

A. Introduction

Deutsche Börse Group welcomes the opportunity to comment on EBA’s Consultation Paper “Draft Regulatory Technical Standards on criteria for determining the minimum requirement for own funds and eligible liabilities under Directive 2014/59/EU” issued on 28 November 2014.

DBG is operating in the area of financial markets along the complete chain of trading, clearing, settlement and custody for securities, derivatives and other financial instruments and as such mainly active with regulated Financial Market Infrastructure providers.

Among others, Clearstream Banking S.A., Luxembourg, and Clearstream Banking AG, Frankfurt/Main, who act as (I)CSD¹ as well as Eurex Clearing AG as the leading European Central Counterparty (CCP), are also credit institutions and are therefore within the scope of the Banking Recovery and Resolution Directive (Directive 2014/59/EU, BRRD).

The Clearstream subgroup is supervised on a consolidated level as a financial holding group. Regulated entities of DBG are regarded as systemically important Financial Market Infrastructures (FMI) and simultaneously classified systemically important credit institutions by its’ national supervisors.

In this context, it needs to be noted that both CSDs and CCPs are regulated primarily under the rules for financial market infrastructures such as Regulation (EU) No. 648/2012 (EMIR) as well as (in the future) Regulation (EU) No. 909/2014 (CSD-Regulation) which implement the CPSS-IOSCO principles for financial market infrastructures² in the EU. The banking services both kinds of FMIs are offering (as in the case of our group’s entities) are only ancillary to their functions as intermediaries to stabilise the financial markets. Cash positions resulting from its FMI operations dominate the balance sheet and these

¹ (International) Central Securities Depository

² CPSS-IOSCO No 101 – Principles for financial market infrastructures, published in April 2012;

are mainly driven by short-term cash liabilities. These are received cash collaterals (margins), cash contributions to the default funds, other cash deposits out of the CCP business and cash deposits for settlement or custody purposes respectively. All cash liabilities towards clients are in principle short-term. The only mid-term liabilities may be commercial papers issued to improve short to medium-term liquidity. Such commercial papers are in general not long-term.

The balance sheets of our group entities are highly volatile depending on the cash amount placed by clients / clearing members with our group entities whereas the capital requirements due to investments with very low level of credit and market risk are fluctuating only marginally.

Capital requirements for CCPs and CSDs in question are mainly driven by capital charges for operational risk or additional capital charges for business risk or winding down / restructuring (see Article 16 EMIR and commission delegated regulation (EU) No. 152/2013 as well as Article 47 CSD-Regulation). In line with the EMIR and CSD-Regulation rules based on the CPSS-IOSCO principles for financial market infrastructures the potential credit and market risk is very limited and in general even the ancillary “banking” activities of CSDs (but in general by a matter of fact also CCPs) are restricted to short-term business in combination with their business model and based on the respective regulations (e.g. Article 54 CSD-Regulation). CCPs and CSDs are forced to maintain their liquidity position with short-term maturities.

This paper consists of general comments (part B) and responses to the stated questions (part C).

B. General comments

- (1) Although the EBA consultation is only implementing the MREL requirements for banks / credit institutions based on its mandate out of BRRD, we do want to point out that **the application of MREL or any similar concept to FMI like CCPs or CSDs either on their own in the future or due to the fact of offering banking services ancillary to their main activity seems not to be appropriate.** For CCPs the concept does not take into account that the default waterfall already is a mechanism to take care of or better even avoid counterparties failure and the need to cover losses of the CCP (and its clearing members and their clients). To supplement the multiple lines of defence with an additional safeguard like MREL will counteract the whole function of a CCP. This nevertheless does not prohibit the setting of adequate levels of capital for CCPs which currently include via Article 16 EMIR and the related level 2 text already charges to allow for orderly winding down or restructuring. The current capital requirements for Eurex Clearing AG under the EMIR rules (as of 31 December 2014: 225,496,520.28 EUR including own contribution to the default fund and notification threshold) are by far higher than the result of the CRR capital requirements (82,151,757.83 EUR) for the same business. The structure of MREL as proposed by EBA in combination with the rules laid down in Article 45 (1) BRRD does not fit to the CCP business at all. Similar arguments are true for CSDs where cash deposits are held in order to fulfil settlement obligations and to secure settlement finality. For CSDs as well dedicated rules to cover cost of winding down or restructuring in the capital requirements (see Article 47 CSD-Regulation) are by far the better way than the MREL framework in its entirety. Even for settlement institutions under Article 54 (2) lit. b CSD-R, MREL should not be applicable on top of CSD-R requirements. In addition parts of the proposal with regards to securing sufficient eligible liabilities and avoiding adverse effects or

imbalanced financing structures are not adequate for such institutions as the strategies of such institutions are not performed in order to avoid bail-in but their current business models do not foresee or require bail-in able liabilities. **The EBA should consider this aspect in its report back to the EU Commission.**

- (2) **We clearly do not share the magnitude of the proposed capital levels.** We already see the TLAC levels as proposed by FSB on G-SIBs only as by far overshooting. However, in any case they should be the upper limits for any non G-SIB credit institution. In our understanding of the proposed MREL concept of EBA, this may lead to way higher amounts in case of systemically important institutions, including the FMIs of our group, than the TLAC maximum level as proposed by FSB.
- (3) The concept of MREL is to be sufficiently capitalised for business activities, resolution and the maintenance of **systemically important parts** of the business at all times. Consequently the MREL concept doesn't foresee additional MREL requirements for institutions which will be resolved if needed via common insolvency processes. **In order to prevent a situation where overwhelming capital requirements harm the functioning of certain institutions** we propose to **introduce a cap of MREL which is substantially below 200% of minimum capital requirements before resolution tool**, even if it is assessed that total risk exposures and therefore own funds requirements will remain the same after resolution tool has been applied. From our perspective this is justified as institutions have a variety of opportunities to increase their capital base in resolution. In this context especially FMIs with a banking license must be mentioned. Due to their business it is anticipated that total risk exposures after resolution tool is activated will be more or less in the same magnitude as they were before. As a result they would need approximately twice the regular own funds re-

quirements following the proposed MREL treatment related to the total risk exposure amount, although they are per-se highly regulated by specific FMI regimes including strict own funds requirements and a default waterfall. Therefore we urge the EBA to treat FMIs not in the same way as regular credit institutions.

- (4) According to the EBA consultative paper, the MREL proposal tries to implement the FSB proposal for a total loss absorbing capacity (TLAC) in an adequate manner to all credit institutions in the EU thereby **taking proportionality into account**. While we already have some concerns on the concept of TLAC³ especially with regards to its applicability on FMIs, we however see **a single requirement based on current risk positions** (as proposed by FSB) **as being superior to the dual elements proposal of EBA consisting of**
- i. **one element for required loss absorbing capacity based on CURRENT RISK POSITION and**
 - ii. **an additional one for re-capitalisation based on FUTURE RISK POSITION after resolution.**

Already the terminology used (recapitalisation) is suggesting that measures have been taken which may include contributing fresh equity from outside which cannot be held prior to its instalment. We therefore clearly favour a simple but proportionate approach which is closer to the one proposed by FSB on TLAC than the proposed EBA MREL basis.

- (5) The EBA proposal to calculate the MREL requirements in our understanding **lacks clarity** to some extent in a variety of points which lead to the need of educated guessing:

³ See our comment to the FSB proposal as published on the FSB website
(<http://www.financialstabilityboard.org/wp-content/uploads/Deutsche-Börse-Group-on-TLAC.pdf>)

- i. The first open question is related to the point in time, institutions are required to fulfil the MREL requirements: **Before or in resolution**. The wording of the second part of the MREL requirements (re-capitalisation) and some other elements (e.g. the provision to have access to the resolution financing arrangements) indicate that the MREL **only** needs to be fulfilled **in resolution** while the whole **concept of MREL is more targeting to paid-in funds** and as such indicate fulfilment before resolution.
- ii. The second topic relates to the **absolute level of MREL**: The context of Article 8 (1) of the draft RTS is indicating that institutions are required to bear potential losses from loss absorption and recapitalisation (before resolution) and still have the same amount left (in resolution). In this case and ignoring any buffer or pillar 2 adjustments and taking a 100% systemic impact into account the solvency requirements would be c.p. 8% (loss absorption before resolution) + 8% (recapitalisation before resolution) + 8% (loss absorption in resolution) + 8% (recapitalisation in resolution) = **32% of total risk exposures** or (simplified) **12%** (4 times assume 3% target rate) **of total assets taking the leverage ratio limit into account**. This cannot be the targeted approach and we therefore kindly ask to clarify content and sense of Article 8 (1) of the draft RTS.
- iii. Thirdly, the requirement to include the eligibility for support from the resolution financing arrangements in the assessments of the resolution authorities as requested by Article 7 of the draft RTS is creating uncertainty if those requirements are only “taking into account” or will form **another level of floor for the requirements to be kept**. The conditions of Article 44 (5) BRRD to have at least 8% of total assets (which is equal to 8% of total liabilities) or 20% of total risk exposures is once more gearing up the

requirements for low risk but systemic important businesses like the ones of CCPs or CSDs with a banking license. 8% of total assets are **almost CLOSE TO 3 times the discussed levels of the leverage ratio minimum** and as such no realistic basis for MREL. In this context we already see room for improvement to the level 1 text of Article 44 (5) BRRD.

- (6) The consultation paper states a reference level of the **MREL of 10% of the total liabilities** which has been used for the impact assessment. This is **MORE THAN 3 times the level of any given leverage ratio** currently discussed with a level of 3% of total assets (which in principle should be the same as the total liabilities). This shows the magnitude of the proposal of being **well above the TLAC requirements of the FSB** and in line with our critical view on the leverage ratio as such⁴ [see general comments (8) and (10) below] cannot be a realistic basis for the impact assessment. **We clearly oppose to MREL levels of such magnitude.** From our perspective it is of utmost importance to have a MREL regime taking into consideration the specific business model, risk and refinancing structures as well as systemic importance. Otherwise (especially) FMIs with a banking license may be forced to substantially increase their capital, although they already comply with the far reaching requirements of EMIR or CSD-R.
- (7) In line with the FSB proposal on TLAC, we see a proper approach at least for banks being non-FMIs in **deriving the MREL needs from pillar 1 capital requirements** by adding additional requirements depending on the need to maintain systemic important functions and **adding CRD IV capital buffers and any pillar 2 ad-**

⁴ See comments on EBA/CP/2013/41 on leverage ratio disclosure requirements:
https://www.eba.europa.eu/documents/ddm/com.liferay.portlet.dynamicdatalists.model.DDLRecord/549312/view_uploadFiles

justment (in both directions to reflect individual situations) on top of that. This clearly would avoid having capital buffers (which may be under fulfilled for some time in line with the concept of a **buffer not being a minimum requirement**) and pillar 2 add-ons being added twice which we feel not being appropriate. Furthermore, the pillar 2 adjustment could be a specific one for MREL requirements only and as such take into account dedicated costs for recapitalisation and restructuring which may not be properly reflected in a standard approach only. For the sake of clarity, the pillar 1 basis for the MREL should be the **total risk exposure amount** as opposed to **risk weighted assets**. Only the comprehensive look on all risk drivers (mainly credit, market and operational risk but also all other categories of risk captured in the CRR) provides the accurate picture and interlinks CRD IV and BRRD in an appropriate manner. The current text (like the FSB proposal on TLAC as well) is not clear in this regards and we therefore also see the approach to widen the basis as a potential way to reduce the targeted levels.

In this context we note that in the explanation section it is stated that **risk weighted assets** after a resolution tool has been applied is the main driver while the proposed legal text is always referring to the **total risk exposure amount**, which we support. EBA should clarify this in the final documentation towards the EU Commission in order to avoid any possible misunderstanding.

- (8) We clearly **reject making the leverage ratio a second alternative** for the calculation of MREL, especially following a “higher of” approach. Currently there is no leverage ratio requirement at all and if that would come in place, MREL could be adjusted in the future if deemed necessary. However, we already disagree to the introduction of a binding (unique) leverage ratio minimum especially with regards to our dedicated business. A ratio of at least 6% total assets (taking the current discussed value of 3% unique minimum

leverage ratio into account) is by far putting the business model of FMI at risk and consequently is undermining the aim of the G20⁵ and the FSB to install safe and sound financial market infrastructures. Therefore in any case, **MREL should not take the leverage ratio into account.**

- (9) In addition, the **point in time to calculate the amount of MREL as well as the frequency of its calculation is not defined in the draft RTS.** Based on the information given at the EBA public hearing it is assumed that it is done in the course of setting up / reviewing the resolution plans, i.e. in general once a year. Consequently the MREL requirement **is not dynamic as such on an on-going basis.** We clearly ask to specify the timing aspects in the final proposal.
- (10) The dynamics of fulfilling MREL is targeted for at BRRD (level 1) by **linking the (static) MREL requirement amount to current total liabilities.** Especially in the case of FMI with in general volatile total liabilities but by far less volatile total risk exposures this leads to unacceptable fluctuations of the actual MREL requirements. More precisely, **this is introducing a binding leverage ratio of its own kind** with an individualised ratio even if our approach not to base the MREL requirements on the CRD IV leverage ratio as such is followed. Per-se it does not seem to be appropriate **to derive MREL from risk positions** (including market and operational risk) **at inception** and to use **total liabilities as the dynamic measure for on-going compliance.** Recognising that this topic is outside the current EBA mandate to draft this dedicated technical standard, we nevertheless encourage EBA to address our concern within the general mandate of EBA but also in the course of transmitting its final proposal for MREL to the EU Commission, if our critics deemed appropriate and reasonable. In case, FSB is following our concerns

⁵ 2009 G20 Pittsburgh summit

as well, we moreover see the urgent need for the EU to correct the MREL concept in order to be in line with the TLAC concept. **Any capital and loss absorbing capacity measure should be dynamic based on the underlying risk parameters and not based on unrelated parameters.** This once more underlines our fundamental criticism to the concept of any kind of leverage ratio as a primary limit system. Any backstop regime should only be part of pillar 2 and include room for discretion. **As such, the MREL percentage may be fixed in the course of the review of the resolution plan (i.e. once a year) as a percentage of total risk exposure, however its fulfilment needs to be dynamic based on the underlying movement of risk.**

- (11) The business model of FMI is in general risk averse which is a natural consequence of their limited activity and their crucial role for the financial markets. The regulatory framework has taken up this and put harmonised rules around that. This is true both on an EU level (EMIR, CSD-Regulation) as on an International level (CPSS-IOSCO principles). In line with this CCPs and CSDs in the EU (also those with a banking license) are strictly limited in their ability to invest cash (see Article 47 EMIR and Article 46 CSD-R). They are obliged that investments have only very low levels of market and credit risk, and therefore resulting capital requirements in the solvency regime are only minor. However, due to the business activities and market conditions it can not be prevented that cash deposits are placed by clients late in the evening or liquidity is needed on short notice to settle business. For these un-predictable situations already CRD II (Directive 2009/111/EC) introduced a dedicated treatment with regards to the large exposures regime (now Article 390 (6) lit. c CRR). Furthermore, **own funds requirements of FMI are in particular driven by operational risks which do not correlate with the balance sheet volume.** In combination with the

low risk investments and the operational risk being the main driver for capital requirements, **such late fluctuations make it even more inadequate to link MREL requirements for FMIs** to the current amount of total liabilities.

- (12) As EBA cannot change the level 1 text in its proposal for the RTS itself (although should address the topic of not linking MREL to total liabilities on an ongoing basis), **we nevertheless see options in the BRRD itself which EBA could use to propose to EU Commission within the RTS and its mandate to draft those in order to reflect better the dedicated business of FMIs**. In line with Article 45 (6) lit. d BRRD we therefore ask to take the refinancing structure and risk profile into account and to exclude liabilities of a securities settlement system or operators of securities settlement systems in the sense of Directive 98/26/EC towards its participants resulting from their participation in that securities settlement system with a remaining maturity of less than 7 days from the total amount of liabilities in the ongoing MREL requirements⁶. This would mirror consequently Article 44 (2) lit. f BRRD and reflect - limited to liabilities resulting from their infrastructure role - the crucial role of FMIs being – for what so ever a reason – also credit institutions and therefore in scope of BRRD. It is to be noted that this should include any kind of cash collateral which is placed with a notice period of 6 days or less (including immediate call possibility) in case such collateral can be replaced e.g. by securities any time or be withdrawn as the consequence of over-collateralisation or reduced risk. We consider this as being a viable option to execute the EBA mandate as given in the BRRD in a reasonable manner for FMIs [see general comment (13) below on the limited (rather non-existing) option to issue bail-in able liabilities]. Furthermore, the final EBA proposal should clearly reference to the option for the res-

⁶ The amount of these liabilities should also be deducted from total assets with regards to the calculation of the exposure measure of the leverage ratio.

olution authority to adjust the requirements and its ongoing fulfilment further or – in case the EBA does not follow our logic – to implement the measure mentioned above.

- (13) **Credit** institutions with dedicated deposit driven business like many retail banks but also **FMLs may not be in a position to issue bail-in able liabilities** which would moreover also allow for inclusion as eligible liabilities under MREL. This is due to the fact that such deposits are either covered (retail banks) or liabilities out of the participation in a securities settlement system with less than 7 days original remaining maturity or interbank liabilities with most likely less than 7 days but in any case less than 1 year remaining maturity. As these institutions cannot use eligible liabilities when continuing their current business model, this would force them to issue equity. As this equity would reduce funds at the level of the shareholders, we assume that the ability to pay in during a recovery or resolution situation may be harmed and as such, **MREL is** negatively impacting the possibility to recover or resolve and as such **contradicting its own target**. Alternatively, they would be forced to issue long term (bail-in able) debt instruments which is not their current business and which would change the business risk profile, create placement risk and as such would also increase the capital requirements again. Based on this and the limitations of investments in high quality liquid assets with in general short term maturities also being capped to a maximum remaining maturity of two years would lead to maturity transformation of long-term financing into short-term investments. This contradicts proper risk management principles and in general is creating additional profitability risks. As such, **the MREL concept is not business neutral** which once more is already a level 1 issue but should be kept in mind by EBA when generating the final draft and shaping the MREL requirements. We refer in this regards to our proposal as stated at the end of part B.

- (14) With regards to differences in capital requirements on consolidated level and subsidiary level within a banking group / financial holding group it must be ensured that **aggregated MREL requirements on subsidiary level do not exceed MREL requirements on consolidated level** (consolidation effects must be taken into account). These adjustments may be included in the pillar 2 adjustments and broken down to the subsidiaries in an appropriate manner.
- (15) **EBA intends to consider market confidence** when deriving the MREL requirements. This is foreseen in Article 3 (7) lit. b of the draft RTS **by imposing that globally systemically important institutions must match the current CET1 ratio median of their peer group**. Linking a dedicated CET1 ratio requirement on the actual median ratio of a peer group has the **effect** that **constantly several G-SIIs are required to increase their CET1 ratio** which has the complementary effect that the median is increasing as well. As a result the capital requirements of G-SIIs included in the peer group are increasing infinitely. We consider this to be wrong as mandatory minimum requirement. We do not agree that market confidence solely relies on the CET1 ratio but on many different others as well or even instead. The CET1 ratio might vary and not be important at all. **Instead we propose to cover market confidence via pillar 2 adjustments** (taking the peer group’s median as a reference is ok, but other indicators exist as well).
- (16) Another aspect that should be considered is that **several off-balance commitments** in favour of institutions to cover losses or increase capital [e.g. a) agreement on loss compensation, b) guarantees, c) partially paid shares with the obligation to pay-in in full, d) comfort letter, e) additional funding obligation, etc.] **are neither taken into account** in the calculation of the required loss absorption capacity and the remaining recapitalisation amount nor for the fulfilment of these requirements. Contrary in our mind they should

be included in either reducing the MREL requirements for loss absorption (e.g. agreement of loss compensation, guarantees or comfort letter) or increase the MREL holding (e.g. partially paid in shares with the obligation to pay-in in full, additional funding obligation). This should at least be given to the discretion of the relevant authorities. While we clearly see the different quality of already paid-in funds compared to contractually committed obligations, a potential failure to fulfil these obligations should not be taken for granted in advance. In order to cover the potential failure to fulfil the commitment appropriate caps to such commitments may be introduced. In combination with the partially unlimited amount of general commitments caps could be:

- i. Additional funding obligations may only cover a percentage of capital shortage;
- ii. Guarantees with a percentage of the committed amount;
- iii. Percentage of required MREL;
- iv. Percentage of total risk exposure amount.

(17) **Systemically important institutions and systemic risk have** been covered on EU level with **additional buffer requirements** (to be precise: with the possibility to set additional buffer requirements). It needs to be prudent valuated if additional safeguards under MREL should not take these buffers into considerations more as part of the dedicated MREL requirements than as part of the buffers to come on top. In other words – to put it more technical – **if these buffer requirements should** not **be used to reduce the MREL requirements.**

(18) It needs to be noted that not only the capital levels (and eligible liabilities requirements under MREL) for credit institutions are constantly increasing but also the requirements as such. Tightened rules under CRD IV have already been introduced and on the Basel level already the next round of adjustments (most likely to become

the revised Basel IV framework) are on their way:

- a) Modified rules for the standardised approaches for operational and credit risk (both leading based on the draft to substantial higher requirements);
- b) Changed rules for exposures towards central governments and with regards to credit risk mitigation;
- c) Changed rules for the market risk / trading book.

The combination of both (higher capital levels and higher capital requirements) is gearing up the capital needs. Taking the phasing-in approach of the capital buffers into account, banks are heading towards capital shortages which may lead to reduced business and massive impacts on the service abilities.

Taking all these critics into account we feel free to make following proposal:

As basis for the determination of the minimum MREL requirements we propose 8% of the total risk exposures in accordance with the CRR which will be multiplied with two additional coefficients:

α (alpha) in a range of 1 to 2 to cover sufficient risks to avoid resolution and make it feasible in case need be and β in a range of 1 to 1.25 as G-SII mark up⁷.

On top of that capital buffers and Pillar 2 adjustments (both for ongoing solvency purposes but potentially also to reflect specific MREL adjustments **in both directions**) requirements must be added.

⁷ The ranges for α and β are taken from the TLAC proposal of the FSB to require a range of 16% to 20% of total risk exposures for G-SIBs. This in general is in line with our understanding of the EBA MREL proposal. Taking our general criticism of the overarching requirements of MREL into account the range need to be calibrated downwards appropriately.

Two assumptions have to be fulfilled:

- β will be limited to the amount of 1 for non-G-SIIs and
- α will be set to 2 (or any final amount to reflect the minimum TLAC level as set by FSB) for G-SIIs.

α is the coefficient which scales the percentage of risk which needs to be resolved. It is assumed 100% for G-SIIs.

β is the coefficient to scale up additional funding requirements for G-SIIs as a consequence e.g. of their complex structures.

The resulting percentage of minimum MREL is based on total risk exposures and can easily be calculated on every point in time.

α shall also be used for the leverage ratio if this is the capital constraint. Possible pillar 2 adjustments in both directions are used to calibrate the result. However, as we are critical to a (unique) leverage ratio pillar 1 requirement, the usage of leverage ratio as backstop regime for MREL is rejected by us in general.

In addition agreements like loss-absorption contracts, parental guarantees and reserve liabilities as well as bail-in-able liabilities which are not eligible liabilities have to be considered in an appropriate manner calibrating the additional capital requirement. Relevant authorities should be in the position to take such agreements into account (even if relevant authorities would determine a haircut for each one of these).

Any limited commitment should be included in the basis of available eligible liabilities and any un-limited commitments (e.g. loss absorption agreements) should be included as reducing the required MREL (e.g. to calibrate the α and β coefficients). Thus, the MREL could fall below 16% of the total risk exposures for G-SIIs (but not below 8% in no case for any bank).

C. Responses to the questions for consultation

In the following we respond to question 1:

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?

From our perspective the approach to include the leverage ratio in the pool of capital constraints is not appropriate [see general comment (8) in part B]. So far the leverage ratio is no binding ratio and a specific minimum ratio hasn't been defined as well. In recital 95 of the CRR it is already stated that it shall be considered to impose a leverage ratio under consideration of the specific business model in order not to harm low risk business models. In general we reject the concept of the leverage ratio as it is not risk based⁸. Nevertheless if the leverage ratio will be introduced despite the mentioned critics we ask to impose a leverage ratio depending on the business model.

Beside these issues in the legislative process and the associated uncertainty the leverage ratio is a non-risk sensitive capital measure and therefore the need for loss absorption is not influencing this capital requirement. A low risk / low margin business with high volumes has only minor needs for loss absorption but high capital requirements with regards to the leverage ratio. This issue is already addressed and discussed in the calibration process of the leverage ratio, nevertheless the problem should not be doubled via the MREL regime in addition at least not at this point in time.

⁸ We refer to our comments in the EBA consultation on leverage ratio disclosure requirements EBA/CP/2013/41.

Further the leverage ratio has been designed as a backstop only. Having the leverage ratio capital requirements possibly doubled via the MREL regime is clearly undermining the backstop character.

As a consequence we propose to exclude the leverage ratio from the elements of capital requirements to be considered in the assessment of the required loss absorption amount.

In case this approach is not followed at least a dedicated treatment for counter values of liabilities towards participants in securities settlement systems or CCPs should be considered in the sense that they are deducted from the leverage ratio exposure measure for the purpose of the calculation of MREL requirements.

In addition buffer requirements should not be imposed twice and pillar 2 adjustments should be tailored for MREL instead of applying the pillar 2 adjustments from the capital framework.

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 relevant 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)?

Assessing the loss absorption amount is a two-way street. In case there exist valid reasons why credit institutions have lower needs for loss absorption this should be reflected as well. This provides further opportunities to set specific instead of general MREL rulings for credit institutions as foreseen in Article 45 BRRD.

Possible reasons why the required loss absorbing amount could be lower are:

- Agreements which are improving the capital base if there occur losses etc. Possible scenarios would be “loss compensation agreements”, “additional funding obligation” or guarantees. In those cases MREL must be adjusted (as the required loss absorption capacity to be provided by the credit institution itself is decreasing) taking into considera-

tion that in a situation of financial stress third parties would step in. Same is true for obligations for capital injection or guarantees. Of course an obligation or agreement of any kind can not be considered as 100% certain, therefore those tools may only be incorporated to a reasonable extend, to be defined by the resolution authority after appropriate assessment of the feasibility (caps and floor possible).

- In this context resolution authorities should also take into account adjustments with regard to consolidated requirements vs. subsidiary level and balance sheet structures with a low complexity and sufficient resolution processes.
- Specific business models requiring lower levels of capital.
- Etc.

One additional element to be considered is adjustments with regard to market confidence in the sense that other factors lead to a situation that market confidence is given without particular consideration of capital positions (see our response to question 5).

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?

Instead of adding further benchmarks we propose focus on the total risk exposure amount approach [see general comment (7) in part B] as for loss absorption in particular risk and not nominal etc. is most relevant. If in later years the necessity is identified the approach can be adjusted (see also our response to question 5).

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?

See our comments to question 1.

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 relevant 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 reject an approach targeting a certain peer group ratio in order to improve market confidence [see general comment (15) in part B].

From our perspective it doesn't make sense to set the requirement to have at least the median of the CET1 capital ratio of a peer group.

First this is leading to a situation which is boosting capital requirements for G-SIIs due to the fact that “undercapitalised” G-SIIs (compared to the peer group) increase their capital and therefore also increase the median which will lead to a situation in which G-SIIs are constantly required to increase capital.

Second this capital regime shall, if at all, take care about a sufficient capital base including the case when resolution tools have been applied, but not to assess the capital position compared to other G-SIIs.

Per-se the target to maintain market confidence with regard to the CET1 ratio should be achieved by setting respective pillar 2 adjustments as qualitative information must be considered as well.

Further we doubt in general that market confidence is relying on CET1 ratio only!

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?

It is not obvious what differences are reflected in Articles 2 and 3 of the draft RTS with regards to consolidated and subsidiary level. In general we state that if MREL requirements on group level are lower than on subsidiary level those higher requirements on subsidiary level must be adjusted appropriately. Overall, the total consolidated MREL requirement of all single legal entities

should not be higher than the consolidated MREL requirement on group level [see general comment (14) in part B].

Nevertheless as the general approach of MREL is not yet stable it doesn't make sense to discuss consolidated/sub-consolidated effects.

Moreover as we in general reject the two component proposal of EBA [see general comment (4) in part B] the structure of Articles 2 and 3 should be reviewed in its' entirety.

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?

No comment.

8. Do you agree that relevant 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?

From our perspective the whole set-up with regard to the access to resolution financing arrangements is not clear [see general comment (5 (iii)) in part B]. Therefore we argue on circumstantial information. We understand that MREL after loss absorption has been consumed still must be at least 8% of total liabilities or 20% of total risk exposures. Therefore the MREL requirements are at least 8% of total liabilities or 20% of total risk exposures plus the required loss absorption capacity. In our mind this can not be the intention of the EBA to have this specific requirement. Rather resolution authorities should ensure that G-SIIs have access to resolution financing arrangements but not linking them to a specific minimum ratio. Again, if adjustments are deemed necessary it should be taken care of via pillar 2 adjustments.

In addition recapitalisation possibilities including but not limited to contractually committed obligations need to be considered for that purpose. In a going concern the capitalisation efforts of shareholders during resolution can not be quantified per se.

Capital requirements in the mentioned levels are neither necessary nor sound. Further it must be doubted that risk averse, high volume and low margin busi-

ness models (as it is the case for FMIs) are capable to raise equity in the required level. As already mentioned in part B eligible liabilities are not an option for FMIs!

9. Is this limit on the transition period appropriate?

Yes.

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

Yes. The same limit should be applied.

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 relevant authorities?

We think that the proposal contains a good balance between the need to adopt the MREL to the circumstances of individual institutions and promoting consistency. However we do not think that this balance matters most. As such we in general reject the intended bulk of the proposed MREL requirements as they are creating overwhelming capital requirements on banks, especially on banks which have due to their business model only limited amounts or even no eligible liabilities at all [see general comment (8) in part B]. We therefore ask the EBA to consider the approach as outlined at the end of part B of this reply in changing the MREL concept substantially while keeping an appropriate balance between general concept and specific circumstances. In doing so the following items should be covered via an individual treatment:

- Include contractually committed obligations in the MREL basis or deduct them from MREL requirements [depends on technical structure, see general comment (16) in part B];
- Cover market confidence via pillar 2 adjustments instead of the requirement to cover the peer group’s CET1 ratio median;

- Instead of linking the access to resolution financing arrangements to certain capital ratios this should be to the discretion of relevant authorities.

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

We refer to our statements in part B above.

We hope our comments are seen as a useful contribution to the discussion and final issuance on the respective guideline is reflecting our comments made.

Eschborn

25 February 2015

Jürgen Hillen
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Financial Accounting and Controlling