

27 February 2015

European Banking Authority  
Floor 46  
One Canada Square  
London  
E14 5AA

Submitted via the EBA website

**Consultation paper on draft RTS on criteria for determining the minimum requirement for own funds and eligible liabilities under directive 2014/59/EU**

Dear Sir / Madam

Please find enclosed the Association for Financial Markets in Europe's response to the EBA consultation paper on draft Regulatory Technical Standards on criteria for determining the minimum requirement for own funds and eligible liabilities under Directive 2014/59/EU (EBA/CP/2014/41).

Please do not hesitate to contact us if you have any questions or wish to discuss these issues further.

Yours faithfully



Oliver Moullin  
Director, Recovery and Resolution  
Association for Financial Markets in Europe

**Association for Financial Markets in Europe**

London Office: St. Michael's House, 1 George Yard, London EC3V 9DH T: +44 (0)20 7743 9300 F: +44 (0)20 7743 9301

Brussels Office: Rue de la Loi 82, 1040 Brussels, Belgium T: +32 (0)2 788 3971

Company Registration No: 6996678 Registered Office: St. Michael's House, 1 George Yard, London EC3V 9DH

[www.afme.eu](http://www.afme.eu)

---

## Consultation response

### **Regulatory Technical Standards on criteria for determining the minimum requirement for own funds and eligible liabilities under Directive 2014/59/EU (EBA/CP/2014/41)**

27 February 2015

---

The Association for Financial Markets in Europe (“**AFME**”) welcomes the opportunity to comment on the European Banking Authority (“**EBA**”) Consultation Paper (the “**CP**”) on draft Regulatory Technical Standards (“**RTS**”) on criteria for determining the minimum requirement for own funds and eligible liabilities (“**MREL**”) under the Bank Recovery and Resolution Directive (2014/59/EU) (the “**BRRD**”).

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.<sup>1</sup>

We set out below our comments in response to the CP. Unless otherwise indicated, references to articles are to articles of the draft RTS.

#### **A. General comments**

We are supportive of requirements for minimum loss absorbing capacity as part of ensuring that effective resolution plans are in place and addressing “too-big-to-fail” (“**TBTF**”) and welcome the EBA’s consultation on the draft RTS on criteria for setting MREL. It is important that institutions and the market are provided with greater clarity as to how MREL will be applied as soon as possible given the deadline for its implementation of 1 January 2016 and the possibility that banks might have to raise additional eligible liabilities to meet requirements.

We support the acknowledgment in the draft RTS of the importance for MREL to support the preferred resolution strategy. We see this as the overriding objective of MREL and suggest some areas where this should be further reflected in the criteria. For example, an important consideration when setting MREL for a particular institution is how that institution would be dealt with under the preferred resolution strategy. In particular it is relevant whether or not the particular institution is a “point of entry” under the resolution strategy. We make some suggestions for additional criteria to reflect this below.

We support the harmonisation of MREL with the Financial Stability Board’s (“**FSB**”) standard for Total Loss Absorbing Capacity (“**TLAC**”) in due course, at least for GSIBs, once the TLAC

---

<sup>1</sup> AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

standard has been finalised. This is necessary to avoid GSIBs having to comply with two different requirements with the same purpose. If necessary this should be done via an amendment to the BRRD. In the meantime, MREL can provide a helpful basis for ensuring credible resolution plans are put in place during the transitional period. The RTS needs to reserve sufficient discretion for resolution authorities so that they can use MREL to implement TLAC, both at group level and for subsidiaries of GSIBs. However, at times the level of prescription in the proposed RTS could compel resolution authorities to set MREL in a manner inconsistent with TLAC. Furthermore, as noted below, the draft RTS actually goes further than the FSB's proposal for Pillar 1 TLAC in a number of respects such as including capital buffers in the loss absorption and recapitalisation amounts.

We are supportive of defining MREL in a manner that puts an end to the TBTF discussion by making banks resolvable without public support. Several elements in the EBA draft RTS support this approach in line with the BRRD level 1 text, whereas other elements would be better addressed once the final TLAC standard has been agreed. The possibility of making MREL compliant with TLAC is already anticipated in the BRRD as it foresees that based on the EBA report under article 45(19) BRRD, the Commission may make a proposal for the necessary adjustments to MREL, taking into account international standards.

This period until ultimate legislative revision of MREL would enable the EBA to conduct further impact analysis. Only based on these findings, together with the finalisation of the TLAC standards, would a more prescriptive harmonised approach across the EU be appropriate. Elements that should be considered in that context include:

- a) the appropriate level of loss absorption for the purposes of MREL – in particular we do not believe that pillar 2 requirements or capital buffers should be required to be included;
- b) the interaction between resolution authorities and competent authorities when setting MREL, in particular the loss absorption amount;
- c) the minimum level of capital an institution is expected to meet once it has undergone resolution; and
- d) if a peer group approach is adopted, defining appropriate peer groups for all kinds of banks and how this should be applied at a consolidated group and individual institution level.

In the meantime there should be sufficient flexibility in the RTS, in particular on the above points. While this could be achieved to a degree through the proposed transitional period, we consider that as these elements would benefit from further impact analysis and consistency with the final TLAC standards, the RTS should be less prescriptive in these areas.

We welcome the EBA's proposal to undertake a more detailed assessment of the potential quantitative impact of MREL on institutions. We see this as a very important and suggest that the study should review the impact on, inter alia: business models (in particular the impact of the leverage ratio); debt markets; risk appetite; investor base; and financial interconnectedness. It should also be taken into account to determine an appropriate transitional period.

## B. Responses to the questions raised in the CP

### Question 1

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

The EBA's proposed approach to setting MREL is predicated upon an assumption that the institution has suffered losses that have eroded all its capital at the point of resolution. We do not believe that this is an accurate assumption or the most appropriate way of assessing the amount of MREL that the institution should hold.

Resolution action is likely to be taken at a point when the group is likely to have some remaining equity value. Accordingly, an assumption that the bank will have zero capital at the point of resolution is very conservative because in practice some capital should remain. While we understand the concern that additional losses may arise at the point of resolution based on experience of past failures, we do not believe that this should be sufficient to justify an assumption that there would be no equity remaining. Additionally, enhanced supervision and regulatory changes since the crisis such as increasingly conservative prudent valuation, asset quality reviews and stress tests should make unrecognised losses less likely. We also expect a greater focus on ensuring that losses are recognised and assets valued appropriately in the recovery and early intervention phases prior to resolution.

We do not agree that capital requirements are "indicators of loss in resolution" but rather indicators of the minimum losses that could be absorbed by the institution both before and in resolution. We note that MREL includes own funds and is not limited to "gone concern" liabilities; rather it is a requirement to ensure that there is a minimum level of capacity for loss absorption and recapitalisation under the preferred resolution strategy. For these reasons we do not believe that a simple doubling of total capital requirements is the correct way to approach this.

We accept that it is not straightforward to assess the level of loss absorption that is appropriate for this purpose and that minimum capital requirements are set at a level deemed appropriate to ensure sufficient loss absorbency. However, we do not agree that total capital requirements including capital buffers and pillar 2 capital requirements equates to the degree of loss absorption that should be required for the purposes of setting MREL. While the primary purpose of minimum capital requirements is to ensure that banks have sufficient capital to absorb losses, the purpose of capital buffers may be less relevant for resolution purposes.

Therefore while it is relevant to consider minimum capital requirements when assessing the amount of loss which the institution should be capable of absorbing, an assessment that a particular institution should hold more capital than the minimum does not mean that the particular institution is likely to suffer greater losses. In our view, the loss absorption amount should therefore be calibrated according to paragraphs 2(a) and 2(e) of article 2 only.

While we understand that undertaking an analysis of historical losses is challenging, we consider that this is necessary in order to inform the level of loss absorbing capacity that should be required. The EBA should conduct analysis of losses suffered by banks in the recent financial crisis, taking into account that pre-Basel III losses should be considered in light of subsequent capital and liquidity requirements, enhanced risk management and supervision, changes to business models and risk-reducing improvements in trading and settlement procedures. For example, a few cases of narrowly focused, undiversified banks such as Anglo-Irish suffered exceptional losses but any bank would certainly face constraints on such business models under post-crisis regulations if it attempted the same strategies today. Alternatively the assessment could be informed by the FSB's historical loss analysis that it is conducting in respect of its TLAC proposal.

In light of the above, subject to confirmation through historical loss analysis, we consider that an assumption that minimum capital requirements, excluding pillar 2 requirements and capital buffers would be a more appropriate and workable assumption.

## **Question 2**

**Should paragraph 5 refer only to the resolution authority increasing the loss absorption amount, rather than adjusting it? Are there specific circumstances under which resolution authorities should allow a smaller need to be able to absorb losses before entry into resolution and in the resolution process than indicated by the capital requirements (for example, due to the use of national discretions in setting capital requirements)?**

As a general principle, the formulation of the resolution authority having the powers to "adjust" rather than only increase the amount of MREL required is appropriate. As established by the BRRD, MREL should be set by the resolution authority taking into account the relevant criteria. The RTS should not therefore constrain the power of the resolution authority to make adjustments to set what it considers is an appropriate MREL for an institution. Exclusively adhering to an increase could also limit incentives for banks to improve resolvability. It could also constrain the ability of resolution authorities to set MREL at a level consistent with the final TLAC standards.

However, we are concerned about the potential source of conflict between supervisors and resolution authorities implied in paragraphs 4 and 5 of article 2. These provisions empower the resolution authority to adjust the loss absorption amount if it considers that the risks, vulnerabilities and need for loss absorption of the corresponding entity are not adequately reflected in the capital requirements set by the supervisor. Thereby, the resolution authority could be seen to question the outcome of the Supervisory Review and Evaluation Process (SREP) and, therefore, the supervisor's assessment. We strongly agree with the EBA that resolution authorities should not act as a "shadow supervisor" and that resolution authorities should not be setting, or commenting on the adequacy of, capital requirements.

The RTS should very clearly establish that the resolution authority is not making an assessment of the adequacy of capital requirements but only the amount of loss absorption that it considers necessary for the sole purpose of setting MREL. Even if based to some degree on capital requirements, the assessment of MREL should be a separate process and analysis. It is our view that the EBA should encourage cooperation between the supervisor and the resolution authority and therefore we propose to delete paragraphs 4 and 5 of article 2.

However, if it is retained, in addition to the factors proposed to be taken into account by the resolution authority in article 2(4) and 2(5), most (if not all) of which are likely to have already been reflected in capital requirements, the resolution authority should, as discussed further below, take account of the preferred resolution strategy for the group.

### Question 3

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

We do not understand the rationale of article 2(6) which links resolvability and the loss absorption amount. If substantive impediments to resolvability are identified, then it is likely to be more relevant to make an adjustment to the recapitalisation amount rather than to the loss absorption amount. We therefore propose that resolvability should be considered as a separate adjustment criteria rather than as part of determining the "loss absorption amount". Once the particular impediment was removed then MREL should accordingly be adjusted back down to take account of this.

For the calibration of the loss absorbency amount, authorities should also take into account the benefits of diversification: an institution that carries on various activities in several countries will be more resilient in case of a crisis in one market or activity.

### Question 4

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

#### **Recapitalisation should be focused on the preferred resolution strategy**

We strongly support the proposal in article 3(1) that the determination of the amount of recapitalisation should be the amount necessary to implement the preferred resolution strategy. It is important to note however that this does not lead to a binary consideration of whether the strategy would be liquidation or resolution; it is just as relevant to consider the nature of the preferred resolution strategy.

The amount of loss absorbing capacity required to implement the preferred resolution strategy should be based upon the outcome of that strategy and the recapitalisation needs for the recapitalised group going forwards. The focus of resolution is to maintain the continuity of critical functions and this might not necessitate the entire group to be maintained as a going concern. For some banks it might be possible to make immediate changes to the business, for example, some non-critical functions and/or business lines could be immediately discontinued or wound down (in run-off) and closed to new business. Where this is the case and the resolution plan reflects this, the bank is likely to require a lower level of recapitalisation to implement the group resolution plan.

While article 3(3) appears to acknowledge this principle, and we are supportive of the proposed conditions in article 3(3)(a) and (b), we suggest that it would be better expressed as a general principle for resolution authorities to consider when setting MREL, elaborating on the principle in article 3(1), as opposed to an exception to the general principle.

We also do not agree that the condition in article 3(3)(c) is necessary or appropriate. As discussed above, where substantive impediments to resolvability are identified, the resolution authority could consider adjusting MREL requirements to deal with them, in accordance with article 17 of the BRRD and the EBA guidelines on the specification of measures to reduce or remove impediments to resolvability. This is a preferable approach, consistent with the BRRD which sets out measures for addressing impediments to resolvability and the EBA's existing guidelines, rather than introducing a new requirement limited to systemic institutions through the level 2 process under paragraphs 2 and 3 of article 7.

In addition to considering the relevant capital ratio denominator, as set out in article 3(3), the nature of the recapitalised institution is also relevant to the determination of whether pillar 2 and capital buffers should be applied to the recapitalised institution. For example, the GSIB capital buffer would only be relevant if the institution in resolution still met the relevant criteria.

The inclusion in the recapitalisation amount of pillar 2 capital requirements and the combined buffer that the supervisor imposed on the bank based on its pre-resolution characteristics may overestimate the required recapitalisation amount. Particular consideration should be given to the minimum requirements applicable to the bank following resolution. For example, to the extent that pre-resolution requirements incorporate the very risk of resolution or the particular risks faced by the bank pre-resolution, they might not be relevant to the bank following resolution. As discussed in our general comments above, this is also an area which should be considered further during the transitional period as inclusion of pillar 2 and capital buffers could imply more demanding standards than those of the TLAC proposal. Therefore the RTS should be less prescriptive in relation to the recapitalisation amount, particularly in relation to pillar 2 and capital buffers and provide greater flexibility for resolution authorities to set what they consider is an appropriate level of recapitalisation.

Additionally, as discussed further below, the principle established in article 3(1) that the recapitalisation amount should be based upon the amount required to implement the preferred resolution strategy also requires that the resolution authority considers the position of the institution within the group and the impact of the preferred group resolution strategy on that particular institution. This factor should be reflected in the RTS.

### **Consideration of the impact of likely pre-resolution actions**

The draft RTS proposes a further layer of conservatism by not taking account of the likely impact of recovery actions which would be taken prior to resolution (such as deleveraging) which could leave the bank smaller at the point of resolution, thereby reducing the amount of resources required for recapitalisation.

### **Assumption of no capital remaining is overly conservative**

As discussed above under our response to question 1, it should also be borne in mind when considering recapitalisation needs that it is highly unlikely that the institution would have no

capital remaining at the point of resolution. Absent the concurrent failure of multiple layers of risk controls, governance and supervision, resolution action is likely to be taken at a point when a group will have some remaining equity value. Accordingly, an assumption that the bank will have zero capital at the point of resolution is very conservative because in practice some capital should remain. This should be reflected in the assessment of the amount of MREL required to recapitalise the institution and the need for the resolution authority to consider this factor should be added to the RTS.

#### **Question 5**

**Is it appropriate to have a single peer group of G-SIIs, or should this be subdivided by the level of the G-SII capital buffer?**

**Should the peer group approach be extended to Other Systemically Important Institutions (O-SIIs), at the option of resolution authorities? If yes, would the appropriate peer group be the group of O-SIIs established in the same jurisdiction?**

**Should the peer group approach be further extended to other types of institution?**

We do not agree that the proposal for GSIIIs to meet the median CET1 capital ratio of a peer group of other GSIIIs established in the EU is an appropriate assessment of the need to sustain sufficient market confidence. It should be noted that market confidence is not only dependent upon the CET1 capital ratio of the institution, but is also dependent upon other factors such as statements by the resolution authority.

The proposed comparator of other GSIIIs is also a blunt approximation and if included it should be assessed by reference to a relevant peer group reflecting the bank post resolution. It is unlikely to be possible to predict ex ante the level of CET1 held by other GSIIIs at the point of resolution when other GSIIIs may be experiencing losses, particularly in a systemic crisis. The proposed peer group of other GSIIIs also does not take account of substantial differences between the business models of GSIIIs. We therefore do not agree with the proposal in article 3(7)(b). Likewise, we do not agree that there should be a peer group for OSIIIs. We propose that a peer group approach would require further analysis and consideration during the transitional period.

If, despite our concerns above, the peer group approach is maintained, we do not understand why it should be limited to GSIIIs when it is important for there to be market confidence in any bank following its recapitalisation regardless of its size. It is also unclear how these requirements would be applied to subsidiary institutions within a globally systemic group. If it is limited to GSIIIs then it is important to stress that it is necessary to consider whether the group would remain a GSII following the resolution and the peer group should be based upon its business post resolution.

Further, if such a distinction is retained, it is also unclear how this requirement would be applied to individual institutions within a group. An individual institution that itself is not a GSII should not be captured just because it is part of a GSII group but considered on an individual basis.

## Question 6

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

We are disappointed that the EBA's proposal is silent on the treatment of MREL within groups. Article 45 of the BRRD requires that institutions comply with MREL at individual and consolidated level and that this requirement will be adapted to the relevant resolution strategy (whether "Multiple Point of Entry" ("MPE") or "Single Point of Entry" ("SPE")). Any capital requirement set at consolidated level should not be included when determining the MREL at individual level. For example, the systemic capital buffer or any Pillar 2 capital surcharge imposed at consolidated level should not be included for subsidiaries.

Further, while articles 2 and 3 might take some account of differences between entities within a banking group, in our view they do not provide sufficient clarity or emphasis on the need for resolution authorities to consider the location of MREL within the group to support the preferred resolution strategy. As discussed above and reflected in article 3(1), the overarching consideration when assessing MREL should be to facilitate the preferred resolution strategy for the group. This should be assessed against the global resolution strategy for groups operating both within the EU and third countries.

As recognised by the FSB in its TLAC proposal, *"a crucial consideration of a resolution strategy's effectiveness is the availability of sufficient amounts of loss-absorbing capacity at the right location(s) within a G-SIB's group structure. In determining the individual requirements for specific firms, authorities have to take into account their preferred resolution strategies and identify the entity or entities within a group to which resolution tools would be applied..."*<sup>2</sup>

This principle is also reflected in recital 80 of the BRRD which states that *"it is imperative that loss-absorbing capacity is located in or accessible to, the legal person within the group in which losses occur ... MREL should be required at the appropriate level in the group in order to reflect a multiple-point-of-entry approach or "single-point-of-entry" approach contained in the resolution plan..."*

Whether or not the relevant institution is a "resolution entity" (as defined in the TLAC proposal) is an important factor when assessing the appropriate MREL requirement. Resolution authorities need to ensure that resolution entities have sufficient MREL to recapitalise the relevant resolution group. However, when setting MREL requirements for institutions that are not resolution entities (which in this response we refer to as "**resolution subsidiaries**"), the focus is the ability to transfer losses and recapitalise the relevant institution, or possibly for the subsidiary to be liquidated where it does not perform critical economic functions.

Any MREL requirements for resolution subsidiaries should therefore be focused on providing a degree of additional comfort to host resolution authorities (in conjunction with resolution planning, information sharing, consultation and cooperation within resolution colleges and Crisis Management Groups) where there are doubts over the effectiveness of the loss transfer mechanism under the group resolution plan and further incentivise their cooperation in a group

---

<sup>2</sup> FSB TLAC proposal, p.7, "Location of TLAC within group structures".

resolution. This concept would be consistent with the FSB proposals and the EBA guidelines on measures to reduce or remove impediments to resolvability<sup>3</sup>.

For example, there should be no need for such MREL in the form of intra-group liabilities between entities located in Member States participating in the Single Resolution Mechanism because the Single Resolution Board is the resolution authority for all such institutions.

Excessive pre-positioning of MREL in resolution subsidiaries could make the group more brittle and disincentivise cooperation through group resolution. High pre-positioning requirements could further reduce the group's efficiency under normal market conditions, potentially increasing costs for consumers, reduce the group's resiliency during stressed conditions by preventing funds from going where they are most needed and hinder the implementation of the group resolution strategy. Alternative mechanisms for achieving the recapitalisation of resolution subsidiaries include a number of intra-group mechanisms including guarantees, credit facilities or other keep-well arrangements, which are not necessarily included in MREL.

A balance must therefore be struck to facilitate cooperation and ensure that group resolution plans are credible without destabilising the group or ring-fencing funds in national jurisdictions. Thus, to the extent that authorities impose MREL requirements on resolution subsidiaries, such requirements should be limited to the minimum amount needed to reinforce host country confidence in the group resolution plan. A balance must also be struck which supports banks' ability to lend to the real economy. As stated in FSB guidance, authorities should take into account "the potential impact of [loss absorbing capacity] requirements on the firms' financing cost and business operations".<sup>4</sup>

When setting any MREL requirements for resolution subsidiaries, other forms of support from a point of entry such as guarantees, credit facilities, legal doctrines of support etc should be taken into account. In particular, to the extent that resolution subsidiaries are self-funding and do not require intra-group funding, support which is not fully paid up should be taken into account when assessing any MREL that might be required. Finally, the degree of critical functions performed by the particular resolution subsidiary should also be taken into consideration.

Currently the RTS is silent on the need to consider these issues. However we consider that while the general principle that MREL should be based on the preferred resolution strategy is reflected in article 3(1), the RTS should make it clearer that when setting the level of MREL, it is important to take account of whether the institution is a resolution entity or a resolution subsidiary under the preferred global resolution strategy, whether MPE or SPE.

Article 3 should be amended to reflect these considerations and to explicitly allow a resolution authority to adjust the recapitalisation amount for a resolution subsidiary to align it to the preferred resolution strategy. In certain circumstances, where a resolution subsidiary is immaterial to a group and immaterial in the local jurisdiction, for example, it could be appropriate for the recapitalisation amount to be set at zero. The RTS should allow for resolution subsidiary MREL to be set at a level below the MREL that would be set for an entity on a standalone basis. This flexibility would also make it clear that MREL for resolution subsidiaries can be set in a manner consistent with internal TLAC requirements.

---

<sup>3</sup> See paragraph 15 of the guidelines.

<sup>4</sup> See FSB, Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Developing Effective Resolution Strategies, 16 July 2013, para 1.1

A distinction could be made between three categories of resolution subsidiary with the MREL requirement for each category calibrated according to the materiality of the subsidiary:

- a) material resolution subsidiaries which would be subject to a standalone MREL that was consistent with the final outcome of the FSB TLAC proposal for material subsidiaries;
- b) non-material resolution subsidiaries which would be subject to a lower MREL requirement than material subsidiaries; and
- c) low materiality resolution subsidiaries which would be subject to liquidation in the event of failure and should not be subject to an MREL requirement which includes a recapitalisation amount.

### Question 7

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

We agree that a *de minimis* derogation could be helpful from a practical perspective to avoid needing to conduct the NCWOL analysis in circumstances where NCWOL issues are unlikely to arise. The proposed threshold of 10% appears conservative and we suggest that further analysis is conducted to inform an appropriate threshold.

### Question 8

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

We do not agree that it is necessary to ensure that systemic (or other) institutions have sufficient MREL to make it possible to access resolution funds for solvency support. As recognised in the draft RTS, the purpose of MREL is to facilitate the preferred resolution strategy which enables a resolution to be conducted without recourse to solvency support from resolution funds. The focus is on ensuring that institutions are resolvable under a credible resolution strategy. It should not be necessary to require institutions to maintain sufficient MREL just in case access to resolution funds is considered necessary provided that they are assessed as resolvable. Such a requirement would go beyond the purpose of MREL as established in the BRRD. It is important to note that in order to meet the conditions to access resolution funds under article 44 of the BRRD, it is not only MREL eligible liabilities but all liabilities that are not excluded from bail-in that can contribute to the required loss absorption.

The concept of a harmonised minimum level of MREL was debated in the level 1 negotiations and agreement was reached that no harmonised minimum level should be introduced in the directive. The need to ensure the availability of access to resolution funds is not referred to in the criteria within the scope of the RTS under article 45(2) BRRD. Therefore we consider that by introducing a minimum MREL through the RTS, the EBA would be exceeding its mandate under the level 2 process.

We therefore suggest that article 7 is removed and that this issue is better dealt with through a general power to increase MREL to deal with specific impediments to resolvability, as

established in the EBA's guidelines on measures to address impediments to resolvability. If however article 7 is retained, the exception currently proposed in article 7(2) should be replaced with an exception where the resolvability assessment process concludes that the institution is resolvable rather than introducing new criteria through the level 2 process.

If, despite this, article 7(2) is retained, we suggest that the following changes should be made:

- a) article 7(2)(a) should refer to “no “substantive” impediments ...” for consistency with article 17 of the BRRD;
- b) article 7(2)(b) should be amended to refer to “no ~~plausible~~ likely circumstances...” because the focus of MREL is on the preferred resolution strategy and not to cover every potential “plausible” situation; and
- c) article 7(2)(c) should be removed or amended to reflect all liabilities that are not excluded from bail-in under article 44(2) BRRD rather than assuming that only liabilities eligible for MREL will absorb losses.

Furthermore, we do not understand why article 7(1) is limited to G-SIIs and O-SIIs when all banks are potentially eligible for the use of resolution funds. Any requirement should apply to all banks.

#### **Question 9**

##### **Is this limit on the transition period appropriate?**

We welcome the introduction of a transitional period during which there could be greater flexibility in setting MREL. However, rather than establish a maximum transitional period and allow resolution authorities to set different transitional periods for different banks, the EBA should establish a harmonised transitional period applicable to all banks to establish a level playing field within the single market. The length of the transitional period should be at least sufficient to cover the period prior to finalisation and implementation of the TLAC proposals and informed by the impact analysis.

#### **Question 10**

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

We have no comments on this question.

#### **Question 11**

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

We agree that there is a need to balance the need to adapt MREL to the circumstances of the particular institution while promoting consistency of the application of criteria for setting MREL across the European Union and we support the EBA in these goals. Subject to the comments raised in this response, we consider that the RTS does strike an appropriate balance.

## Question 12

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

We support the confirmation that the EBA intends to undertake a more detailed assessment of the potential quantitative impact on institutions. The conclusions of this should inform the calibration of the final RTS and consider, in particular:

- a) the impact of including capital buffers, pillar 2 and leverage ratio requirements in the loss absorption and recapitalisation amounts;
- b) if retained, the impact of article 7;
- c) the impact on groups of requirements applied to each institution; and
- d) the length of an appropriate transitional period.

We consider that a comprehensive QIS exercise for MREL is critical. This study should review the impact of MREL on, inter alia: business models (including the impact of the leverage ratio); debt markets; risk appetite; investor base; and financial interconnectedness.