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Brussels, 27 February 2015

EBF Response to EBA consultation paper on criteria for determining the minimum requirements for own funds and eligible liabilities (MREL) under Directive 2014/59/EU (EBA/2014/41)

Introduction and key messages

The two step process for fixing MREL generates excessive caution

By proposing to fix MREL as the sum of two individual amounts, a Loss Absorption Amount, and a Recapitalisation Amount, the draft RTS opens the way to regulatory conservatism on each of these amounts, which may lead to an excessive total amount.

Assumptions on the loss absorption needs are too severe

The draft RTS is based on the assumption that all capital has been lost by a bank that has reached resolution, i.e. is determined to be likely to fail. The EBA minimum MREL requirement includes Pillar 1 capital buffers stemming from Basel III and CRD IV as well as Pillar 2 requirements, no matter whether they are set to reflect the expectation of loss or to achieve other objectives. Given the measures that have already been taken to ensure financial stability, both at global, regional and local level, the assumption seems rigid, and overly conservative. Although capital buffers and Pillar 2 requirements are intended to represent only additional risks and additional losses, their application within the European single market varies widely. In many cases, they are more an expression of risk aversion or macro-prudential concerns by national supervisors than a reasoned appreciation of potential losses not covered elsewhere in the capital framework. In our opinion, it would be more appropriate to base the assumption of capital to be lost on the minimum Pillar 1 capital requirement.

Resolution downsizing should be reflected in the recapitalisation amount

With the inclusion of the Recapitalisation Amount, the EBA acknowledges that the resolution plan may not imply that the entire group is recapitalised in the same form as the one that enters into resolution. The preferred resolution strategy in each group may involve discontinuing or winding down some subsidiaries, business lines or activities rather than continuing the entire business. This characteristic should be taken into account in the recapitalisation amount and is key to avoid a mechanical calibration that simply doubles the Loss Absorption Amount. Furthermore, we are concerned by the inclusion in the recapitalisation amount of the Pillar 2 or any systemic capital requirements that the supervisor imposed to the pre-resolution bank, which may not apply after the restructuring of the failed institution.

The de minimis derogation of 10 per cent for excluded liabilities should be clarified

One of the foundations of the European recovery and resolution regime is the bail-in of liabilities. The EU has deliberately chosen to approach the issue in a flexible manner, giving the resolution authority the power to decide what can be bailed in, as long as no creditor is worse off than in liquidation. The idea of introducing a *de minimis* derogation for the NCWOL test may avoid potentially complex calculations for not very material items. However, the 10% threshold reflects only a very limited estimation of the difference between losses in resolution and the losses that would be incurred in a liquidation scenario. Resolution is designed to avoid the massive destruction of value that arises in liquidation: a 10% estimate of the differences in losses is excessively conservative, and should be better justified if maintained. We therefore recommend to eliminate this threshold or if finally maintained, to set it at a higher level. Also, it should be clarified that the consequence of breaching the threshold is solely to make it compulsory for resolution authority to conduct a more detailed analysis of the NCWOL issue for the particular bank in question, and subsequently draw conclusions from this analysis. We believe this to be the intention of the text, but it is not entirely clear as written.

The RTS goes beyond the EBA's mandate from the BRRD

We understand that the EBA has tried to calibrate a RTS proposal that is flexible enough to accommodate for upcoming regulatory changes, and in particular the TLAC proposal from the FSB. However, we believe that the TLAC proposal represents a paradigm shift, and that the EBA mandate is limited to proposing detailed rules for an MREL requirement based on the BRRD. In addition, TLAC is still under calibration (level, definitions of eligible debts) and we urge European authorities to wait until it is finalised, and adopted in Europe, if necessary through the ordinary legislative process, before attempting to work it into European regulation, i.e. MREL should not be used to implement TLAC before the FSB finalises the rules.

However, we would recommend that the EBA makes a clear statement in the RTS that their intention is that the TLAC and MREL should be made compatible when the final global standard is known, and that, for those banks to which the TLAC requirement would apply, the MREL requirement will never be greater than the Pillar 1 and 2 TLAC requirement.

Monitoring period and comprehensive cost/benefit analysis would be appropriate before strict rules for MREL are implemented

A comprehensive MREL QIS exercise in Europe is very important (in parallel to the TLAC QIS). In particular, the QIS should inform the transition period for full compliance with MREL together with the impact on: business models; the depth of debt markets; the willingness of investors to buy this type of debt; the base of retail deposit funding; refinancing risks, and financial interconnectedness.

Proportionality is crucial

The RTS may lead to serious problems for business models that rely on one single source of funding that is entirely excluded from bail-in, or very unlikely to be bailed-in. In any case, the application of the MREL RTS must not lead to banks having to issue MREL eligible debt instruments where unnecessary or inconsistent with the likely resolution plan. That could force those banks to artificially expand their balance sheets, which is not aligned with the objective of crisis prevention in the BRRD and CRR. Instead the supervisor should be given the possibility to adapt the requirement for banks in a way so that the end level of the MREL requirement

ensures a level playing field amongst different categories of banks. Such an adjustment or waiver could be applied e.g. if a systemically important bank funds itself only with retail deposits or covered bonds, but has sufficient capital to cover the MREL requirement up to a level that is equivalent from a financial stability perspective to that of similar banks in terms of size, risk profile and systemic importance, but with a different business model and a different funding model. This also reinforces our position on the need for the MREL amount (and the Loss Absorption Amount if the two-step method is retained) to be driven from minimum capital requirements and not from actual levels including buffers and Pillar 2 requirements.

We note also note, that in the last sentence of page 6, it could be understood that G SIBs are excluded from the proportionality principle. The proportionality principle is a pillar of European law which should apply to all banks.

The resolution authority should not bring into doubt the decision of the supervisor

We have some concerns that Articles 2 (4 and 5) and 6 (2) could be read as giving the resolution authority the ability to call into question the decisions made by supervisory authorities concerning required capital levels. This could damage market confidence in the soundness of financial entities and result in market uncertainty. Therefore, we would suggest that Article 2 (4 and 5) and 6 (2) be rewritten to clarify the role of the Resolution Authority in relation to supervisory authorities.

Answer to specific questions

Q1: The draft text describes comprehensively capital requirements under the CRR/CRD IV framework, which includes minimum CET1, AT1 and total capital requirements, capital buffers required by CRD IV, Pillar 2 capital requirements set on a case-by-case basis, and alternative backstop capital measures. The EBA is seeking comments on whether all elements of these capital requirements should be considered for the assessment of the loss absorption amount. Do you consider that any of these components of the overall capital requirement (other than the minimum CET1 requirement) are not appropriate indicators of loss in resolution, and if so why?

As a general comment, we believe that the two step approach, which was not provided in BRRD, is too rigid because it results in adding all precautionary buffers at both stages of the reasoning and leads to a disproportionately high level of MREL.

European banks already have high capital buffers and are generally well prepared for the new European regulatory rules CRR/CRD IV. The stress tests performed by the European Central Bank and European Banking Authority demonstrated, for the most part, high resilience of the banking sector against the chosen scenarios of adverse economic developments. Almost all major European banks passed the test with success demonstrating a high capital cushion, which allows them to absorb adverse shocks and maintain total capital adequacy ratio well above the 8% regulatory threshold. The combination of both Pillar 1 and Pillar 2 capital requirements (SREP requirements) and buffers could overestimate the Loss Absorption Amount (LAA) leading to an unwarranted increase in MREL levels.

Furthermore, as written in the accompanying documents to the draft RTS, the aim of EBA was to ensure a sufficient degree of harmonisation of required MREL ratios for institutions with

similar business models across the Union. However, this is hardly possible without harmonising the phase-in periods for implementation of capital buffers under Pillar 1 across all Member States. In Member states without the transitional period for capital buffers, the draft RTS imposes within a short term horizon significantly more severe requirements (and potentially with more severe consequences) for loss absorbing and recapitalisation capacity. Thus, banks in these Member States will not have the same chance to organically increase their capital base through retaining profits until 2019, since they will face significantly larger P/L impact compared to other European peers. This goes against the level playing field of the EU single market.

We recommend the total LAA to be set as a default based on own funds requirements pursuant Article 92 of Regulation (EU) No 575/2013. The inclusion of other elements of capital requirements should be subject to evaluation of the resolution authority based on the resolvability assessment, business model, funding sources and the risk profile of an institution which would help to eliminate different phase-in periods for implementation of capital buffers by individual Member States and also to assess whether for each entity in particular Pillar 2 and buffer requirements should be added, under exceptional conditions, or not, to the LAA. The existing inconsistencies in introduction of capital buffers and also in determination of additional capital buffers under SREP in individual Member States should not be transferred into determination of LAA.

In addition, we think the use of the leverage ratio in the MREL measure should at a minimum await the EBA's assessment on the appropriateness of this measure as mandated by BRRD Article 45(20)(b) and be introduced no sooner than the moment when it has become a Pillar 1 requirement in the European law.

Q 2: Should the resolution authority be allowed to adjust downwards? What are the specific circumstances under which resolution authorities should allow a smaller need to be able to absorb losses before entry into resolution and in the resolution process than indicated by the capital requirements?

As said above, our preferred method would be to base the assessment on an 8% RWA ratio and adapt according to the institution. If nevertheless the Art 2 method was retained, the article should ensure that authorities have flexibility to also adjust the LAA downward.

In some cases, high capital requirements (for instance systemic risk buffers and countercyclical buffers) are rather an expression of high risk aversion or macro prudential tools used to counter the build-up of systemic risk, and are not an indication of potential loss levels for a particular institution or banking system. These are not appropriate to be used as a default LAA. Thus, resolution authorities should retain sufficient flexibility to decrease the LAA for a purpose of elimination of national discretions (multipliers on market risk VaR models, LGD floors for specific exposures, etc.) and for a purpose of normalisation and standardisation of Pillar 2 add-ons. This would ensure a level playing field among entities that are similar but are in different jurisdictions, until a better harmonisation is achieved in Europe.

Despite our preference for "adjusting" rather than "increasing," we are concerned about the potential source of conflict between supervisors and resolution authorities implied in Article 2

(5). It empowers the resolution authority to adjust the MREL if it considers that the risks, vulnerabilities and need of loss absorption of the corresponding entity are not adequately reflected in the capital requirements set by the supervisor. This discretionary power of the resolution authority implies that it is able to call into question the Supervisory Review and Evaluation Process (SREP) carried out by the competent authority, and also the Pillar 1 requirements, therefore, questioning established supervisory criteria. The resolution authority must only be empowered to define the MREL, but should not be provided with any power regarding the entity's capital requirements. This must remain the competence of the supervisory authority. In that vein, we propose to delete the last sentence of Article 2(5), and request that Article 2 (4) and (5), and 6 (2), which contain similar wording, be rewritten to clarify the relationship between resolution and supervisory authorities.

Minimum capital requirements for credit institutions (Pillar 1) and the supervisory review and evaluation process (Pillar 2) are covered by Regulation 575/2013 (CRR) and Directive 2013/36 (CRD IV) which allocate responsibilities in this area, exclusively, to the supervision authority within the limits set by both standards. Neither CRR or CRD IV provide the possibility that the resolution authority could conduct a parallel calculation of the entities' capital needs (*the default loss absorption amount*) nor if the risks and vulnerabilities are adequately reflected in the capital requirements or addressed by other supervisory measures; nor does it fall within the competence of the resolution authority to provide the competent authority with a reasoned explanation of any such assessment.

Among the available powers of the resolution authority *to address or remove impediments to resolvability* (Article 17 of BRRD), it includes the possibility to: *5.(i) require an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to issue eligible liabilities to meet the requirements of Article 45,* but only when (article 17 BRRD), after consulting the competent authority, the resolution authority determines that there are substantive impediments to the resolvability of that institution and where the resolution authority assesses that the measures proposed by an institution (after a period of four months of the notification's receipt date) do not effectively reduce or remove the impediments in question. In that case (but not before), resolution authorities shall have the power to take measures to require an institution to issue (only) eligible liabilities, but not own funds (*higher loss absorption amount*).

To ensure transparency, the resolution authorities should provide the detailed reasoning applied when informing the institution of the retained ratio.

Furthermore, we note that resolution authorities will need to be given the ability to adjust the LAA when setting MREL in a manner consistent with the proposed requirements for internal TLAC.

Q3: Should any additional benchmarks be used to assess the necessary degree of loss absorbency? If yes, how should these be defined and how should they be used in combination with the capital requirements benchmark? Should such benchmarks also allow for a decrease of the loss absorption amount compared to the institution's capital requirements?

We do not understand the rationale of Article 2 (6), which links the Resolvability and the Loss absorption amount. Indeed, if a resolution plan cannot ensure that an institution will be resolvable (absence of sales options or wind down possibilities for instance), then the Recapitalisation Amount should be increased, not the Loss Absorption Amount.

We are unsure as to why the Loss Absorption Amount rather than the Recapitalisation Amount should be increased. We would also point out that increasing MREL is not the only possible response to the existence of impediments to resolution, and indeed that many forms of impediments to resolution could be absolutely unaffected by increases or decreases in MREL amounts. It should be made clear that MREL increases would be justified only if impediments are of a financial nature capable of being addressed by additional MREL.

Nevertheless, we urge the EBA to test its assumptions by analysing the losses experienced in the adverse scenario during the latest (EBA) stress test. This should be sufficiently prudent and detailed to obtain results that can be analysed by a bank's size, risk profile and business model, which would allow EBA to properly calibrate MREL in line with the principle of proportionality, applied to all sizes of bank and to differing business models.

Q4: Do you consider that any of these components of the overall capital requirement are not appropriate indicators of the capital required after resolution, and if so why?

The starting point that all capital (whichever the required level of own funds is, compared to the minimum Basel requirement) would be lost for a bank in resolution is too mechanical. Given the experience from the previous crises, supervisory authorities are well aware that problem banks (especially larger ones) will have to be dealt with long before losses grow to a size large enough to deplete all the equity in a bank. It is very reasonable that failed institutions have some equity left. In addition, it is likely that the bank will be able to recreate own funds after the failure (by selling activities for instance). Thus, the Recapitalisation Amount should only include the minimum capital requirements, which means that Article 3 point 6 (b-c) and point 7 should be deleted.

Any requirement in excess of the 8% capital ratio, i.e. any required capital buffers under Pillar 1 or capital requirements under Pillar 2 based on the SREP outcome should not be considered for the MREL requirement since they correspond to the situation before the resolution.

Depending on supervisory approaches, Pillar 2 requirements may include buffers for risks that have actually materialised during the crisis that led to the resolution event of the institution. As such, it is not clear why these buffers need to be reconstituted – presumably any mandatory restructuring of the institution post-resolution should ensure such risks are no longer being taken by the institution.

The capital conservation buffer and countercyclical buffer primarily target macro-prudential objectives and are designed to be built up in good times and drawn down in times of stress and then replenished through conservation actions. We note that according to Article 142 of Directive 36/2013, "Where an institution fails to meet its combined buffer requirement, it shall prepare a capital conservation plan and submit it to the competent authority..." As resolution represents an extreme stress, it appears entirely credible that a recapitalised institution will not pay dividends or discretionary bonuses while undergoing a restructuring plan. If this were not possible, the entire purpose of these buffers would be called into question. We therefore disagree with the assumption that 'sustaining market confidence is likely to require that the institution is not operating under a capital conservation plan' as stated in the consultation paper. In our view these buffers should not be taken into account for immediate recapitalisation.

After the resolution, the applicable minimum requirement should be applied with consideration of lower RWAs and total assets in resolution. RWAs and total assets are likely to decrease either prior to resolution via recovery actions, or through implementation post resolution of such actions as part of the restructuring plan. Whether this happens before or after the entry in resolution is not relevant, what is essential is to recognise that the post resolution bank will not be of comparable size to the healthy going concern bank on whose metrics ex-ante MREL calibration will be decided.

Any minimum requirement for the recapitalisation amount in resolution should be estimated on the basis of the preferred resolution strategy prepared by the resolution authority. Additional capital increase after the resolution, if needed, should be a matter of a time plan agreed with the competent authority (similar to recovery plan).

Market confidence is certainly important, but we would argue that confidence is not just about levels of capital adequacy, it is also linked to the access to liquidity, to perception of the quality of the management of the bank in resolution, and to the clarity and feasibility of the resolution plan and its associated restructuring plan. These elements of confidence are achieved through the actions of central banks (notably in liquidity provision), and of the resolution authorities, and not by inflating capital requirements.

Q 5: Is it appropriate to have a single peer group of G-SIIs, or should this be subdivided by the level of the G-SII capital buffer? Should the peer group approach be extended to Other Systemically Important Institutions (O-SIIs), at the option of resolution authorities? If yes, would the appropriate peer group be the group of O-SIIs established in the same jurisdiction? Should the peer group approach be further extended to other types of institution?

We do not believe the 'peer group' approach to be an appropriate mechanism for setting regulatory requirements. Regulatory standards should be set by regulators, not by observing market behaviour, which can be influenced by varying factors including notably the maintenance of management buffers over and above regulatory requirements, and individual banks financial strategies.

It does not appear reasonable that an institution immediately after a resolution event which is still undergoing a restructuring program operates with capital levels at the median of its former

peer group (because it is likely that the institution will no longer be a G-SII, or will at least have changed its 'bucket' after resolution to a lower peer group).In addition, G-SIIs from different jurisdictions may be subject to significantly different Pillar 2 and buffer requirements, affecting their total CET1 ratio. Therefore, the EBF does not support the peer group approach, either for GSII's or for OSII's.

Furthermore, O-SIIs may be subsidiaries of banks classified as either G-SIIs or O-SIIs in their home countries. This has potentially significant implications for capital levels, as subsidiaries of global/regional institutions may not operate with the same internal buffers as local institutions (management buffers are more likely to be held at the parent institution). In addition, systemic risk buffers applied to the parent institution may be higher than those that would be applied to the subsidiary on a standalone basis (but be considered as the 'combined buffer requirement' for the subsidiary institution). Both of these factors would potentially distort the sample data for the peer group. Finally, in some jurisdictions, where the banks traditionally retain large portion of their earnings and hold significantly higher capital than prescribed by the supervisory authority, the peer group approach would actually be counterproductive in discouraging such a practice, since it would lead to a spiral increase of MREL requirements.

Q6: The approach outlined in Articles 2 and 3 will reflect differences between consolidated and subsidiary capital requirements. Are there additional ways in which specific features of subsidiaries within a banking group should be reflected?

There is no information in either Article 2 or 3 as to how differences between consolidated and subsidiary capital requirements would be reflected. It is unclear what is meant by the statement that 'differences in capital requirements' will be reflected, as the RTS should address how MREL requirements will be differentiated between subsidiary and consolidated levels. As far as capital requirements are concerned, these are generally available at both consolidated and subsidiary level, so we would assume the methodology outlined in the RTS to be applied based on the relevant requirements. If this is not the intended approach, this should be further clarified.

As a general point, the treatment of MREL requirements within groups is not dealt with in this RTS.

We have concerns about the effective application of the requirements for banking groups in such a way that the different existing business models and capital structures are respected. Since the purpose of the bail-in tool is loss-absorbency we believe the requirements should reflect the risks that banks are facing and be consistent with its preferred resolution strategy (single or multiple point of entry for bail-in purposes). We believe that individual MREL requirements within a group should where relevant only be applicable to systemic subsidiaries in EU host Member States.

With respect to the setting of MREL requirements at systemic subsidiary level it is stipulated in the BRRD that the level will depend, apart from considering the business model and risk profile of the subsidiary (including its own funds of the subsidiary), also on the consolidated requirement that has been set for the group. The EBF considers it important that a proportionate discount is given to internal MREL requirements.

In addition, for entities that are not point of entry in resolution, the MREL should be significantly reduced. We would appreciate if EBA could clarify that flexibility can be applied by resolution authorities to adapt the local MREL with the overall resolution strategy of a group. Also the SRM-context, with a single supervisory and single resolution authority, should be taken into account.

In relation to this it is key that the proposed waiver, allowing resolution authorities to apply the MREL requirements at consolidated level only, can also be applied in cross-border situations. Therefore, the condition stipulating that the resolution authority of the subsidiary must have fully waived the application of individual capital requirements to the subsidiary according to CRD IV is difficult to meet as well as the provision to provide a full guarantee. We further believe that this waiver should be granted provided it is coherent with the resolution strategy of the institution. The granting of the waiver should finally be based on a joint-decision and subject to binding EBA mediation. A waiver for subsidiaries of non-EU headquartered banks should also be allowed if coherent with the resolution strategy and agreed between the respective home/host resolution authorities. The review of waiver requirements should be subject of the BRRD review in 2016 in the context of Article 45 (19) (j).

The EBF advocates that for SPE firms, where a Holding Company is the resolution entity, MREL should be set (solely) on a group consolidated basis. Conversely, for MPE firms it should be applied at individual resolution entity level. In this regard, when determining the MREL at individual level under MPE banks, the resolution authority should not refer to any capital requirement set at consolidated level. This is particularly the case of the systemic capital buffer or any Pillar 2 capital surcharge imposed at consolidated level.

The RTS should clarify the treatment of:

- Intercompany exposures in subsidiary assessments
- Cross guarantee and institutional protection schemes or other intragroup support arrangements

Q7: Do you agree that there should be a *de minimis* derogation from this provision for excluded liabilities which account for less than 10% of a given insolvency class?

The proposal that resolution authorities should take a pragmatic approach to the assessment of the likely exclusion of classes of liability from bail-in and the impact of this on the MREL is welcome. In this context, *a de minimis* threshold is a logical way to convergence of the point at which resolution authorities determine if exclusions present an impediment to resolution. If this threshold is exceeded, then the effect should be that the Resolution Authority conducts the necessary analyses to determine if there is likely to be a problem in respecting the NCWOL principle.

Article 44 (3) of BRRD provides that a resolution authority may decide to exclude debts from bail-in on a discretionary basis (in exceptional circumstances listed in paragraphs a) to d). In that case, losses that would have impacted excluded liabilities are carried over to non-excluded liabilities as long as the NCWOL safeguard is respected. When this safeguard is in danger, the resolution authority may draw from the resolution fund (but only if 8% of total liabilities have

been bailed-in), reconsider the scope of discretionary exclusions, or envisage using resolution tools other than bail-in.

We believe that losses in liquidation are, by definition, much higher than in resolution. This is because the liquidation process is particularly poorly suited to banks, as it generates delays, results in poor conditions for the sales of assets, and allows loss of confidence to further aggravate losses. We could even affirm that the more important and complex the liquidation of a bank is, the more significant will be the gap between losses in liquidation and in resolution.

That is why creditors should be much better off in resolution, especially the most senior creditors in the hierarchy, as this population of creditors will receive shares to in the case of bail-in.

Therefore, the proposal for a threshold of 10% is questionable as the risk to tap the NCWOL is much more a question of liabilities structure than fixing a predetermined threshold, and extremely conservative. In a way, the *de minimis* could be seen to deny the advantages of choosing resolution for senior creditors because regulatory own funds instruments are cancelled/written down in both resolution and liquidation, whereas senior creditors will be converted at par in resolution (instead of waiting for a long and uncertain recovery on their claims). Therefore, they can benefit from an upside on their shares if resolution succeeds.

That is why the general principle should be that the resolution authority assesses on a case by case basis if the mandatory and envisaged discretionary exclusions pass the NCWOL test given the assumptions of the resolution plan. No threshold should be necessary, other than as an expedient to avoid unnecessary analysis by resolution authorities.

If a threshold is nevertheless retained in the final RTS, a 10% threshold is too low as explained above, and should thus be better justified. We therefore recommend both a higher threshold and a clarification of the wording of the RTS to make it clear that the impact of going over the threshold is to only make it compulsory for the resolution authority to conduct a more detailed analysis of the NCWOL issue for the particular bank in question, and subsequently draw conclusions from this analysis. There should be no automatic link between excluded liabilities representing more than 10% of a given class and an increase in MREL. We believe this to be the intention of the text, but it is not entirely clear as written. In this respect, we note that the introduction to the draft RTS highlights that the resolution authority should have discretion over how compensation risks should be addressed, including via the removal of impediments to resolution. This is reflected in Recital 4 but not in Article 5.

Comment to the example in Box 2 on page 12 (Stylised example of the impact of exclusions):

We understand that the purpose of the example in Box 2 is to demonstrate the impact of exclusions of certain in principle bail-inable liabilities on the bail-in amount on other bailed-in liabilities that are *pari passu* in light of point (g) of BRRD Art. 34(1). However, the example contains some aspects that are questionable:

When determining the impact of resolution on senior creditors in the example, nominal claims of holders on senior debt should not be compared with economic (i.e. market) value of shares following resolution. First, market value of senior debt prior to resolution surely would be well

below par. In the example however, the legal claim of former senior creditors remain the same (i.e. only the ranking compared to corporate transaction depositors has changed vis-a-vis the 'debt-to-equity swap').

Equally, market value of equity just after resolution surely will reflect some remaining doubt whether the resolution has been successful. However, the equity owners are now shareholders of an institution with a clean balance sheet. As such, there is likely significant upside potential in the shares' market price.

Q8: Do you agree that resolution authorities should seek to ensure that systemic institutions have sufficient MREL to make it possible to access resolution funds for the full range of financing purposes specified in the BRRD

We agree with the proposal of the draft RTS that systemic relevant institutions should have sufficient MREL. However, we recommend linking the MREL for all institutions with the resolution plan. This should be done on an individual basis but assessed on the basis of EBA guidelines thereby allowing the EBA to reinforce the principle of proportionality by ensuring that MREL requirements are suited to the particular characteristics of each bank.

A uniform minimum would not adequately reflect the different business models, risk profiles and diversification effects of the institutions (retail, universal versus investment banking).

Furthermore, such a uniform minimum is not stated under the specific criteria in BRRD Article 45. Under the BRRD, if the resolution plan contains an ex-ante exclusion of specified liabilities from a bail-in, the MREL should be high enough to ensure that the institution has sufficient other eligible liabilities to ensure that the resolution fund need not be used (Article 45 (6)(c) BRRD). However, there is no legal obligation in the BRRD to set the MREL for all systemic relevant institution at a uniform level.

From our point of view, any uniform MREL minimum for a specific group of institutions at this stage would be a "gold-plating" of the BRRD requirements and so not in line with the level 1 requirements.

In addition to this, the 8% in Article 44 (4)(a) BRRD clearly refers to a capacity for loss absorption and for conversion at the point of resolution, and does not reference MREL as indicated by the draft RTS. The amount of bail-inable liabilities will, by definition, always be greater than MREL given the exclusion of debts with a residual maturity of less than 1 year, and the deliberately limited definition of MREL that was decided by the legislator.

Finally, the level of 8% is much too high (equivalent to doubling a 4% leverage ratio), an MREL minimum of 8% would not benefit the intended goals but hamper the ability of the sector to support the needs of clients. On the other hand, an institution specific MREL set by the resolution authority would ensure the existence of sufficient adequate bail-in-able liabilities while avoiding such overshooting.

Q9: Is this limit on the transition period appropriate?

Given the upcoming TLAC requirements from the FSB, which intended to apply no earlier than 2019, we agree that EBA should seek to insert a phase-in period and suggest that this be informed by a QIS. Given the fact that the FSB are conducting surveys to ascertain the correct transition period for TLAC, and that the issues for TLAC and MREL are very similar (depth of market, calibration of short-falls), we would suggest that the wording of the transition period allow for flexibility to adapt to the final decision of FSB. We note that the CRR introduced a phasing out period of 10 years for capital instruments issued under CRD 3 which were no longer compliant.

Also, when reading Article 9(3), it is not completely clear whether the suggested 48 months limit on the transitional period applies from the date of which the RTS comes into force, from 1 January 2016 or from the date the MREL requirements are applicable according to national law. If the latter is the case, banks in member states transposing the MREL requirements before 1 January 2016 potentially have a shorter transitional period. In order to avoid such unequal treatment across member states, we propose Article 9 (3) should read: "*The transitional period shall end 1 January 2020 at the **earliest**.*"

For level playing field reasons, we believe that the transition period should be the rule and not an option at the authorities' discretion. In our opinion, the main issue arises from the additional volume of debts required to comply with (and its availability in the market in conditions that are sufficiently attractive for the investors) and the risk of each institution (some European Banks' ratings are currently penalised by their respective sovereign's rating). These important restrictions may limit credit institutions' capacity to adopt the measures in a swift way. As such, we understand there should be a sufficiently long transition period. This is particularly relevant in countries coming out of a financial assistance programme. We believe that banks in those jurisdictions will, for a while, only grow organically through earnings retention, which in turn are still highly limited by significant impairments.

Consideration might also be given to using the impact assessment to determine whether it is necessary to set a longer transitional period for countries where the senior unsecured debt market is not developed or does not have the capacity to absorb the necessary amounts of MREL eligible liabilities. It will require, in such countries, substantially longer time to build the investor base for the required amount of debt to be issued than proposed transition period of 48 months.

Thus, it is of particular importance to conduct a thorough market research to assess the capacity of the individual market especially for issuers, which are currently not present on the senior unsecured market.

Q10: Should the resolution authority also set a transitional period for the MREL of banks which are undergoing or have undergone a resolution process?

Yes, it makes sense to set a relevant transitional period during or after the resolution process, depending on the resolution outcome. It can be assumed that for an institution in or shortly after resolution, even the market expectation will reflect the situation and the institution will

not be expected to reach the target immediately. Once the MREL is depleted in resolution, we would expect the minimum capital requirements to be restored immediately and the buffers to be rebuilt over time, with the timeframe dependent on prevailing circumstances. A transition of 4 years seems a minimum to ensure that banks have sufficient time to issue compliant instruments in their respective markets.

Q11: Overall, do you consider that the draft RTS strikes the appropriate balance between the need to adapt the MREL to the circumstances of individual institutions and promoting consistency in the setting of adequate levels of MREL across resolution authorities?

In our opinion the draft RTS has several failings in terms of promoting consistency:

- It penalises banking sectors and banks which are highly capitalised and do not need funding from the secondary market,
- In attempting to introduce consistency between MREL and TLAC, it creates the potential for authorities to set inconsistent and overly penalising MREL requirements on banks according to whether they are subjected to TLAC or similar requirements or not,
- It exacerbates differences between jurisdictions.

There are currently significant differences across jurisdictions with respect to prudential capital requirements set at individual institution level, either through the exercise of national discretions and methodological differences in the determination of Pillar 2 requirements or through the imposition of different buffer levels. Rather than creating a harmonised level of MREL for similar institutions in the EU, the current RTS actually amplifies the existing divergent practices by using the prudential requirements as the basis for both the loss absorption and recapitalisation amounts (thereby effectively increasing the differences).

European perspective:

In our opinion, the qualitative aspects are all mentioned and the principle based approach should allow resolution authorities to set adequate levels of MREL. However, implementation and application of these technical standards has to show in practice whether this is achievable. To preserve a level playing field in the European Union in general and in the Banking Union in particular we strongly recommend creating an equal interpretation across the member states. That is especially important with respect to the implementation of Article 4 (DGS-contribution), Article 6 (Business/ Funding model and risk profile) and Article 7 (Size and systemic risk) by the national resolution authorities. We recommend an intensive dialogue, which could be coordinated by the Single Resolution Board, between the resolution authorities to reach similar MREL requirements for similar institutions. A coherent MREL level is fundamental for the Banking Union, especially for all institutions which are active in more than one of the member states.

An important element for institutions and other market participants (e.g. investors) will be a sufficient degree of simplicity and transparency going forward across the various institutions.

Moreover, in order to ensure a harmonised application of the MREL's discretional criteria, the EBA will submit a report to the European Commission by 21 October 2016 analysing whether there have been any divergences in the levels set for comparable institutions in Europe. This

report will be critical to maintain the level-playing field and enhance transparency among European banks.

Global perspective:
Although we understand that this may not be the intention, in general, the draft RTS indicates that the MREL requirement could be higher than expected by the market participants and also exceed the TLAC requirements on FSB level. As we understand the example in box 1 of the draft RTS, the MREL requirement for a European G-SIB could add up to 30 % of RWA and for O-SIBs in some jurisdictions even above 30% RWA.
In contrast, the comparable TLAC requirement of a non-European G-SIB would be 3.0 to 7.0 percentage points of RWA lower than for the European G-SIB:

TLAC minimum:	16.0 % to 20.0 %
Capital conservation buffer:	2.5 %
G-SIB buffer:	2.5 %
%TLAC requirement:	21%-25%

This would create a disadvantage for all European institutions particularly in comparison to the US and Japanese competitors. We strongly propose to set the MREL not higher than the FSB TLAC level to restore a level playing field between European and non-European G-SIBs.

In addition to that, such a strict MREL requirement will have serious negative effects on the retail and corporate lending to the real economy in the euro-area.

Q12: Are there additional issues, not identified in this section, which should be considered in the final impact assessment?

Excessively high MREL levels would lead to increased funding costs for the European banking industry, hindering the ability to support clients and facilitate growth. In order to compensate for the higher funding costs, the banks would be forced either to invest the raised funds into riskier assets, which would lead to an overall increase of systemic risk in Europe, or to increase the pricing of their finance to the economy. Neither are desirable outcomes.
Low levels of availability of eligible liabilities in some local markets (senior unsecured bonds, long-term funds from institutional investors and large corporates) would lead to banks located there having to search for funding in a foreign currency which would induce FX risk or extra costs for hedging.

From the RTS it is not clear, whether the resolution authority may reduce MREL by potential contribution from the DGS only in the case of institutions which can be liquidated under normal insolvency proceedings (as specifically pointed in Art. 4 (3)). To limit this possibility only to this specific situation would mean, that for these institutions the MREL requirement would be set below the total capital requirement (since Recapitalisation Amount for institutions which can be liquidated under normal insolvency proceedings is zero) and this does not make sense. Thus, it seems that paragraph 3 is redundant. However, we would welcome clarification whether the adjustment of MREL by the potential DGS contribution is applicable for all resolution strategies.

We would also point out that Article 4 (2) whilst it would appear to be written to respect Article 109 (5) of BRRD, is actually saying something quite different. It is one thing to say that a DGS

may not apply more than 50% of its resources to a single resolution, which is what Article 109 is saying, but it is a quite different thing to say that the MREL of a given bank may be reduced if it is not likely to call on more than 50% of the resources of the scheme. The 50% usage of DGS schemes is a cap, not a right to draw down.

In order to reflect specific business, funding models and/or various stages of market development we would recommend to retain sufficient flexibility for resolution authorities to decrease MREL under the following circumstances where:

- the final MREL level would lead to undesirable consequences, contradicting the prudential requirements, e.g. higher leverage, increased interconnectedness of the financial sector, necessity to bring FX risk into balance sheet in case of undeveloped local market for MREL-eligible liabilities, and increased riskiness of the balance sheet of the institutions concerned, etc,
- institutions with specific business model implicitly assume financing by retail deposits acquired from private individuals and investing within limited range of highly liquid assets defined by legal framework (i.e. building societies).

Such flexibility could be justified by

- reflecting inter group guarantees/payment commitments provided to the institution by the parent company,
- reflecting the size of other bail-in-able liabilities, which do not qualify for MREL (especially in the markets with limited amount of contractually long-term liabilities),
- institutions' recovery plan being sufficiently credible that it is reasonable to assume that the probability of the institution entering resolution is substantially reduced and any worsening of financial position or excessive risk taking by the institution will be detected sufficiently in advance before all the own funds are depleted.

Against this backdrop, a comprehensive MREL QIS exercise in Europe is very important (in parallel to the TLAC's one). In particular, the QIS should review the MREL impact, especially of the leverage ratio threshold, on:

- business models;
- the depth of debt markets;
- goal to create a capital market union;
- the willingness of investors to buy this type of debt;
- the base of retail deposit funding;
- refinancing risks; and
- financial interconnectedness.