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WORKING DOCUMENT

From: Presidency
To: Working Party on Financial Services (Risk Reduction Measures)

Subject: MREL framework – a compromise solution as regards subordination requirements

Delegations will find attached MREL framework document for 2 March RRM meeting



1 & 2 March 2018
Working Party Financial Services (RRM) Attachés

MREL framework – a compromise solution as regards subordination requirements

The Presidency puts forward amendments to reflect the views expressed by delegations in previous Council Working Party meetings and through written comments. This cover note summarises the changes made to particular provision related to the MREL requirement compared to the previous version discussed at the meeting of 20 February.

The amendments are explained in the table below and drafting of the relevant provisions is provided in Annex to this cover note.

	Outstanding Items	Legal Reference	Comments
MREL	Framing the discretion to require subordination	Article 45b (3) (c) BRRD	At the meeting on 20 February the Presidency proposed to widen the discretion of the resolution authority as to the amount of subordinated MREL requirement based on the NCWO assessment. Considering the views expressed during the working party and the new article 45b1 (see below), the Presidency proposed to revert back to the previous wording of Article 45b (3) (c).
	Specific conditions for MREL subordination related to G-SIIs and top-tier banks	Article 45b1 (new)	To address the divergent views of MS expressed throughout the discussions related to the possibility of the resolution authority to require subordination, a new article 45b1 is proposed to introduce the following concept: <ul style="list-style-type: none"> - The 3,5 % senior allowance under article 72b (3) CRR based on a risk of legal challenge assessment - wide discretion as per TLAC term sheet; - A step-up subordination requirement for G-SIIs and top-tier banks: <ul style="list-style-type: none"> ✓ up to the higher of 8% or the formula 2P1+2P2+CCBR based on NCWO assessment; ✓ up to 2P1+2P2+CCBR based on strict criteria aimed and limiting the discretion to riskiest banks and those with resolvability impediments that cannot be resolved through other powers of the resolution authority but MREL.

	Outstanding Items	Legal Reference	Comments
	Definition of top-tier banks	Article 45c (3)	To address the concerns expressed by many MS during the WP on 20 February, the definition of the top-tier banks is amended to clarify that the 75 bn threshold applies on resolution group level.
	MREL transitionals	Article 45m	Amendments are proposed to address the concerns expressed during previous WP and in writing: <ul style="list-style-type: none"> ✓ Possibility to require compliance before the start of the compliance period under certain conditions; ✓ Mirroring the transitional provisions with those laid out in Article 92a(2) CRR for G-SIIs, according to which the Pillar 1 requirement does not apply for a period of time following certain events.

Article 45b

Eligible liabilities for resolution entities

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3. Resolution authorities may decide that the requirement referred to in Article 45f ~~is~~ shall be met by resolution entities with instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for paragraphs (3) to (5) of Article 72b of that Regulation with a view to ensure that the resolution entity can be resolved in a manner suitable to meet the resolution objectives.

The resolution authority's decision under this paragraph shall contain the reasons for that decision on the basis of the following elements:

- (a) non-subordinated liabilities referred to in the first and second paragraphs have the same priority ranking in the national insolvency hierarchy as certain liabilities that are excluded from the application of the write-down or conversion powers in accordance with Article 44(2) or Article 44(3);
- (b) the risk that as a result of a planned application of write-down and conversion powers to non-subordinated liabilities that are not excluded from the application of the write-down or conversion powers in accordance with Article 44(2) or Article 44(3), creditors of claims arising from those liabilities incur greater losses than they would incur in a winding up under normal insolvency proceedings;
- (c) the amount of subordinated liabilities **shall not exceed the amount** ~~shall not exceed the amount~~ necessary to ensure that creditors referred to in point (b) shall not incur losses above the level of losses that they would otherwise have incurred in a winding up under normal insolvency proceedings.

Where the resolution authority determines that, within a class of liabilities which includes eligible liabilities, the amount of liabilities that are reasonably likely to be excluded from the application of the write-down or conversion powers in accordance with Article 44(2) or Article 44(3), totals more than 10% of that class, it shall assess the risk referred to in point (b) of the second subparagraph.

4. The resolution authority may exercise the power referred to in paragraph 3 to the extent where the sum of instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 and own funds of an entity due to its obligation to comply with the decision of the resolution authority to exercise that power and with the following requirements:

- (a) the combined buffer requirement defined in Article 128(6) of Directive 2013/36/EU;
- (b) Article 92a of Regulation (EU) No 575/2013; and
- (c) Article 45c(3a),

does not exceed the requirements referred to in Articles 37(10), 44(5) and 44(8) of Directive 2014/59/EU.

For the purposes of this paragraph, derivative liabilities shall be included in total liabilities on the basis that full recognition is given to counterparty netting rights.

~~may decide, on a case by case basis, that the requirement referred to in Article 45(1) is may be met with subordinated liabilities. Such decision shall be taken in accordance with the criteria in paragraph 3 and shall take into account the objectives of the resolution action.~~

(new) Article 45b(1)

Specific conditions applicable to resolution entities of G-SIIs and resolution entities subject to Article 45c (3a)

1. Resolution authorities may decide that Article 72b(3) of Regulation No 575/2013 does not apply to entities subject to the requirements referred to in Article 92a and 494 of Regulation (EU) No 575/2013 where [only the conditions of point (a) and (b) of Article 45b(3)] are fulfilled.
2. Resolution authorities may decide that, up to the levels provided in paragraph (3), the requirement referred to in Article 45f may be met by resolution entities with instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for paragraphs (3) to (5) of Article 72b of that Regulation based on the conditions provided [in points (a) to (c) of Article 45b(3)].
3. The sum of instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 except for paragraphs (3) to (5) of Article 72b of that Regulation and own funds of an entity due to its obligation to comply with the requirements referred to in Article 128(6) of Directive 2013/36/EU, Article 92a of Regulation (EU) No 575/2013, Article 45c(3a), and Article 45f shall not exceed the greater of:

(a) 8% of the total liabilities of the entity including own funds;

(b) the amount resulting from the application of the formula $Ax2+B+C$, where:

A=amount resulting from the requirement referred to in Article 92(1)(c) of Regulation (EU) No 575/2013 [Pillar 1]

B= amount resulting from the requirement referred to in Article 104a of Directive 2013/36/EU [Pillar 2R]

C= amount resulting from the requirement referred to in Article 128(6) of Directive 2013/36/EU [combined capital buffer requirement]

For the purposes of point (a) of the first subparagraph, derivative liabilities shall be included in total liabilities on the basis that full recognition is given to counterparty netting rights.

The requirements referred to in this paragraph shall be those applicable to the entity at the time of determining the requirement referred to in Article 45(1).

4. By derogation from point (b) of paragraph 3, the resolution authority may decide that the requirement referred to in Article 45f shall be met with an additional level of instruments referred in paragraph 2 up to the amount [referred to in letter B of paragraph 3] based on the following conditions:

[(a) the requirement referred to in Article 104a of Directive 2013/36/EU reflects that the resolution entity is among the (TBD: 10% / 20%) riskiest institutions under the supervision of the same competent authority, or

(b) where, based on the latest resolution plan, substantive impediments to resolvability have been identified in the preceding resolvability assessment and:

(i) no remedial action have been taken following the application of the powers referred to in Article 17 (5) in the timeline required by the resolution authority, or

(ii) the identified impediment cannot be addressed by any of the powers referred to in Article 17 (5)].

Article 45c

Determination of the minimum requirement for own funds and eligible liabilities

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3a. For resolution entities that are not subject to Article 92a of Regulation (EU) No 575/2013 and that are part of a **resolution** group whose total assets exceed EUR 75 billion and that is led by a Union parent undertaking the level of the requirement referred to in paragraph 3 shall be at least equal to ["Pillar 1 requirement for top tier banks"]:

(a) 13,5 % when calculated in accordance with point (a) of Article 45(2) and

(b) 5% when calculated in accordance with point (b) of Article 45(2).

By way of derogation from Article 45b, resolution entities referred to in the previous subparagraph shall meet the level of the requirement referred to in this paragraph that is equal to 13,5 % when calculated in accordance with point (a) of Article 45(2) and to 5% when calculated in accordance with point (b) of Article 45(2) with eligible liabilities that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013, except for paragraphs (3) to (5) of Article 72b of that Regulation, liabilities referred to in Article 45b(2a) or own funds.

Article 45m

Transitional and post-resolution arrangements

1. By way of derogation from Article 45(1), resolution authorities shall determine an appropriate transitional period for an institution or entity referred to in points (b), (c) and (d) of Article 1(1) to comply with the requirements in reach the MREL determined under Articles 45f or 45g or a requirement due to application of Article 45b(3), as appropriate. The deadline to comply with the requirements in Articles 45f or 45g or a requirement due to application of Article 45b(3) reach the MREL shall not be earlier not be no later than 1 January 2024 42].

In exceptional circumstances, where duly justified and appropriate on the basis of the criteria referred to in paragraph (4) taking into consideration:

(b) the development of the entity's financial situation;

(c) the prospect that the entity will be able to ensure compliance with the requirements in Articles 45f or 45g or a requirement due to application of Article 45b(3) in a reasonable timeframe;

(d) whether the entity is able to replace liabilities that no longer meet the eligibility or maturity criteria laid down in Articles 72b and 72c of Regulation (EU) No 575/2013, Article 45b or Article 45g(3), whether this inability is of idiosyncratic nature or due to market-wide disturbance,

the resolution authority may set a transitional period that is shorter than 1 January 2024.

By way of derogation from the previous subparagraph, Member States may, where duly justified and appropriate on the basis of the criteria referred to in Article 10(7) authorise the resolution authority to extend the transitional period.

1a. The deadline to comply with the minimum level of the requirements referred to in Article 45c(3a) [Pillar I for top tier banks] shall not be earlier than 2022.

1b. The minimum level of the requirement referred to in Article 45c(3a) shall not apply in the following cases:

(a) within the three years following the date on which the resolution entity starts to be in the situation referred to in Article 45c(3a);

(b) within the two years following the date on which the resolution authority has applied the bail-in tool;

(c) within the two years following the date on which the resolution entity has put in place an alternative private sector measure referred to in point (b) of Article 32(1) by which capital instruments and other liabilities have been written down or converted into Common Equity Tier 1 in order to recapitalise the resolution entity without the application of resolution tools.

2. By way of derogation from Article 45(1), resolution authorities shall determine an appropriate transitional period to comply with the requirements of Articles 45f or 45g **or a requirement due to application of Article 45b(3)**, as appropriate, ~~reach the MREL for an institution or entity referred to in points (b), (c) and (d) of Article 1(1) to which resolution tools or the power to write down and or convert relevant capital instruments and eligible liabilities have been applied.~~

3. For the purposes of paragraphs 1, **1a** and 2, resolution authorities shall communicate to the institution or entity referred to in points (b), (c) and (d) of Article 1(1) a planned MREL for each 12 months period during the transitional period. At the end of the transitional period, the MREL shall be equal to the amount determined under Articles **45c(3a)**, ~~45f or 45g~~ **or 45b(3)**.

4. When setting the transitional periods, resolution authorities shall take into account:

(i) the prevalence of deposits and the absence of debt instruments in the funding model;

(ii) the access to the capital markets for eligible liabilities;

(iii) the reliance on Common Equity Tier 1 to meet the requirement referred to in Article 45f.

5. Subject to paragraph 1, resolution authorities shall not be prevented from subsequently revising either the transitional period or any planned MREL set out under paragraph 3.”