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Your ref., Your message of Our ref., person in charge Extension Date

BSBV 115/Dr. Egger 3137 31 August 2020

Dear Sir or Madam,

**Re: EBA Draft RTS on own funds and eligible liabilities**

With regards to the above mentioned consultation we would like to submit the following comments on behalf of the Austrian banking industry:

1. **General Comments on the Consultation Paper (‘CP’)**

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

Our **key concerns** regarding this draft RTS can be summarized as follows, details are provided under Point B to the questions raised in the consultation:

**Own funds:**

* In general, we do **not agree** that the **timeline** for authorities **to grant permission** should be **extended to 4 months**. The current 3-month decision period should be kept and **in specific cases** a **shorter period** should be defined/**applicable**.
* In case the decision is not granted/renewed by competent authorities within the time period foreseen **at least the permission for market making purposes** **should remain valid**.
* In case of own funds the repurchase of **immaterial amounts** and **remuneration repurchases** should **be kept separately** and **not be included** in the general prior permission regime (including the **time frame** and **limits** proposed). To establish a proportionate approach the decision period should be shortened in case of immaterial amounts and the necessity of an annual renewal should cease.
* The **treatment** of **amortized Tier 2 instruments** has to be **clarified.**
* In case of an own funds applications the detailed breakdown of eligible liabilities is overshooting **and the information requested** should be **reduced.** For **annual renewals simplifications** should be granted, in particular with respect to renewal of market making permissions.
* According to Art 28 (3) of the draft RTS, in case of a general prior permission, the **predetermined amount** permitted by the relevant authority has to **be deducted from the moment the authorization is granted**. In case that the institution decides not to renew the general prior permission, the permission expires at the end of the one-year period. The RTS should clarify that in this case the deduction from own funds is no longer required and the institution can re-include the amounts in own funds without the need to execute any further steps.

**Eligible liabilities:**

* The **scope** of the permission regime needs to **be reduced**:

1. the permission regime should **not apply to institutions** that **have no MREL** **requirement** and/or where MREL **goes not beyond own funds requirements** (where no recapitalization amount is defined)
2. only for **liabilities** that **fulfill the subordination requirement** the **strict permission regime** (including the annual review) should **apply**. This would be not only in line with the current supervisory practice, but also with the wording of Art. 78a CRR II that refers to the term eligible liabilities instruments. The conditions for a liability to be classified as eligible liabilities instrument can be found in Art. 72b CRR II and contain also the subordination clause (Art. 72b (2) (d) CRR II). All **other eligible liabilities** should be **covered in a separate general prior permission** that is **not subject to annual renewal** and be decided by the authorities within a **shorter timeframe**. **Separate 3% limits** should apply for subordinated and non-subordinated liabilities. This approach would also be in line with the transitional regime (applicable for Austrian institutions until the regulatory standards will enter into force) installed by the Austrian Financial Market Authority (FMA), according to which Art 78a CRR II only applies to subordinated eligible liability instruments and eligible liability instruments with a remaining maturity of less than one year.
3. **Instruments** that are **grandfathered** and **instruments** that are **not MREL eligible** (i.e. that do not meet the 1 year maturity requirement) should in any case **not be included.**

* In addition, a **phasing-in approach** should **be introduced** that is **in line with** the **MREL targets**. **Until 1.1.2024 only subordinated liabilities** shall fall under the **permission regime**, other eligible liabilities when final MREL targets are applicable.
* When performing their assessment **resolution authorities** should **rely** to the greatest extent possible **on** the **assessments/information provided by supervisory authorities.**
* For **annual renewals simplifications** should be granted.

1. **Questions for consultation**
2. ***What is the percentage of senior non-preferred and senior preferred liabilities in relation to total liabilities for the institution(s) you represent? Within the senior-preferred layer, what is the percentage of eligible to non-eligible liabilities for this/these institution(s)?***

***The CRR2 introduces new granular eligibility criteria for eligible liabilities related, inter alia, to acceleration, set-off and netting, reference to write down and conversion etc. and the requirement that the instrument be subject to permission. However, some of these criteria are grandfathered indefinitely for existing instruments (legacy instruments) under Article 72b(2)(n) or Article 494b(3) CRR.***

In general, we do not see the need to extend the scope of liabilities subject to the permission regime to the maximum (in comparison with the current praxis) as proposed in the consultation paper. However, we understand and support the intention to establish similar procedures for own funds and liabilities with comparable loss absorption based on their ranking in insolvency. While the level 1 text could be interpreted to cover all MREL eligible liabilities, we would strongly recommend that EBA gives flexibility to resolution authorities regarding the scope of liabilities covered and allows them to focus on subordinated liabilities while excluding other eligible liabilities from the annual renewal requirement. Such an approach would be in line with the current practice of the resolution authorities, where the prior permission is only applied for the senior non-preferred class of instruments.

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

Furthermore it is not understandable that the permission regime should cover and apply to institutions for which MREL does not exceed the loss absorption amount and thus goes not beyond the own funds requirement (i.e. institutions without a recapitalisation amount that would be wound up using normal insolvency proceedings) and institutions for which no MREL is determined/waived.

The regime in general is closely connected to own funds and MREL requirements with the intention to not endanger the fulfillment of these regulatory requirements in case of a reduction following a repurchase. Thus, it does not make sense to make institutions subject to such a control regime for eligible liabilities if they have now additional regulatory requirement that goes beyond own funds. In such cases it is absolutely sufficient that resolution authorities are informed about permissions granted on own funds by supervisory authorities.

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

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

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

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

1. ***Do you consider that the general prior permission as per the 2nd subparagraph of Article 78(1) CRR, with the limits included therein, would be sufficient to cater for permissions to repurchase own funds instruments then to be passed on to employees as part of their remuneration (former Article 29(4) of the RTS), in addition to market making and other repurchase activities? Would you consider any derogations to be needed (in particular in terms of limits and one-year timeframe)?***

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

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

1. ***Do you agree that the provision regarding permission for immaterial amounts to be called, redeemed or repurchased (former Article 29(5) of the RTS) is no longer needed? If you disagree please provide a substantiated rationale.***

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

1. ***Is the information required appropriate? Please specify any change you would make and why. Please consider consistency with the prior permission regime for eligible liabilities instruments.***

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

(i) The specifications foreseen in point e) in Article 30 are absolutely overshooting as these details have nothing to do with own funds and have to be provided anyhow in case of a permission for eligible liabilities. Asking for such a detailed breakdown is and should not be relevant for the supervisory authorities and their going concern perspective and would lead to a huge additional workload every year. We agree with the proposed three-year period, but the breakdown level of liabilities should be kept at a minimum level (i.e. subordinated and non-subordinated liabilities)

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

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

1. ***Do you consider the four months deadline appropriate? Would you consider making a difference between the individual permissions pursuant to Article 78(1) points (a) or (b) CRR and the general prior permission pursuant to the 2nd subparagraph of Article 78(1) CRR? In case the four months deadline was kept for first time applications for general prior permission, would you see merit in:***
2. ***shortening the deadline for applications for the renewal of the permission?***

In our opinion, the time period for individual permissions should not be extended and kept by a maximum of 3 months. The necessary interaction between authorities is no valid argument to extend the deadlines to the detriment of banks. A longer deadline increases uncertainty for banks in a topic that is highly relevant vis-á-vis investors and the market. Since the application has to be renewed every 12 months the long timeframe of 4 months for authorities would be inappropriate. Supervisory and resolution authorities should be able to establish a smooth and unbureaucratic interaction process to ensure that from the very beginning information and data are shared immediately.

Renewals should be dealt with by a fast track procedure of 1 or max 2 months. In particular if the application does not materially differentiate from the first application.

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

The content in case of renewals should be adjusted and limited to those parts that have changed compared to the last/first application.

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

Further shortenings would be appropriate in case of renewals of general prior permissions. Here, adjusting of the content of the application, e.g. if the total volume to be repurchased will remain the same or will not change significantly (reduction of requirements to the necessary minimum to check whether the conditions are still met) is crucial considering the proposed extension of the scope. The reduction of information requirements would also be beneficial for competent (resolution) authorities and is also practically a precondition for a shorter time period.

Supervisory authorities should consider implementing a standardized and transparent process ensuring an efficient approval procedure of the yearly applications i.e. to deal with all applications within the same fixed time frame as it is the case for SREP decisions. This would ensure a level playing field and avoid different treatment/duration. If it cannot be ensured from supervisory side that decision will be delivered on time EBA should alternatively think about providing supervisory authorities additional discretion and flexibility to grant an on-time extension of the GPP by further three months in case the expiration of the permission without renewal would lead to an adverse effects to the business of the institution.

1. ***It is recalled that, as per the mandate to the EBA, the RTS on eligible liabilities for the purpose of specifying the meaning of sustainable for the income capacity of the institution has to be fully aligned with the one on own funds. Do you see any unintended consequences stemming from the drafting of Article 32a?***

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

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

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

1. ***Do you consider the deduction rules appropriate for eligible liabilities? If not, what would be the rationale for departing from the rules applicable for own funds?***

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

1. ***Do you agree that general prior permissions should not be confined only to market making? Why would liability management operations not be sufficiently covered, as for own funds, via ad-hoc permissions? Please substantiate based on concrete experience.***

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

1. ***Is the maximum limit of 3% of the total amount of outstanding eligible liabilities instruments sufficient? If not, please explain which percentage value of outstanding eligible liabilities instruments you would suggest and justify based on your experience.***

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

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

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

1. ***Would you see some good rationale for exempting certain types of entities from the limits foreseen in Article 32c? Please describe cases and substantiate your rationale.***

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

1. ***Do you consider the four months deadline in Article 32f appropriate? Would you consider making a difference between the individual prior permission pursuant to Article 78a(1) points (a), (b) or (c) CRR and the general prior permission pursuant to the 2nd subparagraph of Article 78a(1) CRR?***

***In case the four months deadline was kept for first time applications for general prior permission, would you see merit in:***

***a) shortening the deadline for applications for the renewal of the permission?***

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

***Please provide some rationale. Also, please consider consistency with the prior permission regime for own funds.***

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

We ask you to take our remarks into due consideration.

Yours sincerely,

Dr. Franz Rudorfer

Managing Director

Division Bank and Insurance