EBA/RTS/2013/01
26 July 2013

EBA FINAL draft Regulatory Technical Standards

[*TO BE MERGED INTO ONE LEGAL TEXT WITH EBA-RTS-2013-02 AND EBA-RTS-2013-03 AS PER INDICATIONS THEREIN*]

on own funds [Part 1] under Regulation (EU) No 575/2013 (Capital Requirements Regulation - CRR)

EBA FINAL draft Regulatory Technical Standards on own funds [part 1] under Regulation (EU) No 575/2013 (Capital Requirements Regulation - CRR)

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1. Executive summary

The CRR/CRD IV texts (the so-called Capital Requirements Regulation – henceforth 'CRR' – and the so-called Capital Requirements Directive – henceforth 'CRD') contain specific mandates for the European Banking Authority (EBA) to develop draft Regulatory Technical Standards (henceforth 'RTS'), among which some relate to own funds.

Main features of the RTS

These RTS cover in particular the following areas:

- Common Equity Tier 1 (CET1) capital, in particular foreseeable charges or dividends, features of capital instruments of mutuals, cooperative societies or similar institutions, applicable forms and nature of indirect funding of capital instruments, limitations on redemption of own funds instruments;

- Additional Tier 1 (AT1) capital, in particular the form and nature of incentives to redeem, the conversion or write-down/write-up of the principal amount, the use of special purpose entities;

- Deductions from Common Equity Tier 1 capital and from own funds in general, including deductions of capital instruments of financial institutions and insurance/reinsurance undertakings, losses of the current financial year, deferred tax assets, defined benefits pension fund assets, foreseeable tax charges;

- General requirements such as indirect holdings arising from index holdings, supervisory permission for reducing own funds;

- Transitional provisions for own funds in terms of grandfathering.

2. Background and rationale

Draft RTS on Own funds

The so-called Omnibus Directive[1] amended the directives that are collectively known as Capital Requirements Directive (CRD)[2] in a number of ways, one of which was by establishing areas where the EBA is mandated to develop draft technical standards.

On 26 June 2013, revised CRD texts were published in the Official Journal of the EU. This aims to apply the internationally agreed standards adopted within the context of the Basel Committee for Banking Supervision (known as the 'Basel III framework') in the EU. These texts have recast the contents of the CRD into a revised CRD and a new Capital Requirements Regulation (CRR), which are together colloquially referred to as the CRR/CRD IV.

The EBA has developed these draft Regulatory Technical Standards (RTS) in accordance with the mandate contained in the following articles of the CRR: Article 26(4); Article 28(5)(a); Article 29(6); Article 36(2); Article 41(2); Article 52(2); Article 76(4); Article 78(5); Article 79(2); Article 83(2); Article 481(6); Article 487(3).

Background and regulatory approach followed in the draft RTS

The regulatory framework in terms of own funds has been derived from Directive 2006/48 (colloquially known as CRD), in particular Articles 56 to 67, as transposed by each Member State, which was complemented by the publication of two sets of guidelines from the Committee of European Banking Supervisors (CEBS), the predecessor of the EBA. The first set of guidelines, published in December 2009, relates to hybrid capital instruments[3]. The second set of guidelines, published in June 2010, specifies elements of Article 57(a) of the CRD[4].

In December 2010, the Basel Committee on Banking Supervision (BCBS) published its 'global regulatory framework for more resilient banks and banking systems' aiming at addressing the lessons from the financial crisis. The section of the CRR that covers own funds in essence 'translates' the BCBS proposals into EU law. Both reforms raise both the quality and quantity of the regulatory capital base.

The proposed draft RTS elaborate on the different elements of own funds: Common Equity Tier 1 capital, Additional Tier 1 capital, Tier 2 capital, deductions from these different types of capital, and transitional arrangements for own funds as put forward by the CRR. Where deemed appropriate, the

[1] Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority).

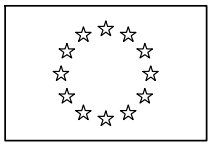
[2] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions.

[3] http://www.eba.europa.eu/regulation-and-policy/own-funds/guidelines-for-hybrid-capital-instruments

[4] http://www.eba.europa.eu/regulation-and-policy/own-funds/guidelines-on-instruments-referred-to-in-article-57-a-of-the-crd

EBA built on the former CEBS guidelines on hybrids and core capital to draft some aspects of the RTS, for example in terms of supervisory permission for reducing own funds or for some provisions related to mutuals, cooperative societies or similar institutions.

3. EBA FINAL draft Regulatory Technical Standards on own funds [part 1]



EUROPEAN COMMISSION

Brussels, XXX
[…](2012) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

on […]

supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions

COMMISSION DELEGATED REGULATION (EU) No …/..

supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012[5], and in particular Articles 26(4) third subparagraph; 28(5) third subparagraph; 29(6) third subparagraph; 36(2) third subparagraph; 41(2) third subparagraph; 52(2) third subparagraph; 76(4) third subparagraph; 78(5) third subparagraph; 79(2) third subparagraph; 83(2) third subparagraph; 481(6) third subparagraph; 487(3) third subparagraph thereof, [*INSERT LEGAL BASES RELATING TO OWN FUNDS PART 2 FROM LEGAL TEXT OF EBA-RTS-2013-02, AND THOSE RELATING TO GAIN ON SALE FROM LEGAL TEXT OF EBA-RTS-2013-03]*

Whereas:

(1) The provisions in this Regulation are closely linked, since they refer to elements of own funds requirements of institutions and to deductions from these same elements of own funds for the application of Regulation (EU) No 575/2013. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, it is desirable to include all of the regulatory technical standards on own funds required by Regulation (EU) No 575/2013, in a single Regulation.

(2) In order to bring more convergence across the EU in the way foreseeable dividends have to be deducted from interim or year-end profits, it is necessary to introduce a hierarchy of ways to evaluate the deduction: in the first place, a decision on distributions from the relevant body, second, the dividend policy, and third an historical payout ratio.

[INSERT RECITALS RELATING TO OWN FUNDS PART 2 FROM LEGAL TEXT OF EBA-RTS-2013-02]

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

[5] OJ L 176, 27.6.2013, p. 1.

(8) ...

(9) When defining situations which would qualify as indirect funding for all types of capital instruments it is more practical and comprehensive to do so by specifying the characteristics of the opposite concept, direct funding.

(10) In order to apply own funds rules to the European cooperative banking sector which includes mutuals, cooperative societies, savings institutions and similar institutions, the specificities of such institutions have to be taken into account in an appropriate manner. Rules should be put in place to ensure, among others, that such institutions are able to limit the redemption of their capital instruments, where appropriate. Thus, where the refusal of the redemption of instruments is prohibited under applicable national law for these types of institutions, it is essential that the provisions governing the instruments give the institution the ability to defer their redemption and limit the amount to be redeemed. Further, given the importance of the ability to limit or defer redemption, competent authorities should have the power to limit the redemption of cooperative shares and institutions should document any decision to limit the redemption.

(11) [*INSERT RECITAL RELATING TO GAIN ON SALE FROM LEGAL TEXT OF EBA-RTS-2013-03*]...

(12) In order to avoid regulatory arbitrage and ensure a harmonised application of the capital requirements rules in the EU, it is important to ensure that there is a uniform approach concerning the deduction from own funds of certain items like losses for the current financial year, deferred tax assets that rely on future profitability, and defined benefit pension fund assets.

(13) In order to ensure consistency across the EU in the way incentives to redeem are assessed, it is necessary to provide a description of cases where an expectation is created that the instrument is likely to be redeemed. There is also a need to design rules leading to timely activation of loss absorbency mechanisms for hybrid instruments so as to consequently increase the loss absorbency of these instruments in the future. Further, given that instruments issued by special purpose entities give less certainty in prudential terms than directly issued instruments, the use of special purpose entities for indirect issuance of own funds has to be restricted and strictly framed.

(14) It is necessary to balance the need between ensuring prudentially appropriate calculations of exposures of institutions to indirect holdings arising from index holdings, with the need to ensure this does not become overly burdensome for them, i.e. when these positions are not material.

(15) A detailed and comprehensive process is deemed necessary for competent authorities to grant a supervisory permission for reducing own funds. Redemptions, reductions and repurchases of own funds instruments should not be announced to holders before the institution has obtained the prior approval of the relevant competent authority. Institutions should provide a detailed list of elements in order for the competent authority to be provided with all relevant information before deciding on granting its approval.

(16) Temporary waivers for deduction from own funds are provided in order to accommodate and allow the application of financial assistance operation plans, where

applicable. Therefore the duration of such waivers should not exceed the duration of financial assistance operation plans.

(17) In order for special purposes entities to qualify for inclusion under the Additional Tier 1 and Tier 2 own funds items, the assets of the special purpose entities not invested in own funds instruments issued by institutions should remain minimal and insignificant. In order to achieve this, this amount of assets shall be capped by a limit expressed in relation to the average total assets of the special purpose entity.

(18) Transitional provisions aim at allowing a smooth passage to the new regulatory framework, therefore it is important, when applying the transitional provisions for filters and deductions, that the treatment applied is consistent with the national rules transposing the previous EU regulatory regime, represented by Directives 2006/48/EC and 2006/49/EC.

(19) Excess Common Equity Tier 1 or Additional Tier 1 instruments grandfathered according to the transitional provisions of Regulation (EU) No 575/2013 are, on the basis of these provisions, allowed to be included within the limits for grandfathered instruments for lower tiers of capital. This nevertheless cannot alter the limits for grandfathered instruments for lower tiers, therefore any inclusion in the grandfathering limits of the lower tier should only be possible if there is sufficient allowance in that lower tier. Finally, as these are excess instruments of the higher tier, it should be possible for those instruments to be later reclassified to a higher tier of capital.

(20) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authority (European Banking Authority) to the Commission.

(21) The European Supervisory Authority (European Banking Authority) has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010,

HAS ADOPTED THIS REGULATION:

TITLE I

Subject matter

Article 1

Subject matter

This Regulation lays down uniform rules concerning:

a) the meaning of foreseeable when determining whether foreseeable charges or dividends have been deducted from own funds according to Article 26(4) of Regulation (EU) No 575/2013;
b) *[INSERT SUBJECT MATTER RELATING TO OWN FUNDS PART 2 FROM LEGAL TEXT OF EBA-RTS-2013-02] …*

c) the applicable forms and nature of indirect funding of capital instruments, according to Article 28(5) of Regulation (EU) No 575/2013;

d) the nature of limitations on redemption necessary where the refusal by the institution of the redemption of own funds instruments is prohibited under applicable national law, according to Article 29(6) of Regulation (EU) No 575/2013;

e) *[INSERT SUBJECT MATTER RELATING TO GAIN ON SALE FROM EBA-RTS-2013-03]…*

f) the application of the deductions from Common Equity Tier 1 items and other deductions for Common Equity Tier 1, Additional Tier 1 and Tier 2 items according to Article 36(2) of Regulation (EU) No 575/2013;

g) the criteria according to which competent authorities shall permit institutions to reduce the amount of assets in the defined benefit pension fund, according to Article 41(2) of Regulation (EU) No 575/2013;

h) the form and nature of incentives to redeem, the nature of a write-up of an Additional Tier 1 instrument following a write-down of the principal amount on a temporary basis and the procedures and timing surrounding trigger events, features of instruments that could hinder recapitalisation and use of special purpose entities, according to Article 52(2) of Regulation (EU) No 575/2013;

i) the extent of conservatism required in estimates used as an alternative to the calculation of underlying exposures for indirect holdings arising from index holdings, according to Article 76(4) of Regulation (EU) No 575/2013;

j) certain detailed conditions that need to be met before a supervisory permission for reducing own funds can be given, and the relevant process, according to Article 78(5) of Regulation (EU) No 575/2013;

k) the conditions for a temporary waiver for deduction from own funds to be provided, according to Article 79(2) of Regulation (EU) No 575/2013;

l) the types of assets that can relate to the operations of a special purpose entity and the concepts of minimal and insignificant for the purposes of determining Qualifying Additional Tier 1 and Tier 2 capital issued by a special purpose entity according to Article 83(2) of Regulation (EU) No 575/2013;

m) the detailed conditions for adjustments to own funds under the transitional provisions, according to Article 481(6) of Regulation (EU) No 575/2013;

n) the conditions for items excluded from grandfathering in Common Equity Tier 1 or Additional Tier 1 items in other elements of own funds, according to Article 487(3) of Regulation (EU) No 575/2013.

TITLE II

Elements of Own Funds

Chapter 1

Common Equity Tier 1 capital

Section 1

Common Equity Tier 1 items and instruments

Article 2

Meaning of foreseeable charge or dividend under Article 26(2)(b) of Regulation (EU) No 575/2013

1. The amount of foreseeable dividends to be deducted by institutions from the interim or year-end profits as provided in Article 26(2) of Regulation (EU) No 575/2013, shall be determined in accordance with paragraphs 2, 3 and 4.

2. Where an institution's management body has formally taken a decision or proposed a decision to the institution's relevant body regarding the amount of dividends to be distributed, this amount shall be deducted from the corresponding interim or year-end profits.

3. Where interim dividends are paid, the residual amount of interim profit resulting from the calculation laid down in paragraph 2 which is to be added to Common Equity Tier 1 capital shall be reduced, taking into account the rules laid down in paragraphs 2 and 4, by the amount of any foreseeable dividend which can be expected to be paid out from that residual interim profit with the final dividends for the full business year.

4. Before the management body has formally taken a decision or proposed a decision to the relevant body on the distribution of dividends, the amount of foreseeable dividends to be deducted by institutions from the interim or year-end profits shall equal the amount of interim or year-end profits multiplied by the dividend payout ratio.

5. The dividend payout ratio shall be determined on the basis of the dividend policy approved by the management body or other relevant body.

   Where the dividend policy contains a payout range instead of a fixed value, the upper end of the range is to be used for the purpose of paragraph 2.

   In the absence of an approved dividend policy, or when, in the opinion of the competent authority, it is likely that the institution will not apply its dividend policy

or this policy is not a prudent basis upon which to determine the amount of deduction, the dividend payout ratio shall be based on the highest of the following:

(a) the average dividend payout ratios over the three years prior to the year under consideration;

(b) the dividend payout ratio of the year preceding the year under consideration.

The competent authority may permit the institution to adjust the calculation of the dividend payout ratio as described in points (a) and (b) to exclude exceptional dividends paid during the period.

6. The amount of foreseeable dividends to be deducted shall be determined taking into account any regulatory restrictions on distributions, in particular restrictions determined in accordance with Article 141 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC. The amount of profit after deduction of foreseeable charges subject to such restrictions may be included fully in Common Equity Tier 1 capital where the condition of point (a) of Article 26(2) of Regulation (EU) No 575/2013 is met. When such restrictions are applicable, the foreseeable dividends to be deducted shall be based on the capital conservation plan agreed by the competent authority pursuant to Article 142 of Directive 2013/36/EU.

7. The amount of foreseeable dividends to be paid in a form that does not reduce the amount of Common Equity Tier 1 capital shall not be deducted from interim or year-end profits to be included in Common Equity Tier 1 capital.

8. The amount of foreseeable charges to be taken into account shall comprise the following:

(a) the amount of taxes;

(b) the amount of any obligations or circumstances arising during the related reporting period which are likely to reduce the profits of the institution and for which the competent authority is not satisfied that all necessary value adjustments, such as additional value adjustments according to Article 34 of Regulation (EU) No 575/2013, or provisions have been made.

9. Foreseeable charges that have not already be taken into account in the profit and loss account shall be assigned to the interim period during which they have incurred so that each interim period bears a reasonable amount of these charges. Material or non-

recurrent events shall be considered in full and without delay in the interim period during which they arise.

10. The competent authority shall be satisfied that all necessary deductions to the interim or year-end profits and all those related to foreseeable charges have been made, either under applicable accounting framework or under any other adjustments, before permitting that the institution includes interim or year-end profits in Common Equity Tier 1 capital.

[INSERT ARTICLES RELATING TO OWN FUNDS PART 2 - FROM LEGAL TEXT OF EBA-RTS-2013-02]

Article 3

…

Article 4

...

Article 5

...

Article 6

…

Article 7

Applicable forms and nature of indirect funding of capital instruments under Article 28(1)(b) and 52(1)(c) of Regulation (EU) No 575/2013

1. Indirect funding of capital instruments under Article 28(1)(b) and Article 52(1)(c) of Regulation (EU) No 575/2013 shall be deemed funding that is not direct.

2. For the purposes of paragraph 1, direct funding shall refer to situations where an institution has granted a loan or other funding in any form to an investor that is used for the purchase of its capital instruments.

3. Direct funding shall also include funding granted for other purposes than purchasing an institution's capital instruments, to any natural or legal person who has a qualifying holding in the credit institution, as referred to in Article 4(36) of Regulation (EU) No

575/2013, or who is deemed to be a related party within the meaning of the definitions in paragraph 9 of International Accounting Standard 24 on Related Party Disclosures as applied in the EU according to Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards[6], taking into account any additional guidance as defined by the competent authority, if the institution is not able to demonstrate all of the following:

(a) the transaction is realised at similar conditions as other transactions with third parties;

(b) the natural or legal person or the related party does not have to rely on the distributions or on the sale of the capital instruments held to support the payment of interest and the repayment of the funding.

4. The applicable forms and nature of indirect funding of the purchase of an institution's capital instruments shall include the following:

(a) funding of an investor's purchase, at issuance or thereafter, of an institution's capital instruments by any entities on which the institution has a direct or indirect control or by entities included in any of the following:

(i) the scope of accounting or prudential consolidation of the institution;

(ii) the institutional protection scheme or the network of institutions affiliated to a central body that are not organized as a group to which the institution belongs;

(iii) the scope of supplementary supervision of the institution in accordance with Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate.

(b) funding of an investor's purchase, at issuance or thereafter, of an institution's capital instruments by external entities that are protected by a guarantee or by the use of a credit derivative or are secured in some other way so that the credit risk is transferred to the institution or to any entities on which the institution has a direct or indirect control or any entities included in any of the following:

(i) the scope of accounting or prudential consolidation of the institution;

(ii) the institutional protection scheme or the network of institutions affiliated to a central body that are not organized as a group to which the institution belongs;

[6] OJ L 243, 11.9.2002, p. 1.

(iii) the scope of supplementary supervision of the institution in accordance with Directive 2002/87/EC.

(c) funding of a borrower that passes the funding on to the ultimate investor for the purchase, at issuance or thereafter, of an institution's capital instruments.

5. In order for the above cases to be considered as indirect funding, where applicable, the following conditions shall also be met:

(a) the investor is not included in any of the following:

(i) the scope of accounting or prudential consolidation of the institution;

(ii) the institutional protection scheme or the network of institutions affiliated to a central body that are not organized as a group to which the institution belongs;

(iii) the scope of the supplementary supervision of the institution in accordance with Directive 2002/87/EC;

(b) the external entity is not included in any of the following:

(i) the scope of accounting or prudential consolidation of the institution;

(ii) the institutional protection scheme or the network of institutions affiliated to a central body that are not organized as a group to which the institution belongs;

(iii) the scope of the supplementary supervision of the institution in accordance with Directive 2002/87/EC.

6. Where direct or indirect funding of the purchase of a capital instrument has been individually assessed for impairment and an impairment allowance has been made, the amount to be excluded from the own funds of the institution shall be net of the impairment allowance.

7. In order to avoid a qualification of direct or indirect funding and where the loan or other form of funding or guarantees is granted to any natural or legal person who has a qualifying holding in the credit institution or who is deemed to be a related party as referred to in paragraph 3, the institution shall ensure on an on-going basis that it has not provided the loan or other form of funding or guarantees for the purpose of subscribing directly or indirectly capital instruments of the institution. Where the loan or other form of funding or guarantees is granted to other types of parties, the institution shall make this control on a best effort basis.

8. With regard to mutuals, cooperative societies and similar institutions, where there is an obligation under national law or the statutes of the institution for a customer to subscribe capital instruments in order to receive a loan, that loan shall not be considered as a direct or indirect funding where all of the following conditions are met:

   (a) the amount of the subscription is considered immaterial by the competent authority;

   (b) the purpose of the loan is not the purchase of capital instruments of the institution providing the loan;

   (c) the subscription of one or more capital instruments of the institution is necessary in order for the beneficiary of the loan to become a member of the mutual, cooperative society or similar institution.

Article 8

Limitations on redemption of capital instruments issued by mutuals, savings institutions, cooperative societies and similar institutions under Article 29(2)(b) of Regulation (EU) No 575/2013 and Article 78(3) of Regulation (EU) No 575/2013

1. An institution may issue Common Equity Tier 1 instruments with a possibility to redeem only where such possibility is foreseen by the applicable national law.

2. The ability of the institution to limit the redemption under the provisions governing capital instruments as referred to in point (b) of Article 29(2) and 78(3) of Regulation (EU) No 575/2013, shall encompass both the right to defer the redemption and the right to limit the amount to be redeemed. The institution shall be able to defer the redemption or limit the amount to be redeemed for an unlimited period of time pursuant to paragraph 3.

3. The extent of the limitations on redemption included in the provisions governing the instruments shall be determined by the institution on the basis of the prudential situation of the institution at any time, having regard to in particular, but not limited to:

   (a) the overall financial, liquidity and solvency situation of the institution;

   (b) the amount of Common Equity Tier 1 capital, Tier 1 and total capital compared to the total risk exposure amount calculated in accordance with the requirements laid down in point (a) of Article 92(1) of Regulation (EU) No 575/2013, the specific own funds requirements referred to in Article 104(1)(a) of Directive 2013/36/EU, the capital conservation buffer and institution specific countercyclical capital buffer, the systemically important institution buffer and

the systemic risk buffer referred to in Articles 129, 130, 131(4), 131(5) and 133 respectively of that Directive.

4. The limitations on redemption included in the contractual or legal provisions governing the instruments shall not prevent the competent authority from limiting further the redemption on the instruments on an appropriate basis as foreseen by Article 78 of Regulation (EU) No 575/2013.

5. Competent authorities shall assess the bases of limitations on redemption included in the contractual and legal provisions governing the instrument. They shall require institutions to modify the corresponding contractual provisions where they are not satisfied that the bases of limitations are appropriate. Where the instruments are governed by the national law in the absence of contractual provisions, the legislation shall enable the institution to limit redemption as described in this Article in order for the instruments to qualify as Common Equity Tier 1.

6. Any decision to limit redemption shall be documented internally and reported in writing by the institution to the competent authority, including the reasons why, in view of the criteria set out in paragraph 3, a redemption has been partially or fully refused or deferred.

7. Where several decisions to limit redemption are taking place in the same period of time, institutions may document these decisions in a single set of documents.

[INSERT HERE ARTICLE FROM GAIN ON SALE- FROM LEGAL TEXT OF EBA-RTS-2013-03]

Section 2

Prudential Filters

Article 9

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Section 2

Deductions from Common Equity Tier 1 items

Article 10

Deduction of losses for the current financial year under Article 36(1)(a) of Regulation (EU) No 575/2013and Article 26(1)(c) of Regulation (EU) No 575/2013

1. For the purpose of calculating its Common Equity Tier 1 capital during the year, and irrespective of whether the institution closes its financial accounts at the end of each

interim period, the institution shall determine its profit and loss accounts and deduct any resulting losses from Common Equity Tier 1 as they arise. Any resulting profit may be included only where the condition of point (a) of Article 26(2) of Regulation (EU) No 575/2013 is met.

2. For the purpose of paragraph 1, income and expenses shall be determined under the same process and on the basis of the same accounting standards as the one followed for the year-end financial report. Income and expenses shall be prudently estimated and shall be assigned to the interim period in which they incurred so that each interim period bears a reasonable amount of the anticipated annual income and expenses. Material or non-recurrent events shall be considered in full and without delay in the interim period during which they arise.

3. Where losses for the current financial year are included in Common Equity Tier 1 items as a result of an interim or a year-end financial report, a deduction is not needed. For the purpose of this Article, the financial report means that the profit and losses have been determined after a closing of the interim or the annual accounts in accordance with the accounting framework to which the institution is subject under Regulation 2002/1606/EC on the application of international accounting standards and Directive 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions.

4. Paragraphs 1, 2 and 3 shall apply in the same manner to gains and losses included in accumulated other comprehensive income.

Article 11

Deductions of deferred tax assets that rely on future profitability under Article 36(1)(c) of Regulation (EU) No 575/2013

1. The deductions of deferred tax assets that rely on future profitability under Article 36(1)(c) of Regulation (EU) No 575/2013 shall be made according to paragraphs 2 to 3.

2. Associated deferred tax liabilities shall be limited to those that arise from the tax law of the same jurisdiction as the deferred tax assets. The offsetting between deferred tax assets and associated deferred tax liabilities shall be done separately for each taxable entity. For the calculation of deferred tax assets and liabilities at consolidated level, a taxable entity includes any number of entities which are members of the same tax group, fiscal consolidation, fiscal unity or consolidated tax return under applicable national law.

3. The amount of associated deferred tax liabilities which are eligible for offsetting deferred tax assets that rely on future profitability is the difference between (a) and (b) below:

   (a) the amount of deferred tax liabilities as recognized under the applicable accounting framework;

   (b) the amount of associated deferred tax liabilities arising from intangible assets and from defined benefit pension fund assets.

Article 12

Deduction of defined benefit pension fund assets under Article 36(1)(e) of Regulation (EU) No 575/2013 *and Article 41(1)(b) of Regulation* (EU) No 575/2013

1. The competent authority shall only grant the prior permission mentioned in point (b) of Article 41(1) of Regulation (EU) No 575/2013 where the unrestricted ability to use the assets entails immediate and unfettered access to the assets such as when the use of the assets is not barred by a restriction of any kind and there are no claims of any kind from third parties on these assets.

2. Unfettered access to the assets is likely to exist when the institution is not required to request and receive specific approval from the manager of the pension funds or the pension beneficiaries each time it would access excess funds in the plan.

Article 13

Deductions of foreseeable tax charges under Article 36(1)(l) and Article 56(f) of Regulation (EU) No 575/2013

1. On the condition that the institution applies accounting framework and accounting policies that provide for the full recognition of current and deferred tax liabilities related to transactions and other events recognized in the balance sheet or the profit and loss account, the institution may consider that foreseeable tax charges have been already taken into account. The competent authority shall be satisfied that all necessary deductions have been made, either under applicable accounting standards or under any other adjustments.

2. When the institution is calculating its Common Equity Tier 1 capital on the basis of financial statements prepared in accordance with Regulation (EC) No 1606/2002 of

the EU Parliament and of the Council of 19 July 2002 on the application of international accounting standards, the condition of paragraph 1 is deemed to be fulfilled.

3. Where the condition of paragraph 1 is not fulfilled, the institution shall decrease its Common Equity Tier 1 by the estimated amount of current and deferred tax charges not yet recognized in the balance sheet and profit and loss account related to transactions and other events recognized in the balance sheet or the profit and loss account. The estimated amount of current and deferred tax charges shall be determined using an approach equivalent to the one provided by Regulation (EC) No 1606/2002. The estimated amount of deferred tax charges may not be netted against deferred tax assets that are not recognized in the financial statements.

Section 3

Other deductions for Common Equity Tier 1, additional Tier 1 and Tier 2 items

Article 14

Other deductions for capital instruments of financial institutions under Article 36(3) of Regulation (EU) No 575/2013

1. Holdings of capital instruments of financial institutions as defined in Article 4(26) of Regulation (EU) No 575/2013 shall be deducted as follows:

   (a) all instruments qualifying as capital under the company law applicable to the financial institution that issued them and, where the financial institution is subject to solvency requirements, which are included in the highest quality Tier of regulatory own funds without any limits shall be deducted from Common Equity Tier 1 capital;

   (b) all instruments which qualify as capital under the company law applicable to the issuer and, where the financial institution is not subject to solvency requirements, which are perpetual, absorb the first and proportionately greatest share of losses as they occur, rank below all other claims in the event of insolvency and liquidation and have no preferential or predetermined distributions shall be deducted from Common Equity Tier 1 capital;

   (c) any subordinated instruments absorbing losses on a going-concern basis, including the discretion to cancel coupon payments, shall be deducted from Additional Tier 1 capital. Where the amount of these subordinated instruments

exceeds the amount of Additional Tier 1 capital, the excess amount shall be deducted from Common Equity Tier 1 capital;

(d) any other subordinated instruments shall be deducted from Tier 2 capital. If the amount of these subordinated instruments exceeds the amount of Tier 2 capital, the excess amount shall be deducted from Additional Tier 1 capital. Where the amount of Additional Tier 1 capital is insufficient, the remaining excess amount shall be deducted from Common Equity Tier 1 capital;

(e) any other instruments included in the financial institution's own funds pursuant to the relevant applicable prudential framework or any other instruments for which the institution is not able to demonstrate that conditions (a), (b), (c) or (d) apply shall be deducted from Common Equity Tier 1 capital.

2. The deductions referred to in paragraph 1 shall not apply in the following cases:

(a) where the financial institution is authorized and supervised by a competent authority and subject to prudential requirements equivalent to those applied to institutions under Regulation (EU) No 575/2013. This approach shall be applied to third country financial institutions only where a coordinated equivalence assessment of the prudential regime of the third country concerned has been performed and where it has been concluded that it is at least equivalent to that applied in the Union.

(b) where the financial institution is an electronic money institution within the meaning of Article 2 of Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions[7] and does not benefit from optional exemptions as provided by Article 9 of that Directive;

(c) where the financial institution is a payment institution within the meaning of Article 4 of Directive 2007/64/EC on payment services in the internal market[8] and does not benefit from a waiver as provided by Article 26 of that Directive;

(d) where the financial institution is an alternative investment fund manager within the meaning of Article 4 of Directive 2011/61/EU on Alternative Investments Fund Managers[9] or a management company within the meaning of Article 2(1) of Directive 2009/65/EC on the coordination of laws, regulations and

[7] OJ L 267, 10.10.2009, p. 7.
[8] OJ L 319, 5.12.2007, p. 1.
[9] OJ L 174, 1.7.2011, p. 1.

administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast)[10].

3. In the cases foreseen in paragraph 2, institutions shall apply the deductions as foreseen by Regulation (EU) No 575/2013 for holdings of capital instruments based on a corresponding deduction approach. For the purposes of this paragraph, corresponding deduction approach shall mean an approach that applies the deduction to the same component of capital for which the capital would qualify if it was issued by the institution itself.

Article 15

Capital instruments of third country insurance and reinsurance undertakings under Article 36(3) of Regulation (EU) No 575/2013

1. Holdings of capital instruments of third country insurance and reinsurance undertakings that are subject to a prudential regime that either has been assessed as non-equivalent to the one provided by Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance[11] (Solvency II) (recast), or that has not been assessed, shall be deducted as follows:

   (a) all instruments which qualify as capital under the company law applicable to the third country insurance and reinsurance undertakings that issued them, and which are included in the highest quality Tier of regulatory own funds without any limits shall be deducted from Common Equity Tier 1 capital;

   (b) any subordinated instruments absorbing losses on a going-concern basis, including the discretion to cancel coupon payments, shall be deducted from Additional Tier 1 capital. Where the amount of these subordinated instruments exceeds the amount of Additional Tier 1 capital, the excess amount shall be deducted from Common Equity Tier 1 capital;

   (c) any other subordinated instruments shall be deducted from Tier 2 capital. Where the amount of these subordinated instruments exceeds the amount of Tier 2 capital, the excess amount shall be deducted from Additional Tier 1 capital. Where the amount of Additional Tier 1 capital is insufficient, the remaining excess amount shall be deducted from Common Equity Tier 1 capital;

[10] OJ L 302, 17.11.2009, p. 32.
[11] OJ L 335, 17.12.2009, p. 1.

(d) for third country insurance and reinsurance undertakings that are subject to prudential solvency requirements, any other instruments included in the third country insurance and reinsurance undertakings' own funds pursuant to the relevant applicable prudential framework or any other instruments for which the institution is not able to demonstrate that conditions (a), (b) or (c) apply shall be deducted from Common Equity Tier 1 capital.

2. Where deductions are deductions of holdings of capital instruments of third country insurance and reinsurance undertakings whose prudential regime, including rules on own funds, has been assessed as equivalent to the prudential regime provided by Directive 2009/138/EC, items shall be treated as holdings of undertakings included in the scope of Directive 2009/138/EC.

3. In the cases foreseen in paragraph 2 of this Article, institutions shall apply the deductions as foreseen by point (b) of Article 44, point (b) of Article 58 and point (b) of Article 68 of Regulation (EU) No 575/2013 for holdings of own funds insurance items.

Article 16

Capital instruments of undertakings excluded from the scope of Directive 2009/138/EC under Article 36(3) of Regulation (EU) No 575/2013

1. Holdings of capital instruments of undertakings excluded from the scope of Directive 2009/138/EC in accordance with Article 4 of that Directive shall be deducted as follows:

(a) all instruments qualifying as capital under the company law applicable to the undertaking that issued them and that are included in the highest quality Tier of regulatory own funds without any limits shall be deducted from Common Equity Tier 1 capital;

(b) any subordinated instruments absorbing losses on a going-concern basis, including the discretion to cancel coupon payments, shall be deducted from Additional Tier 1 capital. Where the amount of these subordinated instruments exceeds the amount of Additional Tier 1 capital, the excess amount shall be deducted from Common Equity Tier 1 capital;

(c) any other subordinated instruments shall be deducted from Tier 2 capital. If the amount of these subordinated instruments exceeds the amount of Tier 2 capital, the excess amount shall be deducted from Additional Tier 1 capital. Where the

amount of Additional Tier 1 capital is insufficient, the remaining excess amount shall be deducted from Common Equity Tier 1 capital;

(d) any other instruments included in the undertaking's own funds pursuant to the relevant applicable prudential framework or any other instruments for which the institution is not able to demonstrate that conditions (a), (b) or (c) apply shall be deducted from Common Equity Tier 1 capital.

2. That deductions referred to in paragraph 1 shall not apply where these undertakings are subject, under national law, to provisions equivalent to provisions applicable to undertakings included in the scope of Directive 2009/138/EC. In such a case, capital instruments shall be treated as holdings of undertakings included in the scope of Directive 2009/138/EC.

Chapter 2
Additional Tier 1 capital

Section 1

Form and nature of incentives to redeem

Article 17
Form and nature of incentives to redeem under Article 52(1)(g) of Regulation (EU) No 575/2013

1. Incentives to redeem shall mean all features that provide, at the date of issuance, an expectation that the capital instrument is likely to be redeemed.

2. The incentives referred to in paragraph 1 shall include the following forms:

(a) a call option combined with an increase in the credit spread of the instrument if the call is not exercised;

(b) a call option combined with a requirement or an investor option to convert the instrument into a Common Equity Tier 1 instrument where the call is not exercised;

(c) a call option combined with a change in reference rate where the credit spread over the second reference rate is greater than the initial payment rate minus the swap rate;

(d) a call option combined with an increase of the redemption amount in the future;

(e) a remarketing option combined with an increase in the credit spread of the instrument or a change in reference rate where the credit spread over the second reference rate is greater than the initial payment rate minus the swap rate where the instrument is not remarketed;

(f) a marketing of the instrument in a way which suggests to investors that the instrument will be called.

Section 2

Conversion or write-down of the principal amount

Article 18
Nature of the write-up of the principal amount following a write-down under Article 52(1)(n) of Regulation (EU) No 575/2013

1. The write-down of the principal amount shall apply on a pro rata basis to all holders of Additional Tier 1 instruments that include a similar write-down mechanism and an identical trigger level.

2. For the write-down to be considered temporary, all of the following conditions shall be met:

   (a) any distributions payable after a write-down shall be based on the reduced amount of the principal;

   (b) write-ups shall be based on profits after the institution has taken a formal decision confirming the final profits;

   (c) any write-up of the instrument or payment of coupons on the reduced amount of the principal shall be operated at the full discretion of the institution subject to the constraints arising from points (d) to (f) and there shall be no obligation for the institution to operate or accelerate a write-up under specific circumstances;

   (d) a write-up shall be operated on a pro rata basis among similar Additional Tier 1 instruments that have been subject to a write-down;

   (e) the maximum amount to be attributed to the sum of the write-up of the instrument together with the payment of coupons on the reduced amount of the principal shall be equal to the profit of the institution multiplied by the amount

obtained by dividing the amount determined in point (i) by the amount determined in point (ii):

(i) the sum of the nominal amount of all Additional Tier 1 instruments of the institution before write-down that have been subject to a write-down;

(ii) the total Tier 1 capital of the institution.

(f) the sum of any write-up amounts and payments of coupons on the reduced amount of the principal shall be treated as a payment that results in a reduction of Common Equity Tier 1 and shall be subject, together with other distributions on Common Equity Tier 1 instruments, to the restrictions relating to the Maximum Distributable Amount as referred to in Article 141(2) of Directive 2013/36/EU, as transposed in national law or regulation.

3. For the purposes of point (e) of paragraph 2, the calculation shall be made at the moment when the write-up is operated.

Article 19
Procedures and timing for determining that a trigger event has occurred under Article 52(1)(n) of Regulation (EU) No 575/2013

The following procedures and timing shall apply for determining that a trigger event has occurred:

(a) Where the institution has established that the Common Equity Tier 1 ratio has fallen below the level that activates conversion or write-down of the instrument at the level of application of the requirements as defined under Title II of Regulation (EU) No 575/2013, the management body or any other relevant body of the institution shall without delay determine that a trigger event has occurred and there shall be an irrevocable obligation to write-down or convert the instrument.

(b) the amount to be written-down or converted shall be determined as soon as possible and within a maximum period of one month from the time it is determined that the trigger event has occurred;

(c) the competent authority may require that the maximum period of one month referred to in point (b) is reduced in cases where it assesses that sufficient certainty on the amount to be converted or written down is established or in cases where it assesses that an immediate conversion or write-down is needed;

(d) where an independent review of the amount to be written down or converted is required according to the provisions governing the Additional Tier 1 instrument, or where the competent authority requires an independent review for the

determination of the amount to be written down or converted, the management body or any other relevant body of the institution shall see that this is done immediately. Any such review shall be completed as soon as possible and shall not create impediments for the institution to write-down or convert the Additional Tier 1 instrument and to meet the requirements of points (b) and (c) of this paragraph.

Section 3

Features of instruments that could hinder recapitalisation

Article 20
Features of instruments that could hinder recapitalisation under Article 52(1)(o) of Regulation (EU) No 575/2013

Features that could hinder the recapitalisation of an institution shall include, in particular provisions that require the institution to compensate existing holders of capital instruments where a new capital instrument is issued.

Section 4

Use of special purposes entities for indirect issuance of own funds instruments

Article 21
Use of special purposes entities for indirect issuance of own funds instruments under Article 52(1)(p) and Article 63(n) of Regulation (EU) No 575/2013

The following treatment shall apply in the use of special purposes entities for indirect issuance of own funds instruments:

(a) Where the institution or an entity within the consolidation pursuant to Chapter 2 of Title II of Part One of Regulation (EU) No 575/2013 issues a capital instrument that is subscribed by a special purpose entity, this capital instrument shall not, at the level of the institution or of the above-mentioned entity, receive recognition as capital of a higher quality than the lowest quality of the capital issued to the special purpose entity and the capital issued to third parties by the special purpose entity. Such requirement applies at the consolidated, sub-consolidated and individual levels of application of prudential requirements.

(b) The rights of the holders of the instruments issued by the special purpose entity shall be no more favourable than if the instrument was issued directly by the institution or an entity within the consolidation pursuant to Chapter 2 of Title II of Part One of Regulation (EU) No 575/2013.

Chapter 3
General requirements

Section 1

Indirect holdings arising from index holdings

Article 22

Indirect holdings arising from index holdings- extent of conservatism required in estimates for calculating exposures used as an alternative to the underlying exposures under Article 76(2) of Regulation (EU) No 575/2013

1. An indirect holding arising from an index holding comprises the proportion of the index invested in the Common Equity Tier 1, Additional Tier 1 and Tier 2 instruments of financial sector entities included in the index. For the purpose of this Article, an index includes, but is not limited to, index funds, equity or bond indices or any other scheme where the underlying instrument is a capital instrument issued by a financial sector entity.

2. Where the monitoring by an institution on an ongoing basis of its underlying exposures to the capital instruments of financial sector entities that are included in indices is deemed by the competent authority to be operationally burdensome, the institution may adopt a structure-based approach to estimating the value of the exposures.

3. When using a structure-based approach, an institution shall ensure in particular by means of the investment mandate of the index, that a capital instrument of a financial sector entity which is part of the index cannot exceed a maximum percentage of the index. This percentage shall be used as an estimate for the value of the holdings that shall be deducted from own funds.

4. In the event that an institution is unable to determine the maximum percentage as referred to in paragraph 3 and the index, in particular in accordance with its investment mandate, includes capital instruments of financial sector entities, the institution shall take into account the full amount of the index holdings for the deduction from own funds.

5. The deduction shall be operated on a corresponding deduction approach. In situations where the institution cannot determine the precise nature of the holding, the value of the holding shall be deducted from Common Equity Tier 1 capital.

Article 23

Indirect holdings arising from index holdings- Meaning of operationally burdensome in Article 76(3) of Regulation (EU) No 575/2013

1. For the purpose of Article 76(3) of Regulation (EU) No 575/2013, operationally burdensome shall mean situations under which look-through approaches to capital holdings in financial sector entities on an ongoing basis are unjustified, as assessed by the competent authorities. In their assessment of the nature of operationally burdensome situations, competent authorities shall take into account the low materiality and short holding period of such positions. A holding period of short duration shall require the strong liquidity of the index to be evidenced.

2. For the purpose of paragraph 1, a position shall be deemed to be of low materiality where all of the following conditions are met:

   (a) the individual net exposure arising from index holdings measured before any look-through is performed does not exceed 2% of Common Equity Tier 1 items as defined in Article 46(1)(a) of Regulation (EU) No 575/2013;

   (b) the aggregated net exposure arising from index holdings measured before any look-through is performed does not exceed 5% of Common Equity Tier 1 items as defined in Article 46(1)(a) of Regulation (EU) No 575/2013;

   (c) the sum of the aggregated net exposure arising from index holdings measured before any look-through is performed and any other holdings that shall be deducted pursuant to Article 36(1)(h) of Regulation (EU) No 575/2013 does not exceed 10 % of Common Equity Tier 1 items as defined in Article 46(1)(a) of Regulation (EU) No 575/2013.

Section 2

Supervisory permission for reducing own funds

Article 24
Meaning of sustainable for the income capacity of the institution under Article 78(1)(a) of Regulation (EU) No 575/2013

Sustainable for the income capacity of the institution under Article 78(1)(a) of Regulation (EU) No 575/2013 shall mean that the profitability of the institution, as assessed by the competent authority, continues to be sound or does not see any negative change after the replacement of the instruments with own funds instruments of equal or higher quality, at that

date and for the foreseeable future. The competent authority's assessment shall take into account the institution's profitability in stress situations.

Article 25
Process and data requirements for an application by an institution to carry out redemptions, reductions and repurchases - under Article 77 of Regulation (EU) No 575/2013

1. Redemptions, reductions and repurchases of own funds instruments shall not be announced to holders of the instruments before the institution has obtained the prior approval of the competent authority.

2. Where redemptions, reductions and repurchases are expected to take place with sufficient certainty, and once the prior permission of the competent authority has been obtained, the institution shall deduct the corresponding amounts to be redeemed, reduced or repurchased from corresponding elements of its own funds before the effective redemptions, reductions or repurchases occur. Sufficient certainty is deemed to exist in particular when the institution has publicly announced its intention to redeem, reduce or repurchase an own funds instrument.

3. This Article shall apply at the consolidated, sub-consolidated and individual levels of application of prudential requirements, where relevant.

Article 26
Submission of application by the institution to carry out redemptions, reductions and repurchases under Article 77 of Regulation (EU) No 575/2013

1. An institution shall submit an application to the competent authority before reducing or repurchasing Common Equity Tier 1 instruments or calling, redeeming or repurchasing Additional Tier 1 or Tier 2 instruments.

2. The application may include a plan to carry out actions listed in Article 77 of Regulation (EU) No 575/2013 for several capital instruments in the near future.

3. In the case of a repurchase of Common Equity Tier 1 instruments, Additional Tier 1 instruments or Tier 2 instruments for market making purposes, competent authorities may give their permission in advance to actions listed in Article 77 of Regulation (EU) No 575/2013 for a certain predetermined amount which shall not exceed the following:

    (a) for Common Equity Tier 1 instruments, the lower of the following amounts:
        (i) 3% of the amount of the relevant issuance;

(ii) 10% of the amount by which Common Equity Tier 1 capital exceeds the sum of the Common Equity Tier 1 capital requirements pursuant to Article 92 of Regulation (EU) No 575/2013, the specific own funds requirements referred to in Article 104(1)(a) of Directive 2013/36/EU and the capital conservation buffer and institution specific countercyclical capital buffer, the systemically important institution buffer and the systemic risk buffer referred to respectively in Articles 129, 130, 131(4), 131(5) and 133 respectively of that Directive;

(b) for Additional Tier 1 instrument or Tier 2 instruments, the lower of the following amounts:
(i) 10% of the amount of the relevant issuance;
(ii) or 3% of the total amount of outstanding Additional Tier 1 instruments or Tier 2 instruments, as applicable.

4. Competent authorities may also give in advance their permission to actions listed in Article 77 of Regulation (EU) No 575/2013 where the related own funds instruments are passed on to employees of the institution as part of their remuneration. Institutions shall inform competent authorities where own funds instruments are purchased for these purposes and deduct these instruments from own funds on a corresponding deduction approach for the time they are held by the institution. A deduction on a corresponding basis is no longer required, where the expenses related to any action according to this paragraph are already included in own funds as a result of an interim or a year-end financial report.

5. A competent authority may give its permission in advance to an action listed in Article 77 of Regulation (EU) No 575/2013 for a certain predetermined amount when the amount of own funds instruments to be called, redeemed or repurchased is immaterial in relation to the outstanding amount of the corresponding issuance after the call, redemption or repurchase has taken place.

6. This Article shall apply at the consolidated, sub-consolidated and individual levels of application of prudential requirements, where relevant.

Article 27
Content of the application to be submitted by the institution under Article 77 of Regulation (EU) No 575/2013

1. The application referred to in Article 26 shall be accompanied by at least the following information:

(a) a well-founded explanation of the rationale for performing one of the actions referred to in paragraph 1 of Article 26;

(b) information on capital requirements and capital buffers, covering at least a 3 year period, including the level and composition of own funds before and after the performing of the action and the impact of the action on regulatory requirements;

(c) the impact on the profitability of the institution of a replacement of a capital instrument as specified in point (a) of Article 78(1) of Regulation (EU) No 575/2013;

(d) an evaluation of the risks to which the institution is or might be exposed and whether the level of own funds ensures an appropriate coverage of such risks, including stress tests on main risks evidencing potential losses under different scenarios.

2. The competent authority shall waive the submission of some of the information listed in paragraph 2 in cases where it is satisfied that this information is already available to it.

3. This Article shall apply at the individual, consolidated and sub-consolidated levels of application of prudential requirements, where relevant.

Article 28

Timing of the application to be submitted by the institution and processing of the application by the competent authority [Article 77 of Regulation (EU) No 575/2013*]*

1. The institution shall transmit a complete application and the information referred to in Articles 26 and 27 to the competent authority at least 3 months in advance of the date where one of the actions listed in Article 77 of Regulation (EU) No 575/2013 will be announced to the holders of the instruments.

2. Competent authorities may allow institutions on a case-by-case basis and under exceptional circumstances to transmit the application referred to in paragraph 1 within a time frame shorter than the 3 months period.

3. The competent authority shall process an application during either the period of time referred to in paragraph 1 or during the period of time referred to in paragraph 2. Competent authorities shall take into account new information, where any is available and where they consider this information to be material, received during this period. The competent authorities shall begin processing the application only when they are satisfied that the information required under Article 25 has been received from the institution.

Article 29

Applications for redemptions, reductions and repurchases by mutuals, cooperative societies, savings institutions or similar institutions under Article 77(b) of Regulation (EU) No 575/2013

1. With regard to the redemption of Common Equity Tier 1 instruments of mutuals, cooperative societies, savings institutions or similar institutions, the application and information referred to in Articles 26 and 27 shall be submitted to the competent authority with the same frequency as that used by the competent body of the institution to examine redemptions.

2. Competent authorities may give their permission in advance to an action listed in Article 77 of Regulation (EU) No 575/2013 for a certain predetermined amount to be redeemed, net of the amount of the subscription of new paid in Common Equity Tier 1 instruments during a period up to one year. This predetermined amount shall not exceed 2% of Common Equity Tier 1 capital.

Section 3

Temporary waiver from deduction from own funds

Article 30

Temporary waiver from deduction from own funds under Article 79(1) of Regulation (EU) No 575/2013

1. 'Temporary' shall mean of a duration that does not exceed the timeframe envisaged under the financial assistance operation plan. The waiver shall not be granted for a period longer than 5 years.

2. The waiver shall apply only in relation to new holdings of instruments in the financial sector entity subject to the financial assistance operation.

3. For the purposes of providing a temporary waiver for deduction from own funds, a competent authority may deem the temporary holdings referred to in Article 79(1) of Regulation (EU) No 575/2013 to be for the purposes of a financial assistance operation designed to reorganise and save a financial sector entity where the operation is carried out under a plan and approved by the competent authority, and where the plan clearly states phases, timing and objectives and specifies the interaction between the temporary holdings and the financial assistance operation.

TITLE III

Minority interest and Additional Tier 1 and Tier 2 instruments issued by subsidiaries

Article 31
The type of assets that can relate to the operation of special purpose entities and meaning of minimal and insignificant regarding qualifying Additional Tier 1 and Tier 2 capital issued by special purpose entities under Article 83(1) of Regulation (EU) No 575/2013

1. The assets of a special purpose entity shall be considered to be minimal and insignificant where both of the following conditions are met:

   (a) the assets of the special purpose entity which are not constituted by the investments in the own funds of the related subsidiary are limited to cash assets dedicated to payment of coupons and redemption of the own funds instruments that are due;

   (b) the amount of assets of the special purpose entity other than the ones mentioned in point (a) are not higher than 0.5% of the average total assets of the special purpose entity over the last three years.

2. For the purpose of point (b) of paragraph 1, the competent authority may permit an institution to use a higher percentage provided that both of the following conditions are met:

   (a) the higher percentage is necessary to enable exclusively the coverage of the running costs of the special purpose entity;

   (b) the corresponding nominal amount does not exceed EUR 500 000.

TITLE IV

Specification of the transitional provisions of Regulation (EU) No 575/2013 in relation to Own Funds

Chapter 1
Own funds requirements, unrealised gains and losses measured at fair value and deductions

Article 32
Additional filters and deductions under Article 481(1) of Regulation (EU) No 575/2013

The adjustments to Common Equity Tier 1 items, Additional Tier 1 items and Tier 2 items, according to Article 481 of Regulation (EU) No 575/2013, shall be applied as follows:

(a) Where, under the transposition measures of the Directive 2006/48/EC and the Directive 2006/49/EC, those deductions and filters result from own funds

items as referred to in Article 57(a) to (c) of Directive 2006/48/EC, the adjustment shall be made to Common Equity Tier 1 items.

(b) In cases other than those covered by point (a), and where, under the transposition measures of the Directive 2006/48/EC and the Directive 2006/49/EC, these deductions and filters have been applied to the total of the items as referred to in Article 57(a) to (ca) of the Directive 2006/48/EC, taking into account Article 154 of that Directive, the adjustment shall be made to Additional Tier 1 items.

(c) Where the amount of Additional Tier 1 items is lower than the related adjustment, the residual adjustment shall be made to Common Equity Tier 1 items.

(d) In cases other than those covered by points (a) or (b), and where under the transposition measures of the Directive 2006/48/EC and the Directive 2006/49/EC, these deductions and filters have been applied to own funds items as referred to in Article 57(d) to (h) or total own funds of Directive 2006/48/EC and Directive 2006/49/EC, the adjustment shall be made to Tier 2 items.

(e) Where the amount of Tier 2 items is lower than the related adjustment, the residual adjustment shall be made to Additional tier 1 items.

(f) Where the amount of Tier 2 and Additional Tier 1 items is lower than the related adjustment, the residual adjustment shall be made to Common equity Tier 1 items.

Chapter 2
Grandfathering of capital instruments for elements not constituting State Aid

Article 33
Items excluded from grandfathering in Common Equity Tier 1 or Additional Tier 1 items in other elements of own funds under Article 487(1) and (2) of Regulation (EU) No 575/2013

1. Where treating own funds instruments referred to in paragraphs 1 and 2 of Article 487 of Regulation (EU) No 575/2013 as falling under Article 486(4) or 486(5) of that Regulation during the period from 1 January 2013 to 31 December 2021, instruments may be reclassified either in whole or in part. Any reclassification shall have no effect on the calculation of the limit as specified in Article 486(4) of Regulation (EU) No 575/2013.

2. Own funds instruments referred to in paragraph 1 may be reclassified as items referred to in Article 484(3) and 484(4) of Regulation (EU) No 575/2013 provided that their amount no longer exceeds the applicable percentages referred to in Articles 486(2) and 486(3) of that Regulation respectively.

TITLE V

Final provisions

Article 34

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

4. Accompanying documents

4.1 Cost–benefit analysis/impact assessment

4.1.1 Introduction

1. As per Article 10(1) of the EBA regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any draft implementing technical standards/regulatory technical standards/guidelines developed by the EBA – when submitted to the European Commission for adoption – shall be accompanied by an impact assessment (IA) annex which analyses 'the potential related costs and benefits'. Such annex shall provide the reader with an overview of the findings as regards the problem identification, the options identified to remove the problem and their potential impacts.

4.1.2 Procedural issues and consultation process

2. The issues relating to the procedure and to the consultation process are explained in section 4.3 (feedback on the consultation and on the opinion of the BSG) of this draft RTS.

4.1.3 Scope and nature of the problem

Issues identified by the European Commission (EC) regarding own funds

3. As documented in the IA accompanying the CRR, the EU banking system entered the financial crisis holding capital resources of insufficient quantity and quality. In particular, the European Commission identified the following **problem drivers**[12]**:**
   i. Certain capital instruments did not fulfil loss absorption, permanence and flexibility of payments criteria.
   ii. Regulatory adjustments were not being applied to the relevant layer of an institution's regulatory capital.
   iii. Regulatory adjustments were not harmonised among Member States.
4. Problem drivers (i) to (iii) are addressed particularly in Part Two, title I (Own Funds) and Part Ten, title I (Transitional Provisions) of the CRR. In order to address those problem drivers, the EU Commission defined the following **operational objectives**:

   A. To enhance loss absorption, permanence and flexibility of payments of going-concern capital instruments;
   B. To enhance loss absorption of regulatory capital by appropriate application of regulatory adjustments from the relevant layers of capital;
   C. To develop a harmonised set of provisions in the area of definition of capital.

5. By realising the objectives above, capital requirements contribute to achieving the **general objectives** of financial stability and depositor protection.

[12] See. the impact assessment accompanying the CRR: http://ec.europa.eu/internal_market/bank/docs/regcapital/CRD4_reform/IA_regulation_en.pdf

6. The general approach followed in the CRR, for the realisation of those objectives, consists in modifying both eligibility criteria and regulatory adjustments as adopted by the Basel Committee while allowing for adjustments that are necessary to take due account of EU specificities[13].

Issues addressed by the RTS and objectives

7. The proposed draft RTS supplement the provisions of the CRR at a technical level, with the aim of contributing to the realisation of the objectives described in the previous section, in accordance with the mandate received by the CRR, and taking due account of the CRR approach of adapting the Basel Committee's measures to the specificities of the EU financial markets.
8. The draft RTS specify the rules and conditions to ensure a harmonised application of the different CRR provisions addressing problem drivers (i) to (iii) and operational objectives (A) to (C) on the following topics:
    a. Common Equity Tier 1 capital: in particular, foreseeable charges or dividends, features of capital instruments of mutuals, cooperative societies, savings institutions or similar institutions, applicable forms and nature of indirect funding of capital instruments, limitations on redemption of own funds instruments;
    b. Additional Tier 1 capital: in particular, the form and nature of incentives to redeem, the conversion or write-down/write-up of the principal amount, the use of special purpose entities;
    c. Deductions from Common Equity Tier 1 capital and from own funds in general, including deductions of capital instruments of financial institutions and insurance/reinsurance undertakings, losses of the current financial year, deferred tax assets, defined benefits pension fund assets, foreseeable tax charges.

4.1.4 Baseline

Before the entry into force of the CRR, the own funds of institutions were subject to the provisions of the consolidated CRD. The CRD provisions on own funds were notably modified by CRD2. In addition, CEBS provided guidelines related to own funds under CRD: the CEBS Guidelines on instruments referred to in Article 57(a) of the CRD, and the CEBS Guidelines on Hybrid Capital Instruments.

4.1.5 Specific areas covered by the RTS in the regulation of own funds

9. The draft RTS cover several different specific areas of own funds regulation, which are listed below. As a result of the proposed harmonised provisions on deductions from regulatory capital as well as on the regulatory treatment of different types of capital instruments, some institutions will incur capital compliance costs, i.e. they will have to raise additional amounts of capital resources and/or modify the composition of capital instruments they currently hold. This type of impact is likely to arise in those jurisdictions where the current regulatory approach is less prudent than the proposed standards, on the matters of deductions from regulatory capital and eligibility/treatment of capital resources. An impact with the opposite effect, i.e. an easing of the capital costs of capital requirements, is likely to materialise for those institutions that operate under regulatory capital

[13] See Policy option 3.5 in the 'Eligibility of capital instruments and application of regulatory adjustments' section of the EC IA accompanying the CRR.

regimes that are less restrictive. The overall magnitude of capital compliance costs, resulting in the Single Market from the two impacts opposite in effect, depends on the characteristics of the current heterogeneous regulatory frameworks across Member States. Besides capital compliance costs, no other types of compliance costs are expected to arise, for either regulated entities or regulators, from the provisions included in these RTS.

10. The realisation of the objectives associated to the provisions of the RTS is likely to result in reduced banking losses, reduced losses for depositors, a decreased likelihood of future banking crises, and increased cost-efficiency of cross-border supervision.
11. Finally, in assessing the costs and benefits of these RTS it is crucial to consider that at least some of those impacts would materialise even in the absence of the harmonised provisions of the RTS, due to the national implementation of the CRR text.
12. Data are not available to quantify the mentioned costs and benefits and to assess what portion of those is to be associated to the provisions of the RTS as a separate independent impact from those of the CRR text. For these reasons, this section describes instead the main issues that motivated some of the changes proposed, their objectives and their likely impacts. Notably, some points have been changed after the consultation period after a debate among Members on the basis of a feedback from respondents to the consultation.

4.1.6 Common Equity Tier 1 capital

Topic 1 - *Application for redemptions, reductions and repurchases by mutuals, cooperative societies, savings institutions or similar institutions pursuant to Article 77(b) CRR*

13. **Issue identified –** In the case of mutuals, cooperative societies, savings institutions and similar institutions, for which redemption of capital instruments can be prohibited under applicable national law, the CRR provides that the necessary conditions for supervisory permission to the redemption can be waived, provided competent authorities impose appropriate limits to such redemption operations.

14. **Objective and impact –** The finalised draft RTS proposes a distinction between ‘material’ and ‘non-material’ levels of redemption that is based on a unique quantitative threshold, equal to 2 % of total CET1 capital. The draft RTS included in the EBA Consultation Paper proposed a threshold rule according to which the lower among the two following limits applied: 3 % of total CET1 capital per year or 10 % of the excess of the amount of Common Equity Tier 1 compared with the sum of the minimum Common Equity Tier 1 capital requirement pursuant to Article 92 of the CRR, the specific own funds requirements referred to in Article 104 of the CRD and the combined buffer referred to in Article 128 of the CRD.
15. In the draft RTS, the approach defined in terms of quantitative thresholds on the size of the redemption has been favoured over possible alternative approaches (e.g. qualitative definitions of materiality), since it better ensures harmonisation in the Single Market of the rules on redemption by mutuals, cooperative societies and similar institutions.
16. The initial ‘lower of two limits’ approach, which had been proposed first, was based on approaches already existing in Member States. It has been removed, following consultation, to ensure greater clarity and simplicity of the regulation under consideration and replaced with a single limit in terms

of CET1. However, in order to keep the same degree of conservatism in the limit, the single remaining threshold has been lowered to 2 %.

Topic 2 - *The meaning of 'foreseeable' when determining whether or not foreseeable charges or dividends have been deducted from own funds in accordance with Article 26(4) CRR*

17. **Issue identified –** Non-harmonised treatment of the deductions for foreseeable dividends and charges in the EU has resulted in Common Equity Tier 1 (CET1) ratios which are not comparable and do not reliably represent the institutions' different levels of resilience. Besides, when retained earnings from which foreseeable dividends and charges are not prudently deducted, there is the risk that the reported CET1 position overestimates the institution's capacity to absorb future unexpected losses, thus undermining the operational objective of enhanced loss absorption capacity of capital instruments.

18. **Objective and impact –** The payout ratio rule introduced by the draft RTS for the deduction of foreseeable dividends ensures that, in the absence of a dividend policy, a prudent deduction of foreseeable dividends is applied and, therefore, that an outcome of overstated CET1 resources is avoided. The payout ratio rule has been designed as a backstop rule, to incentivise credit and financial institutions to implement their own dividend policies.

4.1.7 Additional Tier 1 capital, Tier 2 capital

Topic 3 - *Instruments issued through Special Purpose Entities (SPEs) pursuant to Article 83(2) CRR*

19. **Issue identified –** The issuance of own funds instruments by credit and financial institutions via SPEs (i.e. indirect issuance) may threaten the effective loss absorbency capacity of the indirectly issued instruments. The provisions included in the draft RTS address, in particular, two aspects related to this concern. i) SPEs should not be used to invest in own funds instruments of the credit/financial institution which are treated as instruments of higher quality and loss absorbency capacity than the ones the SPE issues to third party investors. Such imbalance would infringe on the effective capacity of the SPE to absorb the losses it might incur on the own funds instruments purchased from the credit/financial institution. ii) The SPE should not hold material volumes of assets that are of a different nature from the own funds issued by the credit/financial institution setting up the SPE. The potential risk of losses on such assets would directly infringe on the capacity of the SPE to absorb losses incurred by the institution in whose own funds the SPE invested.
20. **Objective and impact –** The proposed RTS take on a prudent approach as relates to the treatment of own funds instruments purchased by a SPE, by providing that such instruments should, in any case, be ranked as the lowest-quality instruments issued by the SPE itself to third party investors.

21. Concerning the concepts of 'non-material' and 'insignificant' volumes of other assets, held by the SPE, the RTS take a quantitative threshold approach. Such approach is favoured over alternative approaches (e.g. qualitative definitions of the concept), since it minimises the room for national supervisory discretion and maximises the harmonisation impact of the provision.
22. The draft RTS included in the Consultation Paper proposed a threshold of 0.5 % of the average total assets, a figure that is deemed to be appropriate for covering assets that the SPE necessarily has to hold in order to operate (operational assets). The proposal was modified after consultation to also include a threshold in terms of maximum nominal value of assets, to allow a more proportional impact on SPEs of small size.
23. The proposal was modified after consultation to also include a threshold expressed in terms of maximum nominal value of operational assets, allowing for a more proportional impact on SPEs of small size. For small-sized SPEs, the proposed 0.5 % quantitative threshold might be too small for it to appropriately represent the relative weight of operational assets within total assets.

Topic 4 - *Nature of the write-up of the principal amount following a write-down and procedures and timing surrounding trigger events, features of instruments that could hinder recapitalisation and use of special purpose entities, pursuant to Article 52(2) CRR*

24. As regards the conditions and procedures governing write-down/write-up of AT1 instruments, the EBA has considered the two following options:
    - **Option 1 –** Mandatory cancellation of coupon payments during a write-down/write up period.
    - **Option 2 –** Discretionary cancellation of coupon payments during a write-down/write up period.

25. *Option 1* presents the following advantages and disadvantages:
    - Advantages: The mandatory cancellation of coupons on temporarily written-down instruments would ensure that, under the circumstances of financial stress that required the writing-down, flexibility of payments is fully ensured in order to restore the capital position of the institution.
    - Disadvantages: The holders of AT1 instruments, on which payments would be prohibited during a temporary write-down/write-up, would end up at a disadvantage relative to the holders of CET1 instruments. This is because, on the latter, payments would still be allowed subject to the Maximum Distributable Amounts (MDA) provisions. Therefore, Option 1 could potentially make AT1 instruments unattractive to investors and/or systematically increase the cost for institutions of issuing such instruments.

26. With respect to Option 1, Option 2 is less conservative in restricting the distribution of resources during temporary writing-down phases, but it does not imply the disadvantages associated with Option 1. After having had regard to the mentioned advantages and disadvantages of a mandatory cancellation of coupon payments and to the feedback received on the matter from respondents to consultation, the draft RTS were amended to propose the Option 2 as the preferred one. This is under the condition that all distributions (write-up + payments of coupons) are made in respect of the Maximum distributable amount and all distributions shall be limited by

the share in the profits under the relevant formula provided in the draft RTS. Institutions may elect to pay a coupon on a reduced amount or to write up the instrument, subject to above-mentioned restrictions. Furthermore, any acceleration of the write-up remains prohibited.

4.1.8 Deductions

Topic 5 - *The application of the deductions from Common Equity Tier 1 items and other deductions for Common Equity Tier 1, Additional Tier 1 and Tier 2 items pursuant to Article 36(3) CRR*

27. As regards the deductions related to holdings of own funds of other financial institutions, the draft RTS considered the two following options:

- **Option 1**: Holdings of instruments issued by other financial institutions should be fully deducted from CET1 capital.

- **Option 2**: Holdings of instruments issued by other financial institutions should be deducted from the layer of regulatory capital that best reflects the loss absorbency of those instruments.

28. *Option 1* is the proposal that would ensure, to the greatest extent, the objective of enhancing the loss absorption capacity of institutions' own funds. Nonetheless, the RTS proposes an approach to the deduction of instruments issued by other financial institutions that more closely follows the 'corresponding approach' put forward by the CRR, as described in Option 2.
29. *Option 2* is considered a more risk-sensitive approach to deductions, in that the layer of own funds resources on which the deduction is applied better reflects the extent of loss absorption to which the instruments are actually exposed, within the capital structure of the issuer. The more conservative approach in Option 1 is likely to excessively discourage the holdings of instruments issued by other financial institutions, to an extent which goes beyond the aims of the CRR text.
30. After having had regard to the mentioned advantages and disadvantages of Option 1 and to the feedback received on the matter from respondents to consultation, the draft RTS propose Option 2 as the preferred one.

31. As regards the deductions related to indirect holdings arising from index holdings, the draft RTS considered the two following options:
    - **Option 1 –** Look-through approach (LTA), unless the National Supervisory Authority (NSA) allows a structure-based approach.

    - **Option 2 –** LTA, unless the exposure falls within a threshold established in the RTS in order to identify non-material exposures.

32. *Option 1* presents the following advantages and disadvantages:

- **Advantages –** The LTA is the most granular approach to the application of deductions due to index holdings. As such, it is more likely to ensure that the deductions better represent the individual exposures to the components of the index. Allowing NSAs to exempt institutions from the use of the LTA, when the implementation of the latter is overly burdensome, in terms of compliance costs, ensures that the right balance is struck between rules' level of accuracy and the general principle of proportionality of regulation.

- **Disadvantages –** Option 1 allows for the possibility of avoiding excessive operational costs although it prescribes an ongoing active role for NSAs. The principles-based task of assessing whether an exemption from the LTA can be granted might impose excessive operational costs on NSAs. In addition, the national discretion embedded in the task does not contribute to the objective of harmonising the rules on own funds within the Single Market.

33. *Option 2* presents the following advantages and disadvantages:
    - **Advantages –** Option 2 does not impose on NSAs the operational burden of granting case-by-case exemptions from the LTA and, in addition, it ensures a higher level of harmonisation and clarity of rules on deductions from own funds.

    - **Disadvantages –** Being a rule-based approach to the exemption from the use of the LTA, Option 2 implies an implementation of the deductions that is less tailored to the individual cases.

34. After having had regard to the mentioned advantages and disadvantages of Option 1 and to the feedback received on the matter from respondents to consultation, the draft RTS propose Option 2 as the preferred one.

Topic 6 - *The conditions for a temporary waiver for deduction from own funds to be provided, pursuant to Article 79(2) CRR*

35. **Issue identified –** The conditions for granting a waiver may be applied differently by NSAs, resulting in different treatment of credit institutions across the EU and preventing the harmonisation of capital requirement between credit institutions.
36. **Objective and impact –** The RTS specify under which conditions an NSA can provide a waiver to credit institutions, ensuring a more consistent implementation of the directive and greater transparency for investors. In particular, the RTS specifies that the waiver shall not be granted for more than five years.

37. Table 1, below, summarises the contribution to the European Commission's operational objectives of own funds regulation of each specific area addressed in the draft RTS. Besides contributing to the objectives reported in Table 1, all the provisions of these draft RTSs aim at harmonising the regulatory framework as regards credit and financial institutions' own funds.

Table 1 – Operational objectives of the draft RTS

Area		**Enhance three core features of going-concern capital instruments:**			**Enhance loss absorption of regulatory capital by appropriate application of regulatory adjustments from the relevant layers of capital**
		Loss absorption capacity	Flexibility of payments	Permanence	
	Features of instruments that hinder recapitalisation	x	x		
38. Deductions	Meaning of 'foreseeable' when determining foreseeable charges and dividends	x			
	Applicable forms and nature of indirect funding of capital instruments	x		x	
	Deductions from CET1 and other deductions from CET1, AT1 and T2 capital	x			x
	Criteria according to which NSAs approve reduction of defined benefit pension fund assets	x			
	Conservatism required in computing underlying exposure of indirect holdings arising from index holdings	x			
	Conditions to be met for supervisory waiver for deduction from own funds	x			
Instruments 39.	The concepts of minimal and insignificant for the purposes of determining Qualifying Additional Tier 1 and Tier 2 capital issued by a special purpose entity pursuant to Article 83(2) CRR	x			
	Conditions to be met for supervisory permission to the reduction of own funds and the relevant process, pursuant to Article 78(5) CRR	x			
	Nature of limitations on redemption when redemption refusal is forbidden by national law	x		x	
	Form and nature of incentives to redeem			x	
	Nature and procedures of write-down and	x	x		

	write-up processes				
Transitional Period	The conditions for a temporary waiver for deduction from own funds to be provided, pursuant to Article 79(2) CRR				

4.2 Views of the Banking Stakeholder Group (BSG)

The BSG expressed a view on the need to ensure the absence of competitive distortion and emphasised the importance of the following points in order to achieve this:

- harmonising the meaning of 'foreseeable dividend' by maintaining the most prudent method currently used by European supervisors, i.e. to regard foreseeable dividend as being generated simultaneously to quarterly results and corresponding to the official payout policy unless the institution can demonstrate to the supervisors that it has been amended (e.g. through management committee proceedings);

- preserving the important place of mutual banks but ensuring that their Common Equity Tier 1 (CET1) instruments are as non-derogatory as allowed under their statuses;

- avoiding regulatory arbitrage: in particular, the economic substance must prevail over the form when considering externally issued instruments (i.e. those instruments must be disregarded when they are only hedges and funded by the group) and instruments to be deducted (i.e. all instruments which are economically equivalent to a type of banking regulatory capital). Furthermore, no institution issuing or being legally able to issue on individual basis common or preference shares that would qualify as CET1 under Article 26 should be included in the definition of mutual banks;

- without prejudice to the Single Rule Book, which the BSG fully supports, some flexibility should be allowed so that national specificities regarding the legal or fiscal regime can be taken into account appropriately, e.g. relating to share premium accounts or pre-defined trigger of write-ups;

- the BSG encourages a consistent application of the capital criteria set out in the CRR. The BSG also supports a prudent (but not penalising) calculation of regulatory own funds, including a definition of prudential valuation adjustments and of a conservative method to compute exposures through indices.

The BSG also stressed that, with the aim of avoiding penalising European credit institutions in a manner that brings no enhanced stability, economic substance should be taken into account when specifying the RTS on deductions. For instance, excess assets located in pension funds which the institution would be able to recover should not be deducted.

Finally, the BSG recalled that, where amendments are made to the draft CRR text during the negotiations, the final text of the draft RTS should be updated to reflect them. The BSG also suggested leaving national supervisors a broad enough room for manoeuvre when devising prudential incentives to rescue distressed financial institutions.

4.3 Feedback on the public consultation and on the opinion of the BSG

The EBA publicly consulted on the draft proposal contained in this paper.

The consultation period lasted for six weeks and ended on 4 July 2012. 31 responses were received, of which 27 were published on the EBA website. The BSG also provided an opinion on the draft RTS.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary. In many cases, several industry bodies made similar comments or the same body repeated its comments in response to different questions. In such cases, the comments and the EBA analysis are included in the section of this paper where the EBA considers them most appropriate.

Changes to the draft RTS have been incorporated as a result of the responses received during the public consultation.

Summary of key issues and the EBA's response

General comments

Respondents generally welcomed the draft RTS elaborated by the EBA, especially to the extent that the RTS are deemed to lead to further harmonisation in terms of the quality of own funds instruments and supervisory practices. A large portion of the answers focused on the features of write-down and write-up for Additional Tier 1 instruments.

The answers to the consultation and comments on the articles of the draft RTS are divided into several blocks related to the following areas: instruments, deductions, cooperatives and general requirements/other aspects.

Instruments

Respondents judged the provisions on the applicable forms of indirect funding of capital instruments to be generally clear. However, for most respondents the provisions are too broad and need to be specified in order to target regulatory arbitrage rather than arm's length transactions.

Regarding Additional Tier 1 (AT1) instruments, overall respondents expressed concerns that the proposal for a mandatory cancellation of coupons on temporarily written-down instruments would both invert the capital hierarchy and make such instruments unattractive to investors. Therefore, many respondents argued that institutions should have discretion to pay coupons on the written-down amount, although there were a variety of views on when such discretion should be permitted. Several respondents also argued in favour of an automatic, rather than a discretionary, write-up of AT1 principal. There were again different views about how an automatic write-up might work. In addition, a number of respondents also commented on the amounts that should be available for the write-up of AT1 instruments.

Respondents also commented on several aspects of the procedures and timing of the trigger event. In particular, they sought clarity on the requirements for instruments with triggers higher than 5.125 % and the amount of AT1 to be included within regulatory capital. Several respondents also proposed that institutions should be allowed use a 'conservative estimate' of the amount to be written down. Some respondents also argued that the trigger event may not need to take place if 'other remedies' were already in place to take an institution back above the 5.125 % level.

EBA response

Under the final proposal from the EBA, the full cancellation of coupons payment during the write-down period is no longer mandatory for temporary write-downs. Nevertheless, all distributions (write-up and payment of coupons together) shall be made in respect of the Maximum Distributable Amount and all distributions shall be limited by the share in the profits under the formula provided in the RTS. Institutions may elect to pay a coupon on a reduced nominal amount or write up the instrument subject to the mentioned restrictions. The EBA maintains its view that no acceleration of the write-up should be allowed.

All the conditions foreseen by the RTS have to be met also in cases where the trigger is higher than 5.125 %. The loss absorption mechanism shall be the same for all instruments, irrespective of the level of the trigger.

These 'other remedies' shall not undermine a timely and automatic conversion of the hybrid instrument. Such remedies should have been taken before the level of the trigger is hit.

Deductions

Overall, respondents assessed the provisions to be sufficiently clear, while further clarifications were recommended in some regards.

Many comments referred to the accounting treatment of some of the deductible items (losses of the current financial year, deferred tax assets, defined benefit pension fund assets, foreseeable tax charges) and asked the EBA to further elaborate on the relation to the regulatory provisions.

A vast majority of respondents expressed concerns about the proposed approach on the deduction of capital instruments of financial institutions, third country insurance and reinsurance undertakings, and undertakings excluded from the scope of Directive 2009/138/EC. More specifically, they raised concerns about possible inconsistencies with the Level 1 text, as well as a departure from the general principle of 'corresponding approach' of the CRR, or regarded the proposals as gold-plating of Basel III. Furthermore, many respondents indicated that the provisions may lead to disincentives to invest in AT1 and T2 instruments issued by those entities.

Respondents judged the provisions on the treatment of indirect holdings arising from index holdings, as well as the meaning of 'operationally burdensome', sufficiently clear but sought some clarification on some provisions/terms used and suggested alternative approaches.

Several respondents sought clarification on a range of issues concerning the deduction of foreseeable charges and dividends and provided drafting suggestions.

EBA response

The EBA has revised the draft RTS on provisions related to the deduction of capital instruments of financial institutions, third country insurance and reinsurance undertakings, and undertakings excluded from the scope of Directive 2009/138/EC. The revised approach is based on the loss absorbency of the capital instruments, which shall be applicable to all institutions (regulated or not regulated). The EBA has revised the draft RTS on indirect holdings arising from index holdings through the introduction of a materiality exemption threshold to allow the use of the structure-based approach instead of the default look-through approach, in case the exposure is below the threshold. Finally, clarification has been brought to the provisions related to foreseeable charges and dividends in particular.

Cooperatives

Some provisions of the RTS are specific to the capital structure of cooperatives entities, groups or networks. Accordingly, they mostly attracted comments from the cooperative sector. Respondents expressed concerns on two provisions in particular:

- the limits to the redemption of cooperative shares: the vast majority of the respondents considered the 3 % CET1 threshold to be acceptable. Nevertheless, the other threshold focusing on the excess amount of CET1 was considered to be too rigid and excessively complicated. Therefore it was advocated that either the threshold of 10 % of the excess amount of CET1 be removed or the limits be allowed to be set as 'the higher' of 3 % of CET1 or 10 % of the excess amount of CET1.

- the provisions related to the application of a waiver for the deduction of holdings in cooperative networks: most of the answers emphasised the changes in the last versions of the draft CRR text, which explicitly allows aggregation as an alternative to consolidation.

EBA response

The EBA has agreed to keep only the reference to the percentage expressed in terms of CET1 capital, but this percentage has been lowered from 3 % to 2 %.

The final version of the RTS takes into account the changes introduced by the final version of the CRR text.

General requirements/other aspects

The majority of the respondents considered the proposed levels of the thresholds for market-making purposes for competent authorities to give a prior consent to be acceptable and consistent with the current practice but sought some clarification on several provisions.

The majority of the respondents considered the duration of three months for the submission of the application to be excessive and favoured, in general, a monthly notification period. On the other hand, a significant number of respondents accepted the proposed duration of three months, as, in their opinion, it grants a uniform European perspective and a level playing field.

Regarding the setting of a time limit for a temporary waiver from deduction from own funds, the vast majority of the respondents supported the time limit of five years, emphasising that it is appropriate and coherent with the purposes of a financial assistance operation designed to reorganise and save the entity. There was no support for a period shorter than five years.

EBA response

The EBA has kept unchanged the proposed levels of the thresholds for market making purposes but clarified the provisions related to the use of a prior permission from the competent authorities. The general principle of a three-month duration has been kept unchanged, since the EBA agrees with the view that it grants a uniform European perspective and a level playing field.

Based on the feedback received, the EBA has formally introduced a time limit of five years to be applied to temporary waivers of deduction from own funds.

EBA mandate

In some cases, respondents commented that the latest proposals of the draft CRR had been amended and required subsequent changes in the RTS.

In other cases, respondents made some proposals which were going beyond the EBA's mandate and which were Level 1 text issues.

EBA response

The EBA has amended (i.e. deleted, added or modified) the provisions of the draft RTS to take into account the final adopted version of the CRR.

The EBA has clearly indicated in the feedback table areas where proposals from respondents were exceeding the EBA's mandate or were Level 1 text issues.

Summary of responses to the consultation and the EBA's analysis

Comments	Summary of responses received	EBA analysis	Amendments to the proposals
Responses to questions in Consultation Paper EBA/CP/2012/02			
For consistency and clarity reasons, the answers to the consultation have been grouped in several blocks: Instruments, Deductions, Cooperatives, General requirements/other aspects. Questions related to defined articles have been attached to the corresponding articles, which means that the order of the questions in this table does not follow the numerical order. Also, articles of the CRR are referenced by mention of 'Article xx of the CRR' whereas articles referring to articles of the draft RTS are generally cited only as 'Article xx'. *NB: Please note that references to articles of the CRR in the feedback statement follow the original numbering of the CRR, i.e. that of the European Commission legislative proposals for the CRR, which the EBA also used when it launched its consultation at the time (when a final CRR text had not been adopted yet)*.			
1. Instruments (Articles of the draft technical standards: 6, 7, 19, 20, 21, 22, 23, 24, 34)			
1.1. General comments on the Articles			
Article 7	Most responses pointed out that the requirement should be understood more as an economic requirement than as a formal one, given that, for instance, in the case of AT1 instruments that are legally debt, it might not be possible to pay coupons 'out of' distributable items.	The purpose of the provision of the CRR is that the amount of payments on AT1 instruments (combined with the amount of payments on CET1 instruments) may not exceed the amount of distributable items.	Deletion of corresponding article in the draft RTS
	One respondent supported a definition that would be in line with the MDA as defined in the CRD, while another respondent thought that concepts already set in the accounting framework should not be reintroduced in the regulatory framework.	On the basis of the Level 1 text, the MDA is an additional restriction on paying dividends or coupons on AT1 instruments.	

	Finally, for one respondent, distributable items should be determined on the basis of consolidated accounts, as it might not be possible on an individual basis in some cases.	This comment is unclear. From the EBA's point of view, it should always be possible to determine distributable items on an individual basis. In any case, the EBA mandate on distributable items has been deleted from the final version of the CRR, since a definition has been included directly in the Level 1 text.	
Article 24	A small number of respondents also made comments on the proposed requirements for SPVs: • One respondent noted that, for legal, tax and other reasons, firms in some jurisdictions use a number of different legal instruments between a firm and an SPV that in total compose a single instrument that is issued by the SPV. Consequently, they asked for clarity that this arrangement would comply with the requirements in Article 24. • The same respondent also argued that, whilst Article 78(1)(d) of the CRR implied that AT1 on-lending was required for AT1 instruments and Tier 2 on-lending for Tier 2 instruments, AT1 or Tier 2 on-lending from the SPV to an institution was permitted even if the SPV issued a Tier 2 instrument.	The general applicable rule is that there shall be a perfect matching between the instruments issued to the SPV and the instruments issued by the SPV. If the quality of the instruments is different, then only the lowest quality shall be taken into account for regulatory purposes at the level of the financial sector entity. The RTS does not preclude the existence of more than one transaction provided that the general rule applies to all transactions. There is no exception for intra-group lending.	No change
	One respondent suggested that a firm should be able to provide an SPV with deeply subordinated guarantee under Article 49(1)(e) of the CRR.	This is a Level 1 issue.	
1.2. Responses to questions			
Question 02 Are the provisions on the applicable	The provisions were generally judged sufficiently clear. However, they were also judged to be too broad, leading respondents to express several concerns.		

forms of indirect funding of capital instruments sufficiently clear? Are there issues which need to be elaborated further?	Several respondents mentioned that 'normal' arm's length situations should not be penalised (lending of excess cash by a subsidiary to its mother, investment by a customer in a capital instrument of the institution without conditionality of the loan to the investment, or in an institutional protection scheme where the central institution does cash clearing in the normal course of business).	The purpose of Article 6(1)(d) of the RTS is to clarify that intragroup transactions (or transactions between members of an institutional protection scheme and its central institution) made at arm's length are not prohibited.	
	Several answers pointed to the difficulty in monitoring the final use of the loan and the impossibility of forbidding the borrower, in the loan agreement, to provide funding to anybody to purchase the capital instruments of the institution. One respondent indicated, in particular, that the main control which is feasible refers to the purpose of the loan when overall credit evaluation is performed before the grant ('funds destination').	At the very least, the institution should be able to demonstrate that the initial purpose of the loan, on the basis of its credit assessment, is not to subscribe capital instruments. In order to avoid a qualification of direct or indirect funding, the institution shall be able to demonstrate that it has not knowingly provided the loan or other form of funding or guarantees for the purpose of subscribing, directly or indirectly, capital instruments of the institution. There shall be no double deduction, meaning that, if the instruments are not included in the calculation of regulatory capital, no corresponding deduction shall be made.	Clarification brought in corresponding article of the RTS
	Several comments were made on the opportunity to expand the envisaged scope of application to include the accounting scope of consolidation and any entities where the institution has a direct or indirect control.	Agreed – sensible proposal.	Corresponding article of the RTS complemented
	A few respondents mentioned that only funding that is designed to artificially inflate own funds should be taken into account. One respondent provided several examples of funding to be considered as indirect if made artificially to inflate own funds of the institution.	The CRR refers to funding without specifying the form of funding and there is no reason to exclude funding in the form of holdings. If the funding in the form of holdings qualifies also as a reciprocal cross-holding that artificially inflates own funds pursuant to Article 33(1)(g) of the CRR [Article 36(1)(g) in the final CRR], it is not necessary to proceed to a double deduction.	
	Several respondents mentioned that the reference to Regulation 1606/2002 (IAS) in Article 6 places non-IFRS institutions at a disadvantage and that the regulatory	The reference does not place non-IFRS institutions at a disadvantage, since there is the mention of 'any additional guidance defined by the competent authority'. This is the substance of the IFRS provisions which are	

	substance should be carried over from IFRS to the RTS by a verbatim quote.	referred to in the RTS, which are, like the Level 1 text, accounting standards neutral.	
Question 03 How do you assess the provisions on related parties regarding the necessity to assess on an ongoing basis that the related party has sufficient revenues?	The provisions were generally judged sufficiently clear. However, they were in some cases judged to be too broad. Respondents suggested alternative wordings.		
	Several respondents suggested that the definition of revenues that was chosen is too narrow and should include the potential proceeds of a sale of assets such as other holdings in equity. Some of those respondents suggested the following change in the wording: 'the natural or legal person or the related party does not have to rely on the distributions of the capital instrument to support the payment of interest and repayment of the funding'. Several other answers pointed to the lack of clarity of the concept of sufficient revenues, which may raise legal issues, and argued that the verification of the arm's length nature of the transaction should suffice.	Agreed**.**	Corresponding article of the RTS amended
	Two respondents would like Article 6(4) to be amended to refer to 'an obligation or tradition' to subscribe capital instruments.	It is inappropriate to refer to a 'tradition' in a RTS. The obligation shall arise from the national law or the statutes.	
	One respondent pointed out that customers may buy more than the number of shares needed to become a member, without it constituting an indirect funding, and suggested a clarification in Article 6(4)(c).	Agreed.	Corresponding article of the RTS amended
Question 11 Would you agree on the types of incentives to redeem as	The majority of respondents agreed with the types of incentive to redeem set out in Article 19(2). There was, however, some confusion about whether or not the Article was a comprehensive list of all incentives to redeem. This led some respondents to suggest the inclusion of a review clause in the Article to enable the EBA to update the list in the light of any new market	Article 19(2)(f) of the draft RTS (CP) covers all cases which cannot be listed upfront in the RTS, since the RTS cannot predict all proposals to come as a result of financial engineering.	No change

described in paragraph 2 of Article 19? Should other types of situations be considered as incentives to redeem?	developments or other respondents to ask for a full description on how to define an incentive to redeem in case the list is not a comprehensive one. Respondents also had the following specific comments on individual incentives to redeem:		
	• One respondent stated that Article 19(2)(b), interpreted as an option to convert to equity at a specific point in time with a certain strike (similar to convertibles), was not an incentive to redeem. Another respondent commented that they understood the purpose of this provision to be to capture 'principal stock settlement' mechanisms, where the only investor option to convert to shares during the life of the instrument arose as a consequence of the issuer not calling the instrument.	The RTS focuses on cases where the investor has the option to convert or where there is an obligation to convert if the issuer does not exercise the call. The ability of the issuer to convert at a call date (if this does not result from an obligation and if there is no consequence for the issuer for not exercising the call) is not considered as an incentive to redeem. For mandatory convertibles for which there is no possibility to redeem in cash, the convertible feature of the instrument is also not an incentive to redeem.	
	• Some respondents queried whether the remarketing option outlined in Article 19(2)(e) constituted an incentive to redeem. Their argument was that such an option would not lead to a capital redemption.	The remarketing option may create an incentive to redeem or buy back the instrument.	
	• Several respondents commented that the scope of Article 19(2)(f) was too broad and gave too much space for interpreting this provision, which would lead to lengthy discussions with regulators before an institution could issue an AT1 instrument. Respondents suggested that the provision should be either clarified or deleted.	Competent authorities will always have the possibility to exercise their judgement, since the RTS cannot foresee all future cases of incentives to redeem.	
Question 12 Are the provisions	Several respondents commented that the amount of AT1 that should be included within regulatory capital should be the amount of 'foreseeable' CET1 items that would be generated in the event of a write-down. Their	Tax effects (which are very different n different EU Member States) cannot be addressed through capital requirements regulations. Discussions are still ongoing at the EBA level on the practical implementation of the	

on the procedures and timing surrounding a trigger event and the nature of the write-down sufficiently clear? Are there issues which need to be elaborated further?	argument was that proposed wording of Article 20(1)(b) would exclude certain proportions of AT1 instruments due to tax effects.	provisions of the CRR due to tax effects.	
	A number of respondents sought clarity about whether or not the proposed requirements would apply to AT1 instruments with triggers that were higher than 5.125 %. In particular, they asked if the order of write-up would be different between such instruments and how this mechanism would work.	It is not in the EBA mandate to define conditions for triggers higher than 5.125 %. All the conditions foreseen by the RTS have to be met also in cases where the trigger is higher than 5.125 %. The loss absorption mechanism shall be the same for all instruments, irrespective of the level of the trigger.	
	Several respondents had questions about the calculation of the amount to be written down. A number of them argued that it would be difficult to calculate an exact amount within a short space of time. Therefore, they argued that institutions should be allowed to use a 'conservative estimate' of the amount to be written down.	This would threaten a timely loss absorbency of the instruments.	
	Some respondents argued that there should be some discretion about whether a write-down takes place if 'other remedies' were in place to ensure that a firm could be restored to a position above the trigger level without a write-down taking place. Their suggestion was that an institution should liaise with its competent authority in such circumstances.	These other remedies shall not undermine a timely and automatic conversion of the hybrid instrument. Such remedies should have been taken before the level of the trigger is reached.	
	One respondent thought that the draft is not clear with respect to the write-down when the institution has issued instruments with different trigger levels. The respondent suggested amending Article 20(1) and, more particularly, inserting a subparagraph (d): 'if instruments with different trigger levels are outstanding, the write-down described in point (a) shall apply first to those instruments with the highest trigger; instruments with a lower trigger will be written down pursuant to point (a) only after such instruments have been fully written off'.	Where the lowest trigger is hit, all instruments will have to share the losses. A certain degree of discretion can be left to institutions on how to operate this sharing of losses.	

Question 13 How would you assess the impact of the provisions to be applied to temporary write-downs and write-ups?	<u>AT1 coupons</u> Many respondents commented that the requirement for a mandatory cancellation of coupon whilst an AT1 instrument was temporarily written down inverted the capital hierarchy. Their argument was that, in these circumstances, AT1 instruments would be subordinated to CET1 instruments, as they would not be eligible to receive a coupon, whilst CET1 instruments could receive a distribution subject to the provisions of the MDA. Many respondents also commented that these provisions would make such instruments unattractive to investors. A number of respondents also commented that the provision was tighter than required by Basel III. Many respondents argued that firms should be able to pay discretionary coupons on the written-down amounts of AT1 instruments. There were a variety of views about how such a provision should operate: to allow discretionary coupons subject to the provisions of the MDA, with a potential supervisory approval in addition to remove any restrictions on coupons and write-ups once an institution is no longer subject to any restrictions under the combined buffer.	The EBA agrees to revise the proposal in the following way: the cancellation of coupons payment is no longer mandatory during the write-down period. Nevertheless, all distributions (write-up and payment of coupons together) shall be made in respect of the MDA and all distributions shall be limited by the share in the profits under the formula provided in the RTS. Institutions may elect to pay a coupon on a reduced nominal amount or write up the instrument subject to mentioned restrictions.	Corresponding article of the RTS amended
	Several respondents also commented that there should be no distributions on either CET1 or AT1 instruments during a write-down period, or that distributions on CET1 instruments should be cancelled when AT1 coupons were cancelled. One respondent argued that there should be a CET1 dividend stopper when no AT1 write-ups were made. Two respondents argued that there should be full discretion on coupons in write-down, but there should be no distributions on either AT1 or CET1 if the full amount of the AT1 write-up permitted under the RTS was not made when in the MDA. Two respondents asked clarification on Article 20(3)(a) on the notion of ‘all payments’: what requires clarification	The RTS cannot reintroduce dividend stoppers which are not allowed in the Level 1 text.	

	is whether all payments on AT1 instruments are to be recognised under the write-downs or payments on subordinated instruments as well (e.g. dividends to shareholders). AT1 write-downs and write-ups Some respondents argued that it would be beneficial for institutions to be able to write-up their AT1 instruments quickly, as it would be a sign of financial strength that would allow them better access to the capital markets. Several respondents argued that there should be an automatic write-up mechanism for temporary write-down instruments rather than allowing an institution discretion to decide whether or not to write-up. There were also a variety of suggestions about how an automatic write-up might work:		
	• Some respondents argued that the automatic write-up should be switched off after an increase in CET1 capital (although others thought that it should be able to continue, subject to supervisory approval). • Other respondents thought that this provision should be subject to certain conditions and supervisory approval. There were also a variety of views about the amounts that should be available for the write-up of temporary write-down instruments. These included the following: • Some respondents said that the amount should at least be equal to the coupon that could be paid on a permanently written-down instrument (i.e. the coupon that could be paid on the written-down amount).	The EBA maintains its view that no acceleration of the write-up should be allowed.	

	• Several respondents also said that the amount should not be restricted to future profits, but should include all sources of 'CET1 generation', such as reversals of unrealised losses, disposals and 'attributable previous years' profits; and	This would add complexity. The EBA's view is that it is preferable to stick to the notion of profits, which is simple, clear and transparent.	
	• One respondent argued that institutions should be permitted to use the reserves [generated by a write-down] to write-up AT1 instruments where the write-down was due to a spike in RWAs and the CET1 ratio was subsequently reinstalled above 5.125 %.	The 5.125 % is already very low and it is not desirable to introduce complexity in the framework. Also, it is not in the EBA's mandate and is not foreseen by the CRR.	
	Some respondents also commented on the write-down and write-up calculation. They considered that the formula proposed in Article 20(3)(e) should be amended so that, while CET1 capital that was subscribed after the write-down is added to the formula, any build-up of reserves was not. Their argument was that this would put the AT1 holders in an inferior position to the CET1 holders. Several respondents made more general comments that the write-up would be too restrictive under the proposed requirements and may not be consistent with company law. <u>Other issues</u>	The build-up of reserves is, in practice, similar to an increase of capital, with a similar effect for AT1 holders. The RTS has not been changed in this respect.	

	Several respondents commented on the relationship between the provisions of the write-downs and write-ups of AT1 instruments and the Point of Non-Viability proposals of the draft Crisis Management Directive.	The Crisis Management Directive will not be finalised in the short term.	
	There were also several comments on the wording of Article 20(1)(b). Respondents noted that CRR-compliant AT1 instruments were likely to be accounted for as equity under IFRS and most local GAAP standards. Therefore, this would not allow them to fulfil the proposed requirement in Article 20(1)(b) that a write-down would lead to 'an increase in equity' rather the amount would be reclassified to a different part of equity.	This provision is now directly in the Level 1 text and has been deleted from the draft RTS.	
	One respondent asked for clarity on the tax treatment of the temporarily written-down AT1 instruments.	See supra Q12**.**	
	There were comments from a few respondents on the procedures for notifying holders of the write-down of the principal amount. A few respondents asked for the notification of the holders to be deferred until the determination of the amount to be written down had been undertaken under Article 21(c). Another respondent argued that the holders should be notified subject to the terms of the instrument. There were also some more detailed individual comments:	This provision is now directly in the Level 1 text and has been deleted from the draft RTS.	

	• One respondent argued that the competent authority should not have the discretion to reduce the one-month period for determining the write-down amount under Article 21(d).	This could be the case, for example, if there is no doubt that a full conversion of the instrument will be necessary. In this case, there is no need to wait for one month, on the basis of the assessment made by the competent authority.	
	• One respondent argued that Article 21(e) should be amended to 'without delay' from 'immediately'. The respondent argued that this amendment was required, as the completion of a conversion would take some time to complete.	Disagreed. This could delay the conversion for several months and undermine the loss absorbency This provision is now directly included in the Level 1 text, which states that write-down or conversion shall occur 'without delay but not later than in one month'.	
	• Some respondents asked for clarity about the meaning of 'independent review' in Article 21(f).	This means that situations where the amount to be written down have to be reviewed by persons independent of the institution.	
	One respondent commented that Tier 2 should also be subject to write-up mechanisms, as part of the criteria governing contingent capital instruments.	No objection that Tier 2 instruments could be used as host instruments for convertible capital instruments. Nevertheless, a conversion or write-down mechanism is compulsory only for Additional Tier instruments according to the provisions of Article 49 of the CRR [Article 52 in the final CRR]. The regulatory classification will be based on the nature of the host instrument.	
Question 21 Would you assess	The majority of respondents agreed that the limit of 0.5 % of the total average assets of the special purpose entity (SPE) over the past three years was appropriate.	The 0.5 % limit will be complemented by a maximum nominal amount of EUR 0.5 million. The competent authority may authorise a higher percentage than 0.5 %	Corresponding article of the

the limit on the amount of assets set at 0.5 % of the average total assets of the special purpose entity over the last three years as appropriate?	However, several respondents commented that this limit may be too low for smaller SPE structures. So, some of those respondents suggested setting the limit as the higher of the proposed 0.5 % limit and EUR 0.5 million. Other respondents suggested alternative limits.	provided that this is necessary only to enable the coverage of the running costs of the SPE with a corresponding maximum nominal amount of EUR 0.5 million.	RTS amended
	Several respondents also asked the EBA to confirm that instruments issued by SPEs complying with Article 78 of the CRR would be treated as though they had been issued directly by the institution (and so not treated as minority interests under the CRR).	Where all the provisions of the CRR and the RTS relating to SPEs are met, the instruments issued by the SPE may be treated as an instrument directly issued by the institution.	
Question 22 How would you assess the impact of setting the limit at 0 %, meaning keeping only the possibility offered by paragraph (a)?	None of the respondents considered that there should be a limit of 0 % for the other assets of SPEs. There were several reasons for this, which included: • Some respondents noted that the SPE would need a certain amount of cash and other assets to cover the running costs that it should bear; • Some respondents noted that the variety of corporate and tax laws across the EU would mean that the SPE would need some other assets; and • Some respondents noted that not allowing any other assets could unintentionally result in the exclusion of AT1 instruments issued by the SPE even where it was clear that the SPE's only asset was the own funds of the institution.	A higher percentage could be authorised, subject to the prior approval of the competent authority, and provided that it covers only the running costs of the SPE and does not exceed EUR 0.5 million (see Q21).	
2. Deductions (Articles of the draft technical standards: 2, 11, 12, 13, 14, 15, 16, 17, 25, 26)			
2.1. General comments on the Articles			
2.2. Responses to questions			

Question 01 Are the provisions on the meaning of foreseeable when determining whether any foreseeable charge or dividend has been deducted sufficiently clear? Are there issues which need to be elaborated further? What would be your definition of 'foreseeable'?	While several responses indicated that the provisions were clear, some respondents sought clarification on a range of issues.		
	Several respondents expressed concerns related to the degree of formality and publicity of the declaration of dividends. Respondents felt that the information about expected dividends that would be disclosed to the supervisor was sensible and should not be disclosed to market participants.	The RTS does not require the decision of the management body to be disclosed to market participants. Pursuant to CRD provisions, supervisors may require all necessary information to assess the compliance with CRR provisions and are subject to strict rules relating to professional secrecy (see Articles 5 and 54 of the CRD [Articles 4 and 53 in the final CRR]). However, as long as the decision has been disclosed to market participants or to the supervisor, it shall be taken into account for the deduction. Before this time, Article 2(3) and 2(4) of the RTS (CP) will apply. This means that in all cases there shall be a deduction of foreseeable dividends based on either the dividend policy or the dividend payout ratio.	
	Other respondents also mentioned that the determination of the deduction on the basis of a three-year average could be burdensome or inappropriate, or that supervisors should only be able to exercise a corrective measure after the institution has repeatedly failed to follow its dividend policy.	If it is felt burdensome or inappropriate by the institution to use the dividend payout ratio on a three-year average, the institution will strive to take a decision on the amount of dividends to be distributed pursuant to Article 2(3) of the RTS (CP). The fact that an institution has repeatedly failed to follow its dividend policy is an indication that the institution will probably not apply its dividend policy in the future. Other circumstances, such as a change in the dividend policy not yet approved by the shareholders, may also justify basing the calculation on the historical payout ratio.	No change
	Some respondents also mentioned that they understood from the RTS that a consent from the competent authorities would be necessary prior to the inclusion of interim or year-end profits in Common Equity Tier 1 capital and expressed the view that this would be burdensome or unnecessary.	In accordance with the CRR (Article 24(2) of the CRR [Article 26(2) in the final CRR], the inclusion of interim or year-end profits in CET1 is subject to the prior consent of competent authorities.	

	In addition, most of the respondents insisted that the notion of exceptional dividends should be better defined and the applicable treatment further clarified (in general, respondents favoured excluding exceptional dividends from the calculation altogether). Clarification was also sought on the following specific aspects:	Exceptional dividends refer to dividends paid due to an exceptional event or transaction. The qualification of a dividend payment as exceptional falls within the responsibility of the supervisor.	
	- confirmation that the foreseeable dividends to be deducted must be capped by the level of the MDA, which should be added to the text of the RTS;	Agreed.	Corresponding article of the RTS amended
	- confirmation that the average payout method should be based on either consolidated or statutory profits depending on the financial communication of the institution; - confirmation that only foreseeable dividends to be paid in cash should be deducted.	The average should be based on the effective dividend payments compared with the statutory profits for the calculation of own funds on a solo basis and to the consolidated profits for the calculation of own funds on a consolidated basis. Agreed that only distributions that may reduce CET1 capital shall be deducted.	Corresponding article of the RTS amended
	One respondent expressed the view that, (a) with regard to the payment of interim dividends and (b) in case of general capital/dividend policies which target not for payout ratios but for fixed (maximum/minimum) amounts to be accumulated or to be paid out as profit distribution as well as for dividend policies which work with payout ranges instead of fixed/approximate payout rates, the rules need to be clarified. The same respondent provided several drafting suggestions in this regard.	Agreed that the rules need to be clarified. In particular, agreed to include the proposals related to the payment of interim dividends and payout ranges (to take the upper bound of the range). Agreed to clarify that, after payment of interim dividends, the general rules defined in Article 2 are still applicable to the residual amount of interim profits.	Corresponding article of the RTS amended
	One respondent emphasised that, in its view, the deduction of foreseeable charges or dividends should follow a time-proportionate approach. The same respondent indicated that, where variable remuneration (bonuses) are recognised as expenditures, the corresponding expected amount should be included in the calculation of the foreseeable dividends unless it is	Agreed on both points (see also Q07 – to be deducted as foreseeable charges or dividends if not already taken into account in the profit and loss account).	Corresponding article of the RTS amended

	already taken into account in the profit and loss account.		
Question 07 Are the provisions on the deductions related to (a) losses for the current financial year sufficiently clear? Are there issues which need to be elaborated further?	There were only few comments on the losses for the current financial year.		No change (except for variable remuneration – see Q01)
	One respondent pointed out that the requirement under Article 11 (2) should not lead to a full closing of accounts including full update of all accounting assumptions. In their opinion, the EBA should provide more guidance on how to determine interim profits. The respondent suggested to clarify that Article 11 did not introduce the obligation to set up a full set of accounts but using the accounting processes and rules to the extent possible and necessary.	This is not the intention of the RTS. Article 11 of the draft RTS (CP) does not introduce the obligation to set up a full set of accounts but using the accounting processes and rules to the extent possible and necessary.	
	One respondent was not sure about whether the calculated losses at full year or at 6 months must be audited.	Provisions of the Level 1 text (article 33(1)(a) of the CRR [article 36(1)(a) in the final CRR]) apply, meaning that losses have to be deducted as they arise without being audited.	
	Another respondent asked for clarification on the treatment of foreseeable charges linked to variable remuneration in the interim profits.	See response to Q01: variable remuneration have to be deducted unless they are already taken into account in the P&L account.	
Question 07 Are the provisions	Most respondents welcomed the fact that netting of DTAs and DTLs is not dependent on accounting rules on netting. Some asked for more clarification concerning the relation of accounting-based calculation of		

on the deductions related to (b) deferred tax assets sufficiently clear? Are there issues which need to be elaborated further?	DTAs/DTLs and the regulatory calculation.		
	Several respondents recommended that the EBA further elaborate on DTAs and DTLs raised at consolidated level and proposed that those DTAs/DTLs recognised only for consolidation purposes should not be taken into account for the capital calculation.	The calculation of own funds is based primarily on accounting. If DTAs have been recognised in the consolidated accounts, they must be taken into account in the calculation of the deductions from own funds. The non-deduction of a DTA may be considered if the DTA does not rely on future profits.	
	One respondent asked the EBA to clarify the meaning of 'same taxable entity' used in Article 35(3)(b) of the CRR (Council proposal).	Agreed that it may be useful to clarify the concept of 'same taxable entity'.	Corresponding article of the RTS amended
	One respondent asked for an amendment of Article 12(3) and (4) to make clear that exclusion from DTA/DTL offsetting is limited to the associated DTL that has already been used to reduce intangible assets and defined benefit pension fund assets (in order to align the wording with the one used in Article 35(4) of the CRR).	The CRR requirements and the Level 1 text do not give institutions a choice on how to treat these DTLs which have to be used for reducing the deductions in accordance with Articles 34 and 38 of the CRR [Articles 37 and 41 in the final CRR] and cannot be used for netting against DTAs according to Article 35 of the CRR [Article 38 in the final CRR].	
	Some respondents referred to the conditions in Article 36(2)(c) of the CRR concerning DTAs that do not rely on future profitability and asked the EBA for further explanation on whether or not the requirement in Article 36(2)(c) of the CRR has to be fulfilled in each of the events named there (loss, insolvency, liquidation).	All events must be considered together and not separately.	
Question 07 Are the provisions on the deductions related to (c) defined pension fund assets sufficiently clear?	The vast majority of respondents questioned whether the condition of 'immediate access to the assets' was practically feasible as Board sign-off may be required. They proposed another wording, such as 'without delay'. There were several comments in relation to the provisions on defined benefit pension fund assets in IAS 19:	'Immediate' does not mean that the bank may access the assets before the Board has taken the necessary decision. On the other hand, the access will be not effective if the institution is required to request and receive specific approval from the manager of the pension funds or the pension beneficiaries each time it wants to access excess funds in the plan.	

Are there issues which need to be elaborated further?	• One respondent was concerned about maintaining a level playing field when valuation rules based on different accounting standards were used. They asked the EBA to clarify how the concept of unrestricted ability to use the assets in Article 13 corresponds with the restrictions provided by IAS 19.	This is a Level 1 text issue (under the CRR, the own funds definition is based on applicable accounting rules).	
	• Some respondents asked the EBA to clarify (1) that the provision in Article 13 is fulfilled when net assets may be used to reduce future contributions or to cover the deficit of another plan and (2) that, in case a pension fund is managed by a related party and accounted for on a gross basis, only net assets should be deducted.	The EBA considers that the ability to reduce future contribution does not fulfil the criteria of 'immediate access to the assets'. If the assets of a plan may cover the deficit of another plan, the calculation of the net assets may take into account the deficit, provided that there is no restriction to an immediate transfer of the assets between the related pension plans. If the assets and the liabilities of a pension fund are accounted on a gross basis, only the net assets should be deducted.	
	• Two respondents referred to the amendment of IAS 19 and asked the EBA to take into account the effects of the removal of the corridor approach by introducing transitional provisions.	This is a Level 1 text issue. No transitional provisions for changes in accounting rules are foreseen in the CRR.	
	• Two respondents drew attention to the clarification adopted by the US consultation paper on Basel III transposition whereby the access to assets is deemed to be unrestricted if the institution is not required to request and receive specific approval from pension beneficiaries each time it accesses excess funds in the plan. These respondents stressed that a similar clarification would be welcome in the EBA's RTS.	Agreed to clarify the text.	Corresponding article of the RTS amended
	One respondent expected the EBA to clarify that deductions relating to pension fund assets should be recognised for the RWA calculation on pension fund	The EBA agrees on the principle that assets that are deducted should not be subject to a risk weight.	

	assets.		
	One respondent questioned the need for prior consent of the competent authority for the reduction of the amount of assets in the defined benefit pension fund.	This is a Level 1 text issue. The requirement of prior permission from competent authorities is required by Article 38(1)(b) of the CRR [Article 41(1)(b) in the final CRR].	
Question 07 Are the provisions on the deductions related to (d) foreseeable tax charges sufficiently clear? Are there issues which need to be elaborated further?	While most respondents welcomed the clarification in Article 14(2), some respondents expected further clarification on the condition laid down in Article 14(1) and asked which other GAAP are deemed equivalent to IFRS in that respect.	The EBA has not made an assessment of all national accounting standards used in EU Member States.	Corresponding article of the RTS amended to refer to liabilities
	One respondent highlighted a potential source of misinterpretation, as Article 14(1) was not limited to current and deferred tax liabilities and thus also required full recognition of tax assets, while tax assets were not in the focus of the Regulation. To avoid any potential misinterpretation, the respondent asked the EBA to explicitly state that effects of tax assets not recognised according to the accounting standard do not lead to any adjustment for prudential reporting.	Agreed that the text should focus on tax liabilities. However, this will not exclude the recognition of tax assets for prudential purposes (subject to the limitations of the CRR) if they are recognised in the financial statements.	
	According to one respondent, the relationship of Article 14(3) to foreseeable tax charges was not apparent. The respondent mentioned that the supervisory consent might create problems in case of time misalignments between the moment the deduction or adjustment has to be taken into account for regulatory reporting purposes and the moment it is accounted for and approved by competent authorities. The respondent was also concerned about the expression 'under any other adjustments', which might leave a high degree of	'Any other adjustments' refers particularly to Article 24(2) of the CRR [Article 26(2) in the final CRR], in accordance with which any foreseeable charges shall be deducted from the interim or year-end profits. Foreseeable tax charges may already be taken into account pursuant to this article.	

	discretion to the authority.		
	More generally, several respondents questioned whether or not Article 14(3) implements an administrative procedure in view of consent by the supervisory authority and opposed such a procedure. There were also some specific comments on Article 14(4):	Foreseeable tax charges are part of the foreseeable charges mentioned in Article 24(2) of the CRR [Article 26(2) of the final CRR]. Under this article, the competent authority shall be satisfied that all foreseeable charges are taken into account before granting the authorisation to take into account the profits. The administrative procedure to implement this principle is not part of the RTS.	
	• Two respondents opposed the reference to Regulation 2002/1606/EC (the IAS Regulation) in Article 14(4) and preferred a reference to local GAAP instead. Two respondents indicated that they cannot accept that credit institutions calculating their eligible capital on the basis of the local GAAP be required to apply IFRS.	The reference to IFRS rules does not imply that the institution shall use the IFRS accounting framework. When the local GAAP already provide for the recognition of all current and deferred tax liabilities, there is no need to make an adjustment to the own funds. If this is not the case, there is a need to determine the foreseeable tax charges, and IFRS rules relating to deferred tax liabilities may serve as a benchmark for the supervisor to assess how the institution has made this adjustment.	
	• One respondent proposed the deletion of the last sentence of Article 14(4) of the RTS.	The last sentence is needed to avoid netting between tax liabilities and tax assets that are not recognised in the financial statements.	
Question 08 Are the provisions on the types of capital instruments of financial institutions, third country insurance and reinsurance undertakings, and undertakings excluded from the	Most respondents assessed the provisions in Articles 15, 16 and 17 to be sufficiently clear.		Corresponding articles of the RTS amended to reflect the revised approach
	However, the vast majority of respondents raised concerns about possible inconsistencies with the Level 1 text, as Article 70 of the CRR states that 'institutions shall not deduct from any element of own funds holdings of a regulated financial entity within the meaning of paragraph 2 of Article 137(4) that do not qualify as regulatory capital of that entity', as well as a departure from the general principle of 'corresponding approach' of the CRR, or regarded the proposals as gold-plating of	The EBA agrees that an RTS shall not change the Level 1 text.	

scope of Directive 2009/138/EC in accordance with Article 4 of that Directive that shall be deducted from the following elements of own funds sufficiently clear? Are there issues which need to be elaborated further?	Basel III.		
	There were some comments on the process of the third country equivalence assessment: • One respondent asked the EBA to make clear which organisation will be in charge of performing the equivalence assessment. Two respondents recommended that the EBA clarify that the lists of countries with similar prudential regimes currently provided by national competent authorities should remain the same until the EBA has finalised its assessment.	As it stands in the final versions of the CRR/CRD texts, the EBA does not have any mandate regarding third country equivalence. The EU Commission is responsible for these decisions, subject to examination by the EBC. The EBA has only a general mandate for assistance in preparing equivalence assessment as set out in the EBA Regulation.	
	Two respondents highlighted the fact that it might be difficult to assess whether instruments are qualified as capital under the company law applicable to the issuer or as part of a financial institution's own funds. There were a couple of specific comments on the deduction of capital instruments issued by insurance and reinsurance companies: • One respondent asked for confirmation that the deduction provided for in Article 15(1) and Article 16(1) refers only to amounts above the 10 % threshold mentioned in Article 43(1)(a) of the CRR.	Agreed (as foreseen by the Level 1 text).	
	• One respondent considered the reference to a similar treatment 'as holdings of undertakings included in the scope of Directive 2009/138/EC' in Article 16(3) and Article 17(3) to be unclear because the CRR does not prescribe a specific treatment of those items.	See Articles 41(b), 55(b), 65(b) of the CRR [Articles 44(b), 58(b), 68(b) of the final CRR], which provide a mapping for the deduction of these items.	

	• One respondent proposed cross-referencing the definitions of own funds insurance items set forth under Article 22 of the CRR.	The EBA does not deem this necessary, since the RTS is using the terms of the Level 1 text.	
	• One respondent was concerned about the deduction of Tier 1 own funds insurance items from CET1, as Tier 1 capital of third country insurance and reinsurance companies which have been assessed equivalent might consist of elements which would have qualified as AT1 under the CRR. As an alternative proposal, some respondents suggested using a corresponding approach based upon subordination, with equity being regarded as equivalent to CET1, deeply subordinated debt to AT1 and subordinated debt to T2.	The EBA has proposed an alternative approach based on the loss absorbency of the capital instruments which shall be applicable to all institutions (regulated or not regulated).	
Question 09 How would you assess the impact of operating a deduction from Common Equity Tier 1 items? (linked to immediate previous question)	Many respondents were concerned about potential disincentives to invest in AT1 and T2 instruments issued by third country institutions and any own funds and subordinated debt issued by financial institutions not included in prudential consolidation and not subject to the CRR caused by a deduction from CET1. One respondent highlighted that an uncoordinated timescale in implementing Basel III in different jurisdictions might lead to a particular large value of deduction.	See Q08.	
Question 14 Are the provisions on indirect holdings arising from index holdings sufficiently clear? Are there issues which need	Most respondents felt that the provisions on indirect holdings arising from index holdings are sufficiently clear. Some respondents assessed the treatment of indirect holdings stemming from index holdings to be rather complex and preferred a more simplified approach. Several respondents mentioned that the meaning of		Corresponding articles of the RTS amended

to be elaborated further?	'index' is not sufficiently clear:		
	• In particular, they did not regard the examples provided in Article 25(1) as very helpful. Some would like to have clarity about whether the index covers only the official indices or is used in a broader sense to cover each vehicle or scheme composed of different assets, or if it includes only publicly disclosed indices.	The objective is to cover commonly used indices but a similar approach shall apply to vehicles or schemes composed of different assets.	
	• Some respondents also had doubts about naming indices of credit derivatives as an example for an index and would prefer including the most obvious indices (equity/bond indices) in paragraph 25(1).	Sensible proposal.	
	• Some respondents recommended providing more guidance on how to distinguish indirect index holdings from synthetic holdings.	This is a Level 1 text issue.	
	Several respondents found the formulation in Article 25(5) 'depending on the nature of the index (equity index or bond index)' confusing and suggested either deleting the mention or starting with the sentence with the general principle and providing an explanation of the different types of indices.	Sensible proposal.	
	Two respondents asked for clarification on the maximum deductible amount (i.e. a cap on the total amount invested in the index) when the index comprises several instruments of relevant entities while the portion of each of those instruments is unknown.	Agreed that there is a cap corresponding to the total amount invested in the index.	
Question 15 How would you	Most respondents basically agreed with the interpretation of 'operationally burdensome' provided for in Article 26. However, the vast majority asked for further clarification of some of the legal terms used (i.e. 'low	It would be quite challenging to define up front all these terms for all types of indices and exposures.	Corresponding articles of the RTS amended

assess the meaning of 'operationally burdensome' and which circumstances would be considered as operationally burdensome?	materiality', 'low net exposure', 'holding period', 'short duration', 'strong liquidity').		
	Most respondents preferred setting an exemption threshold (by reference to own funds or to the total exposure of index holdings), so that institutions would not have to perform a look-through approach to indices when the share of relevant entities is relatively small. Some respondents proposed an alignment with the threshold provided for in the large exposure regime.	The EBA is proposing a materiality exemption threshold to allow the use of the structure-based approach instead of the default look-through approach in case the exposure is below the threshold.	
	Other respondents noted that they would have to perform a full look-through in order to assess whether the exposure to the capital of a relevant entity is indeed of a low materiality (as provided for in Article 26(2)(a) of the RTS).	See previous point.	
Question 16 How would you assess the cost of conducting look-through approaches versus structure-based approaches for the treatment of indirect holdings arising from index holdings?	Several respondents questioned the need generally for a deduction when the exposure to index holdings or the portion of relevant entities in the reference index is relatively small. Many respondents referred to the relation of conducting a look-through approach versus structure-based approaches:	This is a Level 1 issue; no exemption for deduction provided by the CRR.	
	• One respondent recommended an option for the institutions to choose either the look-through or the structure-based approach. • Some respondents pointed out that an alternative to the look-through approach is more necessary for opaque (especially non-UCITS) funds than for index securities.	The default approach is the look-through approach as foreseen by the Level 1 text. The use of a conservative estimate of the underlying exposure can be made under several conditions only (including prior approval from the competent authority).	
	Some respondents recommended introducing alternatives to the structure-based approach, e.g. an RWA based approach under which exposures would be included in the RWA calculation instead of being	This is not an alternative offered by the Level 1 text; the alternative is only about the calculation of the underlying exposures, not about an alternative to the deduction itself.	

	deducted from own funds.		
3. Cooperatives (Articles of the draft technical standards: 4, 5, 8, 18)			
3.1. General comments on the Articles			
Article 4 and Article 5	Respondents pointed out that the Level 1 basis for Articles 4 and 5 that stems from the Commission's version for the CRR has been deleted in the latest Council versions of the CRR text and that some provisions of the articles may contradict the last proposals in the CRR (especially Article 4(3)). Nevertheless, several respondents provided comments on these articles in case the Level 1 text is not modified.	EBA mandates in the Level 1 text have been deleted; the draft RTS has been amended accordingly.	Deletion of the corresponding articles from the draft RTS
Article 4	Two respondents argued that both subparagraphs 1(a) and 2(a) appear redundant and confusing, as they partially restate a condition that is already covered in the CRR. If a CET1 instrument complies with provisions of Article 26 of the CRR, then there cannot be any legal or contractual provisions that require the institution to make distributions during periods of market stress or any obligation to pay the determined amount at any time. Comparable problems arise with subparagraph 1(b).	EBA mandate deleted.	
	One respondent also found the drafting of subparagraph 2(b) unhelpful, since any capital instrument (including ordinary shares) will be marketed in a way that suggests that some level of distribution will under normal circumstances be paid.	EBA mandate deleted.	

	Another respondent argued that the wording of subparagraph 2(c) is not covered by the CRR, which provides for an exemption for distribution based on fixed percentages as long as the distribution is covered by the distributable profit and does not represent a preferential distribution, and suggested its deletion. In a similar way, one respondent suggested replacing the wording 'fixed' by 'pre-determined' or 'fixed without relation to annual results'.	Subparagraph 2(c) means that, in practice, the level of distribution should vary as a function of the financial and solvency situation of the institution. The CRR authorises not a fixed percentage of distribution but a cap on the amount of distribution.	Corresponding article of the RTS amended
	Finally, one respondent indicated that the reference in paragraph 4 to Article 23 of the RTS may cause problems, since it is a reference to the features of an AT1 instrument and Article 23 describes the relationship between AT1 capital holders and future holders of CET1 and AT1 instruments. In this sense, Article 4(4) may provide too much leeway and could be applied in a restrictive manner.		No change
Article 5	One respondent emphasised that mutuals, cooperative societies and similar institutions, by definition, have only limited access to capital, as they can only revert to their members and have no access to capital markets. Thus the term 'capital' should be deleted.	'Capital' is meant as any source of regulatory capital and not restricted to capital to be raised on capital markets.	
3.2. Responses to questions			
Question 04 Are the provisions on the limitations on redemption of own funds instruments sufficiently clear? Are there issues	The provisions were generally judged sufficiently clear.		No change
	Two respondents indicated that, where redemption is currently regulated by law, any such legislation will have to be changed to allow compliance with the CRR and the RTS. Until that happens, the bodies of the institution will not be able to execute any limitation of redemption,	This is a Level 1 text issue. Institutions may make use of the transitional arrangements foreseen by the CRR in terms of grandfathering of capital instruments.	

which need to be elaborated further?	namely deferral and/or payment. The RTS should possibly consider transitory measures to be applied.		
Question 05 How would you assess the impact of documenting decisions on redemptions?	There were three responses to this question. Respondents generally expressed concerns about an increase in the reporting burden, pointing to the necessity of avoiding multiple reporting and of following the general governance of cooperative bodies. One respondent indicated, furthermore, that the redemptions should be documented only when it is required by the competent authority, and that there should not be a systematic obligation, since an internal decision to limit redemption is already a tough decision to make.	A decision to limit redemption is a hard decision for the institution to make and it probably testifies to concerns about the prudential situation of the institution, so competent authorities must be duly informed about the reasons for refusal of redemption. The EBA understands that it is not common practice to exercise this refusal in normal circumstances and considers that the burden should not be material in normal operating circumstances.	
	Another respondent also indicated that the scope of application of Article 8(5) has to be clarified (only institutions referred to in Article 27(2)(b) of the CRR or also institutions referred to in Article 27(2)(a) of the CRR).	The legal empowerment is only on Article 27(2)(b) of the CRR [Article 29(2)(b) of the final CRR], although it is the EBA's view that there shall be no difference in the treatment of all mutuals, cooperative and similar institutions. *[final empowerment to be checked with final CRR text]*	
Question 06 How would you assess the cost impact of including in the provisions of the instruments criteria as listed in paragraphs 2 and 3? (please note that the CRR requires in point (b) of Article 27(2) that, where the refusal by the institution of the redemption of	A few respondents provided input on that question. Respondents envisioned several consequences, depending on the country and the governance rules of the cooperative institution: • If the provisions of the instruments are changed, investors may have to be compensated for the inclusion of new features of the instruments. • Alternatively, it may be difficult to convince cooperative members to enact the changes, in the absence of sufficient regulatory constraint. • Finally, cooperative members may enact the changes but they might lead to the redemption of the outstanding shares and the release of new ones, rather than just a modification of	The CRR (Articles 27(2)(b)) [Article 29(2)(b) of the final CRR] is clear that, where the refusal by the institution of the redemption of instruments is prohibited under applicable national law, the provisions governing the instruments shall give the institution the ability to limit their redemption, making the regulatory constraint clear. This obligation comes in the first place from the Level 1 text.	

instruments is prohibited under applicable national law, the provisions governing the instruments shall give the institution the ability to limit their redemption).	existing shares. One respondent indicated that, as the provisions governing the instruments are part of the statutes, there may be some discussions when altering the statutes, but the respondent does not assume that members would quit because of that alteration even if their readiness to subscribe more shares could be diminished.		
Question 10 Are the provisions related to the requirements for cooperative networks sufficiently clear?	Most of the answers emphasised the changes in the last versions of the draft CRR text which explicitly allow for aggregation as an alternative to consolidation. One respondent argued that the notion of prudential consolidation referred to in Article 18(a) is not defined in the CRR. Some respondents argued that the scope of Article 18(b) is too broad and should not include entities which are not a member of the institutional protection scheme, as they do not profit from the privileges granted in Articles 46(3)(b) and 108(f) of the CRR. Other answers mentioned that proportional consolidation should be considered as an alternative to deduction in the context of Article 18(f), on a case-by-case basis. Two respondents argued for the deletion of Article 18(g), which in their view goes beyond the conditions laid down in Article 46 of the CRR and would be discriminate against groups of institutions.	EBA mandate has been deleted from the Level 1 text. The draft RTS has been amended accordingly.	Deletion of the corresponding article in the draft RTS
4. General requirements/other aspects (Articles of the draft technical standards: 27, 28, 29, 30, 31, 32, 33, 37, 38)			
4.1. General comments on the Articles			
Article 27	Several respondents petitioned for the deletion of the last sentence referring to stress test, especially where a replacement of the instruments with own funds	It is desirable to keep the reference to stress test situations, under the assessment of competent authorities.	

	instruments of equal or higher quality leads to an improvement of the capital situation of the institution.		
	Two respondents asked for the deletion of the middle part of the first sentence: 'as assessed by the competent authority'.	Disagreed – the supervisory judgment is needed.	
	Two other respondents argued that the requirement that the income capacity continue to be 'sound' should be replaced by a requirement pursuant to which it should see no negative change.	Proposed amendment: 'to be sound or does not see any negative change'.	Corresponding article of the RTS amended
	Two other respondents underlined that in their understanding 'Article 73(3)(a) of the CRR focuses on situations where an institution would like to replace an existing capital instrument with lower distributions (e.g. coupons) by a new instrument with higher distributions, resulting in a higher interest expense or distribution going forward. Obviously, in such a situation, institutions will consider the overall economic and regulatory validity of such an "exchange".' One respondent argued that the current wording of the article does not allow buybacks for institutions lacking good earning power.	No specific comments.	
Article 28	The vast majority of the respondents argued that the requirements of Article 28 cannot appropriately cover publicly announced buybacks, as, at the date of announcement, the final amount of the buyback is not predetermined and a deduction of the maximum amount would be too far reaching.	The maximum amount of the issuance has to be deducted.	Corresponding article of the RTS amended to delete 'estimated' in paragraph 2
	Several respondents raised concerns that the requirement to delay the announcement of an expected redemption, reduction or repurchase of own funds	It is unclear why there may be a conflict. On the contrary, it could be a problem for an institution to announce a redemption/repurchase/reduction if at the	

	instruments until obtaining an approval may conflict with the requirements of the Market Abuse Directive 2003/6/EC (MAD).	end the competent authority does not give its permission. Furthermore, this would put unacceptable pressure on the competent authority.	
	Two respondents argued that Article 28(2) should be deleted, as, in their opinion, instruments should be taken into account as regulatory capital as long as the instrument is existent and the money is in the institution. In particular, they stressed that, in case the RTS is not amended, institutions should be allowed to take into account any replacement instrument even though it has not been issued, especially in cases where the competent authority requires a replacement for a call to be approved.	The issuance of the replacement instrument should be made at the latest at the call date of the replaced instrument; this should be part of the capital planning of institutions.	
	A few respondents expressed views that to assume sufficient certainty would already exist at the time of public announcement of an intention to redeem would be far too early, and suggested alternative wording.	Disagreed. Public announcement makes the redemption certain.	
Article 30	The vast majority of the respondents argued that the content and depth of information to be provided by the institution should be appropriate compared with the level of impact of an action listed in Article 72 of the CRR. In particular, in their opinion, providing a three-year capital plan in all circumstances might be disproportionate.	A capital plan should already be available to the competent authority independently of any action listed in Article 72 of the CRR [Article 77 of the final CRR]. Furthermore, the provisions of Articles 28 to 30 of the RTS (CP) shall apply at all levels of application of prudential requirements (i.e. solo and consolidated basis if both levels of applications are in use).	Corresponding article of the RTS amended
	One of the respondents recommended that the competent authority should be obliged to waive the submission of information that is already available to it.	It is up to the competent authority to determine if the appropriate information is already available to it. Proposed amendment: 'the competent authority shall waive the submission ... in cases where it is satisfied that the information is already available'**.**	
	Several respondents indicated that, in their opinion, Article 30 confused the buyback/redemption issue and the market maker exemption, which should be considered separately in terms of application	Applications are required in all cases. For an institution to apply for a prior approval from competent authorities for market making constitutes in itself an application. The content of application is defined by Article 30 of the draft RTS (CP).	

	requirements.		
4.2. Responses to questions			
Question 17 How would you assess the levels of the thresholds for market-making purposes (identical for hybrid instruments to the ones provided by CEBS/EBA guidelines on hybrid instruments published in December 2009) for competent authorities to give a prior consent (Article 29)?	The majority of the respondents considered the proposed levels of the thresholds for market making purposes to be acceptable and consistent with the current practice.		
	At the same time, some of the participants believed that the threshold for CET1 instruments should rather refer to the level of 5 % as given in the current legislation for market making (Article 19-24a of Directive 77/91/EWG, which was reinforced by 2006/68/EG). They also pleaded to delete the reference to 'excess amount', as, in their opinion, it does not make sense. Other respondents asked for the removal of the reference to Pillar II requirements, arguing that this would lead to volatility in the calculation and would not be workable. Finally, several respondents understood that there is a typo in point 3(a) of Article 29 (3 % and 10 % being misplaced).	The EBA has left its initial proposal on the thresholds for market making unchanged, since they are consistent with current market practice.	
	The vast majority of respondents expressed concerns about the possibility of the thresholds being lowered by the authorities. In their opinion, either these discretionary powers of the authorities should be removed or the circumstances under which the authorities may lower the thresholds have to be further clarified. It should also be clear that competent authorities will have to act in a diligent way when removing their prior consent.	The provisions of the RTS have been clarified.	Corresponding article of the RTS amended

	One of the respondents suggested that the application of requirements should cover only early call, redemption or repurchase of the AT1 or T2 instruments and not the one at maturity.	Agreed.	
	One of the respondents sought confirmation that the prior consent of the competent authority for one of the actions listed in Article 72(a) of the CRR in connection with Article 73 of the CRR as well as Articles 28 to 31 of the RTS is limited to CET1 instruments as defined in Article 24(1)(a) of the CRR and excludes items defined in Article 24(1)(b) to (f) of the CRR.	It is confirmed that Article 24(1)(b) to (f) [Article 26(1)(b) to (f) of the final CRR] is excluded from the scope.	
	Finally, one of the respondents indicated that it understood that operations where capital instruments are redeemed and immediately replaced by capital instruments of the same quality are outside the scope of the RTS.	A prior consent from the competent authorities as well as the submission of an application is still required. Provisions of Articles 28 to 32 of the draft RTS (CP) still apply.	
Question 18 How would you assess the impact of the proposed timing of three months for the submission of the application (Article 31)?	The majority of the respondents considered the timing of three months for the submission of the application to be excessive. It was argued that the market movements over such a time span are virtually impossible to predict and that might effectively jeopardise transactions. Most of the respondents favoured instead a monthly or four-week notification period. Nevertheless, a significant number of the respondents accepted the proposed timing of three months, as, in their opinion, it grants a uniform European perspective and a level playing field.	The EBA agrees that a three-month timing grants a uniform EU perspective. The draft RTS already gives flexibility with the possibility for competent authorities to allow for a shorter timeframe under exceptional circumstances. In normal circumstances, a three-month period is appropriate and redemptions/reductions/repurchases shall be included in the medium-term capital planning of the institution.	
	A number of the respondents argued that, in their opinion, it was not necessary to include the over-exhaustive information referred to in Article 30 in every application.	Article 30(3) of the draft RTS (CP) provides for the possibility for competent authorities to waive the submission of some of the information if already available to them.	

	Furthermore, some of the respondents were of the opinion that the competent authority should always, and not only 'under exceptional circumstances', have the possibility to allow institutions to transmit an application within a time frame shorter than three months and suggested deleting the reference to 'exceptional circumstances'.	Disagreed. This shall remain an exception, otherwise there would be at the end no convergence/ harmonisation of supervisory practices.	
	Finally, a few respondents argued that it is cumbersome that the processing of the application shall begin only when competent authorities are satisfied that they have received the information required.	This should be an incentive for institutions to provide the competent authorities with the necessary information in due time.	
Question 19 How would you assess the levels of the thresholds for the non-materiality of the amounts to be redeemed for mutuals, cooperative societies or similar institutions (Article 32)?	Several respondents welcomed the alignment between all types of institutions; one respondent found the levels proposed to be appropriate.		Corresponding article of the RTS amended
	The 3 % CET1 threshold was considered to be acceptable by the vast majority of the respondents. Nevertheless, the other threshold focusing on the excess amount of CET1 was considered to be too rigid and excessively complicated, and could lead to a situation where a considerable excess coverage of the CET1 ratio becomes necessary for a full utilisation of the 3 % parameter: namely, there has to be an aggregate excess coverage of 30 % before the 3 % can really be used. Therefore, it was advocated that either the threshold of 10 % of the excess amount of CET1 be removed or setting the limits as 'the higher' of 3 % of CET1 or 10 % of the excess amount of CET1 be permitted.	The EBA agreed to amend the RTS to keep only the reference to the percentage expressed in terms of CET1 capital, but this percentage has been lowered from 3 % to 2 %.	
	One of the respondents sought clarification on whether the 3 % threshold refers to the CET1 level as in Article 87(1) of the CRR or includes the CET1 instruments to be held pursuant to Article 122 of the CRD.	The threshold refers to the CET1 level as defined in Article 87(1) of the CRR [Article 92(1) of the final CRR].	

	Further clarification was also required about the circumstances under which competent authorities may lower the thresholds of 3 % of CET1 and 10 % of the excess amount of CET1.	The provisions of the RTS have been clarified.	
	Lastly, one of the respondents pointed out that in case of some groups payouts are done throughout the year, which makes it difficult to deliver the relevant information in short intervals. Therefore, in their opinion, in the case of requirements under Article 32(2) documentation should only be provided at the end of the year.	An application is required each time the conditions of the RTS are met and not only on a yearly basis. Nevertheless, the competent authority may renew its prior permission during the year for a new limit up to 2 %.	
Question 20 The EBA is considering setting a time limit that the temporary waiver from deduction from own funds shall not exceed. This time limit would be set at a maximum of five years and a lower time limit could also be considered. Which time limit, within a maximum of five years, would you find appropriate?	The vast majority of the respondents supported the time limit of five years, emphasising that it is appropriate and coherent with the purposes of a financial assistance operation designed to reorganise and save the entity. Some of the respondents indicated that they would welcome a possibility of longer periods being granted, especially in case of specific situations, e.g. for particularly complex financial assistance operations. There was no support for a period shorter than five years. Several respondents argued that the defined time limit is unnecessary and should therefore be deleted. They stressed that every financial assistance operation plan will look different and it should be left to the discretion of the competent authority to assess this limit over time. Several respondents indicated that the RTS should not be too restrictive or prescriptive ex ante (as is the case in the proposed draft), as during stressful times, authorities may want to be able to use this exemption as broadly as possible to make the rescue of distressed institutions more attractive and preserve taxpayers' money.	The proposal is to keep five years in the RTS.	

	Furthermore, some of the respondents suggested that the authorities that may approve the plan should be defined more broadly (they might include supervisory authorities, resolution authorities and relevant ministries).	The 'competent authority' is the term used in the Level 1 text.	
	Other respondents pointed out that the waiver should not be limited to situations where the institution has negotiated it prior to the rescue, as such matters are typically not amongst those that are dealt with in emergency situations.	Agreed, provided that it is clear that the waiver is granted in the context of a financial assistance operation.	