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John Berrigan
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EBA-2020-D-3378

25 January 2021

Subject: Inconsistencies between CRR and BRRD and subsequent impact on the ability to deliver the RTS under the mandate on "daisy chains" of internal MREL instruments (Art 45f(6) BRRD)

Dear Mr Berrigan,

Under the mandate to develop regulatory technical standard (RTS) under Article 45f(6) of Directive 2014/59/EU (BRRD), the EBA is required to further specify methods to avoid that instruments eligible for meeting the minimum requirement for own funds and eligible liabilities (internal MREL or i-MREL) issued by a subsidiary through an intermediate parent and indirectly subscribed by the resolution entity (ultimate parent) hamper the smooth implementation of the resolution strategy; such methods should consist of "a deduction regime or an equivalently robust approach" and should ensure, amongst others, to entities that are not themselves the resolution entity, "an outcome equivalent to that of a full direct subscription" by the resolution entity of i-MREL eligible instruments issued by the subsidiary.

The EBA committed to deliver the mandate under Art 45f(6) BRRD by 31 December 2020. The Consultation Paper on the draft RTS was published on 27 July 2020.

The consultation feedback showed general support to the draft RTS but highlighted Level 1 text inconsistencies which impact the delivery of the mandate. After a thorough analysis of the comments received, as well as additional technical investigations on the interactions between the BRRD and CRR provisions, it appears that Regulation (EU) No 575/2013 (CRR) does not allow the application of the prudential treatment needed for the mandate to be fulfilled as originally intended.

The CRR sets that an instrument is to be risk weighted, unless deducted from own funds, including for the purpose of MREL calculation under the BRRD. The 'total risk exposure amount' (TREA), constantly referred to in the BRRD (e.g. Art.45(2)(a) BRRD), is to be 'calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013'.

The CRR provides rules for the deductions from own funds (and concurrently relevant positions are not risk-weighted) as well as for exemptions and alternatives, including deductions of holdings of own funds of financial sector entities. Under certain conditions (for example Art. 49 CRR), the deduction of instruments can be subject to the discretionary decision of the Competent Authority. However, the EBA does not have the regulatory power to constrain such a decision on the basis of the current BRRD mandate for the RTS. This leaves the application of both deduction and risk-weighting either subject to an option or CRR-constrained, and not necessarily matching the treatment corresponding to BRRD.

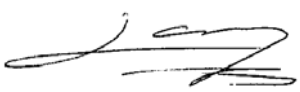
Moreover, the CRR does not provide rules for deductions of holdings of eligible liabilities capturing all daisy chain situations. In particular, according to Art 113(6) CRR, the application of a zero risk weight to the holdings of eligible liabilities is possible only if the issuer and the holder are established in the same member state, and this condition is not able to capture all the relevant cases that the mandate under art 45f(6) BRRD is supposed to cover.

Therefore, the present CRR does not allow for the deduction and for the zero risk weight in all the cases relevant for the current mandate under Art 45f(6) BRRD. In particular an indirect issuance would generate a higher TREA, and thus additional own funds requirements and i-MREL requirements at the level of the intermediate parent, as compared to a situation where the i-MREL eligible instruments of the subsidiary were subscribed directly by the resolution entity; this situation would not only generate an inconsistency between the prudential and resolution framework but would also go against the requirement of the BRRD mandate to generate an outcome equivalent to that of a direct subscription. Similar consequences for the intermediate parent may arise in the area of leverage requirements and, potentially, large exposures rules.

On the basis of the reasoning explained above, the legislative requirements cannot be fulfilled without additional provisions that the RTS, as mandated, cannot bear on its own but need rather to rely on the Level 1 text to specify.

Conscious of the relevance of this mandate, the EBA stands ready for any additional contribution on this matter as well as to explore, together with the Commission services, any approach that could enable the EBA to fulfil the mandate in compliance with the relevant legislative acts.

Yours sincerely,



José Manuel Campa

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