities be covered by any form of the permission regime, a **phase-in approach** should **be introduced** that is **in line with** the **MREL targets**.

- When performing their assessment **resolution authorities** should **rely** to the greatest extent possible **on** the **assessments/information provided by supervisory authorities.**

- **Equal treatment of the instrument classes is not appropriate**: we do not consider it necessary to make the rules on eligible liabilities identical to the requirements for own funds. In our view, these are precisely not comparable situations since a reduction in capital ratios has completely different consequences than failure to meet MREL obligations. Although the latter could have an influence on the bank's ability to settle, a fall in an institution's capital ratios has far more serious direct consequences for an institution and thus also for the financial market. It must also be taken into account that equity instruments and eligible liabilities - in particular preferred senior instruments without explicit subordination agreement - differ significantly in terms of their number of units, their further use for liquidity management, their average term, but also in terms of the group of investors. In our opinion, therefore, **more prudence should be applied when designing the scope of the permission regime** and special features of the respective classes of instruments should be considered.

- **Exception of preferred-senior issuances needed**: for example, equity instruments are usually issued with long maturities or are even available for an unlimited period. By comparison, "classic" debt instruments (usually preferred senior instruments or, due to legacy portfolio regulations, non-preferred senior issues) have significantly shorter maturities (durations) and thus shorter roll-over periods and a completely different ratio of the amount of annual maturities to redemptions, as they serve not only to meet MREL requirements but also to ensure funding or liquidity management. For liquidity management purposes in particular, institutions require greater flexibility for these instruments than for own funds. And for the investor, too, a preferred senior issue ultimately represents something different from an AT1 instrument

- For **annual renewals, simplifications** should be granted.

B. Question for consultation

1. **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.

In general, we do not see the need to extend the scope of liabilities subject to the permission regime to the maximum (in comparison with the current practice) as proposed in the consultation paper. However, we understand and support the intention to establish similar procedures for own funds and liabilities with comparable loss absorption based on their ranking in insolvency. We would strongly recommend that EBA gives flexibility to resolution authorities regarding the scope of liabilities covered and allows them to focus on subordinated liabilities while excluding other eligible liabilities from the annual renewal requirement. Such an approach would be in line with the current practice of the resolution authorities, where the prior permission is only applied for the senior non-preferred class of instruments.

Moreover, the **CRR II does not provide legal basis for the inclusion of the non-subordinated eligible liabilities under the scope of Art. 77 and 78a CRR II.** According to Art. 77 (2) CRR 2, the institutions are required to obtain a prior permission from their competent (resolution) authorities to effect the call, repayment or repurchase of eligible liabilities instruments. The CRR 2 differentiates between eligible liabilities items, which are defined in Art. 72a CRR 2 and eligible liabilities instruments, which are subject to requirements as set out in Art. 72b CRR 2. The Art. 77 and 78a CRR 2 refer in their wording explicitly to eligible liabilities instruments. In order for an eligible liability to be included in the eligible liabilities instruments, that liability item has to fulfil – among others – the subordination clause of Art. 72b (2) (d) CRR.

If extended to non-subordinated eligible liabilities, the permission regime **should at least follow** the **same stepwise approach** (phase-in) as the **MREL target level** itself (that differentiates between intermediate (informational/binding) and final targets). In a first step and as long as final MREL targets do not become binding, **only subordinated liabilities should be in scope of the permission regime until 1.1.2024**.

Furthermore it is **not understandable** that the permission regime should cover and **apply to institutions** for which **MREL does not exceed the loss absorption amount** and thus goes not beyond the own funds requirement and institutions for which **no MREL is determined/waived**.

The regime in general is closely connected to own funds and MREL requirements with the intention to not endanger the fulfillment of these regulatory requirements in case of a reduction following a repurchase. Thus, it does not make sense to make institutions subject to such a control regime for eligible liabilities if they have no additional regulatory requirement that goes beyond own funds. In such cases it is sufficient that resolution authorities are informed about permissions granted on own funds by supervisory authorities.

This new regime means anyhow a huge additional workload compared to the current status on all sides – supervisory and resolution authorities as well as banks - and thus should not be overextended from the very beginning.

Finally, **grandfathered instruments** should not be considered and subject to the permission regime and not be taken into account when limits for a general prior permission are calculated.

In addition, it does not make sense to include instruments that are not MREL eligible and to cover them even when they **do not meet the 1-year maturity requirement anymore**.

It is not clear whether the **Tier 2 instruments** with **residual maturity of at least 1 year**, to the extent to which they do **not qualify as Tier 2 items** ("amortized Tier 2 instruments" – see Art. 72a (1) (b) CRR II) fall under the scope of this RTS. In case they are under the scope it is unclear whether the part of the instrument, that does not qualify as Tier 2 item anymore (due to their amortization) should be considered as Own Funds or Eligible Liabilities. Since we are always dealing with ISINs for which one part is still considered OF, such instrument shall be subject to the OF regime and therefore be subject to permission regime under the remit of the supervisory authority.

2. **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?**

3. **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?**

Going forward, our expectation is that banks will build-up their stock of eligible instruments meeting the CRR2 and BRRD2 eligibility criteria in order to be able to meet their MREL requirements. This will not necessarily mean that those instruments are going to replace other senior liabilities on the banks' balance sheets that do not meet the eligibility criteria. Such "ineligible" instruments would be almost all interbank liabilities (which are excluded from bail-in) and usually represent a material part of the "senior unsecured" layer on banks' balance sheets and corporate demand and term deposits whose dynamic is a result of numerous factors like (client relationship, overall liquidity in the market, brand name, etc.).

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 that the institutions might issue fewer MREL-eligible instruments in the future due to the existing permission regime, this would have to be viewed critically for several reasons:

- The creation of a further class of instruments **would no longer be comprehensible** to the client/consumer. There would be an increasing number of instruments that are not MREL-capable, but are bail-in-capable. This cannot be communicated to the general public.
- Assuming that institutions that are suitable for national insolvency procedures would increasingly use such "non-MREL instruments": if such an institution were to go into resolution according to BRRD, it would massively lack MREL capital. In the interest of ensuring a smooth liquidation, this approach is therefore not recommended.

4. **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?**

5. 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.

The existing thresholds deem to be suitable.

6. 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)?

Our understanding is that an institution can obtain **one general prior permission** for **different purposes**. In case an institution intends to seek such permission for market making purposes and other repurchases (which was separated in the past) the RTS should provide further guidance on the procedural requirements and formats to be **used when dealing with different topics in one application**.

Own funds instruments that are passed on to employees should **not be part of the general prior permission regime and treated separately**. The intention here is very clear and defined and not comparable with other repurchases that are i.e. part of market making. We see no need to change the existing process and thus they should be **treated separately**. A **1-year time limit** for these transactions is **not useful**. Banks normally do not change their remuneration programs on an annual basis but keep them over a longer time period and thus it should be sufficient if they approach the regulator once they cannot get along with the existing permission anymore.

7. 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.

The possibility to seek for a prior permission for immaterial amounts **should remain available** in addition and independently of other general prior permissions **at least for small and non-complex institutions**. For these immaterial amounts/permissions the one-year time-limit should not apply. Such a **proportionate approach** should be kept, would reduce the bureaucratic burden and is absolutely necessary to cover the needs of smaller institutions to treat them separate from i.e. market making applications. This regime was intensively and constantly used in the past by small and non-complex institutions (even within banking groups). Article 29 (5) RTS should **not be deleted**.

8. 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.

We agree with most of the information items required in case of the first, original application with the following exceptions:

(i) The terminology in point d) iv) in Article 30 shall be revised from “Tier1 capital” to “Leverage Ratio” requirement. In addition, point d) v) shall also be revised to point out that additional own funds requirement for the leverage ratio can only be made up of CET1 and AT1 capital.

(ii) The **specifications foreseen in point e) in Article 30 are absolutely overshooting** as these details have nothing to do with own funds and have to be provided anyhow in case of a permission for eligible liabilities. Asking for such a detailed breakdown is and should not be relevant for the supervisory authorities and their going concern perspective and would lead to a huge additional workload every year. It should also be noted that the validity of the pre-approval granted

is now also limited to one year and that the requested information **must therefore be submitted on an annual basis**. The repeated provision of this data would be an obvious case of **multiple collection** of already existing information. Especially in view of the requested planning figures for the next three years, we see no need for such a specific requirement. Banks generally update their multi-year planning (MYP) once a year. The **preparation of the multi-year plan is a complex process within the bank**, which is also the subject of decisions by the corporate bodies. The multi-year plan is submitted to the supervisory authority shortly after it has been approved by the bank's executive bodies. At the time of application, the bank does not have any planning figures more than the last MYP submitted to the supervisory authority. We would appreciate if the bank were to refrain from submitting the multi-year plan again when the application is submitted. If, in the view of the supervisory authority, a resubmission is necessary, it must be made clear in the RTS that this is the **bank's annually updated multi-year planning** and that no update to the time of application is necessary. On the assumption that separate applications must be submitted for own funds instruments and for eligible liabilities and that a new application must be submitted just eight months after approval of an application for prior approval, the latter is not feasible.

(iii) In this context we would also like to address a point in connection with Article 30a of the draft RTS: according to our understanding of the draft Article 30a of the RTS, prior approval will no longer be granted for a capital class in general. Rather, the application must list all the issuances concerned individually. If it is assumed that pre-approval will not be applied for all issues in a capital class in the future, this procedure will **increase the monitoring effort regarding compliance with pre-approval**. We therefore ask that the possibility of applying for pre-approval for an entire capital class be retained. This also solves the problem of market- making for eligible liabilities issued after the application was made, which is addressed by the supervisory authority in Article 30a (3) of the draft RTS. In view of the fact that there is a proposed period of four months between application and approval, it is difficult for institutions to estimate at the time of application to what extent they will actually undertake new issues in the next 16 months, as this depends very much on the market environment.

(iv) Also, with regard to the identical requirement for eligible liabilities, a procedure in which all issues are to be listed individually does seem very burdensome and with limited added value in view of the number of issues involved. In the case of applications for entire capital classes, the supervisory authority has the corresponding individual issues at its disposal via the banks' disclosure or via the SRB's Liability Data Reporting (LDR). In terms of content, we fail to understand why prior permission should not always relate to all instruments in circulation in a capital class and thus make it more difficult, for example, to maintain the market in new issues without any discernible supervisory benefit.

(v) (ii) **Point g (iii) the costs for replacement** should be deleted as it has to be considered in the impact calculation under point g (v) already. Asking for both has no added value but leads to additional effort.

However we in addition see a strong need to **define additional reliefs** and a **quick and unbureaucratic process** (fast procedure) in case of **renewals of a general prior permission** where the **amount** and the **instruments covered** are highly **comparable** with the first original approval and **in case of immaterial amounts**.

9. 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?

In our opinion, the time period for individual permissions **should not be extended and kept by a maximum of 3 months**. The necessary interaction between authorities is no valid argument to extend the deadlines to the detriment of banks. A longer deadline increases uncertainty for banks in a topic that is highly relevant vis a vis investor and the market. Supervisory and resolution authorities should be able to establish a smooth and unbureaucratic interaction process to ensure that from the very beginning information and data are shared immediately.

Moreover, we consider the long application period to be problematic with regard to individual applications to withdraw or reduce individual issuances. 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 enquiries from customers who hold an eligible promissory note loan or a longer-term deposit. Any extension of the application or approval periods leads to **less flexibility**. In many cases, a four-month (or even a three month period) approval period will already have changed the market development in such a way that the planned withdrawal is no longer in the interest of the bank. Even a customer who asks the bank to take back his borrower's note loan or repay his deposit in the event of an urgent need for liquidity (e.g. in the event of an unforeseeable corona-related closure of operations) will generally not be able to wait four months for a decision. In this respect, a long approval period forces banks to apply for significantly higher advance approvals, which will have a negative impact on the corresponding quotas due to the associated deduction obligations. For a solution that we believe to be practicable, we refer to our proposal for the introduction of a de minimis rule with notification procedures.

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

The content in case of renewals should be adjusted and limited to those parts that have changed compared to the last/first application. A fast track procedure should be introduced with length of 1 or max. 2 months.

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

Further shortenings would be appropriate in case of renewals of general prior permissions. Here, adjusting of the content of the application, e.g. if the total volume to be repurchased will remain the same or will not change significantly (reduction of requirements to the necessary minimum to check whether the conditions are still met) is crucial considering the proposed extension of the scope. The reduction of information requirements would also be beneficial for competent (resolution) authorities and is also practically a precondition for a shorter time period.
Supervisory authorities should consider **implementing a standardized and transparent process** ensuring an efficient approval procedure of the yearly applications i.e. to deal with all applications **within the same fixed time frame** as it is the case for **SREP decisions**. This would ensure a level playing field and avoid different treatment/duration. If it cannot be ensured from supervisory side that decision will be delivered on time EBA should alternatively think about providing supervisory authorities additional discretion and flexibility to **grant an on-time extension** of the GPP **by further three months** in case

the expiration of the permission without renewal would lead to an adverse effects to the business of the institution.

In addition, we would also like to point out once again in this context that we have already stated in the general comments that a complete conformity of the rules for own funds and eligible liabilities is not necessary and may not be appropriate. There are important differences between the two groups which the RTS does not take into account sufficiently. Moreover, Art. 78a para. 3 sentence 2 CRR only requires full consistency for the definition of "sustainable in terms of the institution's earnings potential".

10. 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?

The sustainability assessment of the resolution authority should fully build on those performed by the supervisory authority. The profitability of institutions in stress situations is not the focus of resolution authorities and thus currently not assessed by them. It needs to be avoided that resolution authorities start acting as shadow supervisors and duplicate the assessments of supervisors. Therefore, this information should be provided by supervisory authorities to resolution authorities and based on that they should consider it as part of their approval process.

Copying the 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 gold plating. In addition, the assessment by the RA is not well defined and leaves room for interpretation.

To reflect this the wording in Art 32a should be changed as follows:

*The resolution authority's assessment shall take into account the **supervisory assessment** of institution`s profitability in stress situation.*

Furthermore, the definition of the term "sustainable with regard to the Institute's earning potential" can be found both in Article 27 of the draft RTS and now in Article 32a of the draft RTS. The definitions do not differ from each other, except that the competent authority is the supervisory authority on the one hand and the resolution authority on the other. Irrespective of the fact that we do not consider such an assessment to be necessary for eligible liabilities, we would welcome a summary of the above-mentioned articles in order to avoid the different authorities arriving at different assessments or criteria in the future.

11. 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?

The **deduction regime** should be limited to senior non preferred instruments and refer to the **subordination requirement only** (see above for more reasoning on this topic). Otherwise it needs to be clarified from which stock the deduction shall be performed and what portion shall be deducted from NPS and PS instruments.

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 applied and a dedicated regime for handling breaches is in place. In addition, the introduction of an M-MDA and the ineligibility of own funds used for buffer requirements for MREL both act 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 instruments 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 to suffice to recapitalise a bank. This is the very nature of MREL, governed by the specific laws and policies for MREL. 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 a permission to redeem early, the resolution authorities already have the ability to prevent an early redemption. Yet the automatic deduction would:

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

It should be added that for the transitional period between the entry into force of the revised CRR provisions and the publication of the RTS, the SRB refrained from demanding automatic deduction due to the abovementioned reasons.

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

After all, the deductions should only become necessary when the permit is actually used and the instrument is bought back permanently. Since banks could alternatively apply for ad-hoc reduction permits on a staggered basis, even weekly or monthly, this would impose an enormous and almost impossible administrative burden on the resolution authorities.

Nevertheless, if the EBA were to consider a deduction necessary for both non-preferred senior and preferred senior instruments, we believe it would be imperative to include a provision to ensure that buyback limits on preferred senior instruments can also be deducted from them and that only buyback limits on non-preferred senior instruments are deducted from this class. Such differentiation may be significant with regard to compliance with the subordination requirements set by the resolution authorities.

With regard to the scope of the deduction of eligible liabilities, the following contradiction also arises with regard to institutions that are eligible for insolvency: For these institutions, the MREL ratio is limited in that no further eligible liabilities need to be held in addition to the capital adequacy requirements, cf. Art. 45c para. 2 2nd UA BRRD. In addition, the reporting and disclosure obligations with regard to MREL are generally not applicable to them, Art. 45i para. 4 BRRD. This means that these institutions do not even have a separately shown portfolio / a quota from which the amount to be repaid could be deducted.

The proposals for deduction are therefore currently not compatible with the provisions of the BRRD. This also suggests that institutions suitable for insolvency should not be covered by this RTS with regard to the authorisation procedure for reducing eligible liabilities.

The deduction provisions is not clear regarding institutions suitable for resolution either: if those institutions have, according to the resolution authority's demand, to meet their MREL quota only with subordinated/non-preferred securities, institutions suitable for settlement would also have to obtain permission to redeem preferred securities. If such permission is granted, the approved amount would have to be deducted from the MREL holdings. As we understand it, this would lead to the incomprehensible result that an amount of preferred securities would then be deducted from an MREL (subordinated/non-preferred securities) portfolio.

12. **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, e.g. a case where an individual investor who, for instance, has bought an eligible instrument as a private placement approaches the bank with a request for early redemption. This customer expects an instant reaction. 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-centred solutions are met. 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 have to be notified by the bank in any case.

The general authorisation framework should enable institutions to carry out both market maintenance activities and redemptions/repurchases/terminations of MREL-eligible liabilities without economic restrictions. In contrast to the management of own funds instruments, decisions in liability management must be made at short notice, taking into account current market conditions and within the framework of liquidity management. An approval decision would therefore have to be applied for and decided within 1-2 days.

However, we think that based on the principle of proportionality a **separate general prior permission** should be established and determined by EBA in this RTS in case of **immaterial amounts of eligible liabilities and for eligible liabilities that are not subordinated**. A paragraph comparable to the existing Article 29 (5) should be included in Article 32c to deal with such cases. In these cases, a **1-year time limit should not apply**. The information required according to Article 32d in such a case should be narrowed down to a minimum (i.e. not asking for a detailed split as foreseen under letters c) d) f)). See our answer to Question 7 above.

13. 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.

The current proposal of **3% for all eligible liabilities is not sufficient**. As foreseen in the case of own funds (different thresholds for CET1 and AT1/T2 instruments) it should be differentiated between subordinated and non-subordinated liabilities. If applicable, the **limit** should be **applied on both levels separately**. 3% of the total amount of subordinated eligible liabilities and 3% for other eligible liabilities to reflect and differentiate in the ranking of liabilities. Since the Level 1 text does not specify the limits there is room for EBA to ensure sufficient flexibility.

As outlined in the general remarks above, a **phase-in approach should apply**.

Furthermore, it is not clear how the amount of Amortized Tier 2 instruments (subordinated instruments – as stated above) is considered and would be included for the purposes of calculating the 3 % limit.

If the general prior permission is intended to also include replacements under highly 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 only granted for a lower amount. However, a fixed 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 sets the possible repurchase amount at MREL far too low from a practical point of view, is also problematic for the following reasons: CET1, AT1 and Tier2 instruments have in the past and are also currently issued predominantly in the form of large volumes, for which early repurchase is usually not considered and also not economically sensible, 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 with a call right that was already assumed to be exercised in the pricing of the bond, provided that the yield curve and other market conditions develop as expected. For some institutions, such liabilities represent a large proportion of the total volume of existing MREL liabilities, which is well over 3%. A grandfathering provision would be appropriate here, as also indicated in the "Explanatory box" to Art. 32b draft RTS.

The argumentation that MREL instruments no longer count as eligible liabilities in the last year of their maturity and are thus excluded from the 3 % rule (see the "Explanatory box to Art. 32c of the draft RTS) . This conclusion is also not to be found in the wording of the proposed Art. 32c RTS draft, which specifically refers to the instruments. We would like clarification in this respect.

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

With regard to the 3 % limit, the provisional implementation of the provision of Art. 78a CRR through the "MREL Addendum to the SRB 2018 MREL policy of the SRB", which has set the limit at 1 % TREA, could also be used as a superordinate basis. Apparently, the SRB considers this limit to be sufficient to protect the institutions' ability to wind up. In our view, the EBA should be guided by this.

14. 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.

Institutions for which **no MREL is determined/ where MREL is waived** should not be subject to the permission regime for eligible liabilities and thus be exempted from the limits.

Based on the comments already made in the general comments, to which we expressly refer again here, we reject the inclusion of institutions suitable for insolvency, for which no resolution measures have just been defined in the resolution plan, in the scope of the approval procedure. The same applies to waiver institutions.
For insolvency institutions with a minimum MREL requirement at the individual level (equal to own funds requirements), inclusion in the buy-back approval requirement and the planned extension to old portfolios of MREL-eligible liabilities would mean that, despite the fact that the MREL minimum requirements would be significantly exceeded, they would have to submit approval applications and install corresponding monitoring systems, solely in order to comply with the regulatory requirements for the buy-back / redemption of individual liabilities.

In this context, the following aspect: As already described in Article 32b of the draft RTS (Q11) on deduction obligations, we consider an application and thus also a deduction obligation separately for each class of eligible liabilities (preferred-senior and non-preferred-senior instruments) to be necessary if the inclusion of preferred-senior instruments is to be maintained.

15. 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.

Most of the information required under Art. 32d RTS draft is information not previously requested by the SRB. It is not comprehensible why this extent of information is requested. This does not seem appropriate in view of the risk level of a granted permission. In our opinion, the decision as to whether an institution has sufficient MREL-eligible liabilities can be made in a sufficiently robust manner with the information provided in accordance with the "MREL Addendum to the SRB 2018 MREL policy of the SRB".

In particular, the information to be provided under (a) represents a purely qualitative requirement regarding the reasons for submitting an application. It would be desirable here if the information could be presented more precisely, which is considered a "well-founded explanation", since the previous requirement leaves considerable scope for discretion in the presentation by the banks but also in the assessment by the authorities.

For institutions suitable for insolvency, which are not subject to any obligations to maintain eligible liabilities, the information requirement – as proposed - would be arbitrary, disproportionate and unnecessary in every respect if one wanted to continue to subject them to the approval procedure.

In addition, we refer also to our comments to Q8, Art. 30 RTS. The information request according to Art. 32d RTS is far too detailed. The provision of 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 in scope of the considerations, this would effectively set up a whole new reporting process, error-prone and duplicating existing MREL reporting, which seems unsubstantiated given the fact that MREL compliance is already ensured by regular reporting to RAs.

Regarding 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 e.g. private placements. Consequently, it not only illogical to request a full list but simply impossible. A list of outstanding liabilities is regularly provided to RAs through the annual resolution reporting (CIR, LDR for the banking union). We also refer to our comments to Art. 30a RTS.

16. 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.

The same **comments/statement** as provided in the answer to **question 9 above** are **relevant** and should be **taken into account in case of eligible liabilities** as well.

It is advisable to have some time ahead and we also welcome the shortening of the deadline for renewals of existing permissions. Much more important, 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 adapt. There should be time in the process to check and grant a resubmission if problems had been identified in a first round.

In addition to shortening the lead time for subsequent applications, the scope of the documents to be submitted should be limited to the qualitative information and an update of the documents already submitted with regard to the newly requested amount and the requested duration of the authorisation should be sufficient, as this will restore the transparency of information for the settlement and supervisory authorities to the level at which the original application was submitted.

With regard 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 the possibility to remove them from actual loss-absorption in comparison to own funds, such cumbersome processes stand in no proportion to the effort they require and the risks they cover.

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