EAPB comments on the
EBA Interim Report on implementation and design of the MREL framework

30 August 2016

General comments

We explicitly welcome the publication of the interim report based on Art. 45 para. 19 and 20 BRRD and the opportunity to provide comments before the finalization of the report. In particular, we support EBA's approach to take into account the European Commission's intention to harmonize MREL and TLAC. In this context, we would like to highlight that such a harmonization must not lead to the application of TLAC to non-G-SIBs as the scope of TLAC should be strictly limited to G-SIBs as foreseen by the FSB. Additionally, we would like to point out that institution-specific aspects like systemic importance must be solely considered from a resolution perspective and be assessed on a case-by-case basis. Thus, prudential differentiations which don't relate to resolution and therefore follow a different rationale (such as the differentiation between significant and less significant institutions) should not be taken into account as this would lead to a 'one size fits all' approach and not reflect the differences of various banks in terms of resolution.

Detailed comments

Provisional Recommendation 1: Reference base (denominator) for MREL

In general we support the introduction of a consistent definition of the reference base for the calculation of MREL and TLAC. This would reduce complexity and lead to a more linear and transparent management of loss absorption requirements across the EU. Therefore, we generally support EBA's recommendation to use risk-weighted assets (RWA) as the preferred MREL denominator. However, we note that the determination of a backstop as described on page 36 is introducing a new stand-alone requirement. As such, the use of the LRE as a backstop should only apply to G-SIBs as recommended by the FSB. Otherwise, this would lead to a binding minimum requirement which is not in line with the concept of the BRRD which stipulates that MREL is an institution-specific requirement.

Provisional Recommendation 2: Relationship with regulatory requirements

Stacking of CET1 buffers

We are in favor of the proposed stacking of capital buffers on top of the MREL requirement, as buffers should be usable in stressed situations without leading to a breach of MREL. In addition, this would align the MREL framework with the framework for TLAC, facilitating international comparability. Nonetheless, we are of the opinion that the ban to double-count

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CET1 capital should only apply to G-SIBs which would be in line with the FSB standards. In this context, we don't share EBA's opinion, according to which such a regime would increase complexity and create confusion. From our point of view, another suitable policy option would be to allow double counting for all banks and to allow for the resolution authority to make adjustments to MREL, taking into account inter alia the capital buffer requirements. This would be in accordance with the current version of the SRM-Regulation and the RTS on MREL.

Approval for the redemption of MREL-eligible liabilities

We would like to point out that there is no legal requirement for a particular term structure of MREL. The only requirement is that maturities are in excess of one year. MREL-eligible liabilities are an important part of the funding structure of the bank and are part of managing the interest rate- and liquidity risk. Mandatory directions of the resolution authority might interfere with the institution's management of these risks and/or any directions in this context given by the competent supervisory authorities. From our point of view, there should thus be no approval requirement for the redemption of MREL-eligible liabilities as such a procedure would take time and for instance hamper a smooth and efficient liability management.

Provisional Recommendation 3: Breach of MREL

We think that a breach of MREL should not automatically lead to the consequence that a bank is seen as failing or likely to fail, since MREL is not an indicator for a bank's viability. Failing or likely to fail is related to capital shortfalls, while MREL is related to gone concern elements. It is hard to justify a Point of Non-Viability (PONV) assessment based on an MREL-shortfall of a bank that has not breached its capital requirements.

Therefore, in a first step after a breach of MREL there should be an analysis concerning the cause of a shortfall. Based on the result the next step could e.g. consist in the same treatment which is used in case of a breach of the combined buffer requirement (CBR), which means that the bank would be required to prepare a strategy to restore MREL within an agreed timeframe (similar to the capital conservation plan required in cases of a CBR-breach). Measures and solutions should always reflect the actual situation, in particular as some 'breaches' of MREL can be purely technical or just a question of timing, e.g. when an anticipated bond issue is delayed by a few weeks, leading to available MREL dropping below the requirement.

Eventually, we believe that the competences of resolution authorities as set out in the BRRD are adequate to address the issue as they are obliged to require and verify that banks meet MREL and shall take any decision in parallel with the development and the maintenance of resolution plans (Art. 45 para. 15 BRRD).

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Provisional Recommendation 4: Adequacy and calibration
We share EBA's preliminary view that the calibration of MREL should in all cases be closely linked to and justified by the institution's resolution strategy and thus, be part of the pillar 2 process. As the BRRD foresees that resolution authorities are empowered to determine the binding MREL-quota on a case by case basis and since there is not sufficient experience yet concerning resolution planning and the level of MREL-quotas, there should be no standard/uniform MREL or binding MREL-floor.

Provisional Recommendation 5: Eligibility
In general, we would like to highlight that any policy decisions about eligibility criteria and/or subordination requirements should also inform the current calibration discussions given the – as evidenced by the report – magnitude of impact in terms of the volume of issuance required.

Concerning EBA's recommendation we agree with its view that relevant information should be available to bank creditors, i.e. banks' creditor hierarchies should be clear and in line with national insolvency law. In this respect it is worth noting that the creditor hierarchy prescribed in the BRRD is not always in line with national insolvency law, which can create issues with respect to the 'no creditor worse off' principle. The clarity of the creditor hierarchy is not only important in the case of resolution but more generally with respect to going-concern funding operations, as the hierarchy (and attendant expectation of risk) is a key input to pricing of instruments by both issuers and investors. Notwithstanding the aforementioned, we would currently be rather reluctant towards the disclosure of a bank's MREL-quota given the early stage and ongoing discussions regarding its determination.

With regard to subordination, we are of the opinion that mandatory subordination should only apply to G-SIBs as this would be in line with the TLAC-standard. Concerning non-G-SIBs we think that it should be left to the discretion of the resolution authority taking into account the specificities of the bank concerned, to determine whether senior unsecured liabilities are eligible for the fulfilment of the MREL-quota or not.

Provisional Recommendation 6: Third country recognition
In order to avoid legal uncertainty regarding resolvability and to give resolution authorities enough flexibility concerning the exclusion of certain liabilities from bail-in, we believe that the best approach would be a combination of the main elements of option ii (empower resolution authorities to grant waivers from Art. 55 BRRD) and option iii (general limitation of the scope of Art. 55 BRRD to MREL-eligible liabilities).

This would provide banks and the competent supervisory and resolution authorities with the necessary degree of flexibility. In particular, it would allow taking into account the fact that even in the case of a reduction of the scope of the obligation to MREL-eligible liabilities,

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there will be situations where a bank will not be able to impose the contractual recognition clauses or where this would not be appropriate or proportionate in relation to the consequences. The respective authorities should therefore have enough discretion to address the issue of the degree of the implementation of the obligation to impose contractual recognition clauses and have the right to determine the appropriate consequences and measures to be taken in view of the relevance of the agreements in question and the impact on the resolvability of the respective bank.

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