



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 8 November 2017

on revisions to the Union crisis management framework

(CON/2017/47)

Introduction and legal basis

On 2 and 20 February 2017 the European Central Bank (ECB) received requests from the Council of the European Union and the European Parliament, respectively, for an opinion on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012¹ (hereinafter the 'proposed amendments to the Capital Requirements Regulation')².

On 17 and 20 February 2017 the ECB received requests from the European Parliament and the Council of the European Union, respectively, for an opinion on a proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures³ (hereinafter the 'proposed amendments to the Capital Requirements Directive').

On 2 and 20 February 2017 the ECB received requests from the Council of the European Union and the European Parliament, respectively, for an opinion on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 as regards loss-absorbing and Recapitalisation Capacity for credit institutions and investment firms⁴ (hereinafter the 'proposed amendments to the Single Resolution Mechanism Regulation').

On 20 February 2017 the ECB received requests from the Council of the European Union and the European Parliament for an opinion on a proposal for a Directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and

1 COM(2016) 850 final.

2 The ECB has adopted a separate opinion on some of the proposed amendments to the Capital Requirements Regulation and the Capital Requirements Directive, see CON/2017/xx of the European Central Bank of date Month Year on amendments to the Union framework for capital requirements of credit institutions and investment firms (not yet published in the Official Journal). All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

3 COM(2016) 854 final.

4 COM(2016) 851 final.

Directive 2007/36/EC⁵ (hereinafter the ‘proposed amendments to the Bank Recovery and Resolution Directive’) (hereinafter collectively referred to as the ‘proposed amending regulations and directives’).

The ECB’s competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed amending regulations and directives contain provisions affecting the ECB’s tasks concerning policies relating to the prudential supervision of credit institutions in accordance with Article 127(6) of the Treaty and the European System of Central Banks’ contribution to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system, as referred to in Article 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Implementation of the total loss-absorbing capacity (TLAC) standard in the Union

The ECB welcomes the proposed amending regulations and directive, which aim to implement the TLAC standard of the Financial Stability Board (FSB)⁶ for global systemically important institutions (G-SIIs) established in the Union. Extending the scope of the TLAC requirements to another set of credit institutions, e.g. to other systemically important institutions (O-SIIs), would raise calibration issues, since they have very heterogeneous profiles. However, if an extension of the scope is considered, an alternative could be to cover a subset of O-SIIs, which resemble the G-SIIs in terms of size, complexity, business model, interconnectedness and systemic importance, possibly with a lower minimum calibration floor. This would allow the differences compared to G-SIIs to be more precisely reflected.

2. Amendments to the minimum requirement for own funds and eligible liabilities (MREL)

2.1 The MREL consists of two parts: a loss absorption amount and a recapitalisation amount. The proposed amendments to the Bank Recovery and Resolution Directive⁷ (BRRD) and to the Single Resolution Mechanism Regulation⁸ (SRMR) provide the possibility for the resolution authority to adjust the MREL recapitalisation amount in order to adequately reflect risks resulting from the business model, funding model and overall risk⁹. This allows the resolution authority to take account of a probable asset reduction and the different risk profile of the institution after the application of resolution tools and to adjust the recapitalisation amount to the new smaller balance sheet size.

⁵ COM(2016) 852 final.

⁶ See the FSB’s Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution Total Loss-absorbing Capacity (TLAC) Term Sheet of 9 November 2015, available on the FSB’s website at www.fsb.org.

⁷ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

⁸ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

⁹ Proposed new Article 45c(3) of the BRRD and proposed new Article 12d(3) of the SRMR.

In addition, the ECB considers that the resolution authority should be allowed, after consultation with the competent authority, to adjust the MREL recapitalisation amount upwards to provide for a 'safety margin'. This small buffer will ensure that the group and entities resulting from resolution have sufficient resources to cover additional unexpected losses and unforeseen costs that may arise in the period after resolution, which may, e.g., arise from the final outcome of the valuation or be related to costs arising from the implementation of a business reorganisation plan. The amount of such a safety margin should be established on a case-by-case basis, dependent on the resolution plan for the credit institution.

- 2.2 The proposed amendments to the BRRD and the SRMR allow a resolution authority to give guidance to an entity on having own funds and eligible liabilities in excess of the MREL, in order to cover the entity's potential additional losses and to ensure market confidence in resolution¹⁰. The ECB recommends that the proposed MREL guidance is eliminated as it adds complexity to the framework without providing clear benefits. First, the MREL guidance may increase the overall MREL calibration, as the guidance may be perceived by the market as a requirement that must always be respected. The resolution authority's power to convert the MREL guidance, if consistently breached, into a hard MREL requirement¹¹ may reinforce the market's perception that the MREL guidance essentially contributes to an increased MREL requirement. Second, the MREL guidance is not needed in order to underpin compliance with the MREL requirement since the combined buffer requirement is already stacked up on top of the MREL requirement in the Commission's proposal. Third, the MREL guidance cannot be justified by the objective of avoiding automatic maximum distributable amount (MDA) restrictions since a breach of the combined buffer requirement stacked on top of the MREL requirement should, in any case, not lead to immediate automatic restrictions on distributions¹². Fourth, the MREL guidance does not appear to be necessary to enhance the flexibility of the resolution authority since the MREL requirement can also be adjusted if needed, for example by taking into account the proposed safety margin.
- 2.3 Under the proposed amendments to the Capital Requirements Directive¹³ (CRD)¹⁴, credit institutions will fail to meet the combined buffer requirement if they do not have enough own funds and eligible liabilities to meet the combined buffer requirement, the capital requirements and the MREL at the same time. As the combined buffer requirement is stacked on top of both the MREL requirement¹⁵ (first scenario) and the capital requirements¹⁶ (second scenario) the powers to address a breach of the buffers must be tailored depending on the underlying situation. Although the resolution authority is well placed to require an MREL restoration plan in the first scenario, the competent authority should act in line with the CRD in the second scenario.

10 See the proposed new Article 45e(1) of the BRRD and the proposed new Article 12f(1) of the SRMR.

11 See the proposed new Article 45e(3) of the BRRD.

12 See paragraphs 2.9 and 2.10.

13 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

14 See the proposed new Article 141a of the CRD.

15 See the proposed new Article 141a(1)(d) of the CRD.

16 See the proposed new Article 141a(1)(a), (b) and (c) of the CRD.

- 2.4 The process to address or remove impediments to resolvability due to a breach of buffers stacked on top of the MREL¹⁷ should be modified to include consultation of the competent authority, as is already provided for in relation to other impediments. Furthermore, the resolution authorities should have more flexibility regarding deadlines in order to ensure that the credit institution has sufficient time, if necessary, to develop the most appropriate strategy to address the breach of buffers. Additionally, the ECB welcomes the Commission's proposal, which allows the resolution authority to require an institution to change the maturity profile of MREL instruments as part of the measures to address impediments to resolvability¹⁸.
- 2.5 The ECB recommends that the proposed amendments to the BRRD and SRMR clarify that resolution authorities have the task of monitoring the levels of available MREL eligible instruments and the MREL ratio itself, taking account of all the calculations on deductions. Likewise, it should be clarified that resolution authorities also have the task of monitoring compliance with MREL and informing the competent authority of any breaches and other relevant events that may affect the credit institution's ability to fulfil the MREL or the MREL guidance.
- 2.6 In the event of a breach of the MREL that coincides with a breach of capital requirements, the competent authority should first address the capital requirements breach by adopting the relevant measures, i.e. supervisory measures or use of early intervention powers in consultation with the resolution authority. This consultation should be short in order to ensure a prompt reaction to the breach of capital requirements. In addition, in exercising its power to address the MREL breach, the resolution authority must take account of the measures adopted by the competent authority.
- 2.7 Under the proposed amendments to the Capital Requirements Regulation¹⁹ (CRR), early redemption of eligible liabilities requires prior permission to avoid an erosion of bail-in-able liabilities. The resolution authority should be responsible for granting such permission, since it is also responsible for determining the MREL and specifying the amount and quality of instruments that will be needed for the preferred resolution strategy²⁰.
- The resolution authority should be required to consult the competent authority in those cases where a credit institution is converting MREL eligible liabilities into own funds instruments in order to ensure compliance with capital requirements, as the approval of such a measure may be necessary to preserve the going concern capital position of the institution. Finally, the amendments should clarify that eligible liabilities instruments with a residual maturity below one year are also subject to this requirement for prior permission where the entity or resolution group is in breach of its MREL.
- 2.8 The ECB sees merit in the proposed amendments to the CRD, which provide that automatic MDA restrictions do not apply where the breach of the combined buffer requirement is due to the inability

17 See the proposed new Article 17(5)(h1) of the BRRD.

18 See the proposed new Article 17(5)(j1) of the BRRD.

19 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

20 This is in line with the view expressed in paragraph 2.6.

of the institution to replace liabilities that no longer meet the MREL eligibility or maturity criteria²¹. This exemption should be extended to include the situation where the institution breaches its combined buffer requirement stacked on top of the MREL requirement²² because it suffers a reduction of own funds but does not breach its combined buffer requirement stacked on top of capital requirements. In such a situation, the credit institution may still have a relatively high level of own funds, which, considered in isolation without the MREL, would suffice to meet its own fund requirements and its combined buffer requirement.

- 2.9 The ECB recommends that the proposed exemption from the application of MDA restrictions where the credit institution lacks MREL instruments should not be limited to a six-month period, since this may not be a sufficient delay of automatic application of MDA restrictions and thus may still further exacerbate stress in funding markets when there is the need to issue new capital or debt instruments²³. Instead, the exemption should apply for a twelve-month period, which will allow for additional time for the institution to issue MREL eligible instruments. This is particularly relevant since MREL instruments generally have shorter maturities than own funds instruments and thus bring greater refinancing risks, which might coincide with future stress in funding markets.
- 2.10 From a financial stability perspective, cross-holdings of MREL liabilities between credit institutions are not desirable. In order to prevent double counting and limit contagion effects, deduction rules should apply to all holdings of external MREL liabilities, i.e. issued to entities outside the resolution group, irrespective of the type of credit institution, i.e. not limited to GSIs. The same method currently proposed for G-SIs should apply in respect of all credit institutions, i.e. deductions are made from MREL eligible liabilities and from own funds on the basis of a corresponding deduction approach. In general, other aspects of the deduction rules should be consistent with what is agreed internationally for TLAC, i.e. in the FSB TLAC Term Sheet and the Basel III framework, including for banking groups with more than one resolution entity and resolution group.
- 2.11 From a financial stability perspective, resolvability may be reduced if new 'non-preferred' senior debt instruments as well as subordinated debt instruments were to be held by retail investors. Therefore, consideration could be given to clear and easily understandable disclosure requirements and other safeguards to raise investor awareness of the risks associated with such instruments. In the same vein, it may be advisable to consider requiring a minimum denomination of at least EUR 100 000 per unit in respect of each instrument. This would increase the investment threshold and thus also raise investor awareness, thereby limiting direct retail investment. A common framework at Union level should be pursued on these issues in order to avoid divergent approaches being taken across Member States, which would lead to fragmentation within the Union market for these instruments²⁴.
- 2.12 The treatment of groups to be resolved under a multiple point of entry approach should be clarified. First, the definition of a 'resolution group' should exclude third-country subsidiaries that are points

²¹ See the proposed new Article 141a(2) of the CRD.

²² See the proposed new Article 141a(1)(d) of the CRD.

²³ Note that a combined buffer requirement breach may also occur at high levels of regulatory capital where a credit institution actually meets a significant part of its MREL through own funds and not other MREL eligible liabilities.

²⁴ See also paragraph 3.5 of Opinion CON/2017/23.

of entry themselves since these will be treated separately from the rest of the group in the event of resolution²⁵. Second, the amendments should clarify that compliance with MREL at resolution entity level must be achieved on a consolidated basis at the level of the resolution group²⁶. Third, the proposed rules on deductions from eligible liabilities applicable to groups to be resolved under the multiple point of entry approach²⁷ should fully reflect the TLAC term sheet with regard to the adjustments permitted and the components of the formula.

3. Transitional arrangements for MREL

- 3.1 One key factor in the implementation of an entity-specific MREL is the determination of an adequate transition period. The potentially high level of MREL shortfalls that may occur at the onset of the introduction of the new harmonised levels could pose significant challenges for certain credit institutions as regards meeting these requirements in a timely manner in the current macroeconomic environment. Therefore, the ECB proposes that an adequate minimum transition period across credit institutions should be introduced, which should be no shorter than the period applicable to G-SIIs set out in the TLAC term sheet. In addition, the resolution authority should be given the flexibility to determine, on a case-by-case basis, a final period for compliance that is longer than this harmonised minimum. The ECB recommends clarifying that any extension, beyond the minimum transition period for a given institution, should be based on an assessment of the challenges in meeting the MREL requirement that such an institution would face due to limited market access or market capacity, or similar constraints in the relevant macroeconomic environment.
- 3.2 Moreover, the ECB sees merit in the introduction of new eligibility criteria for MREL eligible instruments which align the MREL eligibility criteria with the TLAC eligibility criteria²⁸ and introduce additional features that improve the permanence of MREL eligible instruments²⁹. These will assist in ensuring the loss-absorption capacity of MREL at the point of resolution. However, the additional features that go beyond the TLAC eligibility criteria may lead to further shortfalls, e.g. by making liabilities with acceleration clauses ineligible, which should be taken into account when setting the final transition period for compliance with MREL on a case-by-case basis. Alternatively, the proposed amendments to the CRR could be reworded to specify that liabilities that were previously MREL eligible but are not compliant with new additional features will be subject to ‘grandfathering’, meaning that they will continue to be eligible as they are under the current regime. Such grandfathering should be phased out over a reasonable time horizon.

²⁵ Such clarification concerning the treatment of third-country subsidiaries may have a sizeable effect on the MREL for these group types.

²⁶ See the proposed new Article 11(3) of the CRR.

²⁷ See the proposed new Article 72e(4) of the CRR.

²⁸ The main difference that remains is that subordination is not required for all institutions and that structured notes, under certain conditions, are eligible for MREL.

²⁹ See the proposed new Article 72b(2) of the CRR, point (h) on incentives to redeem, point (j) on call options exercisable on sole discretion of the issuer, point (k) on the need to comply with Articles 77 and 78 of the CRR, point (l) on no mentioning of early repayment, point (m) on no acceleration rights for holder, and point (n) on the level of payments not being dependent on the credit standing of the institution.

- 3.3 Regarding the requirement that liabilities arising from debt instruments with embedded derivatives must be excluded from eligible liabilities, further clarification of the definition of ‘embedded derivatives’ is necessary. This could possibly be achieved by developing appropriate regulatory technical standards³⁰.

4. Early intervention measures

- 4.1 There is a significant overlap between supervisory measures under the CRD³¹, the SSM Regulation³² (SSMR) and early intervention measures provided for in the BRRD, both in terms of content as well as the conditions for their application. This overlap creates significant challenges for the practical implementation of the early intervention framework, especially in view of the lack of clarity regarding the conditions for early intervention.
- 4.2 Moreover, the ECB’s early intervention powers must be exercised on the basis of individual national transpositions of the BRRD³³. This results in uncertainty regarding the available measures and the conditions for their exercise in each Member State.
- 4.3 Consequently, the ECB recommends removing from the BRRD those early intervention measures that are already available in the CRD and the SSMR and amending the SRMR to provide a legal basis in a regulation for the ECB’s early intervention powers in order to facilitate their consistent application.

5. Pre-resolution moratorium tool

- 5.1 The proposed amendments to the BRRD confer new powers to suspend payment and delivery obligations on both the competent authorities and the resolution authorities. While the ECB generally welcomes the harmonisation of such powers at Union level, the ECB expects these far-reaching powers to be exercised only in extreme circumstances, if at all. Due to its exceptional nature and its disruptive impact on contracts, the moratorium tool should be decided in close coordination between all relevant authorities. The ECB suggests introducing a procedure for the allocation of responsibility for a moratorium to either the competent or the resolution authority, depending on whether the moratorium is imposed before or after the ‘failing or likely to fail’ determination. Such a procedure should as a rule avoid the imposition of successive moratoria. Only exceptionally, where motivated by the specific circumstances and in compliance with the principle of proportionality, should the resolution authority be able to impose an additional moratorium in order to bridge the gap from the ‘failing or likely to fail’ determination until resolution action is taken.

³⁰ See also paragraph 2.1.2 of Opinion CON/2017/6.

³¹ See, in particular, Article 104 of the CRD.

³² Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63), in particular Article 16.

³³ In line with Article 4(3) of the SSMR.

- 5.2 In general, a pre-resolution moratorium tool should be separate and independent from the early intervention measures. The primary objective of a pre-resolution moratorium should be to prevent severe deterioration of a credit institution's balance sheet. In particular, the pre-resolution moratorium tool would give the competent authority sufficient time, if necessary, to finalise the 'failing or likely to fail' assessment, also taking into consideration the time required to take such a formal decision, which also requires consultation of the resolution authority. Moreover, a moratorium allows additional time for the resolution authority to start preparing for its resolution tasks in parallel. The maximum period for a moratorium should be five working days in total, a limitation which is also necessary considering the severe impact of a moratorium on creditors' rights. The ECB cautions that prolonged periods during which depositors have no access to their deposits undermine confidence in the banking system and might ultimately create risks to financial stability.
- 5.3 An effective pre-resolution moratorium needs to have the broadest possible scope in order to allow for a timely reaction to liquidity outflows. The general exception for covered deposits and claims under investor compensation schemes should be replaced by limited discretionary exemptions to be granted by the competent authority in order to retain a degree of flexibility. Under that approach, the competent authority could, for example, allow depositors to withdraw a limited amount of deposits on a daily basis consistent with the level of protection established under the Deposit Guarantee Schemes Directive (DGSD)³⁴, while taking into account potential liquidity and technical constraints. Certain safeguards to protect the rights of depositors should be put in place, such as a clear communication on when access to deposits would be restored. Finally, possible implications under the DGSD should be assessed, as the pre-resolution moratorium tool would not be useful if it were to be deemed to trigger the unavailability of deposits under the DGSD.
- 5.4 The ECB recommends extending the existing exemptions from the moratorium related to financial market infrastructures (FMIs), including CCPs, also to (a) third-country central securities depositories (CSDs) recognised by the European Securities and Markets Authority pursuant to the Central Securities Depositories Regulation³⁵, and (b) third-country payment systems subject to a cooperative oversight arrangement involving at least one central bank in the European System of Central Banks. A suspension prohibiting a participant (credit institution) from making any payments to an FMI will de facto cause that participant to no longer be able to meet its obligations as they fall due. For payment obligations to FMIs, this would place the participant in default. Without an exemption for this type of payment, the moratorium would actually have the potential to create and spread systemic risk before the FMI safeguards kick in³⁶.

³⁴ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173, 12.6.2014, p. 149). As an example, Article 8(4) of this Directive provides that, during a transitional period, depositors should have access to an appropriate amount of their covered deposits to cover the cost of living within five working days of a request.

³⁵ See Article 25 of Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

³⁶ For this reason, there is a common understanding, both at Union and international level (settlement finality laws and FSB Key Attributes), of the need to protect financial obligations linked to FMIs from a moratorium.

- 5.5 The proposed harmonisation of pre-resolution moratorium powers should also be without prejudice to any other moratorium powers, e.g. supervisory or judicial powers, introduced at national level to safeguard the *par condicio creditorum* (equal treatment of creditors) principle upon the opening of insolvency proceedings. If a credit institution does not enter into resolution once a moratorium has been imposed, e.g. because the resolution authority determines that resolution would not be in the public interest, such national tools may become relevant again. A similar situation could occur if the failing entity goes into insolvency following the application of resolution tools.
- 5.6 The exceptions in the BRRD applicable to central banks, including with respect to the pre-resolution moratorium tool, should be extended to include the Bank for International Settlements (BIS). The BIS has been entrusted with the tasks of promoting cooperation between central banks, providing additional facilities for international financial operations and acting as trustee or agent for international financial settlements, it is therefore appropriate that it receives a treatment under the BRRD that is similar to that of a central bank.
- 5.7 Further assessments should also be undertaken with respect to recognising the moratorium tool under third-country laws, specifically in those cases where a recognition mechanism has not yet been established. In particular, careful consideration should be given to the potential implications of the moratorium tool for the purposes of the International Swaps and Derivatives Association 2015 Universal Resolution Stay Protocol, which only recognises a shorter period for a stay, with an opt-out in relation to jurisdictions that subsequently amend the length of the statutory stay.
- 5.8 Finally, the possible implications of prudential regulatory requirements should be carefully assessed given the proposed duration of the moratorium tools and the envisaged suspension of termination or netting/set-off rights.

6. 'Failing or likely to fail' assessment regarding less significant credit institutions under the direct responsibility of the Single Resolution Board (SRB)

Although the Commission's proposed amendments to the SRMR do not address this, the resolution procedure established in the SRMR requires urgent attention. In particular, the misalignment between the institution-specific responsibilities of the ECB and of the SRB combined with the current wording of the SRMR leads to legal uncertainty as to which authority is responsible for assessing that a less significant credit institution, under the direct responsibility of the SRB, is failing or likely to fail. While a literal reading of Article 18 of the SRMR suggests that the ECB is responsible for making the 'failing or likely to fail' assessments in relation to some less significant credit institutions, this reading does not take account of the limitations of Union primary law. In fact, a systematic interpretation of the Union legal framework suggests that the 'failing or likely to fail' assessment for both less significant cross-border groups and other less significant credit institutions under the direct responsibility of the SRB should be outside the ECB's direct competence and should rather be a competence of the national competent authorities, as the competent supervisory authorities for less significant credit institutions on the basis of the SSMR³⁷. The ECB recommends that the proposed amendments to the SRMR are extended to provide explicitly

³⁷ See Article 6(4) of the SSMR.

that the respective national competent authority is responsible for the 'failing or likely to fail' assessment for a less significant credit institution under the remit of the SRB³⁸.

Specific ECB staff drafting proposals to amend the proposed amending regulations and directives are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document has not been adopted by the Governing Council. The technical working document is available in English on the ECB's website.

Done at Frankfurt am Main, 8 November 2017.

[signed]

The President of the ECB

Mario DRAGHI

³⁸ The same considerations apply *mutatis mutandis* to the provisions of Article 21 of the SRMR.



Technical working document

ECB staff drafting proposals on revisions to the Union crisis management framework

Drafting proposals in relation to proposal for a directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures

and

further proposed amendments to the current text of the Capital Requirements Directive (CRD)

Text proposed by the European Commission or current text of the CRD	Amendments proposed by the ECB ¹
<p>Amendment 1</p> <p>Point (22) of Article 1 of the proposed directive</p> <p>(Article 104c of the CRD)</p>	
<p>‘1. Competent authorities shall consult resolution authorities prior to determining any additional own funds requirement referred to in Article 104(1)(a) and prior to communicating to institutions any expectation for adjustments to the level of own funds in accordance with Article 104b. For these purposes, competent authorities shall provide resolution authorities with all available information.</p> <p>2. Competent authorities shall inform the relevant resolution authorities about the additional own funds requirement imposed on institutions pursuant to Article 104(1)(a) and about any expectation for adjustments to the level of own funds communicated to institutions in accordance with Article 104b.’</p>	<p>‘1. Competent authorities shall consult inform resolution authorities of prior to determining any additional own funds requirements referred to in Article 104(1)(a) and prior to communicating to institutions any expectation for adjustments to the level of own funds referred to in Article 104b. For these purposes, competent authorities shall provide authorities with all available-information.</p> <p>2. Competent authorities shall inform the relevant resolution authorities about the final additional capital requirements imposed to institutions pursuant to Article 104(a) and any expectation for adjustments to the level of own funds communicated to institutions in accordance with Article 104b.’</p>

¹ Bold in the body of the text indicates where ECB staff proposes inserting new text. Strikethrough in the body of the text indicates where ECB staff proposes deleting text.

Text proposed by the European Commission or current text of the CRD	Amendments proposed by the ECB ¹
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The proposal requires competent authorities to consult resolution authorities prior to the adoption of any additional capital requirement. ECB staff supports the objective of good cooperation with resolution authorities. However, the proposed formal consultation of resolution authorities prior to determining additional own fund requirements or providing guidance would prove unnecessarily burdensome in practice and unduly formalistic without enhancing, content-wise, the current setting process. Moreover, the memorandum of understanding between the ECB and the Single Resolution Board implemented for the first time in the context of the preparation of the 2016 SREP decisions already ensures smooth cooperation.</i></p>	
<p style="text-align: center;">Amendment 2 Point (32) of Article 1 of the proposed directive (Article 141a(2) of the CRD)</p>	
<p>‘2. By way of derogation from paragraph 1, an institution shall not be considered as failing to meet the combined buffer requirement for the purposes of Article 141 where all the following conditions are met:</p> <p>(a) the institution meets the combined buffer requirement defined in Article 128(6) and each of the requirements referred to in points (a), (b) and (c) of paragraph 1;</p> <p>(b) the failure to meet the requirements referred to in point (d) of paragraph 1 is exclusively due to the inability of the institution 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;</p> <p>(c) the failure to meet the requirements referred to in point (d) of paragraph 1 does not last longer than 6 months.’</p>	<p>2. By way of derogation from paragraph 1, an institution shall not be considered as failing to meet the combined buffer requirement for the purpose of Article 141 where all the following conditions are met:</p> <p>(a) the institution meets the combined buffer requirement defined in Article 128(6) when considered in addition to and each of the requirements referred to in points (a), (b) and (c) of paragraph 1;</p> <p>(b) the failure to meet the combined buffer requirement defined in Article 128(6) when considered in addition requirements referred to the requirement in point (d) of paragraph 1 is exclusively due to the inability of the institution to issue or replace liabilities that do not or no longer meet the eligibility or maturity criteria laid down in Article 72b and 72c of Regulation (EU) No 575/2013.;</p> <p>(c) the failure to meet the requirements referred to in point (d) of paragraph 1 does not last longer than 6 12 months.</p>

Text proposed by the European Commission or current text of the CRD	Amendments proposed by the ECB¹
<p style="text-align: center;"><u>Explanation</u></p> <p><i>ECB staff considers that a buffer breach due to a lack of minimum requirement for own funds and eligible liabilities (MREL) eligible instruments, either via the inability to roll over or to issue new MREL, should not lead to the MDA automaticity from the start.</i></p> <p><i>Furthermore, the exemption from MDA restrictions should not be limited to a six-month period. A 6 month exemption is too short to matter and may still exacerbate funding market stress when there is the need to issue new capital or debt instruments. It should therefore be extended to 12 months to allow for additional time for the institution to issue MREL eligible liabilities.</i></p>	

Drafting proposals in relation to proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012
and
further proposed amendments to the current text of the Capital Requirements Regulation (CRR)

Text proposed by the European Commission or current text of the CRR	Amendments proposed by the ECB ²
Amendment 1 Article 4(1)(130a) of the CRR (new)	
No text	<p>'(130a) 'third-country resolution entity' means a third-country resolution entity as defined in point (83aa) of Article 2(1) of Directive 2014/59/EU of the European Parliament and of the Council*;</p> <p>(*) Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).'</p>
<p><u>Explanation</u></p> <p><i>To avoid a misunderstanding in the determination of MREL and its level of application, it is desirable to harmonise the terms used in the CRR by making clear that, in the case of 'resolution entities', compliance will be on a consolidated basis at the level of the resolution group. The new definition of 'third-country</i></p>	

² Bold in the body of the text indicates where ECB staff proposes inserting new text. Strikethrough in the body of the text indicates where ECB staff proposes deleting text.

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<p><i>resolution entity</i>’ introduced by this amendment is used in the amendments to the proposed Articles 11 and 12 of the CRR.</p>	
<p style="text-align: center;">Amendment 2 Point (7) of Article 1 of the proposed regulation (Article 11(3) of the CRR)</p>	
<p>‘3. By way of derogation from paragraph 2, only parent institutions identified as resolution entities that are G-SIIs or part of G-SIIs or part of non-EU G-SIIs shall comply with Article 92a on a consolidated basis, to the extent and in the manner prescribed by Article 18. [...]</p>	<p>‘3. By way of derogation from paragraph 2, only parent institutions identified as resolution entities that are G-SIIs or part of G-SIIs or part of non-EU G-SIIs shall comply with Article 92a on a consolidated basis at the level of the resolution group, to the extent and in the manner prescribed by Article 18. [...]</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>To avoid a misunderstanding in determining MREL and its level of application, in addition to the amendments proposed under Article 2(1) of the BRRD to introduce a new definition of ‘third-country resolution entity’ (see the proposed amendment to Article 2(1)(83b) of the BRRD), it is desirable to also harmonise the terms used in the CRR by making clear that, for ‘resolution entities’, compliance will be assessed on a consolidated basis at the level of the resolution group.</i></p>	
<p style="text-align: center;">Amendment 3 Point (8) of Article 1 of the proposed regulation (Article 12 of the CRR)</p>	
<p style="text-align: center;">‘Article 12 <i>Consolidated calculation for G-SIIs with multiple resolution entities</i></p> <p>Where more than one G-SII entity belonging to the same G-SII is a resolution entities, the EU parent institution of that G-SII shall calculate the amount of own funds and eligible liabilities referred to in point (a) of Article 92a(1). That calculation shall be undertaken based on the consolidated situation of the EU parent institution as if it were the only</p>	<p style="text-align: center;">‘Article 12 <i>Consolidated calculation for G-SIIs with multiple resolution entities</i></p> <p>Where more than one G-SII entity belonging to the same G-SII is a resolution entities, entity or a third-country resolution entity, the EU parent institution of that G-SII shall calculate the amount of own funds and eligible liabilities referred to in point (a) of Article 92a(1). That calculation shall be undertaken based on the consolidated situation of</p>

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<p>resolution entity of the G-SII.</p> <p>Where the amount calculated in accordance with the first sub-paragraph is lower than the sum of the amounts of own funds and eligible liabilities referred to in Article 92a(1)(a) of all resolution entities belonging to that G-SII, the resolution authorities shall act in accordance with Article 45d(3) and 45h(2) of Directive 2014/59/EU.</p> <p>Where the amount calculated in accordance with the first sub-paragraph is higher than the sum of the amounts of own funds and eligible liabilities referred to in Article 92a(1)(a) of all resolution entities belonging to that G-SII, the resolution authorities may act in accordance with Article 45d(3) and 45h(2) of Directive 2014/59/EU.'</p>	<p>the EU parent institution as if it were the only resolution entity of the G-SII.</p> <p>Where the amount calculated in accordance with the first sub-paragraph is lower than the sum of the amounts of own funds and eligible liabilities referred to in Article 92a(1)(a) of all resolution entities and corresponding amounts for third-country resolution entities belonging to that G-SII, the resolution authorities shall act in accordance with Article 45d(3) and 45h(2) of Directive 2014/59/EU.</p> <p>Where the amount calculated in accordance with the first sub-paragraph is higher than the sum of the amounts of own funds and eligible liabilities referred to in Article 92a(1)(a) of all resolution entities and corresponding amounts for third-country resolution entities belonging to that G-SII, the resolution authorities may act in accordance with Article 45d(3) and 45h(2) of Directive 2014/59/EU.'</p>
<p><u>Explanation</u></p> <p><i>As the scope of 'resolution group' should also exclude third-country subsidiaries that are points of entry themselves, it is necessary to also mention such third-country resolution entities when specifying the consolidating calculation of MREL. This clarification may have a considerable effect on the MREL requirement for these group types.</i></p>	
<p>Amendment 4</p> <p>Point (27) of Article 1 of the proposed regulation</p> <p>(Article 72b(2)(k) and (6) of the CRR)</p>	
<p>'2. [...]</p> <p>(k) the liabilities may only be called, redeemed, repurchased or repaid early where the conditions laid down in Articles 77 and 78 are met;</p> <p>[...]</p> <p>6. The competent authority shall consult the</p>	<p>'2. [...]</p> <p>(k) the liabilities may only be called, redeemed, repurchased or repaid early where the conditions laid down in Articles 77, and 78 and 78a are met;</p> <p>[...]</p> <p>6. The competent resolution authority shall consult</p>

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resolution authority when examining whether the conditions of this Article are fulfilled.'	the resolution competent authority when examining whether the conditions of this Article are fulfilled.'
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The resolution authority (and not the competent authority) should be the authority responsible for the assessment of the conditions laid down in the proposed Article 72b of CRR according to which liabilities qualify as eligible liabilities instruments.</i></p>	
<p style="text-align: center;">Amendment 5</p> <p style="text-align: center;">Point (27) of Article 1 of the proposed regulation</p> <p style="text-align: center;">(Article 72e(1) of the CRR)</p>	
<p>'1. Institutions that are subject to Article 92a shall deduct the following from eligible liabilities items :</p> <p>[...]</p> <p>(b) direct, indirect and synthetic holdings by the institution of eligible liabilities instruments of G-SII entities with which the institution has reciprocal cross holdings that the competent authority considers to have been designed to artificially inflate the loss absorption and recapitalisation capacity of the resolution entity;</p> <p>(c) the applicable amount determined in accordance with Article 72i of direct, indirect and synthetic holdings of eligible liabilities instruments of G-SII entities, where the institution does not have a significant investment in those entities;</p> <p>(d) direct, indirect and synthetic holdings by the institution of eligible liabilities instruments of G-SII entities, where the institution has a significant investment in those entities, excluding underwriting positions held for fewer than five working days.'</p>	<p>'1. Institutions that are subject to Article 92a shall deduct the following from eligible liabilities items:</p> <p>[...]</p> <p>(b) direct, indirect and synthetic holdings by the institution of eligible liabilities instruments of G-SII resolution entities with which the institution has reciprocal cross holdings that the competent authority considers to have been designed to artificially inflate the loss absorption and recapitalisation capacity of the resolution entity;</p> <p>(c) the applicable amount determined in accordance with Article 72i of direct, indirect and synthetic holdings of eligible liabilities instruments of G-SII resolution entities, where the institution does not have a significant investment in those entities;</p> <p>(d) direct, indirect and synthetic holdings by the institution of eligible liabilities instruments of G-SII resolution entities, where the institution has a significant investment in those entities, excluding underwriting positions held for fewer than five working days.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>To prevent double counting and limit contagion effects, ECB staff suggests applying deduction rules to all</i></p>	

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<p><i>holdings of external MREL/total loss-absorbing capacity (TLAC) liabilities of banks (i.e. liabilities issued to entities outside the resolution group) irrespective of the type of the institution (i.e. not only global systemically important institutions (G-SIIs)).</i></p>	
<p style="text-align: center;">Amendment 6 Point (27) of Article 1 of the proposed regulation (Article 72e(4) of the CRR)</p>	
<p>‘4. Where an EU parent institution or a parent institution in a Member State that is subject to Article 92a has direct, indirect or synthetic holdings of own funds instruments or eligible liabilities instruments of one or more subsidiaries which do not belong to the same resolution group as that parent institution, the resolution authority of that parent institution, after consulting the resolution authorities of any subsidiaries concerned, may permit the parent institution to derogate from paragraphs 1(c), 1(d) and 2 by deducting a lower amount specified by the home resolution authority. That lower amount must be at least equal to the amount (m) calculated as follows:</p> $m_i = O_i + P_i - \max \{0; O_i + P_i - rRG \times R_i\}$ <p>Where</p> <p>i = the index denoting the subsidiary;</p> <p>O_i = the amount of own funds instruments issued by subsidiary i which is recognised in consolidated own funds by the parent institution;</p> <p>P_i = the amount of eligible liabilities instruments issued by subsidiary i and held by the parent institution;</p> <p>rRG = the ratio applicable to the respective resolution group in accordance with point (a) of Article 92a(1) and Article 45d of Directive 2014/59/EU;</p> <p>R_i = the total risk exposure amount of the G-SII</p>	<p>‘4. Where an EU parent institution or a parent institution in a Member State that is subject to Article 92a has direct, indirect or synthetic holdings of own funds instruments or eligible liabilities instruments of one or more subsidiaries which do not belong to the same resolution group as that parent institution, the resolution authority of that parent institution, after consulting the resolution authorities of any subsidiaries concerned, may permit the parent institution to derogate from paragraphs 1(c) and (d) and 2 of this Article and paragraphs 1(h) and (i) of Article 36 by deducting a lower amount specified by the home resolution authority. That lower amount must be at least equal to the amount (m) calculated as follows:</p> $m_i = \max \{0; O_i + L_{Pi} - \max \{0; \beta \cdot [O_i + L_i - r_i \cdot RWA_{ai}]\}\}$ <p>Where:</p> <p>m_i = amount of deduction</p> <p>O_i = capital items of the subsidiary i</p> <p>O_{Pi} = capital instruments of the subsidiary i held by the parent undertaking</p> <p>L_i = amount of eligible liabilities instruments issued by subsidiary i</p> <p>L_{Pi} = amount of eligible liabilities instruments issued by subsidiary i held by the parent undertaking</p> <p>β = percentage of capital instruments and eligible liabilities instruments issued by</p>

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<p>entity i calculated in accordance with Article 92(3) and (4).</p> <p>Where the parent institution is allowed to deduct the lower amount in accordance with the first subparagraph, the difference between the amount calculated in accordance with paragraphs 1(c), 1(d) and 2 and this lower amount shall be deducted by the subsidiary from the corresponding element of own funds and eligible liabilities.'</p>	<p>subsidiary i held by the parent undertaking</p> <p>ri = MREL ratio applicable to the subsidiary i (at the level of the resolution group of that subsidiary)</p> <p>RWA_{ai} = RWA adjusted (taking into account the Article 12 of CRR) of the subsidiary i.'</p> <p>$m_i = O_i + P_i = \max \{0; O_i + P_i - rRG \times R_i\}$</p> <p>Where</p> <p>i = the index denoting the subsidiary;</p> <p>O_i = the amount of own funds instruments issued by subsidiary i which is recognised in consolidated own funds by the parent institution;</p> <p>P_i = the amount of eligible liabilities instruments issued by subsidiary i and held by the parent institution;</p> <p>rRG = the ratio applicable to the respective resolution group in accordance with point (a) of Article 92a(1) and Article 45d of Directive 2014/59/EU;</p> <p>R_i = the total risk exposure amount of the G-SII entity i calculated in accordance with Article 92(3) and (4).</p> <p>Where the parent institution is allowed to deduct the lower amount in accordance with the first subparagraph, the difference between the amount calculated in accordance with paragraphs 1(c), 1(d) and 2 and this lower amount shall be deducted by the subsidiary from the corresponding element of own funds and eligible liabilities.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>In the case of a multiple points of entry (MPE) approach, Article 72e(4) of the CRR would allow the reallocation of the amount of the deduction with the aim of taking into account the surplus TLAC/MREL that a subsidiary outside the resolution group might have. However, the current proposal is not clear and may be interpreted in a way that does not properly reflect the TLAC term sheet in the following two ways:</i></p> <p><i>First, the adjustment to the deduction seems to affect only eligible liabilities instruments, given that the</i></p>	

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<p><i>proposed wording of Article 72e(4) “may permit the parent institution to derogate from paragraphs 1(c), 1(d) and 2’ refers exclusively to eligible liabilities. The TLAC term sheet does not foresee this limitation. In the term sheet (Section 3) this adjustment can be applied to any exposure that corresponds to items eligible for TLAC, which includes capital instruments that meet the requirements of Section 6 of the term sheet.</i></p> <p><i>Second, according to the term sheet, the deduction at the parent institution must be no lower than the parent’s exposure to the subsidiary’s TLAC, less the TLAC surplus of the subsidiary that is attributable to the parent. The calculation of the surplus should take into account any adjustment that has been agreed to minimise or eliminate differences in the calculation of risk weighted assets (RWAs) between host and home jurisdictions.</i></p> <p><i>However, the formula included in the proposed Article 72e(4) of the CRR does not seem to reflect the above and, with its current wording, it is difficult to understand the objective which it pursues:</i></p> <ul style="list-style-type: none"> <i>(a) the second component of the formula (subtracting) should reflect the surplus of TLAC of the subsidiary that is attributed to the parent (taking into account the adjustment of RWAs described in the next paragraph), but this is not currently the case;</i> <i>(b) it is not clear what the first component of the formula reflects (in particular, the variable «Oi»);</i> <i>(c) it is doubtful why «Oi+Pi» are the same in the subtracting as in the minuend of the formula. In addition, doubts exist as to whether «rRG» is correct, since it is defined as ‘the ratio applicable to the respective resolution group’, but in an MPE there is more than one resolution group.</i> <p><i>It is also not clear that the RWA used in the formula should be adjusted to eliminate differences between host and home jurisdictions. In the current proposal the adjustment to eliminate the potential differences in RWA is included in Article 12 of the CRR, but the proposal does not expressly reflects its interrelationship with Article 72e(4) of the CRR.</i></p>	
<p>Amendment 7</p> <p>Point (27) of Article 1 of the proposed regulation</p> <p>(Article 72h (title) of the CRR)</p>	
<p>‘Article 72h</p> <p><i>Deduction of holdings of eligible liabilities of other</i></p> <p><i>GSII entities’</i></p>	<p>‘Article 72h</p> <p><i>Deduction of holdings of eligible liabilities of other</i></p> <p><i>GSII resolution entities’</i></p>
<p><u>Explanation</u></p> <p><i>The title has been adjusted to reflect the proposed amendments to Article 72e of the CRR.</i></p>	

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<p>Amendment 8</p> <p>Point (27) of Article 1 of the proposed regulation</p> <p>(Article 72i(1) of the CRR)</p>	
<p style="text-align: center;"><i>'Article 72i</i></p> <p style="text-align: center;"><i>Deduction of eligible liabilities where the institution does not have a significant investment in G-SII entities</i></p> <p>1. For the purposes of point (c) of Article 72e(1), institutions shall calculate the applicable amount to be deducted by multiplying the amount referred to in point (a) of this paragraph by the factor derived from the calculation referred to in point (b) of this paragraph:</p> <p>(a) the aggregate amount by which the direct, indirect and synthetic holdings by the institution of the Common Equity Tier 1, Additional Tier 1, Tier 2 instruments of financial sector entities and eligible liabilities instruments of G-SII entities in none of which the institution has a significant investment exceeds 10% of the Common Equity Tier 1 items of the institution after applying the following:</p> <p>[...]</p> <p>(b) the amount of direct, indirect and synthetic holdings by the institution of the eligible liability instruments of G-SII entities in which the institution does not have a significant investment divided by the aggregate amount of the direct, indirect and synthetic holdings by the institution of the Common Equity Tier 1, Additional Tier 1, Tier 2 instruments of financial sector entities and eligible liability instruments of G-SII entities in none of which the resolution entity has a significant investment.'</p>	<p style="text-align: center;"><i>'Article 72i</i></p> <p style="text-align: center;"><i>Deduction of eligible liabilities where the institution does not have a significant investment in G-SII resolution entities</i></p> <p>1. For the purposes of point (c) of Article 72e(1), institutions shall calculate the applicable amount to be deducted by multiplying the amount referred to in point (a) of this paragraph by the factor derived from the calculation referred to in point (b) of this paragraph:</p> <p>(a) the aggregate amount by which the direct, indirect and synthetic holdings by the institution of the Common Equity Tier 1, Additional Tier 1, Tier 2 instruments of financial sector entities and eligible liabilities instruments of G-SII resolution entities in none of which the institution has a significant investment exceeds 10% of the Common Equity Tier 1 items of the institution after applying the following:</p> <p>[...]</p> <p>(b) the amount of direct, indirect and synthetic holdings by the institution of the eligible liability instruments of G-SII resolution entities in which the institution does not have a significant investment divided by the aggregate amount of the direct, indirect and synthetic holdings by the institution of the Common Equity Tier 1, Additional Tier 1, Tier 2 instruments of financial sector entities and eligible liability instruments of G-SII resolution entities in none of which the resolution entity has a significant investment.'</p>

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<p><u>Explanation</u></p> <p><i>This adjustment reflects the proposed amendments to Article 72e of the CRR.</i></p>	
<p>Amendment 9</p> <p>Point (27) of Article 1 of the proposed regulation</p> <p>(Article 72j of the CRR)</p>	
<p style="text-align: center;"><i>'Article 72j</i></p> <p style="text-align: center;"><i>Trading book exception from deductions from eligible liabilities items</i></p> <p>1. Institutions may decide not to deduct a designated part of their direct, indirect and synthetic holdings of eligible liabilities instruments, that in aggregate and measured on a gross long basis is equal to or less than 5% of the Common Equity Tier 1 items of the institution after applying Articles 32 to 36, provided that all of the following conditions are met:</p> <p>(a) the holdings are in the trading book;</p> <p>(b) the eligible liabilities instruments are held for no longer than 30 business days.</p> <p>2. The amounts of the items that are not deducted pursuant to paragraph 1 shall be subject to own funds requirements for items in the trading book.</p> <p>3. Where in the case of holdings deducted in accordance with paragraph 1 the conditions laid down in that paragraph cease to be met, the holdings shall be deducted in accordance with Article 72g without applying the exceptions laid down in Articles 72h and 72i.'</p>	<p style="text-align: center;"><i>'Article 72j</i></p> <p style="text-align: center;">Trading book <i>Exception from deductions from eligible liabilities items</i></p> <p>1. Institutions may decide not to deduct a designated part of their direct, indirect and synthetic holdings of eligible liabilities instruments, that in aggregate and measured on a gross long basis is equal to or less than 5% of the Common Equity Tier 1 items of the institution after applying Articles 32 to 36,.</p> <p>Institutions that are G-SII entities may apply the first subparagraph only when provided that all of the following conditions are met:</p> <p>(a) the holdings are in the trading book;</p> <p>(b) the eligible liabilities instruments are held for no longer than 30 business days.</p> <p>2. The amounts of the items that are not deducted pursuant to paragraph 1 shall be subject to own funds requirements for items in the trading book.</p> <p>3. Where in the case of holdings deducted in accordance with the second subparagraph of paragraph 1 the conditions laid down in that subparagraph cease to be met, the holdings shall be deducted in accordance with Article 72g without applying the exceptions laid down in Articles 72h and 72i.'</p>

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<p style="text-align: center;"><u>Explanation</u></p> <p><i>This adjustment reflects the proposed amendments to Article 72e of the CRR.</i></p>	
<p style="text-align: center;">Amendment 10</p> <p style="text-align: center;">Point (33) of Article 1 of the proposed regulation (Article 78(1) of the CRR)</p>	
<p style="text-align: center;"><i>'Article 78</i></p> <p><i>Supervisory permission for reducing own funds and eligible liabilities</i></p> <p>1. The competent authority shall grant permission for an institution to reduce, repurchase, call or redeem Common Equity Tier 1, Additional Tier 1, Tier 2 or eligible liabilities instruments where either of the following conditions is met:</p> <p>(a) earlier than or at the same time as the action referred to in Article 77, the institution replaces the instruments referred to in Article 77 with own funds or eligible liabilities instruments of equal or higher quality at terms that are sustainable for the income capacity of the institution;</p> <p>(b) the institution has demonstrated to the satisfaction of the competent authority that the own funds and eligible liabilities of the institution would, following the action in question, exceed the requirements laid down in this Regulation, in Directive 2013/36/EU and in Directive 2014/59/EU by a margin that the competent authority considers necessary.</p> <p>The competent authority shall consult the resolution authority before granting that permission.</p> <p>Where an institution provides sufficient safeguards as to its capacity to operate with own funds above the amount of the requirements laid down in this Regulation, in Directive 2013/36/EU and in Directive 2014/59/EU, the resolution authority, after</p>	<p style="text-align: center;"><i>'Article 78</i></p> <p><i>Supervisory permission for reducing own funds and eligible liabilities</i></p> <p>1. The competent authority shall grant permission for an institution to reduce, repurchase, call or redeem Common Equity Tier 1, Additional Tier 1 or Tier 2 or eligible liabilities instruments where either of the following conditions is met:</p> <p>(a) earlier than or at the same time as the action referred to in Article 77, the institution replaces the instruments referred to in Article 77 with own funds or eligible liabilities instruments of equal or higher quality at terms that are sustainable for the income capacity of the institution;</p> <p>(b) the institution has demonstrated to the satisfaction of the competent authority that the own funds and eligible liabilities of the institution would, following the action in question, exceed the requirements laid down in this Regulation, in Directive 2013/36/EU and in Directive 2014/59/EU by a margin that the competent authority considers necessary.</p> <p>The competent authority shall consult the resolution authority before granting that permission.</p> <p>Where an institution provides sufficient safeguards as to its capacity to operate with own funds above the amount of the requirements laid down in this Regulation, in Directive 2013/36/EU and in Directive 2014/59/EU, the resolution authority, after</p>

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<p>consulting the competent authority, may grant a general prior permission to that institution to effect calls, redemptions, repayments or repurchases of eligible liabilities instruments, subject to criteria that ensure that any such future actions will be in accordance with the conditions laid down in points (a) and (b) of this paragraph. This general prior permission shall be granted only for a certain time period, which shall not exceed one year, after which it may be renewed. The general prior permission shall only be granted for a certain predetermined amount, which shall be set by the resolution authority. Resolution authorities shall inform the competent authorities about any general prior permission granted.</p> <p>Where an institution provides sufficient safeguards as to its capacity to operate with own funds above the amount of the requirements laid down in this Regulation, in Directive 2013/36/EU and in Directive 2014/59/EU, the competent authority, after consulting the resolution authority, may grant that institution a general prior permission to that institution to effect calls, redemptions, repayments or repurchases of eligible liabilities instruments, subject to criteria that ensure that any such future actions will be in accordance with the conditions laid down in points (a) and (b) of this paragraph. This general prior permission shall be granted only for a certain time period, which shall not exceed one year, after which it may be renewed. The general prior permission shall be granted for a certain predetermined amount, which shall be set by the competent authority. In case of Common Equity Tier 1 instruments, that predetermined amount shall not exceed 3% of the relevant issue and shall not exceed 10 % of the amount by which Common Equity Tier 1 capital exceeds the sum of the Common Equity Tier 1 capital requirements laid</p>	<p>consulting the competent authority, may grant a general prior permission to that institution to effect calls, redemptions, repayments or repurchases of eligible liabilities instruments, subject to criteria that ensure that any such future actions will be in accordance with the conditions laid down in points (a) and (b) of this paragraph. This general prior permission shall be granted only for a certain time period, which shall not exceed one year, after which it may be renewed. The general prior permission shall only be granted for a certain predetermined amount, which shall be set by the resolution authority. Resolution authorities shall inform the competent authorities about any general prior permission granted.</p> <p>Where an institution provides sufficient safeguards as to its capacity to operate with own funds above the amount of the requirements laid down in this Regulation, in Directive 2013/36/EU and in Directive 2014/59/EU, the competent authority, after consulting the resolution authority, may grant that institution a general prior permission to that institution to effect calls, redemptions, repayments or repurchases of own funds instruments eligible liabilities, subject to criteria that ensure that any such future actions will be in accordance with the conditions laid down in points (a) and (b) of this paragraph. This general prior permission shall be granted only for a certain time period, which shall not exceed one year, after which it may be renewed. The general prior permission shall be granted for a certain predetermined amount, which shall be set by the competent authority. In case of Common Equity Tier 1 instruments, that predetermined amount shall not exceed 3 % of the relevant issue and shall not exceed 10 % of the amount by which Common Equity Tier 1 capital exceeds the sum of the Common Equity Tier 1</p>

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<p>down in this Regulation, in Directive 2013/36/EU and in Directive 2014/59/EU by a margin that the competent authority considers necessary. In case of Additional Tier 1 instruments or Tier 2 instruments, that predetermined amount shall not exceed 10% of the relevant issue and shall not exceed 3 % of the total amount of outstanding Additional Tier 1 instruments or Tier 2 instruments, as applicable. In case of eligible liabilities instruments, the predetermined amount shall be set by the by the resolution authority after it has consulted the competent authority.</p> <p>Competent authorities shall withdraw the general prior permission where an institution breaches any of the criteria provided for the purposes of that permission.'</p>	<p>capital requirements laid down in this Regulation, in Directive 2013/36/EU and in Directive 2014/59/EU by a margin that the competent authority considers necessary. In case of Additional Tier 1 instruments or Tier 2 instruments, that predetermined amount shall not exceed 10 % of the relevant issue and shall not exceed 3 % of the total amount of outstanding Additional Tier 1 instruments or Tier 2 instruments, as applicable. In case of eligible liabilities instruments, the predetermined amount shall be set by the by the resolution authority after it has consulted the competent authority.</p> <p>Competent authorities shall withdraw the general prior permission where the institution breaches any of the criteria provided for the purposes of that permission.'</p>
<p><u>Explanation</u></p> <p><i>For the sake of clarity ECB staff suggests moving the power of the resolution authority to grant an institution the permission to reduce, repurchase, call or redeem eligible liabilities instruments to a dedicated provision (see the proposed amendment to Article 78a of the CRR). ECB staff is of the view that consultation of the resolution authority for the reduction of own funds is not needed since this will create an additional operational burden with little added value from a supervisory perspective. Indeed, those transactions are usually routine operations.</i></p>	
<p>Amendment 11</p> <p>Point (33) of Article 1 of the proposed regulation</p> <p>(Article 78(2) of the CRR)</p>	
<p>'2. When assessing under point (a) of paragraph 1 the sustainability of the replacement instruments for the income capacity of the institution, competent authorities shall consider the extent to which those replacement capital instruments and liabilities would be more costly for the institution than those they would replace.'</p>	<p>'2. When assessing under point (a) of paragraph 1 the sustainability of the replacement instruments for the income capacity of the institution, competent authorities shall consider the extent to which those replacement capital instruments and liabilities would be more costly for the institution than those they would replace.'</p>
<p><u>Explanation</u></p>	

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<i>See the explanation for the proposed amendment to Article 78(1) of the CRR.</i>	
Amendment 12 Point (33) of Article 1 of the proposed regulation (Article 78(4) of the CRR)	
<p>[...]</p> <p>(d) earlier than or at the same time as the action referred to in Article 77, the institution replaces the instruments referred to in Article 77 with own funds or eligible liabilities instruments of equal or higher quality at terms that are sustainable for the income capacity of the institution and the competent authority has permitted that action based on the determination that it would be beneficial from a prudential point of view and justified by exceptional circumstances;</p> <p>(e) the Additional Tier 1 or Tier 2 instruments are repurchased for market making purposes.</p> <p>The competent authority shall consult the resolution authority on those conditions before granting permission.'</p>	<p>[...]</p> <p>(d) earlier than or at the same time as the action referred to in Article 77(1), the institution replaces the instruments referred to in Article 77(1) with own funds or eligible liabilities instruments of equal or higher quality at terms that are sustainable for the income capacity of the institution and the competent authority has permitted this action based on the determination that this action would be beneficial from a prudential point of view and justified by exceptional circumstances;</p> <p>(e) the Additional Tier 1 or Tier 2 instruments are repurchased for market making purposes.</p> <p>The competent authority shall consult the resolution authority as concerns these conditions before granting permission.'</p>
<u>Explanation</u> <i>See the explanation for amendment 11.</i>	
Amendment 13 Article 78a of the CRR (new)	
No text	<p style="text-align: center;">'Article 78a</p> <p style="text-align: center;">Permission to reduce eligible liabilities</p> <p>1. The resolution authority shall grant permission for an institution to reduce, repurchase, call or redeem eligible liabilities instruments where any of the following conditions is met:</p> <p>(a) earlier than or at the same time as an action</p>

Text proposed by the European Commission or current text of the CRR	Amendments proposed by the ECB ²
	<p>referred to in Article 77, the institution replaces the instruments referred to in Article 77 with own funds or eligible liabilities instruments of equal or higher quality at terms that are sustainable for the income capacity of the institution;</p> <p>(b) the institution has demonstrated to the satisfaction of the resolution authority that the own funds and eligible liabilities of the institution would, following the action in question, exceed the requirements for own funds and eligible liabilities laid down in this Regulation, in Directive 2013/36/EU and in Directive 2014/59/EU by a margin that the resolution authority considers necessary;</p> <p>(c) the institution has demonstrated to the satisfaction of the resolution authority that the partial or full replacement of the MREL liability by own funds instruments is necessary to ensure compliance with the capital requirements laid down in this regulation and in Directive 2013/36/EU. The resolution authority shall consult the competent authority before granting permission.</p> <p>Where an institution provides sufficient safeguards as to its capacity to operate with own funds and eligible liabilities above the amount of the requirements laid down in this Regulation, in Directive 2013/36/EU and in Directive 2014/59/EU, the resolution authority, after consulting the competent authority, may grant a general prior permission to that institution to effect calls, redemptions, repayments or repurchases of eligible liabilities instruments, subject to criteria that ensure that any such future actions will be in accordance with the conditions laid down in points (a) and</p>

Text proposed by the European Commission or current text of the CRR	Amendments proposed by the ECB ²
	<p>(b) of this paragraph. This general prior permission shall be granted only for a certain time period, which shall not exceed one year, after which it may be renewed. The general prior permission shall only be granted for a certain predetermined amount, which shall be set by the resolution authority. The resolution authority shall inform the competent authority about any general prior permission granted.</p> <p>The resolution authority shall withdraw the general prior permission where the institution breaches any of the criteria laid down for the purposes of such permission.</p> <p>2. When assessing under point (a) of paragraph 1 the sustainability of the replacement instruments for the income capacity of the institution, the resolution authority shall consider the extent to which those liabilities would be more costly for the institution than those they would replace.</p> <p>3. EBA shall develop draft regulatory technical standards to specify the process, including the time limits and procedures for consulting the competent authority and granting approval in advance by the resolution authority for an action listed in Article 77(2), and data requirements for an application by an institution for the permission of the resolution authority to carry out an action listed in Article 77(2), including the time period for processing such an application.</p> <p>EBA shall submit those draft regulatory technical standards to the Commission by 1 January 2019.</p> <p>Power is delegated to the Commission to adopt the regulatory technical standards in accordance with Articles 10 to 14 of Regulation</p>

Text proposed by the European Commission or current text of the CRR	Amendments proposed by the ECB ²
	(EU) No 1093/2010.'
<p style="text-align: center;"><u>Explanation</u></p> <p><i>For the sake of clarity ECB staff suggests dedicating a specific provision to the resolution authorities' power to grant permission for an institution to reduce, repurchase, call or redeem eligible liabilities instruments.</i></p>	

Drafting proposals in relation to proposal for a directive of the European Parliament and of the Council amending Directive 2014/59/EU on loss-absorbing and recapitalisation capacity of credit institutions and investment firms and amending Directive 98/26/EC, Directive 2002/47/EC, Directive 2012/30/EU, Directive 2011/35/EU, Directive 2005/56/EC, Directive 2004/25/EC and Directive 2007/36/EC

and

further proposed amendments to the current text of the Bank Recovery and Resolution Directive (BRRD)

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB³
Amendment 1 Recital 18a of the proposed directive (new)	
No text	‘(18a) When exercising their power to suspend competent authorities should take into account the impact that the exercise of that power might have on the orderly functioning of financial markets’
<u>Explanation</u> <i>While the competent authority will certainly take into account the effect of the use of the moratorium power on the functioning of financial markets, it would be sufficient to mention this specifically in a recital rather than in an enacting provision of the BRRD. This change would prevent the competent authorities from being exposed to unnecessary litigation risks. See also the proposed amendment to Article 29a(4) of the BRRD.</i>	
Amendment 2 Point (3) of Article 1 of the proposed directive (Article 2(1)(83a) and (83c) and new Article 2(1)(83b) of the BRRD)	
‘(83a) ‘resolution entity’ means an entity established in the Union, which is identified by the resolution authority in accordance with Article 12 as an entity in respect of the resolution plan provides	‘(83a) ‘resolution entity’ means an entity established in the Union, which is identified by the resolution authority in accordance with Article 12 as an entity in respect of the resolution plan provides

³ Bold in the body of the text indicates where ECB staff proposes inserting new text. Strikethrough in the body of the text indicates where ECB staff proposes deleting text.

<p>Text proposed by the European Commission or current text of the BRRD</p>	<p>Amendments proposed by the ECB³</p>
<p>for resolution action;</p> <p>(83b) 'resolution group' means a resolution entity and its subsidiaries that are not resolution entities themselves and that are not subsidiaries of another resolution entity;'</p>	<p>for resolution action;</p> <p>(83b) 'third-country resolution entity' means an entity established in a third country which is identified by the resolution authority in accordance with Article 12 as an entity in respect of which the resolution plan provides for resolution action;</p> <p>(83bc) 'resolution group' means a resolution entity and its subsidiaries within the same resolution group, in so far as those subsidiaries that are not resolution entities or third-country resolution entities themselves and that are not subsidiaries of another resolution entity;'</p>
<p><u>Explanation</u></p> <p><i>The definition of 'resolution group' should be clarified so that third-country subsidiaries which are points of entry are also excluded from its scope, since these subsidiaries will be treated separately from the remainder of the group in the event of resolution. This also requires the inclusion of a new definition of third-country resolution entity.</i></p>	
<p>Amendment 3</p> <p>Article 2(1)(101) of the BRRD</p>	
<p>'(101) 'crisis prevention measure' means the exercise of powers to direct removal of deficiencies or impediments to recoverability under Article 6(6), the exercise of powers to address or remove impediments to resolvability under Article 17 or 18, the application of an early intervention measure under Article 27, the appointment of a temporary administrator under Article 29 or the exercise of the write down or conversion powers under Article 59;'</p>	<p>'(101) 'crisis prevention measure' means the exercise of powers to direct removal of deficiencies or impediments to recoverability under Article 6(6), the exercise of powers to address or remove impediments to resolvability under Article 17 or 18, the application of an early intervention measure under Article 27, the appointment of a temporary administrator under Article 29, the exercise of the power to suspend certain payment or delivery obligations under Article 30a or the exercise of the write down or conversion powers under Article 59;'</p>

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Article 68 of the BRRD provides that a crisis prevention or crisis management measure is not per se deemed to be an enforcement of a contract entered into by the institution or insolvency proceedings, provided that the substantive obligations under the contract continue to be performed. It is proposed below (see the proposed amendments to Article 29a of the BRRD) that the moratorium power be decoupled from early Intervention and listed as a separate power. As a result, the definition of 'crisis prevention' measure needs to be amended to include the moratorium power for the purposes of Article 68 of the BRRD.</i></p>	
<p style="text-align: center;">Amendment 4</p> <p style="text-align: center;">Point (13) of Article 1 of the proposed directive (Article 17(3) of the BRRD)</p>	
<p>'Where a substantive impediment to resolvability is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU the institution shall, within two weeks of the date of receipt of a notification made in accordance with paragraph 1, propose to the resolution authority possible measures to ensure that the institution complies with Articles 45f or 45g and the requirement referred to in Article 128(6) of Directive 2013/36/EU.'</p>	<p>'Where a substantive impediment to resolvability is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU the institution shall, within two weeks of the date of the receipt of a notification made in accordance with paragraph 1, propose to the resolution authority possible measures to ensure that the institution complies with Article 45f or 45g and the requirement referred to in Article 128(6) of Directive 2013/36/EU. The two week deadline may be extended by the resolution authority, in consultation with the competent authority, taking into account the specific circumstances of the case.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>ECB staff is of the view that more flexibility should be granted to the institution in order to submit proposals on measures to address impediments since the development of the most appropriate strategy by the institution in order to address the breach of any buffers that apply in addition to MREL requirements may require a longer time, see also the proposed amendment to Article 18(3) of the BRRD. Additionally, ECB staff welcomes the Commission's proposal, which allows the resolution authority to require an institution to change the maturity profile of MREL instruments as part of the measures to address impediments to resolvability.</i></p>	

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
Amendment 5 Point (14) of Article 1 of the proposed directive (Article 17(5) of the BRRD)	
<p>'(h1) require an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) to submit a plan to restore compliance with Articles 45f and 45g, and the requirement referred to in Article 128(6) of Directive 2013/36/EU;'</p>	<p>'(h1) require an institution or an entity referred to in point (b), (c), or (d) of Article 1(1) to submit a plan to restore compliance with Article 45f and 45g, and the requirement referred to in Article 128(6) of Directive 2013/36/EU only when considered in addition to Article 141a(1)(d) of Directive 2013/36/EU.'</p>
<p><u>Explanation</u></p> <p><i>The provision has been amended in order to clarify that the MREL restoration plan may be requested by the resolution authority only in case of breach of the combined buffer requirement on top of the MREL requirement (referred to in Article 141a(1)(d) of Directive 2013/36/EU), while in case of breach of the combined buffer requirement on top of the capital requirements (referred to in Article 141a(1)(a), (b) and (c) of Directive 2013/36/EU), the institution must submit to the competent authority a capital conservation plan in line with Article 142 of the CRD.</i></p>	
Amendment 6 Point (17) of Article 1 of the proposed directive (Article 18(2) of the BRRD)	
<p>'2. The group level resolution authority [...]</p> <p>Where the impediment to resolvability of the group is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the group-level resolution authority shall notify its assessment of that impediment to the Union parent undertaking after having consulted the resolution authority of the resolution entity and resolution authorities of its subsidiary institutions.'</p>	<p>'2. The group level resolution authority [...]</p> <p>Where the impediment to resolvability of the group is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the group-level resolution authority, after consulting the consolidating supervisor, shall notify its assessment of that impediment to the Union parent undertaking after having consulted the resolution authority of the resolution entity and resolution authorities of its subsidiary institutions.'</p>

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p><u>Explanation</u></p> <p><i>The provision has been amended in order to provide for the consultation of the competent authority.</i></p>	
<p>Amendment 7</p> <p>Point (17) of Article 1 of the proposed directive (Article 18(3) of the BRRD)</p>	
<p>'3. Within four months of the date of receipt of the report [...]</p> <p>Where those impediments are due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the Union parent undertaking shall, within two weeks of the date of receipt of a notification made in accordance with paragraph 2, propose to the group-level resolution authority possible measures to address or remove those impediments.'</p>	<p>'3. Within four months of the date of receipt of the report [...]</p> <p>Where those impediments are due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the Union parent undertaking shall, within two weeks of the date of receipt of a notification made in accordance with paragraph 2, propose to the group-level resolution authority possible measures to address or remove those impediments. The two week deadline may be extended by the resolution authority, in consultation with the competent authority, taking into account the specific circumstances of the case.'</p>
<p><u>Explanation</u></p> <p><i>ECB staff is of the view that more flexibility should be granted to the Union parent undertaking in order to submit proposals on measures to address impediments (i.e. including the possibility for the resolution authority to extend the two week period in consultation with the supervisor) as the development of the most appropriate strategy by the Union parent undertaking in order to address the breach of any buffers that apply in addition to MREL requirements may require a longer time, see also the proposed amendment to Article 17(3) of the BRRD .</i></p>	
<p>Amendment 8</p> <p>Point (17) of Article 1 of the proposed directive (Article 18(5) of the BRRD)</p>	
<p>'5. The joint decision shall be reached within four months [...]</p>	<p>'5. The joint decision shall be reached within four months [...]</p>

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p>The joint decision concerning the impediment to resolvability due to a situation referred to in Article 141a(2) of Directive 2013/36/EU shall be reached within two weeks of submission of any observations by the Union parent undertaking in accordance with paragraph 3.</p> <p>[...]</p>	<p>The joint decision concerning the impediment to resolvability due to a situation referred to in Article 141a(2) of Directive 2013/36/EU shall be reached within two weeks months of submission of any observations by the Union parent undertaking in accordance with paragraph 3.</p> <p>[...]</p>
<p><u>Explanation</u></p> <p><i>ECB staff is of the view that the two week deadline for reaching a joint decision should be replaced by a longer deadline (for example two months) as the authorities involved need to carefully consider all available options for addressing the breach of any buffers that apply in addition to MREL requirements.</i></p>	
<p>Amendment 9</p> <p>Article 27(1) of the BRRD</p>	
<p>'1. Where an institution infringes or, [...]</p> <p>(a) require the management body of the institution to implement one or more of the arrangements or measures set out in the recovery plan or in accordance with Article 5(2) to update such a recovery plan when the circumstances that led to the early intervention are different from the assumptions set out in the initial recovery plan and implement one or more of the arrangements or measures set out in the updated plan within a specific timeframe and in order to ensure that the conditions referred to in the introductory phrase no longer apply;</p> <p>(b) require the management body of the institution to examine the situation, identify measures to overcome any problems identified and draw up an action programme to overcome those problems and a timetable for its implementation;</p> <p>(c) require the management body of the institution to convene, or if the management body fails to</p>	<p>'1. Where an institution infringes or, [...]</p> <p>(a) require the management body of the institution to implement one or more of the arrangements or measures set out in the recovery plan or in accordance with Article 5(2) to update such a recovery plan when the circumstances that led to the early intervention are different from the assumptions set out in the initial recovery plan and implement one or more of the arrangements or measures set out in the updated plan within a specific timeframe and in order to ensure that the conditions referred to in the introductory phrase no longer apply;</p> <p>(b) require the management body of the institution to examine the situation, identify measures to overcome any problems identified and draw up an action programme to overcome those problems and a timetable for its implementation;</p> <p>(c) require the management body of the institution to convene, or if the management body fails to</p>

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p>comply with that requirement convene directly, a meeting of shareholders of the institution, and in both cases set the agenda and require certain decisions to be considered for adoption by the shareholders;</p> <p>(d) require one or more members of the management body or senior management to be removed or replaced if those persons are found unfit to perform their duties pursuant to Article 13 of Directive 2013/36/EU or Article 9 of Directive 2014/65/EU;</p> <p>(e) require the management body of the institution to draw up a plan for negotiation on restructuring of debt with some or all of its creditors according to the recovery plan, where applicable;</p> <p>(f) require changes to the institution's business strategy;</p> <p>(g) require changes to the legal or operational structures of the institution; and</p> <p>(h) acquire, including through on-site inspections and provide to the resolution authority, all the information necessary in order to update the resolution plan and prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution in accordance with Article 36.'</p>	<p>comply with that requirement convene directly, a meeting of shareholders of the institution, and in both cases set the agenda and require certain decisions to be considered for adoption by the shareholders;</p> <p>(d) require one or more members of the management body or senior management to be removed or replaced if those persons are found unfit to perform their duties pursuant to Article 13 of Directive 2013/36/EU or Article 9 of Directive 2014/65/EU;</p> <p>(e) require the management body of the institution to draw up a plan for negotiation on restructuring of debt with some or all of its creditors according to the recovery plan, where applicable;</p> <p>(f) require changes to the institution's business strategy;</p> <p>(g) require changes to the legal or operational structures of the institution; and'</p> <p>(h) acquire, including through on-site inspections and provide to the resolution authority, all the information necessary in order to update the resolution plan and prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution in accordance with Article 36.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>There is a significant overlap between early intervention measures pursuant to Articles 27 to 29 of the BRRD and supervisory measures foreseen in Article 104 of the CRD or, in relation to the ECB's supervisory role, in Article 16 of the SSMR. This overlap implies that Article 27 of the BRRD includes measures in the early intervention framework which are also available as 'regular' supervisory measures and do not bring any added value to the competent authority, the Single Resolution Board (SRB) or the Commission. On the contrary, this overlap is problematic, since the legal basis for taking supervisory action could be perceived as having its own significance to the market and to the public, which might trigger market disclosure in accordance with Article 17 of the Market Abuse Regulation (MAR) when early</i></p>	

<p>Text proposed by the European Commission or current text of the BRRD</p>	<p>Amendments proposed by the ECB³</p>
<p><i>intervention is used as a basis, but not when the same measure is adopted pursuant to Article 104 of the CRD or Article 16 of the SSMR.</i></p> <p><i>Since the degree of intrusiveness of measures, which are substantially the same, would then depend on the 'labelling' of such measures, it could be very difficult to justify, from a proportionality perspective, the adoption, in the form of an early intervention measure, of a measure which is already available as a 'regular' supervisory measure. Limiting early intervention to a smaller set of non-overlapping measures, which are also generally more intrusive, would ensure a clear hierarchy of supervisory action, enhance transparency and may avoid unnecessary market turmoil as a result of market disclosure requirements if less severe measures are required.</i></p>	
<p style="text-align: center;">Amendment 10</p> <p style="text-align: center;">Point (18) of Article 1 of the proposed directive (Article 27(1)(i) of the BRRD)</p>	
<p>'(i) where the conditions laid down in Article 29a are complied with, suspend any payment or delivery obligation to which an institution or entity referred to in point (b), (c) or (d) of Article 1(1) is a party.'</p>	<p>'(i) where the conditions laid down in Article 29a are complied with, suspend any payment or delivery obligation to which an institution or entity referred to in point (b), (c) or (d) of Article 1(1) is a party.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>A pre-resolution moratorium should be an ultima ratio measure, where a measure available under Articles 27 to 29 of the BRRD would not suffice to address the problem. The decision to impose such a moratorium should be preceded by a thorough assessment process, involving a close coordination between all relevant authorities, in which the competent authority determines that it is not possible to apply less intrusive measures.</i></p> <p><i>Moreover, the current wording of the proposed Article 29a(1) of the BRRD seems contradictory and creates difficulties in applying the rule in the context of early intervention. On the one hand, the first subparagraph of Article 27(1) of the BRRD sets out the precondition for the application of all early intervention measures, including the new moratorium tool. On the other hand, the new Article 29a(1) of the BRRD suggests that the application of the new moratorium tool should provide precise input into the assessment as to whether the precondition in the first subparagraph of Article 27(1) BRRD has been met. Such a legal construction appears unnecessarily complicated and difficult to apply. This represents yet another reason that justifies separating the moratorium tool from the early intervention powers. Therefore, it should be listed as a separate power of the competent authority at the end of Title III.</i></p>	

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p style="text-align: center;">Amendment 11</p> <p style="text-align: center;">Point (19) of Article 1 of the proposed directive (Article 29a of the BRRD)</p>	
<p style="text-align: center;"><i>'Article 29a</i></p> <p style="text-align: center;"><i>Power to suspend certain obligations'</i></p>	<p style="text-align: center;">'TITLE IIIa</p> <p style="text-align: center;">SUSPENSION OF CERTAIN OBLIGATIONS</p> <p style="text-align: center;"><i>Article 30a 29a</i></p> <p style="text-align: center;"><i>Power to suspend certain obligations'</i></p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>See the explanation provided for the proposed amendment to Article 27(1)(i) of the BRRD.</i></p>	
<p style="text-align: center;">Amendment 12</p> <p style="text-align: center;">Point (19) of Article 1 of the proposed directive (Article 29a(1) and (2) of the BRRD)</p>	
<p style="text-align: center;"><i>'Article 29a</i></p> <p style="text-align: center;"><i>Power to suspend certain obligations</i></p> <p>1. Member States shall establish that their respective competent authority, after having consulted the resolution authority, can exercise the power referred to in point (i) of Article 27 (1) only where the exercise of the suspension power is necessary to carry out the assessment provided for in the first sentence of Article 27(1) or to make the determination provided for in point (a) of Article 32(1).</p> <p>2. The suspension referred to in paragraph 1 shall not exceed the minimum period of time that the competent authority considers necessary to carry out the assessment referred to in point (a) of Article 27(1) or to make the determination referred to in point (a) of Article 32(1) and shall in any event not exceed 5 working days.'</p>	<p style="text-align: center;"><i>'Article 30a 29a</i></p> <p style="text-align: center;"><i>Power to suspend certain obligations'</i></p> <p>1. Where the conditions of Article 27(1) are met, Member States shall ensure that competent authorities, after having consulted the resolution authority, have at their disposal, without prejudice to the measures referred to in Article 104 of Directive 2013/36/EU and Articles 27 to 30 of this Directive, the power to suspend any payment or delivery obligation of the institution or entity referred to in points (b), (c) or (d) of Article 1.</p> <p>The competent authority may decide that specific payments are possible subject to certain preconditions.</p> <p>Member States shall establish that their respective competent authority, after having consulted the resolution authority, can exercise the power referred to in point (i) of Article 27 (1) only where the exercise of the suspension power is necessary</p>

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
	<p>to carry out the assessment provided for in the first sentence of Article 27(1) or to make the determination provided for in point (a) of Article 32(1).</p> <p>2. The competent authority may provide for exemptions from the suspension, insofar as they are necessary for the conduct of the business or its administration, to prevent economic hardship for natural persons or to sustain the resolvability of the institution or entity referred to in points (b), (c) or (d) of Article 1.</p> <p>3. The suspension referred to in paragraph 1 shall not exceed the minimum period of time that the competent authority considers necessary to carry out the assessment referred to in point (a) of Article 27(1) or to make the determination referred to in point (a) of Article 32(1) and shall in any event not exceed 5 five working days.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The reference to the necessity to carry out the failing or likely to fail assessment could be misinterpreted as meaning that the competent authority must withdraw the measure once the failing or likely to fail assessment is finalised. However, since there is a certain time lag between the assessment and the resolution authority determining whether the other conditions for resolution are fulfilled and then adopting the resolution scheme, the moratorium should remain in place until the point in time when the institution has entered into a private solution, resolution or insolvency, while observing the maximum duration of five working days. A requirement for the resolution authority to exercise their own moratorium power immediately after the failing or likely to fail assessment would be an unnecessary additional step and could also result in additional legal risks.</i></p> <p><i>Regarding the exemptions, the amendments proposed by ECB staff to Article 29a(3) and the insertion of Article 63(1b) of the BRRD provide that covered depositors' and investor protection schemes' claims should be included in the scope of the moratorium powers. Furthermore, to compensate for this extension of the scope, the BRRD should provide for limited exemptions on a discretionary basis, when necessary and if technically possible. One example of such an exemption would be the possibility of withdrawing a limited amount of deposits on a daily basis, consistent with the level of protection provided by Directive 2014/49/EU. In addition, it should be made clear that the authorities have the discretion to exclude</i></p>	

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p><i>specific claims or types of claims from the scope of the moratorium on an ad hoc basis to give them the flexibility to adjust the scope to the concrete case and possibly allow the withdrawal of a limited amount of deposits on a daily basis taking into account any liquidity and technical constraints.</i></p>	
<p style="text-align: center;">Amendment 13 Point (19) of Article 1 of the proposed directive (Article 29a(3) of the BRRD)</p>	
<p>'3. Any suspension pursuant to paragraph 1 shall not apply to:</p> <p>(a) payment and delivery obligations owed to systems or operators of systems that have been designated in accordance with Directive 98/26/EC, CCPs and third country CCPs recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012 and to central banks;</p> <p>(b) eligible claims for the purpose of Directive 97/9EC;</p> <p>(c) covered deposits.'</p>	<p>'3. Any suspension pursuant to paragraph 1 shall not apply to:</p> <p>(a) payment and delivery obligations owed to systems or operators of arising from participation in systems designated for the purposes of Directive 98/26/EC and owed to such systems, their operators or their participants; (b) payment and delivery obligations owed to: (i) CCPs; and</p> <p>(ii) third-country central counterparties recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012;</p> <p>(iii) third-country central securities depositories recognised by ESMA pursuant to Article 25 of Regulation (EU) No 909/2014;</p> <p>(iv) third-country payment systems subject to a cooperative oversight arrangement involving at least one ESCB central bank;</p> <p>and to</p> <p>(v) central banks; and</p> <p>(vi) the Bank for International Settlements.</p> <p>(b) eligible claims for the purpose of Directive 97/9EC;</p> <p>(c) covered deposits.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>For a pre-resolution moratorium to succeed in preventing a severe deterioration in an institution's situation it must have the broadest possible scope. It could be argued that there is no danger of a bank</i></p>	

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p><i>run as a result of an exception for covered depositors, because they are protected by the deposit guarantee scheme. However, in practice it is possible that if the failure of a bank appears to be imminent, a substantial number of covered depositors might still withdraw their funds immediately in order to ensure uninterrupted access or because they have no faith in the guarantee scheme. Such a scenario is particularly likely for large banks, where the sheer amount of covered deposits might erode confidence in the capacity of the deposit guarantee scheme. In such a scenario, if the scope of the moratorium power does not include covered deposits, the moratorium might alert covered depositors of the strong possibility that the institution has a failing or likely to fail assessment. The moratorium would therefore be counterproductive, causing a bank run instead of preventing it. Such an outcome could be detrimental to the bank's orderly resolution, which could ultimately cause severe harm to creditors and significantly strain the deposit guarantee scheme. In addition, such an exemption could lead to a worse treatment for depositor funded banks, as the exemption needs to be factored in when determining the seriousness of the liquidity situation of the bank. Finally, any potential technical impediments may require further assessment.</i></p> <p><i>Therefore, an exception for covered depositors from the application of the moratorium would cast serious doubts on the overall usefulness of the tool. Instead of mandating a general exemption, the BRRD should instead include certain safeguards to protect the rights of depositors, such as clear communication on when access will be regained and a restriction of the suspension to a maximum of five working days by avoiding a cumulative use by the competent authority and the resolution authority.</i></p> <p><i>The proposed text regarding the exemption from the 'power to suspend obligation' by the competent or resolution authorities covers only third-country CCPs recognised by ESMA and does not cover other types of financial market infrastructures (FMI) established in third countries. Based on the recognition process foreseen under Regulation (EU) No 909/2014 (CSDR), ECB staff proposes amendments regarding central securities depositories (CSD). At the same time, it is noted that in addition to central counterparties (CCP) and CSDs, there are other types of FMIs (e.g. payment systems) that could be located in third countries. Their functioning would be still hindered by the suspension of the payment and delivery obligations, while this may not be the intention of the competent or resolution authorities exercising such a power.</i></p> <p><i>Furthermore, according to Article 17(3) of Regulation (EU) 648/2012 (the 'EMIR') and Article 39(1) of the CSDR, it may not be necessary to refer to CCPs and CSDs authorised under the EMIR or the CSDR respectively.</i></p> <p><i>Moreover, it is proposed to add a reference to participants in systems designated for the purpose of Directive 98/26/EC of the European Parliament and of the Council⁴ (the 'Settlement Finality Directive' or 'SFD'), in addition to the system operators and the systems themselves, to ensure that all obligations</i></p>	

⁴ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

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<p><i>effected through the system are covered.</i></p> <p><i>Finally it is appropriate to extend the exception applicable to central banks also to the Bank for International Settlements (BIS) which has been entrusted with the tasks to promote the co-operation of central banks, to provide additional facilities for international financial operations; and to act as trustee or agent in regard to international financial settlements⁵. Such an exception would therefore be justified by financial stability considerations.</i></p>	
<p style="text-align: center;">Amendment 14</p> <p style="text-align: center;">Point (19) of Article 1 of the proposed directive</p> <p style="text-align: center;">(Article 29a(4) of the BRRD)</p>	
<p>'(4) When exercising a power under this Article, competent authorities shall have regard to the impact the exercise of that power might have on the orderly functioning of financial markets.'</p>	<p>'(4) When exercising a power under this Article, competent authorities shall have regard to the impact the exercise of that power might have on the orderly functioning of financial markets.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>While the competent authority will certainly take into account the effect of the use of the moratorium power on the functioning of financial markets, it would be sufficient to mention this in a recital rather than as part of the provision itself. This change would prevent the competent authorities from being exposed to unnecessary litigation risks. Therefore, the reference to the orderly functioning of financial markets should be deleted from Article 29a(4) and set out in a recital instead. See also the proposed new recital 18a to the directive amending the BRRD).</i></p>	
<p style="text-align: center;">Amendment 15</p> <p style="text-align: center;">Point (23) of Article 1 of the proposed directive</p> <p style="text-align: center;">(Article 45b of the BRRD)</p>	
<p>'2. By way of derogation from point (l) of Article 72a(2) of Regulation (EU) No 575/2013, liabilities that arise from debt instruments with derivative features, such as structured notes, shall be included in the amount of own funds and eligible liabilities only where all of the following conditions are met:</p>	<p>'2. By way of derogation from point (l) of Article 72a(2) of Regulation (EU) No 575/2013, liabilities that arise from debt instruments with derivative features, such as structured notes, shall be included in the amount of own funds and eligible liabilities only where all of the following conditions are met:</p>

⁵ See Article 3 of the Statutes of the Bank for International Settlements, available at www.bis.org.

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<p>(a) a given amount of the liability arising from the debt instrument is known in advance at the time of issuance, is fixed and not affected by a derivative feature;</p> <p>(b) the debt instrument, including its derivative feature, is not subject to any netting agreement and its valuation is not subject to Article 49(3);</p> <p>The liabilities referred to in the first subparagraph shall only be included in the amount of own funds and eligible liabilities for the part that corresponds with the amount referred to in point (a) of the first subparagraph.</p> <p>3. Resolution authorities may decide that the requirement referred to in Article 45f is met by resolution entities with instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 with a view to ensure that the resolution entity can be resolved in a manner suitable to meet the resolution objectives.</p> <p>[...]</p>	<p>(a) a given amount of the liability arising from the debt instrument is known in advance at the time of issuance, is fixed and not affected by a derivative feature;</p> <p>(b) the debt instrument, including its derivative feature, is not subject to any netting agreement and its valuation is not subject to Article 49(3); and</p> <p>(c) the resolution entity has demonstrated to the satisfaction of the resolution authority that the instrument is sufficiently loss absorbing and can be bailed-in without undue complexity.</p> <p>The liabilities referred to in the first subparagraph shall only be included in the amount of own funds and eligible liabilities for the part that corresponds with the amount referred to in point (a) of the first subparagraph.</p> <p>3. Resolution authorities may decide, in consultation with the competent authority, that the requirement referred to in Article 45f is met, partially or in full, by resolution entities with instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 with a view to ensure that the resolution entity can be resolved in a manner suitable to meet the resolution objectives. In such cases points (3), (4) and (5) of Article 72(b) shall apply.</p> <p>[...]</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The bailing-in of structured notes presents additional complexities compared to long-term unsecured vanilla debt. Banks should only count such notes towards MREL if they can demonstrate that they can be bailed-in without undue complexity.</i></p> <p><i>It is important that the exemptions from subordination apply equally to all banks that are subject to a subordination requirement. Hence, a non-G-SII subject to a decision to meet its MREL requirement with subordinated instruments should also be able to use the same exceptions on equal terms with a G-SII.</i></p> <p><i>The amendment in paragraph 3 should make it possible to require that only parts of the requirement are</i></p>	

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p><i>met with subordinated liabilities, as in the current text of the BRRD. It should also be made clear that such a decision should be taken by resolution authorities in consultation with the component authority.</i></p>	
<p style="text-align: center;">Amendment 16 Point (23) of Article 1 of the proposed directive (Article 45c(3)(b)(ii) of the BRRD)</p>	
<p>'(b) the sum of: [...] (ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore the leverage ratio referred to in Article 92(1)(d) of Regulation (EU) No 575/2013 at resolution group sub-consolidated level. For the purposes of point (a) of Article 45(2), the requirement referred to in Article 45(1) shall be expressed in percentage terms as the amount calculated in accordance with point (a) of this paragraph divided by the total risk exposure amount. For the purposes of point (b) of Article 45(2), the requirement referred to in Article 45(1) shall be expressed in percentage terms as the amount calculated in accordance with point (b) of this paragraph divided by the leverage ratio exposure measure. The resolution authority shall set the recapitalisation amounts referred to in the previous subparagraphs in accordance with the resolution actions foreseen in the resolution plan and may adjust those recapitalisation amounts to adequately reflect risks that affect resolvability arising from the resolution group's business model, funding profile and overall risk profile.'</p>	<p>'(b) the sum of: [...] (ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore the leverage ratio referred to in Article 92(1)(d) of Regulation (EU) No 575/2013 at resolution group sub-consolidated level. For the purposes of point (a) of Article 45(2), the requirement referred to in Article 45(1) shall be expressed in percentage terms as the amount calculated in accordance with point (a) of this paragraph divided by the total risk exposure amount. For the purposes of point (b) of Article 45(2), the requirement referred to in Article 45(1) shall be expressed in percentage terms as the amount calculated in accordance with point (b) of this paragraph divided by the leverage ratio exposure measure. The resolution authority shall set the recapitalisation amounts referred to in the previous subparagraphs in accordance with the resolution actions foreseen in the resolution plan and may adjust those recapitalisation amounts to adequately reflect risks that affect resolvability arising from the resolution group's business model, funding profile and overall risk profile. In addition, the resolution authority, after</p>

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
	<p>having consulted the competent authority, may adjust upwards the recapitalisation amount in order to ensure that the resolution group resulting from resolution has sufficient resources in order to cover any additional unexpected or unforeseen losses or costs that may arise from implementing either resolution actions or the business reorganisation plan (“safety margin”).’</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>ECB staff considers that the resolution authority should be allowed, after consultation with the competent authority, to adjust the MREL recapitalisation amount upwards to provide for a ‘safety margin’. This small buffer will ensure that the group and entities resulting from resolution have sufficient resources to cover additional unexpected losses and unforeseen costs that may arise in the period after resolution, which may, e.g., arise from the final outcome of the valuation or be related to costs arising from the implementation of a business reorganisation plan. The amount of such a safety margin should be established on a case-by-case basis, dependent on the resolution plan for the credit institution.</i></p>	
<p style="text-align: center;">Amendment 17 Point (23) of Article 1 of the proposed directive (Article 45e of the BRRD)</p>	
<p>‘1. The resolution authority may give guidance to an entity to have own funds and eligible liabilities that fulfil the conditions of Article 45b or 45g(3) in excess of the levels set out in Article 45c and Article 45d that provides for additional amounts for the following purposes:</p> <p>(a) to cover potential additional losses of the entity to those covered in Article 45c, and/or</p> <p>(b) to ensure that, in the event of resolution, a sufficient market confidence in the entity is sustained through capital instruments in addition to the requirement in point (b) of Article 45c(2) (‘market confidence buffer’).</p>	<p>‘1. The resolution authority may give guidance to an entity to have own funds and eligible liabilities that fulfil the conditions of Article 45b or 45g(3) in excess of the levels set out in Article 45c and Article 45d that provides for additional amounts for the following purposes:</p> <p>(a) to cover potential additional losses of the entity to those covered in Article 45c, and/or</p> <p>(b) to ensure that, in the event of resolution, a sufficient market confidence in the entity is sustained through capital instruments in addition to the requirement in point (b) of Article 45c(2) (‘market confidence buffer’).</p>

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p>The guidance shall be only provided and calculated with respect to the requirement referred to in Article 45(1) calculated in accordance with point (a) of Article 45(2).</p> <p>2. The amount of the guidance given in accordance with of paragraph 1 may be set only where the competent authority has already set its own guidance in accordance with Article 104b of Directive 2013/36/EU and shall not exceed the level of that guidance.</p> <p>The amount of the guidance given in accordance with point (b) of paragraph 1 shall not exceed the amount of the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU, except for the requirement referred to in point (a) of that provision, unless a higher level is necessary to ensure that, following the event of resolution, the entity continues to meet the conditions for its authorisation for an appropriate period of time that is not longer than one year.</p> <p>The resolution authority shall provide to the entity the reasons and a full assessment for the need and the level of the guidance given in accordance with this Article.</p> <p>3. Where an entity consistently fails to have additional own funds and eligible liabilities as expected under the guidance referred to in the first paragraph, the resolution authority may require that the amount of the requirement referred to in Article 45c(2) be increased to cover the amount of the guidance given pursuant to this Article.</p> <p>4. An entity that fails to have additional own funds and eligible liabilities as expected under the guidance referred to in the first paragraph shall not be subject to the restrictions referred to in Article 141 of Directive 2013/36/EU.'</p>	<p>The guidance shall be only provided and calculated with respect to the requirement referred to in Article 45(1) calculated in accordance with point (a) of Article 45(2).</p> <p>2. The amount of the guidance given in accordance with of paragraph 1 may be set only where the competent authority has already set its own guidance in accordance with Article 104b of Directive 2013/36/EU and shall not exceed the level of that guidance.</p> <p>The amount of the guidance given in accordance with point (b) of paragraph 1 shall not exceed the amount of the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU, except for the requirement referred to in point (a) of that provision, unless a higher level is necessary to ensure that, following the event of resolution, the entity continues to meet the conditions for its authorisation for an appropriate period of time that is not longer than one year.</p> <p>The resolution authority shall provide to the entity the reasons and a full assessment for the need and the level of the guidance given in accordance with this Article.</p> <p>3. Where an entity consistently fails to have additional own funds and eligible liabilities as expected under the guidance referred to in the first paragraph, the resolution authority may require that the amount of the requirement referred to in Article 45c(2) be increased to cover the amount of the guidance given pursuant to this Article.</p> <p>4. An entity that fails to have additional own funds and eligible liabilities as expected under the guidance referred to in the first paragraph shall not be subject to the restrictions referred to in Article 141 of Directive 2013/36/EU.'</p>

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p><u>Explanation</u></p> <p><i>ECB staff recommends that the proposed MREL guidance is eliminated as it adds complexity to the framework without providing clear benefits. First, the MREL guidance may increase the overall MREL calibration, as the guidance may be perceived by the market as a requirement that must always be respected. The resolution authority’s power to convert the MREL guidance, if consistently breached, into a hard MREL requirement may reinforce the market’s perception that the MREL guidance essentially contributes to an increased MREL requirement. Second, the MREL guidance is not needed in order to underpin compliance with the MREL requirement since the combined buffer requirement is already stacked up on top of the MREL requirement in the Commission’s proposal. Third, the MREL guidance cannot be justified by the objective of avoiding automatic maximum distributable amount (MDA) restrictions since a breach of the combined buffer requirement stacked on top of the MREL requirement should, in any case, not lead to immediate automatic restrictions on distributions. Fourth, the MREL guidance does not appear to be necessary to enhance the flexibility of the resolution authority since the MREL requirement can also be adjusted if needed, for example by taking into account the proposed safety margin.</i></p>	
<p>Amendment 18</p> <p>Point (23) of Article 1 of the proposed directive</p> <p>(Article 45k of the BRRD)</p>	
<p>‘1. Any breach of the minimum requirement for own funds and eligible liabilities by an entity shall be addressed by the relevant authorities on the basis of at least one of the following:</p> <p>(a) powers to address or remove impediments to resolvability in accordance with Article 17 and Article 18;</p> <p>(b) measures referred to in Article 104 of Directive 2013/36/EC;</p> <p>(c) early intervention measures in accordance with Article 27;</p> <p>(d) administrative penalties and other administrative measures in accordance with Article 110 and Article 111;</p> <p>2. Resolution and competent authorities shall</p>	<p>‘1. The resolution authorities shall monitor the fulfilment of the minimum requirement for own funds and eligible liabilities and shall inform the competent authority of any breaches or other relevant events that may affect the fulfilment of the minimum requirement.</p> <p>42. Any breach of the minimum requirement for own funds and eligible liabilities by an entity shall be addressed by the resolution authority, relevant authorities in consultation with the competent authority, on the basis of at least one of the following:</p> <p>(a) powers to address or remove impediments to resolvability in accordance with Article 17 and Article 18;</p> <p>(b) measures referred to in Article 104 of Directive</p>

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p>consult each other when they exercise their respective powers referred to in points (a) to (d) of paragraph 1.’</p>	<p>2013/36/EC;</p> <p>(e) early intervention measures in accordance with Article 27;</p> <p>(db) administrative penalties and other administrative measures in accordance with Article 110 and Article 111.</p> <p>2. Resolution and competent authorities shall consult each other when they exercise their respective powers referred to in points (a) to (d) of paragraph 1.</p> <p>3. Where a breach of the minimum requirement for own funds and eligible liabilities occurs simultaneously with a breach of the requirements referred to in Article 92(1)(a), (b) and (c) of Regulation (EU) 575/2013 and Article 104a of Directive 2013/36/EU, the powers of the resolution authority under paragraph 1 may be exercised only to the extent necessary to restore the minimum requirement for own funds and eligible liabilities for the amount not addressed by the competent authority through supervisory actions (including early intervention measures) or through other measures proposed by an institution or entity referred to in point (b) or (c) of Article 1(1).</p> <p>Before adopting any measures pursuant to this paragraph the competent authority shall notify the resolution authority which may make recommendations within three days of such notification.’</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>ECB staff is of the view that the resolution authority should monitor the level of MREL, i.e. not only the MREL eligible items but also the calculation of the final ratio including any deductions, and inform the competent authority of any breaches or other relevant event that may affect the fulfilment of the requirement.</i></p>	

Text proposed by the European Commission or current text of the BRRD	Amendments proposed by the ECB ³
<p><i>Furthermore, ECB staff considers that the role of the competent and resolution authorities in the event of breaches of the MREL should be clarified. In the event of a breach of the MREL requirement, that coincides with a breach of capital requirements, it should be clarified that the competent authority should first address the capital requirements breach by adopting the relevant measures (i.e. supervisory measures or the use of early intervention powers), in consultation with the resolution authority. The duration of such consultation should be short in order to ensure a prompt reaction to the breach of capital requirements. The power of the resolution authority to address the MREL requirement breach should be exercised taking into account the measures adopted by the competent authority.</i></p>	
<p style="text-align: center;">Amendment 19 Article 45m of the BRRD (new)</p>	
<p>No text</p>	<p style="text-align: center;">‘ Article 45m Transitional period</p> <p>1. Resolution authorities, after consulting the competent authorities, shall provide for a transitional period for entities to comply with the MREL requirements defined in Articles 45f and 45g.</p> <p>2. The transitional period referred to in paragraph 1 shall not end earlier than 1 January 2022.’</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>One key factor concerning the implementation of the entity-specific MREL requirements is the determination of an adequate transition period. The potentially high level of MREL shortfalls which may occur at the onset of the introduction of the new harmonised levels may make it difficult for certain banks to meet these requirements in a timely manner in the current macroeconomic environment. Therefore, an adequate minimum transition period across banks should be introduced, which should be, as a minimum, the one foreseen for G-SIIs in the TLAC Term Sheet. In any case a flexible approach should be taken with regard to resolution when determining the final period by which entities must comply. Resolution authorities should be able to apply a longer period than the harmonised minimum on a case-by-case basis.</i></p> <p><i>ECB staff further recommends clarifying that any extension beyond the minimum transition period for a given institution should be based on an assessment of the challenges in meeting the MREL requirement that such an institution would face due to limited market access or market capacity, or similar constraints</i></p>	

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<i>in the relevant macroeconomic environment.</i>	
<p style="text-align: center;">Amendment 20</p> <p style="text-align: center;">Point (26) of Article 1 of the proposed directive (Article 63(1b) of the BRRD)</p>	
<p>'1b. Any suspension under paragraph 1(n) shall not apply to:</p> <p>(a) payment and delivery obligations owed to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties and third country central counterparties recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012, and central banks;</p> <p>(b) eligible claims for the purpose of Directive 97/9/EC</p> <p>(c) covered deposits as defined in Article 2(1)(94).'</p>	<p>'1b. Any suspension under paragraph 1(n) shall not apply to:</p> <p>(a) payment and delivery obligations owed to systems or operators of arising from participation in systems designated for the purposes of Directive 98/26/EC and owed to such systems, their operators or their participants; (b) payment and delivery obligations owed to:</p> <p>(i) central counterparties; and</p> <p>(ii) third country central counterparties recognised by ESMA pursuant to Article 25 of Regulation (EU) No 648/2012;</p> <p>(iii) third-country central securities depositories recognised by ESMA pursuant to Article 25 of Regulation (EU) No 909/2014;</p> <p>(iv) third-country payment systems subject to a cooperative oversight arrangement involving at least one ESCB central bank; and</p> <p>(v) central banks;</p> <p>(vi) the Bank for International Settlements.</p> <p>(b) eligible claims for the purpose of Directive 97/9/EC</p> <p>(c) covered deposits as defined in Article 2(1)(94).'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The amendments are necessary to align the scope of the pre-resolution and resolution moratorium powers. See also the proposed amendments to Article 29a of the BRRD.</i></p>	

Drafting proposals in relation to proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 806/2014 as regards loss-absorbing and Recapitalisation Capacity for credit institutions and investment firms

and

further proposed amendments to the current text of the Single Resolution Mechanism Regulation (SRMR)

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
<p style="text-align: center;">Amendment 1 Point (4)(b) of Article 1 of the proposed regulation (Article 10(7) of the SRMR)</p>	
<p>'Where the impediment to resolvability of the entity of group is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the Board shall notify its assessment of that impediment to the Union parent undertaking.'</p>	<p>'Where the impediment to resolvability of the entity of group is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the Board, after consulting the competent authorities, including the ECB, shall notify its assessment of that impediment to the Union parent undertaking.'</p>
<p style="text-align: center;"><u>Explanation</u> <i>See explanation to the proposed amendment to Article 18(2) of the BRRD.</i></p>	
<p style="text-align: center;">Amendment 2 Point (4)(c) of Article 1 of the proposed regulation (Article 10(9) of the SRMR)</p>	
<p>'Where an impediment to resolvability is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the Union parent undertaking shall propose to the Board possible measures to address or remove the impediment identified in accordance with the first subparagraph within two weeks of the date of receipt of a notification made in accordance with paragraph 7.'</p>	<p>'Where an impediment to resolvability is due to a situation referred to in Article 141a(2) of Directive 2013/36/EU, the Union parent undertaking shall propose to the Board possible measures to address or remove the impediment identified in accordance with the first subparagraph within two weeks of the date of receipt of a notification made in accordance with paragraph 7. This deadline</p>

⁶ Bold in the body of the text indicates where ECB staff proposes inserting new text. Strikethrough in the body of the text indicates where ECB staff proposes deleting text.

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
	may be extended by the Board, after consulting the competent authorities, including the ECB, taking into account the specific circumstances of the case.'
<u>Explanation</u> See explanation to the proposed amendment to Article 18(3) of BRRD.	
Amendment 3 Point (4) of Article 1 of the proposed regulation (Article 10(11)(k) of the SRMR)	
'(k) require an entity to submit a plan to restore compliance with Articles 12g and 12h, and the requirement referred to in Article 128(6) of Directive 2013/36/EU;'	'(k) require an entity to submit a plan to restore compliance with Article 12g and 12h, and the requirement referred to in Article 128(6) of Directive 2013/36/EU only when considered in addition to Article 141a paragraph 1 point (d) of Directive 2013/36/EU; '
<u>Explanation</u> See explanation to the proposed amendment to Article 17(5) of the BRRD.	
Amendment 4 Point (5) of Article 1 of the proposed regulation (Article 12c(3) of the SRMR)	
'3. The Board, on its own initiative after consulting the national resolution authority or upon proposal by a national resolution authority, may decide that the requirement referred to in Article 12g is met by resolution entities with instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 with a view to ensure that the resolution entity can be resolved in a manner suitable to meet the resolution objectives. [...]	'3. The Board, on its own initiative after consulting the national resolution authority or upon proposal by a national resolution authority, may decide, in consultation with the competent authority , that the requirement referred to in Article 12g is met, partially or in full , by resolution entities with instruments that meet all conditions referred to in Article 72a of Regulation (EU) No 575/2013 with a view to ensure that the resolution entity can be resolved in a manner suitable to meet the resolution objectives. In such cases, points (3),

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
	(4) and (5) of Article 72(b) shall apply. [...]
<p style="text-align: center;"><u>Explanation</u></p> <p><i>For consistency with the proposed amendments to Article 45b of the BRRD. The SRMR should also be changed so that it is possible to only require that parts of the requirement are met with subordinated liabilities, and that it is clear that also such a decision should be taken in consultation with the component authorities.</i></p>	
<p style="text-align: center;">Amendment 5</p> <p style="text-align: center;">Point (5) of Article 1 of the proposed regulation</p> <p style="text-align: center;">(Article 12d(3)(b)(ii) of the SRMR)</p>	
<p>‘(b) the sum of:</p> <p>[...]</p> <p>(ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore the leverage ratio referred to in Article 92(1)(d) of Regulation (EU) No 575/2013 at resolution group sub-consolidated level in accordance with the resolution actions foreseen in the resolution plan;</p> <p>For the purposes of point (a) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed as the amount calculated in accordance with point (a) divided by the total risk exposure amount ('TREA').</p> <p>For the purposes of point (b) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed as the amount calculated in accordance with point (b) divided by the leverage ratio exposure measure.</p> <p>The Board shall set the recapitalisation amounts referred to in the previous subparagraphs in accordance with the resolution actions foreseen in the resolution plan and may adjust those recapitalisation amounts to adequately reflect risks</p>	<p>‘(b) the sum of:</p> <p>[...]</p> <p>(ii) a recapitalisation amount that allows the resolution group resulting from resolution to restore the leverage ratio referred to in Article 92(1)(d) of Regulation (EU) No 575/2013 at resolution group sub-consolidated level in accordance with the resolution actions foreseen in the resolution plan;</p> <p>For the purposes of point (a) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed as the amount calculated in accordance with point (a) divided by the total risk exposure amount ('TREA').</p> <p>For the purposes of point (b) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed as the amount calculated in accordance with point (b) divided by the leverage ratio exposure measure.</p> <p>The Board shall set the recapitalisation amounts referred to in the previous subparagraphs in accordance with the resolution actions foreseen in the resolution plan and may adjust those recapitalisation amounts to adequately reflect risks</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
<p>that affect resolvability arising from the resolution group's business model, funding profile and overall risk profile.'</p>	<p>that affect resolvability arising from the resolution group's business model, funding profile and overall risk profile.</p> <p>In addition, the Board, after having consulted the competent authority, may adjust upward the recapitalisation amount in order to ensure that the resolution group resulting from resolution has sufficient resources in order to cover any additional unexpected or unforeseen losses or costs that may arise from implementing either resolution actions or the business reorganisation plan ("safety margin").'</p>
<p><i>Explanation</i></p> <p>See explanation to the proposed amendment to Article 45c of the BRRD.</p>	
<p>Amendment 6</p> <p>Point (5) of Article 1 of the proposed regulation</p> <p>(Article 12d(4)(b)(ii) of the SRMR)</p>	
<p>'(b) the sum of:</p> <p>[...]</p> <p>(ii) a recapitalisation amount that allows the entity to restore its leverage ratio referred to in Article 92(1)(d) of Regulation (EU) No 575/2013 in accordance with the resolution plan;</p> <p>For the purposes of point (a) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed in percentage terms as the amount calculated in accordance with point (a) divided by the total risk exposure amount ('TREA').</p> <p>For the purposes of point (b) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed in percentage terms as the amount calculated in accordance with point (b) divided by</p>	<p>'(b) the sum of:</p> <p>[...]</p> <p>(ii) a recapitalisation amount that allows the entity to restore its leverage ratio referred to in Article 92(1)(d) of Regulation (EU) No 575/2013 in accordance with the resolution plan;</p> <p>For the purposes of point (a) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed in percentage terms as the amount calculated in accordance with point (a) divided by the total risk exposure amount ('TREA').</p> <p>For the purposes of point (b) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed in percentage terms as the amount calculated in accordance with point (b) divided by</p>

<p>Text proposed by the European Commission or current text of the SRMR</p>	<p>Amendments proposed by the ECB⁶</p>
<p>the leverage ratio exposure measure.</p> <p>The Board shall set the recapitalisation amounts referred to in this paragraph in accordance with the resolution actions foreseen in the resolution plan and may adjust those recapitalisation amounts to adequately reflect risks that affect the recapitalisation needs arising from the entity's business model, funding profile and overall risk profile.'</p>	<p>the leverage ratio exposure measure.</p> <p>The Board shall set the recapitalisation amounts referred to in this paragraph in accordance with the resolution actions foreseen in the resolution plan and may adjust those recapitalisation amounts to adequately reflect risks that affect the recapitalisation needs arising from the entity's business model, funding profile and overall risk profile.</p> <p>In addition, the Board, after having consulted the competent authorities, including the ECB, may adjust upward the recapitalisation amount in order to enable the entity to cover any additional unexpected or unforeseen losses or costs that may arise following the Board's exercise of the power under Article 21 or in relation to the implementation of the business reorganisation plan by the resolution entity ("safety margin").'</p>
<p><i>Explanation</i></p> <p>See explanation to the proposed amendment to Article 45c of the BRRD.</p>	
<p>Amendment 7</p> <p>Point (5) of Article 1 of the proposed regulation</p> <p>(Article 12f of the SRMR)</p>	
<p>'1. The Board may give guidance to an entity to have own funds and eligible liabilities that fulfil the conditions of Article 12c and Article 12h(3) in excess of the levels set out in Article 12d and Article 12e for amounts for the following purposes:</p> <p>(a) to cover potential additional losses of the entity to those covered in Article 12d, and/or</p> <p>(b) to ensure that, in the event of resolution, a sufficient market confidence in the entity is</p>	<p>'1. The Board may give guidance to an entity to have own funds and eligible liabilities that fulfil the conditions of Article 12c and Article 12h(3) in excess of the levels set out in Article 12d and Article 12e for amounts for the following purposes:</p> <p>(a) to cover potential additional losses of the entity to those covered in Article 12d, and/or</p> <p>(b) to ensure that, in the event of resolution, a sufficient market confidence in the entity is</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
<p>sustained through capital instruments in addition to the requirement in point (b) of Article 12d(2) ('market confidence buffer').</p> <p>The guidance shall be only provided and calculated with respect to the requirement referred to in Article 12a(1) calculated in accordance with point (a) of Article 12a(2).</p> <p>2. The amount of the guidance given in accordance with point (a) of paragraph 1 may be set only where the competent authority has already set its own guidance in accordance with Article 104b of Directive 2013/36/EU and shall not exceed the level of that guidance.</p> <p>The amount of guidance given in accordance with point (b) of paragraph 1 shall not exceed the amount of the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU, except for the requirement referred to in point (a) of that provision unless a higher level is necessary to ensure that, following the event of resolution, the entity continues to meet the conditions for its authorisation for an appropriate period of time that is not longer than one year.</p> <p>The resolution authority shall provide to the entity the reasons and a full assessment for the need and the level of the guidance given in accordance with this Article.</p> <p>3. Where an entity consistently fails to have additional own funds and eligible liabilities as expected under the guidance referred to in the first paragraph, the Board may require that the amount of the requirement referred to in Article 12d(2) be increased to cover the guidance given pursuant to this Article.</p> <p>4. An entity that fails to have additional own funds and eligible liabilities as expected under the</p>	<p>sustained through capital instruments in addition to the requirement in point (b) of Article 12d(2) ('market confidence buffer').</p> <p>The guidance shall be only provided and calculated with respect to the requirement referred to in Article 12a(1) calculated in accordance with point (a) of Article 12a(2).</p> <p>2. The amount of the guidance given in accordance with point (a) of paragraph 1 may be set only where the competent authority has already set its own guidance in accordance with Article 104b of Directive 2013/36/EU and shall not exceed the level of that guidance.</p> <p>The amount of guidance given in accordance with point (b) of paragraph 1 shall not exceed the amount of the combined buffer requirement referred to in point (6) of Article 128 of Directive 2013/36/EU, except for the requirement referred to in point (a) of that provision unless a higher level is necessary to ensure that, following the event of resolution, the entity continues to meet the conditions for its authorisation for an appropriate period of time that is not longer than one year.</p> <p>The resolution authority shall provide to the entity the reasons and a full assessment for the need and the level of the guidance given in accordance with this Article.</p> <p>3. Where an entity consistently fails to have additional own funds and eligible liabilities as expected under the guidance referred to in the first paragraph, the Board may require that the amount of the requirement referred to in Article 12d(2) be increased to cover the guidance given pursuant to this Article.</p> <p>4. An entity that fails to have additional own funds and eligible liabilities as expected under the</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
guidance referred to in the first paragraph shall not be subject to the restrictions referred to in Article 141 of Directive 2013/36/EU.’	guidance referred to in the first paragraph shall not be subject to the restrictions referred to in Article 141 of Directive 2013/36/EU.’
<p><u>Explanation</u></p> <p>See explanation to the proposed amendment to Article 45e of the BRRD.</p>	
<p>Amendment 8</p> <p>Point (5) of Article 1 of the proposed regulation</p> <p>(Article 12g of the SRMR)</p>	
<p style="text-align: center;"><i>‘Article 12g</i></p> <p style="text-align: center;"><i>Breaches of the requirement</i></p> <p>1. Any breach of the minimum requirement for own funds and eligible liabilities by an entity shall be addressed by the Board and other relevant authorities through at least one of the following means:</p> <p>(a) powers to address or remove impediments to resolvability in accordance with Article 10;</p> <p>(b) measures referred to in Article 104 of Directive 2013/36/EC;</p> <p>(c) early intervention measures in accordance with Article 13;</p> <p>(d) administrative penalties and other administrative measures in accordance with Article 110 and Article 111 of Directive 2014/59/EU.</p> <p>2. The Board, resolution authorities and competent authorities of participating Member States shall consult each other when they exercise their respective powers referred to in points (a) to (d) of paragraph 1.’</p>	<p style="text-align: center;"><i>‘Article 12g</i></p> <p style="text-align: center;"><i>Breaches of the minimum requirement for own funds and eligible liabilities</i></p> <p>1. The Board and the other resolution authorities shall monitor the fulfilment of the minimum requirement for own funds and eligible liabilities and shall inform the competent authority of any breaches or other relevant events that may affect the fulfilment of the requirement.</p> <p>2. Any breach of the minimum requirement for own funds and eligible liabilities set out in Articles 12d and 12e by an entity shall be addressed by the Board and other the resolution authority, relevant authorities in consultation with the relevant competent authority, through at least one of the following means:</p> <p>(a) powers to address or remove impediments to resolvability in accordance with Article 10;</p> <p>(b) Measures referred to in Article 104 of Directive 2013/36/EC;</p> <p>(c) Early intervention measures in accordance with Article 13;</p> <p>(d) administrative penalties and other administrative measures in accordance with Article</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
	<p>110 and Article 111 of Directive 2014/59/EU.</p> <p>2. The Board, resolution authorities and competent authorities of participating Member States shall consult each other when they exercise their respective powers referred to in points (a) to (d) of paragraph 1.</p> <p>3. If a breach of the minimum requirement for own funds and eligible liabilities, as set out in Articles 12d and 12e, occurs simultaneously with a breach of the requirements referred to in Article 92(1)(a), (b) and (c) of Regulation (EU) 575/2013 and Article 104a of Directive 2013/36/EU, the powers of the Board and other resolution authorities under paragraph 1 may be exercised only to the extent necessary to restore the minimum requirement for own funds and eligible liabilities for the amount not addressed by the competent authority through supervisory actions, including early intervention measures, or other measures proposed by the credit institution or entity referred to in points (b) or (c) of Article 2(1).</p> <p>Before adopting any measures according to this paragraph the ECB or the other competent authority shall notify the Board which may make recommendation within three days of such notification.</p>
<p><i>Explanation</i></p> <p><i>See explanation to the proposed amendment to Article 45k of the BRRD.</i></p>	
<p>Amendment 9 (Article 12I of the SRMR (new))</p>	
No text	<p><i>‘ Article 12I</i> <i>Transitional period</i></p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
	<p>1. The Board, after consulting the relevant competent authorities, including the ECB, shall set the transitional period for compliance with the MREL requirements as defined in Articles 12g and 12h.</p> <p>2. The transitional period referred to in paragraph 1 shall not end earlier than 1 January 2022.'</p>
<p><i>Explanation</i></p> <p>See explanation to the proposed new Article 45m of the BRRD.</p>	
<p>Amendment 10</p> <p>Point (5) of Article 1 of the proposed regulation</p> <p>(Article 13(1) and (2) of the SRMR)</p>	
<p>'1. The ECB or national competent authorities shall inform the Board of any measure that they require an institution or group to take or that they take themselves pursuant to Article 16 of Regulation (EU) No 1024/2013, to Article 27(1) or Article 28 or 29 of Directive 2014/59/EU, or to Article 104 of Directive 2013/36/EU.</p> <p>The Board shall notify the Commission of any information which it has received pursuant to the first subparagraph.</p> <p>2. From the date of receipt of the information referred to in paragraph 1, and without prejudice to the powers of the ECB and national competent authorities in accordance with other Union law, the Board may prepare for the resolution of the institution or group concerned. For the purposes of the first subparagraph, the ECB or the relevant national competent authority shall closely monitor, in cooperation with the Board, the conditions of the institution or the parent undertaking and their</p>	<p>'-1. Where an entity or group referred to in Article 7(2)(a) infringes or, due, inter alia, to a rapidly deteriorating financial condition, including deteriorating liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures, as assessed on the basis of a set of triggers, which may include the institution's own funds requirement plus 1,5 percentage points, is likely in the near future to infringe the requirements of Regulation (EU) No 575/2013, Directive 2013/36/EU, Title II of Directive 2014/65/EU or any of Articles 3 to 7, 14 to 17, and 24, 25 and 26 of Council Regulation (EU) No 1024/2013, the ECB shall have at its disposal, (without prejudice) to the measures referred to in Article 16 of Regulation (EU) No 1024/2013 where applicable, at least the following measures:</p> <p>(a) require the management body of the</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
<p>compliance with any early intervention measure that was required of them. The ECB or the relevant national competent authority shall provide the Board with all of the information necessary in order to update the resolution plan and prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution in accordance with Article 20(1) to (15).'</p>	<p>institution to implement one or more of the arrangements or measures set out in the recovery plan or to update such a recovery plan when the circumstances that led to the early intervention are different from the assumptions set out in the initial recovery plan and implement one or more of the arrangements or measures set out in the updated plan within a specific timeframe and in order to ensure that the conditions referred to in the introductory phrase no longer apply;</p> <p>(b) require the management body of the institution to convene, or if the management body fails to comply with that requirement convene directly, a meeting of shareholders of the institution, and in both cases set the agenda and require certain decisions to be considered for adoption by the shareholders;</p> <p>(c) require the management body of the institution to draw up a plan for negotiation on restructuring of debt with some or all of its creditors according to the recovery plan, where applicable;</p> <p>(d) require changes to the legal structures of the institution.</p> <p>1. The ECB or the national competent authorities shall inform the Board of any measure that they require an institution or group to take or that they take themselves pursuant to Article 13(1) or Articles 13a or 13b of this Regulation or, to Article 16 of Regulation (EU) No 1024/2013, to Article 27(1) or Articles 28 or 29 of Directive 2014/59/EU, or to Article 104 of Directive 2013/36/EU.</p> <p>The Board shall notify the Commission of any information which it has received pursuant to the</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
	<p>first subparagraph.</p> <p>2. From the date of receipt of the information referred to in paragraph 1 and without prejudice to the powers of the ECB and national competent authorities in accordance with other Union law, the Board may prepare for the resolution of the institution or group concerned. For the purposes of the first subparagraph, the ECB or the relevant national competent authority shall closely monitor, in cooperation with the Board, the conditions of the institution or the parent undertaking and their compliance with any early intervention measure that was required of them. The ECB or the relevant national competent authority shall provide the Board with all of the information necessary in order to update the resolution plan and prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution in accordance with Article 20(1) to (15).'</p>
<p><u>Explanation</u></p> <p><i>Early intervention powers may only be exercised by the ECB on the basis of the respective national transpositions of the BRRD. This complicates the adoption of such early intervention measures by the ECB, since decision-making must be based on national law and take the specificities of 19 different countries into account. By comparison, the supervisory powers provided for in Article 16 of the SSMR mirror those foreseen in Article 104 of the CRD, but since they are enshrined in a regulation they may be applied directly. ECB staff would therefore suggest that its early intervention powers be included in the SRMR to mirror Articles 27 to 29 of the BRRD. This would allow the ECB to rely on the respective powers included in the SRMR, while NCAs could continue to act based on the national implementation of Articles 27 to 29 of the BRRD.</i></p>	
<p>Amendment 11</p> <p>Article 13a of SRMR (new)</p>	
No text	<p>‘Article 13a</p> <p>Removal of senior management and</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
	<p style="text-align: center;">management body</p> <p>Where there is a significant deterioration in the financial situation of an institution or where there are serious infringements of law, of regulations or of the statutes of the institution, or serious administrative irregularities, and other measures taken in accordance with Article 13(1) are not sufficient to reverse that deterioration, the ECB may require the removal of the senior management or management body of the institution, in its entirety or with regard to individuals. The appointment of the new senior management or management body shall be done in accordance with national and Union law and be subject to the approval or consent of the ECB.'</p>
<p><i>Explanation</i></p> <p>See explanation to the proposed amendment to Article 13 of the SRMR.</p>	
<p>Amendment 12</p> <p>Article 13b of the SRMR (new)</p>	
No text	<p style="text-align: center;">'Article 13b</p> <p style="text-align: center;">Temporary administrator</p> <p>1. Where replacement of the senior management or management body as referred to in Article 13a is deemed to be insufficient, the ECB may appoint one or more temporary administrators to the institution. The ECB may, based on what is proportionate in the circumstances, appoint any temporary administrator either to replace the management body of the institution temporarily or to work temporarily with the management body of the institution and the ECB shall specify its</p>

<p>Text proposed by the European Commission or current text of the SRMR</p>	<p>Amendments proposed by the ECB⁶</p>
	<p>decision at the time of appointment. If the ECB appoints a temporary administrator to work with the management body of the institution, the ECB shall further specify at the time of such an appointment the role, duties and powers of the temporary administrator and any requirements for the management body of the institution to consult or to obtain the consent of the temporary administrator prior to taking specific decisions or actions. The ECB shall be required to make public the appointment of any temporary administrator except where the temporary administrator does not have the power to represent the institution. Any temporary administrator shall have the qualifications, ability and knowledge required to carry out his or her functions and be free of any conflict of interests.</p> <p>2. The ECB shall specify the powers of the temporary administrator at the time of the appointment of the temporary administrator based on what is proportionate in the circumstances. Such powers may include some or all of the powers of the management body of the institution under the statutes of the institution and under national law, including the power to exercise some or all of the administrative functions of the management body of the institution. The powers of the temporary administrator in relation to the institution shall comply with the applicable company law.</p> <p>3. The role and functions of the temporary administrator shall be specified by the ECB at the time of appointment and may include ascertaining the financial position of the</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
	<p>institution, managing the business or part of the business of the institution with a view to preserving or restoring the financial position of the institution and taking measures to restore the sound and prudent management of the business of the institution. The ECB shall specify any limits on the role and functions of the temporary administrator at the time of appointment.</p> <p>4. The ECB shall have the exclusive power to appoint and remove any temporary administrator. The ECB may remove a temporary administrator at any time and for any reason. The ECB may vary the terms of appointment of a temporary administrator at any time subject to this Article.</p> <p>5. The ECB may require that certain acts of a temporary administrator be subject to the prior consent of the ECB. The ECB shall specify any such requirements at the time of appointment of a temporary administrator or at the time of any variation of the terms of appointment of a temporary administrator.</p> <p>In any case, the temporary administrator may exercise the power to convene a general meeting of the shareholders of the institution and to set the agenda of such a meeting only with the prior consent of the ECB.</p> <p>6. The ECB may require that a temporary administrator draws up reports on the financial position of the institution and on the acts performed in the course of its appointment, at intervals set by the ECB and at the end of his or her mandate.</p> <p>7. The appointment of a temporary administrator shall not last more than one year.</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
	<p>That period may be exceptionally renewed if the conditions for appointing the temporary administrator continue to be met. The ECB shall be responsible for determining whether conditions are appropriate to maintain a temporary administrator and justifying any such decision to shareholders.</p> <p>8. Subject to this Article the appointment of a temporary administrator shall not prejudice the rights of the shareholders in accordance with Union or national company law.</p> <p>9. A temporary administrator appointed pursuant to this Article shall not be deemed to be a shadow director or a de facto director under national law.'</p>
<p><i>Explanation</i></p> <p>See explanation to the proposed amendment to Article 13 of the SRMR.</p>	
<p>Amendment 13</p> <p>Point (6) of Article 1 of the proposed regulation</p> <p>(Article 16(3) of the SRMR)</p>	
<p>'3. Notwithstanding the fact that a parent undertaking does not meet the conditions established in Article 18(1), the Board may decide on resolution action with regard to that parent undertaking when it is a resolution entity and when one or more of its subsidiaries which are institutions and not resolution entities meet the conditions established in Article 18(1) and their assets and liabilities are such that their failure threatens an institution or the group as a whole and resolution action with regard to that parent undertaking is necessary for the resolution of such subsidiaries which are institutions or for the</p>	<p>'3. Notwithstanding the fact that a parent undertaking does not meet the conditions established in Article 18(1), the Board may decide on resolution action with regard to that parent undertaking when it is a resolution entity and when one or more of its subsidiaries which are institutions and not resolution entities meet the conditions established in Article 18(1) and their assets and liabilities are such that their failure threatens an institution or the resolution group as a whole and resolution action with regard to that parent undertaking is necessary for the resolution of such subsidiaries which are institutions or for the</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
resolution of the group as a whole.'	resolution of the relevant resolution group as a whole.'
<p><u>Explanation</u></p> <p><i>The condition that 'their failure [should] threaten an institution or the group as a whole' causes confusion because it is unclear whether the institution referred to is the same institution that is failing. The addition is also inconsistent with the proposed amendments to Article 33(4) of the BRRD. Therefore it is proposed that the texts of the SRMR and the BRRD should be aligned.</i></p>	
<p>Amendment 14</p> <p>Article 18(1) of the SRMR</p>	
<p>'1. [...]</p> <p>An assessment of the condition referred to in point (a) of the first subparagraph shall be made by the ECB, after consulting the Board. The Board, in its executive session, may make such an assessment only after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of that information, does not make such an assessment. The ECB shall, without delay, provide the Board with any relevant information that the Board requests in order to inform its assessment.</p> <p>Where the ECB assesses that the condition referred to in point (a) of the first subparagraph is met in relation to an entity or group referred to in the first subparagraph, it shall communicate that assessment without delay to the Commission and to the Board.</p> <p>An assessment of the condition referred to in point (b) of the first subparagraph shall be made by the Board, in its executive session, or, where applicable, by the national resolution authorities, in close cooperation with the ECB. The ECB may also inform the Board or the national resolution authorities concerned that it considers the</p>	<p>'1. [...]</p> <p>An assessment of the condition referred to in point (a) of the first subparagraph for entities referred to in Article 7(2)(a) shall be made by the ECB, after consulting the Board.</p> <p>An assessment of the condition referred to in point (a) of the first subparagraph for entities referred to in Article 7(2)(b), 7(4)(b) and Article 7(5) shall be made by the relevant national competent authority responsible for the direct supervision of the entities concerned, after consulting the Board.</p> <p>The Board, in its executive session, may make such an assessment only after informing the ECB or the relevant national competent authority of its intention and only if the ECB or the relevant national competent authority, within three calendar days of receipt of that information, does not make such an assessment. The ECB or the relevant national competent authority shall, without delay, provide the Board with any relevant information that the Board requests in order to inform its assessment.</p> <p>Where the ECB or the relevant national</p>

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
<p>condition laid down in that point to be met.</p> <p>2. Without prejudice to cases where the ECB has decided to exercise directly supervisory tasks relating to credit institutions pursuant to Article 6(5)(b) of Regulation (EU) No 1024/2013, in the event of receipt of a communication pursuant to paragraph 1 or where the Board intends to make an assessment under paragraph 1 on its own initiative in relation to an entity or group referred to in Article 7(3), the Board shall communicate its assessment to the ECB without delay.'</p>	<p>competent authority assesses that the condition referred to in point (a) of the first subparagraph is met in relation to an entity or group referred to in the first subparagraph, it shall communicate that assessment without delay to the Commission and to the Board.</p> <p>An assessment of the condition referred to in point (b) of the first subparagraph shall be made by the Board, in its executive session, or, where applicable, by the national resolution authorities, in close cooperation with the ECB or the relevant national competent authority. The ECB or the relevant national competent authority may also inform the Board or the national resolution authorities concerned that it considers the condition laid down in that point to be met.</p> <p>2. Without prejudice to cases where the ECB has decided to exercise directly supervisory tasks relating to credit institutions pursuant to Article 6(5)(b) of Regulation (EU) No 1024/2013, in the event of receipt of a communication pursuant to paragraph 1 or where the Board intends to make an assessment under paragraph 1 on its own initiative in relation to an entity or group referred to in Article 7(3), the Board shall communicate its assessment to the ECB or the relevant national competent authority without delay.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>Taking into account the limitations under Union primary law, ECB staff is of the view that the 'failing or likely to fail' assessment for both less significant cross-border groups and other less significant institutions under the direct responsibility of the SRB should fall outside the ECB's direct competence and should be a competence of the national competent authorities, as the competent supervisory authorities for less significant institutions on the basis of Article 6(4) of the SSM Regulation. This should be clarified in Article 18 of the SRMR.</i></p>	

Text proposed by the European Commission or current text of the SRMR	Amendments proposed by the ECB ⁶
Amendment 15 Article 21 of the SRMR	
<p>'1. [...]</p> <p>The assessment of the conditions referred to in points (a), (c) and (d) of the first subparagraph shall be made by the ECB, after consulting the Board. The Board, in its executive session, may also make such assessment.</p> <p>2. Regarding the assessment of whether the entity or group is viable, the Board, in its executive session, may make such an assessment only after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of such information, does not make such an assessment. The ECB shall, without delay, provide the Board with any relevant information that the Board requests in order to inform its assessment.'</p>	<p>'1. [...]</p> <p>The assessment of the conditions referred to in points (a), (c) and (d) of the first subparagraph for entities referred to in Article 7(2)(a) shall be made by the ECB, after consulting the Board.</p> <p>The assessment of the condition referred to in points (a), (c) and (d) of the first subparagraph for entities referred to in Article 7(2)(b), 7(4)(b) and Article 7(5) shall be made by the relevant national competent authority responsible for the direct supervision of the entities concerned, after consulting the Board.</p> <p>The Board, in its executive session, may also make such assessment.</p> <p>2. Regarding the assessment of whether the entity or group is viable, the Board, in its executive session, may make such an assessment only after informing the ECB or the relevant national competent authority of its intention and only if the ECB or the relevant national competent authority, within three calendar days of receipt of such information, does not make such an assessment. The ECB or the relevant national competent authority shall, without delay, provide the Board with any relevant information that the Board requests in order to inform its assessment.'</p>
<p><u>Explanation</u></p> <p>See explanation to the proposed amendment to Article 18 of the SRMR.</p>	