EACB Comments

Single Resolution Board Public Consultation

MREL SRB Policy under the Banking Package

Brussels, 6th March 2020

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General comments

The EACB welcomes the opportunity to comment on the Single Resolution Board (SRB) draft policy applying Minimum Requirements for Own Funds and Eligible Liabilities (MREL) following the finalisation of the Banking Package.

We believe that such transparent exercise if of the utmost importance to bring clarity in how the new provisions brought into being by CRR2, BRRD2, SRMR2 will affect the practical daily work of resolution authorities and institutions.

Furthermore, we welcome the fact that the SRB provided a dedicated section to MREL in cooperative groups/networks, it is indeed essential to cater for specific legal and institutional arrangements when applying resolution requirements.

Nevertheless, we believe that the policy needs a number of adjustments and refinements in order to adequately take into account the scope set by level 1 legislation, proportionate solutions (e.g. for setting the recapitalisation amount, with regard to the request of independent legal opinions, identifying the scope of non-resolution entities for internal MREL etc.), and the concrete manner in which resolution requirements are declined within cooperative groups.

Answers to specific questions

Calibration

1) Do you agree that the proposed calibration is consistent with a level playing field across resolution approaches and bank business models? No Yes Comments

Proportionality

We notice that overall the entire SRB draft MREL Policy, not limited to Section 1, does not make any reference to the principle of proportionality. As the SRB, according to paragraph 4, aims to take into account the "ultimate policy objectives" we believe that an introductory paragraph should be added, indicating that the SRB would take proportionality considerations into account, adjusting its approach to bank-specific characteristics where appropriate.

Also, the BRRD states in Art. 1 that resolution authorities should take into a wide range of aspects when establishing and applying the requirements to an institution, i.e.: the nature of its business, its shareholding structure, its legal form, its risk profile, size and legal status, its interconnectedness to other institutions or to the financial system in general, the scope and the complexity of its activities, its membership of an institutional protection scheme (IPS) that meets the requirements of Article 113(7) of Regulation (EU) No 575/2013 or other cooperative mutual solidarity systems as referred to in Article 113(6) of that Regulation and whether it exercises any investment services or activities as defined in point (2) of Article 4(1) of Directive 2014/65/EU.

In the same vein, BRRD illustrates the main principle of the MREL as an institution specific requirement being adjusted to the specifics of the institution, the character of the MREL thus being determined in individual cases as a Pillar 2 requirement. We warmly suggest to add a chapter on proportionality to the MREL Policy, clearly outlining that the SRB would adjust the approach and main principles to the specifics of the addressed institution.

Combined buffer requirement (CBR)

We see a certain inconsistency with the treatment of the CBR. With regard to the formula for the calibration of LAA TREA, the CBR shall be no longer included pursuant to Para 18. The SRB indicates that CET1 used to meet the CBR can no longer be used to meet the MREL-TREA in order to avoid a double use of funds (Para. 20).

With regard to the calibration of Pillar 1 subordinated MREL requirements based on the RWA, it is not sufficiently clear to what extent the CBR is taken into account. In terms of subordination requirement for Other Pillar 1 Banks how should the wording "13.5% TREA (plus CBR)" in Para. 60 be understood by the institutions? Can the CBR be recognised for the 13,5% TREA or not? In the latter case, this would contradict the stance that CBR shall no longer be used to meet the MREL-TREA. We believe the SRB should clarify that the CBR is recognised in the course of the calculation of Pillar 1 subordinated MREL requirements.

Recapitalisation amount (RCA)

With regard to paragraph 23, we would highlight two elements.

First, we believe that the sentence "*all possible adjustments of the RCA under the SRB MREL policy are described below*" should be removed. Indeed, such wording takes away the flexibility of the SRB to make further downward adjustments if necessary.

Second, the reference for a level playing field is worth supporting, but only provided that the rules applied to the institutions are comparable to each other. The range of banks under the SRB remit includes (among others) SSM banks and thus a list of banks that are not always directly comparable (different in size, cross-border activity, etc...). In this vein it is difficult to argue for a wide comparability and proportionality should rather be considered, as mentioned before. The SSM itself when performing benchmarking of institutions uses various clusters that can vary according to the dimension under scrutiny (e.g. type of risk, type of activity, size etc).

Also, the SRB does not mention that the BRRD II in Art 45c (2)(b) clearly includes a time limitation for the quantification of the recapitalisation amount, i.e. an amount that would allow the entity to carry on activities "*for an appropriate period not longer than one year*". We therefore advocate for adding the time limitation of maximum 1 year wherever referring to the determination of the RCA.

With regard to the paragraphs referring to the Market Confidence Charge, we advocate for explicitly adding adjustments downwards regarding the MCC as the BRRD II expressis verbis provides for reduction of the MCC in Art 45c (3) last subparagraph. MCC should be adjusted downwards if the SRB determines that it would be feasible and credible for a lower amount to be sufficient to sustain market confidence and to ensure both the continued provision of critical economic functions by the institution and its access to funding without recourse to extraordinary public financial support other than contributions from resolution financing arrangements, after implementation of the resolution strategy.

Furthermore, when setting a MCC this requirement should be based on assumptions for an appropriate period only and never considering a longer period than one year.

For the MCC, the SRB proposes to phase out the 125bp reduction in four years. We would encourage the SRB to use the discretionary room available in order to maintain this reduction, in particular as the reduction of the Counter Cyclical Buffer requirement (CCyB) only partially offsets this change. Moreover, under BRRD II Art. 45c(3), the RCA should be calibrated on the basis of the foreseen requirements that would apply after resolution. This principle does not only apply in terms of taking into account foreseen RWA depletion, up or downward adjusted Pillar 2 requirements, but, where applicable, also the MCC. Without prejudice to other adjustments discussed above, the default amount for MCC is the Combined Buffer Requirement (CBR) that would apply after application of the resolution tools, less the CCyB requirement. We therefore believe that when calibrating the MCC one should consider whether a bank could be anticipated to become less systemic after resolution and therefore be subject to adjusted (i.e. reduced) buffer requirements under the revised buffer framework of CRD V. This in particular when there is more clarity as to how the relevant competent or designated authorities in Member States will apply the revised buffer framework going forward.

The SRB refers to the LAA using its default formula. We would see benefit in allowing adjustments downward of the RCA as Art 45c (2) (a) BRRD II stipulates that the loss absorption amount shall be sufficient to ensure that the "losses that are expected to be incurred by the entity" are fully absorbed. As we assume that minimum capital requirements of banks at the point of FOLTF will be lower, the surplus could be considered when determining the RCA. Especially if the resolution strategy primarily relies on a transfer tool we believe that there may occur a smaller loss than the current own funds requirement. This should be reflected in a lower RCA (including the MCC).

With regard to the section on "Adjustments to the recapitalisation amount for transfer strategies" laid down in paragraph 35-39, we see that the current wording gives cause for concern and we would propose certain improvements.

In particular, Article 45c (3) (a) BRRD (II) refers to the preferred resolution strategy when setting the RCA without explicitly mentioning a "variant strategy" while Commission Delegated Regulation (EU) 2016/1075 (e.g. Article 25(4)) additionally refers to "variants of the resolution strategy" (not a "variant strategy").

Variants of the preferred resolution strategy are possible if the preferred resolution strategy is not feasible or credible. Nevertheless, although a variant of the preferred resolution strategy may be included in the resolution plan if necessary, there is no legal basis for the influence of a variant strategy on the level of MREL.

To be more precise, we strongly support the paragraph 35 which allows for adjustments to the RCA (including MCC) when the resolution strategy relies primarily on a transfer tool. But we oppose paragraph 39 MREL which states that MREL is calibrated based on a "variant strategy" if the feasibility of implementing transfer strategies relies on a third party and market conditions as any transfer strategy relies on third parties and market conditions and the only remaining possible "variant strategy" is the bail-in tool.

Therefore, paragraph 39 leaves no scope of application for transfer strategy-based adjustments to the RCA.

It is difficult to separate the "preferred" from the "variant" strategy. The question is whether the combination of a transfer strategy (which the resolution strategy primarily relies on) with the bail-in tool- as opposed to solo transfer- already represents a variant strategy or only a "package of measures" of a primarily on transfer strategy. The bail-in tool itself may be combined with transfer strategies.

We ask the SRB to use the proposed range for the scaling-factor (15%-25%) if the resolution strategy is primarily based on a transfer strategy even if alternatively bail-in is considered. The inclusion of a transfer strategy as the primarily strategy should be reflected in the level of MREL since in most cases the SRB will consider a set of resolution tools to be applied in the event of a resolution, and therefore this would also consist of (at least alternatively) a bail-in tool measure.

Subordination requirement

According to Para. 61 the SRB may set subordination requirements for resolution entities that do not qualify as G-SIIs, Top Tier Banks and Other Pillar 1 Banks, based on a case-by-case assessment of NCWO risk. The level of subordination is limited by the higher of 8% of total liabilities and own funds and the so-called "prudential formula" (2x Supervisory Pillar 1 + 2x Supervisory Pillar 2 + CBR).

However, this approach is not consequently implemented in the SRB draft. For institutions where the subordination requirement is limited by the "prudential formula" it can be even higher than the MREL ratio in some cases due to the calculation method of the "prudential formula" (2x Supervisory Pillar 1 + 2x Supervisory Pillar 2 + CBR) and the MREL ratio (no recognition of the CBR).

2) Do you agree that the approach represents the most adequate way to calibrate MREL in support of MPE strategies from a resolvability perspective?

No

Yes

Comments

According to Para. 53 of the SRB draft, MPE deductions as set out in Art. 72e(4) CRR II for G-SIIs shall be translated into corresponding MREL add-ons for all MPE groups. As we will illustrate right below, this approach is not justified at all as it evidently contradicts the provisions of CRR II..

- The planned deductions are only intended for G-SIIs: CRR foresees the application of these deduction rules explicitly only for G-SIIs (Recital 17 and Art. 72e(4) CRR II). The planned extension to all MPE banks appears to be undue gold plating. The legislator explicitly set limits the deduction in-line with FSB's TLAC term sheet with the intention to safeguard global financial institutions. The intended change hence appears excessive and disproportionate, as there is no legal basis in CRR II.
- The new MREL policy assumes a simultaneous default of all subsidiaries: the approach of the SRB implies that all resolution groups are failing at the same time which is a highly unrealistic scenario. For instance, in relevant cases central bodies have implemented necessary mitigation measures and carefully monitor all exposures to other resolution groups with the intragroup limit-system even daily; actual exposures are set within limits in order to avoid contagion risk to the maximum extent.

- The new MREL policy assumes a full write down of any intragroup exposure: the full deduction of any holding of MREL eligible instruments, has one methodological weakness: it implies that the whole intragroup exposure would be written off. This could hold true only for the capital requirements, but not for the remaining MREL. The latter will be converted into new equity and remain on the bank's balance sheet at least to a certain extent.
- No differentiation of the various asset classes: equity is being treated the same way as deposits. Since the new calculation logic involves a complete capital deduction, the risk weighting for any intra-group exposure equals de facto 1.250% RWA, regardless of the affected asset class.
- Unexpected loss is already reflected in the capital requirements: under IRB, the unexpected loss is used to determine the risk weights, i.e. the capital required is already specified by the level of the RWA. Therefore, the full MREL deductions or calculation as an MPE add-on according to the new SRB MREL policy represents an unjustified and disproportionate burden.

Subordination for resolution entities

3) For resolution entities that are not subject to Pillar 1 subordinated MREL requirements, do you agree with the SRB's proposal to determine subordination requirements taking into account the NCWO risk assessed with the NCWO assessment tool?

No

Yes

Comments

In paragraphs 58-66 and throughout the Policy, the SRB refers to "other Pillar 1 banks" as term for non-Top Tier Banks for which the fishing option in Art 45c (6) BRRD II has been exercised. Classification as a Pillar 1 bank has wide-ranging implications as in principle the same rules as for G-SIIs and O-SIIs with balance sheets of more than € 100 billion apply.

It should therefore be possible to ensure predictability for the banks subject to the SRB MREL Policy. We would advocate for a clarification by the SRB that the classification as Other Pillar 1 Bank should only be exercised in exceptional cases, for example if the € 100 billion limit is not quite reached, but the bank/group should nevertheless be subject to the rules for G-SIIs and Top Tier Banks due to the above-average risk posed to the European financial system and its close proximity to the EUR 100 billion limit.

Regarding paragraph 79 which describes the SRB NCWO assessment we welcome the underlying objective but would seek further clarification, more details and greater transparency of the simulation model since effective planning and efficient management (in particular with regard to subordinated liabilities) is a huge burden for banks. Furthermore, where "the total amount of losses" is addressed, we advocate for clarifying that only expected losses should be taken into account for the assessment/valuation. We believe that any surplus of capital requirements reflected in the P2R should be considered as a reducing factor or the RCA.

4) Do you agree that the aspects considered in the tool encompass the main drivers of NCWO risk? Should the SRB consider any additional factors influencing NCWO outcomes? Do you have specific suggestions on how to further refine the methodology?

No

Yes

Comments

With regard to the set-up of a quantitative tool to assess NCWO risk we appreciate in principle the idea to provide transparency in this regard. However, we would urge the SRB to clarify that the tool to assess possible breach of NCWO should only play a role once where the 10% threshold of excluded liabilities from Art. 45b (5) BRRD2 is touched.

Furthermore, we would not support an approach linking an automatic add-on once the 10% threshold is breached. The SRB should instead undertake the required assessment to ascertain whether or not there are indeed any NCWO issues in relation to the write-down and/or conversion of liabilities within the concerned class.

Internal MREL for non-resolution entities

5) Is the proposed approach to the treatment of guarantees appropriately rigorous and even handed?

No

Yes

Comments

According to paragraphs 93 and 94, the SRB has expanded the scope of subsidiaries for which internal MREL will be set to "entities providing critical functions" and "entities meeting the 4% threshold of the total risk exposure amount, or leverage exposure, or total operating income" (previous threshold being 5%) and will continue to expand the scope of subsidiaries with internal MREL in future scenarios as deemed appropriate.

We would ask the SRB to reconsider the extension of the scope of internal MREL.

Indeed, the FSB Total Loss-absorbing Capacity (TLAC) Term Sheet published in November 2015 states in paragraph 16 on "internal TLAC" that the objective of internal TLAC is to facilitate co-operation between home and host authorities and the implementation of effective cross-border resolution strategies.

Therefore, the concept of TLAC is limited to subsidiaries of cross-border groups. It is worth noting that according to the EBA the EU should be treated as a single jurisdiction from the point of view of the internal TLAC requirement (EBA final report on MREL published in December 2016, EBA-Op-2016-2). We believe that the fundamental aim and intention of the TLAC should be reflected, especially now that the banking package has sought to align the EU regime and TLAC.

The materiality was defined in paragraph 17 of the TLAC Term Sheet on "material sub-groups" as follows: a sub-group of a resolution entity is considered "material" for purposes of applying the Internal TLAC requirement if the subsidiary represents either more than 5% of the consolidated risk-weighted assets of the group or more than 5% of the total operating income of the group or a total leverage exposure measure larger than 5% of the consolidated leverage exposure measure of the group (or has been identified as material to the exercise of critical functions). The concept of internal MREL based on a multilateral agreement therefore provides for a uniform threshold of 5% for the identification of material subgroups.

In order to prevent competitive disadvantages for banks under the remit of the SRB and to avoid extending the concept of internal MREL too far beyond the intended scope (subsidiaries of cross-border groups), the SRB should reconsider lowering the threshold to 4% and in any case refrain from further potential restrictions in the future (as described in paragraph 94).

Regarding the requirement in paragraph 102 that a resolution entity may need to provide an "independent written and reasoned legal opinion", we would strongly call for deleting the word independent since this would cause an unnecessary increase of complexity and costs.

First-time adoption of internal MREL minimum requirement

With regard to the internal MREL requirement the question arises on when institutions would have to comply with it for the first time. If it is planned that institutions already receive a request with the 2020 MREL notification on the basis of the current SRB-MREL Policy of 2019 it is unclear, what kind of instruments would be recognized. More punctual clarification is therefore desirable.

MREL for cooperative groups

6) Do you agree with the criteria for recognition of network eligible liabilities? Specifically, do you agree with the condition to disclose to investors subscribing MREL eligible debt instruments information about the potential bail-in of such instruments for the recapitalisation of any of the entities of the network? No Yes Comments

Scope of application

We appreciate the specific attention that SRB dedicates to cooperative banks, rightly identifying the need for a proper consideration of their specific legal and institutional arrangements. However, the proposed criteria for recognition of network eligible liabilities do not take into account the diversity of cooperative groups across jurisdictions. We would thus recommend to clarify further that the concepts and approach illustrated in this section are applicable to consolidated cooperative groups/networks and should not be seen as a reference for non-consolidated cooperative networks, which by essence could not be in scope for the application of certain rules.

In fact, the term 'resolution group' is defined in Art. 2(1)(83b)(a) and (b) BRRD II and Art. 3(1)(24b)(a) and (b) SRMR II, where prerequisite is belonging to the same resolution entity as per Art. 2(1)(83a)(a) and (b) BRRD II and Art. 3(1)(24a) SRMR II. Belonging to the same resolution entity is linked to one single resolution plan for the whole banking group.

The definition for 'resolution group' as defined in Art. 2(1)(83b)(a) BRRD II and (b) and Art. 3(1)(24b) SRMR II only applies to banking groups organized according to Art. 10 and 113(6) CRR, or when a coordinated bail-in is envisaged as the preferred resolution strategy. But not for decentralized cooperative banking groups, where the legally independent institutions do not belong to the same resolution group as they are separate resolution entities with their own resolution plans. It would be useful to clarify in an unambiguous manner that this section is applicable only to the resolution groups described above.

Eligible liabilities and external MREL

In para. 104, the SRB states that it considers the possibility of recognising eligible liabilities issued externally from entities of the cooperative network "leading to the existence of more than one resolution entity". We ask the SRB to reword and clarify this clause: the possibility of recognition of eligible liabilities issued by entities must not be automatically linked to the assumption that the cooperative network consists of more than one resolution entity.

Should additional resolution entities within the cooperative network (in addition to the one identified, be it central body or other entity of the group) be identified, there would still be one resolution group in accordance with Art. 2(1) (83b)(b) BRRD II ("credit institutions permanently affiliated to a central body and the central body itself when at least one of those credit institutions or the central body is a resolution entity, and their respective subsidiaries"). This is in accordance with Art. 45e(1) BRRD II (and Art. 12f SRMR) on "Application of the minimum requirement for own funds and eligible liabilities to resolution entities", which states that resolution entities shall comply with the requirements laid down in Art. 45b to 45d (MREL) on a consolidated basis at the level of the resolution group.

Read in conjunction with Art. 45e(3) BRRD II we assume that the resolution authority will decide – depending on the features of the solidarity mechanism and of the preferred resolution strategy – which entities in the resolution group would have their eligible liabilities used in order to ensure that the resolution group as a whole (still one group) complies with Art. 45e(1) BRRD II, and qualifies for a group MREL waiver as per Art. 45g BRRD II.

With regard to paragraph 108 on SRB specific criteria for the MREL treatment of cooperative networks we would like to point out that the criteria provided can reveal more or less burdensome depending on the national legislative framework in which institutions operate and on the specific arrangements proper to each cooperative group.

We recommend the SRB to introduce some flexibility for jurisdictions where the implementation of the criteria is not possible due to the respective legal frameworks. For these jurisdictions the following aspects are relevant:

- criterium i: loss distribution before the point of resolution reduces NCWO breaches and shareholders are well informed that they may have to bear losses of one institution within the cooperative network (e.g. prospectus). The requirement of a loss sharing mechanism in insolvency is not in line with some national insolvency regimes and therefore may not be legally possible to comply with (while in other Member States the provision in embedded in the legislative framework). More generally however, loss participation in the form of an equal loss distribution is not prescribed by the BRRD and not included in its underlying objectives and therefore is beyond the requirements set by the European legislator.
- criterium ii: we note that FOLTF would be declared at the level of the cooperative network/group. In this vein, we refer to Art. 32a BRRD II which requires Member States to ensure that any resolution action in respect of any affiliated institution or the central body can be taken if the resolution group as a whole complies with the conditions for resolution. Therefore, we believe that the BRRD does not provide a legal basis for such criterium.
- criterium iii: this provision addresses hypothetical situations of a bail-in. We believe that for groups where the resolution strategy is not primarily based on the bail-in tool this criterium should not be applied. Therefore, we call for adjusting this aspect as follows: "*when applying the bail-in tool,* ***in case the resolution strategy is primarily based on the bail-in tool*** […]".
- criterium iv.: transparency vis-à-vis market participants is necessary in order to ensure that investors are well informed. We would like to point out that e.g. the prospectus regime already requires the issuer to properly inform investors, including information of the potential bail-in linked to one entity of the cooperative network.

The paragraph 109 requires that assets and liabilities of all network entities are legally and economically bundled. In normal insolvency procedures, no distribution of losses will be executed. To require the distribution of losses for resolution groups could be described as "Gold-plating for resolution" and should therefore not be required.

Reconciling resolution mergers with existing national frameworks

According to paragraphs 110 and 111, a "*reorganization of the network leading to the merger of all affiliates into one entity might under certain conditions achieve such aggregation*" (network eligible liabilities to count towards the consolidated MREL requirement). The BRRD addresses mergers primarily in conjunction with company law and its implications, and any derogation needs precise limitations. However the draft SRB policy seems to disregard with a general presumption the specific provisions that national legislation may set, also in the context of national BRRD implementation. It is essential to take into due account national frameworks when translating policies into practice.

Company law contains mandatory rules for the protection of shareholders and creditors of going-concern institutions. In a situation where resolution authorities need to act rapidly, those rules may hinder effective action and use of resolution tools and powers by resolution authorities. Indeed, recitals 120-124 BRRD explicitly mention inter alia rules on:

- the rights of shareholders to decide on capital increases and reductions;
- the approval of mergers by the general meeting of each of the merging companies;
- the obligation to launch a mandatory takeover bid on all shares of the company for the equitable price;
- procedural rights of the shareholders relating to general meetings, minimum notice period for general meetings and the contents of the notice of general meeting.

It is also stated that appropriate derogations should be provided in order to allow a rapid action by resolution authorities.

Accordingly, where Member States have adopted complementary/far reaching laws and provisions to limit shareholder rights in case of e.g. mergers, the SRB should also reflect on these national specifics (e.g. § 69 and 117 BaSAG in Austria).

In particular, the aforementioned reasons apply to the conditions in paragraph 111 which requires a merger to be credible and feasible and its execution must not rely on discretionary decisions by external shareholders (conditions covered by the BRRD and national transpositions).

Data collection and reporting

Regarding paragraph 117 we disagree with the expectation of the SRB that banks should provide all necessary data for the legal entity, as any subsidiary. We want to point out that the EBA is currently executing its ITS-mandate on disclosure and reporting of MREL and TLAC (EBA consultation paper Draft ITS, EBA-CP-2019/14) and any reporting requirement must not go beyond these requirements and must only include data needed for resolution purposes.

Furthermore, further reason to reject the approach that application of a waiver does not automatically translate into a waiver from reporting requirements, we refer to Article 45i BRRD II on "Supervisory reporting and public disclosure of the requirement" (i.e. external MREL) where only entities subject to MREL according to Article 45 BRRD II should be subject to MREL reporting or disclosure requirements. In any case, every new obligation should be subject to an implementation period of at least one year after the final publication of the requirement.

7) Do you agree that the assessment of any waiver of the internal MREL for affiliated institutions should relate to the bilateral situation between the affiliated institution and the resolution entity, without taking a network-wide perspective?

No

Yes

Comments

Members do not agree with the SRB's proposition to assess a prompt transfer of own funds or repayment of liability without taking into account the network as a whole. Given that the support scheme of cooperative banking groups may vary among jurisdictions, and given differences regarding the extent to which solidarity mechanisms would apply, such an assessment cannot be one-size-fits-all. On the contrary, we encourage the SRB to have a case-by-case approach and take into account potential legal obligations applying to the central body when activating internal solidarity mechanisms among the network. When a central body may activate the financial support from the whole network, it would be inappropriate to restrict the assessment to a bilateral relationship between the central body and each affiliate.

Liabilities issued under third country law

8) Do you agree with the criteria for the acceptance of legal opinions? Is there any criterion that in your view needs additional detail or clarification?

No

Yes

Comments

The SRB proposal to set minimum requirements for legal opinions that accompany the use of Article 55 clauses appears both inefficient and disproportionate. Such requirements would be beyond the general scope of the BRRD and SRMR, and risk being extremely difficult to put in practice.

Moreover, paragraph 120 of the draft policy refers to the application of the amended Article 55 requirements with respect to AT1 and T2 instruments. Footnote 81 seeks to clarify that the impact on an institution's liabilities would be limited to those issued after the date referred to in Article 55(1)(d) BRRD2. This would run parallel to the grandfathering provisions under Article 494b CRR2. However, paragraph 121 seems to counter such understanding as the it states that the SRB would exclude AT1 and T2 instruments governed by third country law from MREL, unless the bank has included an effective and enforceable contractual recognition clause.

We would urge an unequivocal clarification that this will not impact liabilities issued before the date referenced in footnote 81, also in light of grandfathering clauses under BRRD2 and CRR2.

9) With the objective of finding practical solutions that ensure full coverage of liabilities for which a legal opinion is expected, which arrangement would you consider to be the most efficient for your issuance practice?

No

Yes

Comments

XXX

Transition arrangements

10) Do you envisage any complications or constraints related to the transition arrangements? No Yes Comments

With regard to "Transition arrangements", and in particular paragraph 128-129, we advocate for not requiring banks/groups to ensure a linear build-up of the MREL capacity and not defining binding intermediate targets for 1 January 2022 by dividing the amount of shortfall relative to the final target equally until the end of the transition period.

This would otherwise result in a situation where banks would need to meet half their final MREL shortfall by the beginning of 2022.

Considering the findings of the recent "EBA MREL quantitative report under a new methodology" published on 17 February 2020[1] we would like to point out that, according to the EBA, 117 of the relevant banks account for a MREL-shortfall of € 178 billion. Having this in mind, the capital market will be able to anticipate the need of issuances with large volumes if linear intermediate targets are prescribed.

This would increase the spreads and costs for the issuance of own funds and eligible liabilities, ultimately hampering the objective of building up capacity by 1 January 2024.

We understand that the MREL decision taken by the resolution colleges in 2020, and communicated to the banks in 2021 will be based on the MREL policy at hand, and thus on the SRMR version which shall apply from 28th December 2020. We also understand that paragraph 131 indicates that such MREL decisions will include (intermediate) targets to be binding by 1 January 2022/1 January 2023 respectively and 2024. However the question remains open on whether there will be separate targets for 2021 (albeit non-binding) and if so which legal status will be applied, in fact the draft policy is only explicit regarding 2022 onwards, stating that "*each new decision, communicated to a bank in 2021, will set out two binding MREL targets […] the binding intermediate target to be met by 1 January 2022 […] and the fully calibrated MREL (final target) to be met by 1 January 2024*". A further clarification is therefore desirable.

[1] https://eba.europa.eu/eba-shows-banks%E2%80%99-progress-planning-failure-encourages-them-issue-eligible-debt-instruments