European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken

2012 International Year of Cooperatives

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Brussels, 4 July 2012
VH/ B02/12-119

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EBA/CP/2012/02: Consultation paper on Draft Regulatory Technical Standards on Own Funds (Part 1)

Dear Sir, Madam,

The European Association of Co-operative Banks (EACB) welcomes the opportunity to provide comments to EBA/CP/2012/02: Consultation paper on Draft Regulatory Technical Standards on Own Funds (Part 1).

Please find our general and specific remarks on the following pages.

We remain at your disposal for any further questions or requests for information.

Yours sincerely,

Hervé Guider
General Manager

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Head of Legal Department

KEY MESSAGES

The Members of the EACB acknowledge that uniform standards as regards own funds is desirable to meet the aim to have a single rule book.

A. Limits to the Redemption of Cooperative Shares

Limits to redemption and "materiality levels for redemption" are a key aspect. These limits and levels have to allow sufficient flexibility and be reassuring for the members of co-operative banks. In particular, they have to be high enough so that they do not hamper the proper functioning of the co-operative bank as a variable capital company. The general impression among the members of the EACB is that the suggested limits are too rigid. They are significantly lower than the limits in existing legislation. Especially the suggested rate of the *"lower of"* 3% of CET1 or the excess of CET1 + buffers will be very restrictive even for relatively well capitalized banks, which operate comfortably above minimum capital ratios. **In our opinion, the formula in Article 32(2) should rather allow the choice between the better of the two factors.**

B. Write-up of AT1 instruments

The members of the EACB strongly disapprove the suggested rules on write down and write up of ADT1, as laid down in article 20(3). According to article 20 RTS additional Tier 1 instruments absorb a disproportionately greater share of losses. Following write-down, the terms of investors in Additional Tier 1 instruments will deteriorate compared with those of share investors, since due to article 20(3)(e) RTS the write up is limited to the profit that is proportionate to the nominal AT1 instruments before the write-down. In our opinion, also from a recapitalization perspective, the negative impact of this rule prevail. We therefore propose to amend Article 20(3)(c) RTS to o the effect that any write-up is subject to the constraints arising from points (d) and (f) but not (e).

C. Proportionate consolidation in three level networks instead of deduction (Art 18)

We think that article 18 does not properly reflect the particularities of institutional protection schemes. It therefore requires modifications in many respects.

SPECIFIC REMARKS TO QUESTIONS

TITLE II –
Elements of own funds

Chapter 1-Common Equity Tier 1 capital

- **Article 2: Meaning of foreseeable charge or dividend under Article 24(2)(b) CRR:**

Q01. Are the provisions on the meaning of foreseeable when determining whether any foreseeable charge or dividend has been deducted sufficiently clear? Are there issues which need to be elaborated further? What would be your definition of foreseeable?

Answer Q01:

The aim of the deduction of the foreseeable charges and dividends is to determine that part of the net income that will be retained and function as stable capital in the long run. When foreseeable charges or dividends are estimated based on past experience, the effect of one-time factors should be generally filtered out from the pay-out ratio. It should not be at the discretion of the authorities, who have to to give permission to disregard the exceptional dividends from the calculation.

Moreover, we think that as regards to non-application of dividend policies, intervention of authorities should only occur when there is ***evidence*** that the institution is not sticking to its dividend policy or that it is imprudent. We therefore suggest modifying the wording of Art. 2(4) as regards "in the opinion of the competent authority, it is likely that ……".

Finally, interim-year profits should be given a stronger weight in the context of article 2(4)(a) and (b). Practice has shown that some banks, which are extremely profitable, have semi-annual or even quarterly audited financial statements and take into account their profits for regulatory capital throughout the business year.

- **Article 4: Capital instruments of mutuals, cooperative societies or similar institutions in Common Equity Tier 1 items under Article 25(1)(c) of the CRR**

We disapprove to the wording of Art 4(1)(b), 4(3). These rules could create the impression that co-operative shares are some second rate instruments that are accepted, as an exception, as common equity. Thereby these rules water down the very clear-cut statement in article 27(1) of the CRR.

Moreover, we think that art. 4(1)(b) is superfluous, since it simply duplicates article 27(1)(i).

We think that Art. 4 (2) (a) and (c) may need some linguistic revision and possibly alignment to the wording of article 25(1)(c) in order to avoid misunderstandings.

- Art. 4 (2) a ---(see also Art. 26 (1) h (v) and (vii) CRR)
  "At any time" may not be the right term in this context, since it could be understood as referring to the timing of the payout. Possibly "all the time" would possibly be better, since we think that it would refer to the payment intervals

- Art. 4 (2) c---(see also Art. 26 (1) h (iii) and (iv) CRR)
  The wording may cause misunderstandings. A cap is normally definied as a fixed percentage resp. amount based on a certain nominal value, i.e. a cap is an upper limit for distributions. This does not automatically imply that an institution is obliged or promising to pay distributions within the cap-range. The term "fixed" therefore requires further clarification or replacement. Probably "***pre-determined***" or "***fixed without relation to annual results***" would help to achieve more clarity. The current wording does not establish the link between remuneration and profit, which is essential for the CET1 criteria, to the necessary degree.

- Art. **4(3) RTS :** For the loss absorbing capacity of an instrument the limitation to the nominal value of that instrument in case of redemption is not relevant. What matters is only the event of insolvency or liquidation. Therefore "redemption" is not mentioned in Art 27 (4) CRR. We therefore suggest deleting the word **"redemption"** in Art 4 (3) as well.

- Furthermore, it should be clarified that the principle in Art 4 (3) RTS, according to which entitlement to retained earnings should apply to the same degree to all holders of all Common Equity Tier 1 instruments, does not impact the institution's possibility to issue nonvoting CET 1 instruments apart from cooperative shares, as long as the conditions according to Art 27 (4) a and b of the CRR (in the recent Council proposal) are met. (The alternative for a cooperative issuing cooperative shares and nonvoting CET-1 instruments would be to cancel in its statutes the limitation to the nominal value of cooperative shares also for the event of redemption; this would obviously be counterproductive: Art 27 (2) b CRR requires the ability to limit the redemption of cooperative shares. In this respect, the limitation of the redemption to the nominal value of the instrument is one of the most important and most common features of cooperative shares, because it reduces the incentive for members to call for redemption).

Finally, the reference in article 4(4) to article 23 may cause problems since it is a reference to the features of an AT1 instruments and article 23 describes the relationship between AT1 capital holders and future holders of CET1 and AT1 instruments. As such article 4 (4) may provide for too much leeway and could be applied in a restrictive manner.

- **Article 5: Definition of Market Stress under Article 25(1)(c) of the CRR**

Art. 25(1)(c) is deleted in the Council Common Approach.

- **Article 6: Applicable forms and nature of indirect funding of capital instruments under Article 26(1)(b) and 49(1)(c) of the CRR**

Art 6(1), as well as 6(4) are addressing direct funding, which is not covered by the mandate under article 26 (3) of the CRR.

In order to avoid that article 6(1)(c) will lead to overly burdensome procedures, it should be restricted to cases where there is sufficient evidence for the institution to draw conclusions of that kind.

The reference to paragraph 9 of IAS 24 under (1)(d) seems problematic. As any IAS/IFRS it may be modified sooner or later. Moreover, banks not subject to IAS/IFRS

may find it difficult to make themselves familiar with it. Therefore, it seems preferable to carry over the regulatory substance of paragraph 9 of IAS 24 by means of verbatim quote into the RTS.

Q02. Are the provisions on the applicable forms of indirect funding of capital instruments sufficiently clear? Are there issues which need to be elaborated further?

Answer to Q2:

The term "material" becomes highly relevant in this respect. However, it remains fairly unclear what is considered to be "material". We would like to get more precision to allow robust procedures.

The issue and the examples of indirect funding seem to required some fine-tuning. We agree that the case mentioned under point c) is an indirect funding, which is undesirable, but from the part of the credit institution is very difficult to control. While the goal of financing a person more or less can be monitored, primarily in the corporate sector, it is impossible to ban in the loan agreement that the borrower should not provide funding to anybody for purchasing the capital instruments of the institution. The more external relations the borrower has, the less possible is to detect such a chain of financing. We suggest to clarify this in the text by stating that if the institutions voluntarily creates such a situation or becomes aware that such a situation has emerged, it should deduct the instruments concerned. When the situation was created voluntarily the detraction must be executed without delay, but if the situation has emerged in a way which was out of the control of the institution, the institution should have a transitory period to adjust its regulatory capital

Point d) is even more difficult to control, because in this case the goal of the loan is something else, not the purchase of capital instruments.

The application of Art. 6(1) RTS seems too strict with respect to intra-IPS cash flows. It has to be considered that in such systems central institutions have to provide cash-clearing operations to the affiliated institutions (see also 46(3)(b)(i), 108(7), etc. CRR). Such operations should be treated as other intragroup transactions. IPS should thus also be exempted in a new Art. 6(2)(a) RTS. We would suggest the following wording:

"(a) The investor is not included in the scope of prudential consolidation of the institution or in the scope of the supplementary supervision of the institution in accordance with Directive 2002/87/EC or in the institutional protection scheme according to Art 108(7)"

Q03. How do you assess the provisions on related parties regarding the necessity to assess on an on-going basis that the related party has sufficient revenues?

Answer Q3:

We do not fully understand the rationale of art 6(1)(1)(d)(iii). What should be the purpose of establishing that related parties have sufficient revenues on an ***ongoing basis***? Possibly, it would be sufficient to dispose more generally on sufficient funds to support the payments.

The rule leaves too much discretion regarding the concept of "on an on-going basis". Normal loan-process should be applied, so sufficient revenues should be assessed at time of lending and only material loans should be assessed on on-going basis.

Since in point d) the funding is provided not for the purchase of capital instruments, but for other goals, normal lending standards applicable to the persons mentioned in the point should be used. If the client qualifies for retail treatment, sufficient revenues are assessed at time of the loan decision and when the client's payments get delayed. Only material corporate or non-retail loans should be monitored on an on-going basis, but at least with a yearly frequency. Sufficient revenues of the client should be understood as without the income earned from the credit institution concerned.

We very much appreciate the rule article 6(4), which is very important for co-operative banks and will help to avoid and inappropriate administrative burden. However, we consider it problematic to insist on an "obligation to subscribe capital instruments" of the co-operative. In many banks there is no formal statutory obligation but rather a strong expectation, which is also communicated to the member. We therefore suggest rather referring to an "obligation ***or tradition*** to subscribe capital instruments"

In other cases the amount of cooperative shares to be subscribed may depend on the amount of the loan. Thus, members may have to subscribe more capital instruments to get the loans, while for achieving membership (only) the subscription of one Cooperative share would be sufficient. We would therefore suggest the following wording in Art 6 (4) c:

> "(c) the subscription of at least one of the institution's capital instruments is necessary in order for the beneficiary of the loan to become a member of the mutual, cooperative society or similar institution. "

- **Article 7 Distributable items under Articles 26(1)(h)(ii) [and 49(1)(l)(i) of the CRR]**

We have doubts that it is appropriate (or possible) to determine "distributable items" on the basis of the individual accounts and not on the basis of consolidated accounts. In fact, this may not be possible in some cases (see e.g. article 9 CRR). Moreover, we do not think that individual accounts do not always provide the desired results.

- **Article 8: Limitations on redemption of own funds instruments issued by mutuals, cooperative societies and similar institutions under Article 27(2)(b) of the CRR [and Article 73(2) of the CRR]**

Q04. Are the provisions on the limitations on redemption of own funds instruments sufficiently clear? Are there issues which need to be elaborated further?

Where redemption is currently regulated by law, any such legislation will have to be changed to allow compliance with the CRR and this standard. Until that happens, the bodies of the institution will not be able to execute any limitation of redemption, namely deferral and/or payment. The standard should possibly consider to vest authorities with such powers, so that the aim can be achieved.

Q05. How would you assess the impact of documenting decisions on redemptions?

We were quite surprised to understand during the Hearing on June 14th, that some rules under article 8, especially para. 5 and possibly others should not only apply to institutions referred to under article 27(2)(b) CRR, as article 27(6) CRR suggests, but also to institutions referred to in article 27(2)(a). We fear that the current wording of article 8 could be a source of confusion in this respect. We therefore suggest to clarify to whom which obligations apply.

Moreover, any documentation required under article 8(5) should be limited to the necessary.

Decisions on the limitation of redemption should be documented in all cases, however this obligation should follow the general governance of the co-operative and its bodies. The information delivered should not go beyond what it is necessary for the supervisory authority to assess that the relevant governance rules of the bank and its rules and conditions for redemption were respected, so that any such decision cannot be challenged.

Q06. How would you assess the cost impact of including in the provisions of the instruments criteria as listed in paragraphs 2 and 3? *(please note that the CRR requires in point (b) of Article 27 (2) that where the refusal by the institution of the redemption of instruments is prohibited under applicable national law, the provisions governing the instruments shall give the institution the ability to limit their redemption).*

The change in the statute of the co-operative bank must be accepted by the general meeting of the members and with regard to redemption it is not sure that such a change could be accepted by each small co-operative bank, if there is no regulatory constraint. Moreover, if the deferral or temporary ban on redemption by the institution would be only reflected in the statute of the co-operative banks, there could be relevant one-time costs for the institution of convincing the members of the co-operative bank to accept such a change. Furthermore, it could have an impact on ensuring a level playing-field.

Section 3: Deductions from Common Equity Tier 1 item

Q07. Are the provisions on the deductions related to losses for the current financial year, deferred tax assets, defined pension fund assets and foreseeable tax charges sufficiently clear? Are there issues, which need to be elaborated further?

- **Article 12: Deductions of deferred tax assets that rely on future profitability under Article 33(1)(c) of the CRR**

We have doubts about the terminology used: associated deferred tax liabilities = (total) deferred tax liabilities -/- associated deferred tax liabilities from intangibles and def benefit pension funds. Should this not be total associated deferred tax liabilities?

- **Article 13: Deduction of defined benefit pension fund assets under Article 33(1)(e) of the CRR [and Article 38(1)(b) of the CRR]**

- **Article 14: Deductions of foreseeable tax charges under Article 33(1)(l) of the CRR**

Art. 14(2) is presuming the presumption that IFRS provide for the full recognition of current and deferred tax effects related to transactions and other events. We think that this rule should also be applied to national accounting standard complying with directive 86/635/EC.

With respect to Art. 14(3) we are strongly pleading not to implement any administrative procedures in view of a consent of the competent authority or similar. This should be left to the ongoing supervision process.

Moreover, we suggest clarifying the notion of an "equivalent approach" in article 14(4).

Section 4: Other deductions for Common Equity Tier 1, additional Tier 1 and Tier 2 items

Q08. Are the provisions on the types of capital instruments of financial institutions, third country insurance and reinsurance undertakings, and undertakings excluded from the scope of Directive 2009/138/EC in accordance with Article 4 of that Directive that shall be deducted from the following elements of own funds sufficiently clear? Are there issues which need to be elaborated further?

Answer Q08:

For the time being there is no list provided by EBA on the prudential regimes of third countries, which are considered equivalent to that applied in the Union. Art.15(3)(a) RTS in combination with Art.15 (4) RTS might therefore create fundamental disincentives to invest in AT1 and T2 instruments issued by 3rd country institutions, as well as in any own funds or subordinated instruments issued by financial institutions not included in prudential consolidation and not subject to the CRR (e.g. minority interest in leasing companies) as these will be deducted from CET1 only, thereby neglecting the corresponding deduction approach.

Q09. How would you assess the impact of operating a deduction from Common Equity Tier 1 items? *(linked to immediate previous question)*

What is meant by 'operating'?

Answer Q09:
We have doubts that it is appropriate to link the non-deduction of capital instruments to the bank proving the prudential requirements in a third country are equivalent to those in the EU. By today, there is no list of countries that could reasonably be considered "equivalent" in this respect. This rule can create serious disincentives for investment outside EU

- **Article 15: Other deductions for capital instruments of financial institutions under Article 33(2)(b) of the CRR**

- **Article 16: Capital instruments of third country insurance and reinsurance undertakings under Article 33(2)(b) of the CRR**

- **Article 17: Capital instruments of undertakings excluded from the scope of Directive 2009/138/EC under Article 33(2)(b) of the CRR**

- **Article 18: Exemption from, and alternatives to, deduction where consolidation is applied under Article 46(3)(b) of the CRR**

Q10. Are the provisions related to the requirements for cooperative networks sufficiently clear?

Answer to Q10:

- We do not think that Art. 18(a) complies with article 46(5) of the CRR. Art.46(3)(b)(v) CRR only requires a consolidated balance sheet and not consolidated accounts as in Art.18(a) RTS. That CRR provision furthermore refers to Art.108(7)e CRR which even allows aggregated accounts as long as multiple gearing is avoided. Art.18(a) does not consider the difference in substance and treatment between an IPS acc. to Art.46(3)(b) and 108(7) CRR and a consolidating group according to article 108(6).
- We do not think that "concerning the IPS as a whole" in Art.108(7)(e) CRR justifies to include entities which themselves are not members of an IPS as they do not profit from the privileges granted in Art.46(3)(b) and Art.108 (7) CRR . The wording of Art.18(b) RTS "*as well as their subsidiaries and their holdings in relevant entities. To determine if a relevant entity meets the definition of a subsidiary, the holdings of all the members and their own subsidiaries shall be considered together.*" therefore requires modifications.
- The wording of Art. 18(f) RTS seems to provide only for the deduction method in case of overlapping IPS. Avoiding deduction is what the whole Art 46 (3) CRR is all about. So without clarification, we are afraid, that the wording of subpara (f) would miss the central purpose of Art 46 (3) CRR. As long as multiple gearing is avoided acc. to Art. 108(7)(g) CRR there is no legal basis to exclude proportionate consolidation. To avoid multiple gearing of own funds in a three level network with more than one IPS, it is sufficient to have a full consolidation for two levels and a proportionate consolidation of the holding for the third level. This is a special case of proportionate consolidation that should not be subject to the limits of Art 16 CRR. We therefore suggest to explicitly allow proportionate consolidation or aggregation in subpara (f):
- "(f) for the purpose of point (b), all capital instruments held by entities which are part of the consolidated report referred to in point (a), in other relevant entities which are not part of the consolidated report, shall be deducted from the consolidated own funds in accordance with Articles 33, 53 and 63 of the CRR. <u>Where institutional protection schemes interact according to Article 46(3) point (b) and (c) CRR competent authorities may on a case-by-case basis allow that holdings in relevant entities which participate in another institutional protection scheme can be consolidated by proportional consolidation"</u>
- The wording of Art.18(g) RTS seems to go too far. As long as multiple gearing is avoided according to Art.108(7)(g) CRR there is no legal basis for a consolidation of different IPS within the same cooperative network. See comments on consolidations methods in Art.18(a) RTS. We suggest to delete subparagraph (g)

Chapter 2: Additional Tier 1 capital

Section 1: Form and nature of incentives to redeem

Q. 11 Would you agree on the types of incentives to redeem as described in paragraph 2 of article 19? Should other types of situations be considered as incentives to redeem?

Answer Q11:

We have doubts regarding the appropriateness of art. 19(2)(e) RTS. The remarketing option does not lead to a redemption. No capital will be reduced. With regard to the aim to ensure that instruments are "perpetual", we do not understand the exclusion of this type of clause.

The phrase "in a way which suggests" in Art. 19(2)(f) RTS leaves ample space for interpretation and would require time-consuming consultation with the local regulator before issuing AT1 instruments. This again is not in the interest of local regulators as it would make them liable to any damages arising from undue time delays or leakages. We suggest deleting subparagraph (f).

- **Article 19: Form and nature of incentives to redeem under Article 49(1)(g) of the CRR [and Article 60(h) of the CRR**

Section 2: Conversion or write-down of the principal amount

Q12. Are the provisions on the procedures and timing surrounding a trigger event and the nature of the write-down sufficiently clear? Are there issues which need to be elaborated further?

According to Article 51(1)(aa) (see also 51(1)(a) of the Council general approach, it is possible to specify trigger events ***in addition*** to the event referred to the level of 5,125% in article 51(1)(a).

We could imagine, according to that rule, a credit institution issuing AT1 instruments with an additional write-down trigger event of, e.g. 8%. In addition, the institution may lay down provisions in the prospectus (differing from the requirements of Article 20(3) of the RTS) containing more lenient write-up conditions than those described in Article 20(3) RTS. We would understand that such an instrument may not have to meet all the requirements of Article 20 will until Common Equity Tier 1 meets the trigger specified in Article 51(1)(a)(i), i.e. 5,125%

We would ask to provide clarification regarding such interpretation.

EBA recommended that relevant banks need a core tier1 ratio, i.e. of 9% to remain viable in times of crisis. Furthermore, it was suggested that state aid might be necessary as an instrument of last resort to achieve this goal. Under this aspect all trigger events an amount of 9% become meaningless. There will thus be significantly different capital levels between banks. The standard should, as much as possible, provide for guidance in this respect.

At present, there is no general practice in Member States for the temporary write-down and write-up of instruments. For most co-operative banks the conversion into co-operative shares would be legally difficult and conflict with governance. Therefore the temporary write-down and write-up may be the applicable solution to comply with the requirement. For this reason the write-down and write-up technique must be clear and viable to all institutions. Probably the text should be further clarified and both the accounting treatment under the accounting directives and the IFRS should be clarified.

Q13. How would you assess the impact of the provisions to be applied to temporary write-downs and write-ups?

The members of the EACB are seriously concerned that the rules on a temporary write-downs and write-ups will have very negative impact and significantly increase the cost of AT1 instruments. As co-operatives and mutuals they see themselves even more impacted than other banks (see question 12).

According to article 20 RTS additional Tier 1 instruments absorb a disproportionately greater share of losses. We do not find that the suggested distribution is consistent with the requirement that Common Equity Tier 1 must absorb the first and proportionately greatest share of losses. However, we do recognise that the institution will be less loss-absorbent if it writes down the instruments proportionately rather than converting them upon a trigger event, as it will cause the Common Equity Tier 1 capital ratio to drop below the minimum level of 4.5% sooner.

We would like to recall that EBA's findings and rules should not call into question or change any principles and provisions of the CRR.

Following a write-down, the terms of investors in Additional Tier 1 instruments will deteriorate compared with those of share investors, since due to article 20(3)(e) RTS the write up is limited to the profit that is proportionate to the nominal AT1 instruments before the write-down. Thus, shareholders *may* receive dividend, while investors in Additional Tier 1 instruments do not receive any payment. And even if no dividend is paid to shareholders, they would be better off than investors in ADT1 as profit would be accumulated in the firm instead. While we understand that the underlying idea is to create incentives for the recapitalisation of the bank, we do not think that this aim will be fully achieved by such a binding rule.

- As it stands, the rule primarily favours existing shareholders, not recapitalisation. A write-down will have an immediate stabilizing effect on share prices. There is even a danger that a binding rule would create undesirable incentives to shareholders to draw profit from this.
- On the other hand, the public perception that a bank has recovered will certainly also depend on its AT1 written up again. Access to capital markets will be more easy when all capital is written up again. There may be many situations when shareholders might have a strong interest to "come back to normalcy" as soon as possible.
- Any write-up of Additional Tier 1 instruments will be very slow, particularly if capital has been contributed – both during crisis management and after. Compared with share capital or converted Additional Tier 1 instruments, it will take a long time before the investment is re-established.
- The rule gives priority to paying out dividends, i.e. the outflow of capital, to a write-up that keeps capital in the institutions
- The approach implies a tightening of the EU rules compared to Basel III. Thus, non-EU institutions may issue instruments with dividend stoppers, while EU institutions may not (art. 50 (b) in CRR Council general agreement and ECON report). This creates an unlevel playing field, which will disadvantage investors in Additional Tier 1 instruments in particular.

We therefore propose to amend Article 20(3)(c) RTS. This could be done to the effect that any write-up is subject to the constraints arising from points (d) and (f) but not (e), which would allow issuers unlimited write-up, but subject to compliance with buffer requirements, acceptance from local supervisors and proportionately between the Tier 1 instruments that have been written down. This would allow issuers to write up instruments faster than under the EBA proposal. The proposal may cause uncertainty as to whether issuers may introduce a lenient write-up approach that could prevent recapitalisation. In that respect, it should be noted that it is up to the shareholders, as owners, to ultimately recommend a write-up. Consequently, the proposals do not prevent recapitalisation.

- **Article 20: Nature of the write-down of the principal amount under Article 49(1)(n) of the CRR**

The terminology applied under art. 20(1)(b) does not seem to be correct, since a write-down cannot result in another financial instrument, but only in reserves or retained

earnings. Otherwise, it would be a "conversion". For example, the write-down of Cooperative Ledencertificaten (member certificates) results in an increase in 'Other reserves'.

- **Annex: Write up**

The Annex seems to require further clarification and references in order to make the calculation easy to understand.

- **Article 21 : Procedures and timing for determining that a trigger event has occurred under Article 49(1)(n) of the CRR**

It will be important to consider which elements lead to a trigger event and to what extent this trigger event can be neutralized immediately by measures already on the way and hence not requiring a write-down. Institutions should liaise with the competent authority whether such write-down has to occur. The reason is that in such a situation already intended measures would cure the situation and a write-down could actually have a negative effect on the institution.

- **Article 22: Procedures and timing for notifying the competent authority and the holders of the instrument under Article 49(1)(n) of the CRR**

The exact amount of the write-down may be an issue to sort out between supervisors and banks. We would therefore plead to wait for the determination of the amount to be written down acc. to Art.21(c) RTS before the holders of the instruments are informed. Any other procedure would mean to inform the holder about the fact that a trigger event has happened, but being unable to tell him how much is written down and to what degree he may be concerned.

<u>Section 3: Features of instruments that could hinder recapitalisation</u>

- **Article 23:Features of instruments that could hinder recapitalisation under Article 49(1)(o) of the CRR**

<u>Section 4: Use of special purposes entities for indirect issuance of own funds instruments</u>

- **Article 24: Use of special purposes entities for indirect issuance of own funds instruments under Article 49(1)(p) of the CRR**

Chapter 3: General requirements

Section 1: Indirect holdings arising from index holdings

Q14. Are the provisions on indirect holdings arising from index holdings sufficiently clear? Are there issues which need to be elaborated further?

Q15. How would you assess the meaning of operationnally burdensome and which circumstances would be considered as operationnally burdensome?

Answer to Q15

Some investment trusts do currently calculate a quarterly average risk weight on their funds based on a look through approach. This method can simply be used for the RWA calculation of funds within the RWA-amounts of banks; in future potential calculations the relevant positions within the fund of e.g. bank-shares will be weighted with a risk weight of for example 1.250% and the result will be recognised in the calculated average.

This approach is likely to overestimate the inherent risk, but would simplify workflows within the calculation.

We do not consent with the definition of "operational burdensome" in Art. 26 RTS as „low materiality" is not defined. In order to reduce operational burdens we propose to exempt index holdings from the look through approach that do not breach the large exposure limits.

Q16. How would you assess the cost of conducting look-through approaches vs structure-based approaches for the treatment of indirect holdings arising from index holdings?

The use of the look-through approach is not a general market practice in all Member States and the method is burdensome for small institutions. As the structure-based approach is a conservative estimate, we think that the choice should be left to the institutions whether they use the look-through approach or the structure-based approach for estimating the effect of indirect holdings on own funds. This choice should be solely left to the institution and without any conditions linked to its application

- **Article 25: Indirect holdings arising from index holdings- extent of conservatism required in estimates for calculating exposures used as an alternative to the underlying exposures under Article 71(1) of the CRR**

- **Article 26: Indirect holdings arising from index holdings- Meaning of operationally burdensome under Article 71(2) of the CRR**

We think the list should be extended to cases, where the share of the relevant entities is small in the index. E.g. if the share of relevant entities in the reference index is less than 5% or total exposure of index holdings is less than 2% of total own funds in our approach it should be exempt from the calculation as indirect holding.

Section 2: Supervisory consent for reducing own funds

Q17. How would you assess the levels of the thresholds for market making purposes (identical for hybrid instruments to the ones provided by CEBS/EBA guidelines on hybrid instruments published in December 2009) for competent authorities to give a prior consent (Article 29)?

The reference to the excess amount in Art. 29(3)(a) RTS does not make much sense in the given context. We believe that it rather should refer to the level of 5% as given in the current legislation for market making (Art.19-24a of Directive 77/91/EWG which was reinforced by 2006/68/EG). Therefore we would plead to delete this reference.

For the sake of legal clarity the thresholds should not be in the discretion of supervisors, who may lower it. Therefore we plead for the deletion of Art. 29(4) RTS.

The provision of information on ESOP (Employee Stop Option Program) and MSOP (Management Stock Option Program) to the supervisory authority seems to be burdensome in terms of administration. We do not see any additional use for Art. 29(5) RTS anyway. Therefore the whole paragraph should be skipped.

Q18. How would you assess the impact of the proposed timing of 3 months for the submission of the application (Article 31)?

Answer Q18

During such a long time span it is virtually impossible to foresee market movements, so that it will effectively jeopardize transactions which in fact improve CET1 ratios and which are encouraged by EBA within the 9% exercise. Such transactions should rather be effected within 4 weeks

Moreover, three months seem to be rather a long period, during which it may be difficult to keep secrets.

Q19. How would you assess the levels of the thresholds for the non-materiality of the amounts to be redeemed for mutuals, cooperative societies or similar institutions (Article 32)?

- **Article 27: Meaning of sustainable for the income capacity of the institution under Article 73(1)(a) of the CRR**

- **Article 28: Process and data requirements for an application by an institution to carry out redemptions, reductions and repurchases - under Article 72(b) of the CRR**

The consequences stipulated by art. 28 (2) seem to be too far-reaching. As long as the capital is in the bank it is available to absorb losses. The factual situation should prevail.

The requirement to delay the announce of an expected redemption, reduction or repurchase of own funds instruments before approval (Art.28 (1) RTS) may contradict requirements of the Market Abuse Directive (MAD). This should be checked carefully.

- **Article 29: Submission of application by the institution to carry out redemptions, reductions and repurchases under Article 72(b) of the CRR**

- **Article 30: Content of the application to be submitted by the institution under Article 72(b) of the CRR**

As a general rule institutions should provide authorities with all potentially relevant information regarding an action listed in Article 72 CRR. However, the volume of that information should be proportionate to the relevance of such an action in the overall capital context. A 3 year capital plan might be disproportionate in many cases.

- **Article 31: Timing of the application to be submitted by the institution and processing of the application by the competent authority [Article 72(b) of the CRR]**

- **Article 32: Applications for redemptions, reductions and repurchases by mutuals, cooperative societies or similar institutions under Article 72(b) of the CRR**

Preliminary Considerations

For co-operative banks any limits on the redemption of shares are a highly sensitive issue. From the evidence collected among member organizations we can draw the conclusion that for the time being a limit of 3% of CET1 would not create serious problems. However, future developments have to be considered as well:

- In the first place the required increase of the CET1 ratio + buffers.
- Moreover, the past years were marked by a steady growth of capital in co-operative banking organizations. For some of our member organizations the last years count among the most successful ones in their history. This trend will not last forever.
- Combined with an unfavorable economic environment, in which the acquisition will be more difficult, members may increasingly demand redemption and the limits will become more relevant.

Relevant aspects

- Limits to redemption and "materiality levels for redemption" have to be high enough so that they do not hamper the proper functioning of the co-operative bank as a variable capital company. It has to be seen that the issue and redemption of shares is the equivalent of the trading of shares of joint stock companies on financial markets.

- Moreover, it has to be taken into consideration that members may take a too restrictive approach to redemption very negative and rather trigger an increase of requests for redemption, while at the same time create disincentives for any new members to become a member of buy more shares. Thus, a too rigid handling of limits would possibly protect the capital base at short term, but on the medium term already have destabilizing effects.
- Excessively strict regulation would hamper the subscription of cooperative shares at a time when the regulators ask for an increase in the capital of banks.
- It would endanger the very principles of cooperative banks by increasing the lack of liquidity of members' shares.

The Limits suggested under Art. 32(2) RTS

First of all, the materiality level requires further clarification. One of its elements is a level of 3% Common Equity Tier 1 instruments. It is not clear whether this percentage is referring to the CET1 level as in article 88(1), or whether it includes also the CET1 instruments to be held according to article 122 of the CRD.

Nevertheless, the general impression among the members of the EACB is that the limits are too rigid.

- They are significantly lower than the limits in existing legislation like in France, where the figure is currently the higher of 4% of own funds or 10% of the excess of own funds.
- The suggested rate of the lower of 3% of CET1 or the excess of CET1 + buffers will be very restrictive even for relatively well capitalized banks, which operate comfortably above minimum capital ratios (see also the model calculations in Annex I.
- Anyway, cooperative banks have to abide by the solvency regulation and respect the CET 1 ratio. So they monitor their capital and net issues of shares. Supervisors monitor cooperative banks, their solvency ratios and the evolution of their capital. They should be able to see large and unexpected movements of shares independently of thresholds. The purpose of the limitation should not be to be painful but to avoid large and unexpected changes in capital.
- Since article 32(1), 30 require to present complete applications already three months before a redemption, a too low level would lead banks to introducing requests by precaution very early, possibly even with no regard to the levels under article 32. Thus, a too low level would also under procedural aspects not provide efficiency.
- The limit does not allow to consider special situations (i.e. restructuring, etc.)
- These limits would be dangerous in years without growth.

In our opinion, the formula in Article 32(2) should rather allow the choice between the better of the two factors.

- In addition to what was mentioned before, thjs rule would be much more easy to handle for smaller co-operative banks, for whom the administration of a variable ratio (10% of excess of OF) would be more difficult to administer and thus create an additional administrative burden.

Consolidated Level

Banks have to fulfill consolidated capital requirements anyway. Both for banks and supervisors limits to redemption are much more relevant at solo level, not at consolidated level. We therefore think that in groups calculation at solo level should prevail. This is different, however, for article 3 (future article 9) groups, were there are no more solvency ratios to respect at solo level.

The calculation basis- reference to Article 122 CRD

The members of the EACB think that the calculation base of the excess capital should not include any of the different buffers in order not to bring about volatility for capital, which should rather remain stable. Moreover, since some of these buffers are institution-specific, their calculation is a rather complex matter and would make the calculation of the excess of capital a rather burdensome matter. For smaller banks this may be rather difficult, too. We also do not see that the countercyclical buffer and the limits to redemption of shares should be aligned.

Information to be submitted (Article 32(1) RTS)

Further clarification is required regarding "*application and information to be submitted with the same frequency as that by the competent body of the institution*". In some groups there are payouts throughout the year, which makes it difficult to deliver the relevant information in short intervals. We therefore think that in the case of article 32(2) documentation should only be provided at the end of the year. When banks see that danger that the article 32(2) is reached before the end of the year, they will contact authorities anyway in order to get an authorization according to article 32(1) and will provide all relevant information.

Section 3 : Temporary waiver from deduction from own funds

Q20: The EBA is considering setting a time limit that the temporary waiver from deduction from own funds shall not exceed. This time limit would be set up at a maximum of 5 years and a lower time limit could also be considered. Which time limit, within a maximum of 5 years, would you find appropriate?

Answer Q20:

There should be no limitation for the application of the waiver from deduction of own funds amounting to 5 years. In most cases 5 years are not enough time to reorganise, restructure, integrate or to wind-up a medium sized or large bank.

TITLE III-
Minority interest and Additional Tier 1 and Tier 2 instruments issued by subsidiaries

- **Article 34: The meaning of minimal and insignificant regarding qualifying Additional Tier 1 and Tier 2 capital issued by a special purpose entity under Article 78(1) of the CRR**

Q21. Would you assess the limit on the amount of assets set at 0.5% of the average total assets of the special purpose entity over the last three years as appropriate?

Q22. How would you assess the impact of setting the limit at 0%, meaning keep only the possibility offered by paragraph (a)?

Answer Q21 and Q22

The limit on the amount of other assets of an SPE set at 0.5% (or lower) of the average total assets of the SPE over the last 3 years seems too low. In general "other assets" of SPEs will only consist of assets that are necessary for operational business purposes or which are necessary to run the business. Especially smaller SPE structures might have difficulties staying within the limit of 0.5% for those assets.

Setting the limit at 0% does not make sense to us as cost for running the SPV (auditors, lawyers, directors) should be borne by the SPV. The SPV will thus need a certain amount of extra cash not dedicated to redemption or coupon payments.

TITLE VI - Specification of the transitional provisions of the CRR in relation to Own Funds

Chapter 1 Own funds requirements, unrealised gains and losses measured at fair value and deductions

- **Article 37 Additional filters and deductions under Article 461(1) of the CRR**

With regards to the filters on the sovereigns, EACB members suggest that the calendar for implementation should be the same as for the unrealized gains and unrealized losses.

Chapter 2
Grandfathering of capital instruments for elements not constituting State Aid

- **Article 38: Items excluded from grandfathering in Common Equity Tier 1 or Additional Tier 1 items in other elements of own funds under Article 465(1) and (2)**

Annex I

The formula "exceeds 3% of CET1 **or** 10 % of excess of CET1", which means the minimum of the two, does not seem coherent. Indeed 10 % of excess of CET 1 may be very low.
Example: Minimum CET1 = 7 RWA = 100

Own funds CET1	3 %	Alert	10 % excess	Alert	Threshold Ratio CET 1	Years to minimum CET1
8	0,24	7,76	0,1	7,9	7,9 %	10
10	0,3	9,7	0,3	9,7	9,7 %	10
15	0,45	14,55	0,8	14,2	14,55 %	18

This example shows that the formula is excessively sensitive. Highly capitalized banks may require the authorization of the supervisors, whereas they are obviously well capitalized. Banks just above the minimum should require the authorization of the supervisor even for a very limited decrease (1 %).

With these thresholds it would mean that the minimum of 7 would be reached in ten to eighteen year of supervision.

Cooperative banks are usually well capitalized. Therefore a threshold based on the lower indicator would penalize them.
The French rule (higher of the two, 4 % and 10 % excess) has different impacts:

Own funds CET1	4 %	Alert	10 % excess	Alert	Threshold Ratio CET 1	Years to minimum CET1
8	0,32	7,68	0,1	7,9	7,68 %	3
10	0,4	9,6	0,3	9,7	9,6 %	7,5
15	0,6	14,4	0,8	14,2	14,2 %	10

- For low capitalized banks the threshold is determined by the percentage of capital (4%)
- For highly capitalized banks the threshold is determined by the percentage of excess of capital (10 %)

The thresholds are protective but not excessively sensitive.

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