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Resolution aspects of the EU Risk Reduction Measures Package

Recommendations for effective implementation of TLAC, MREL and related reforms

Association for Financial Markets in Europe
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AFME views on resolution aspects of the EU Risk Reduction Measures Package

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Introduction

The Association for Financial Markets in Europe (AFME)[1] welcomes the Commission's proposals to amend the Capital Requirements Regulation (CRR), Capital Requirements Directive (CRD), Bank Recovery and Resolution Directive (BRRD) and Single Resolution Mechanism Regulation (SRMR). This paper sets out our initial views on the resolution aspects of the proposals including the implementation of Total Loss-Absorbing Capacity (TLAC), as set out in the FSB TLAC Principles and Term Sheet[2] (TLAC Standard), amendments to the Minimum Requirement for own funds and Eligible Liabilities (MREL), the proposal to amend the creditor hierarchy and other recovery and resolution issues.

AFME has been very supportive of the development of an effective recovery and resolution framework in Europe and closely involved in the implementation of the BRRD, development of TLAC and related issues.

Executive summary

We strongly support the objectives of the proposals to implement TLAC in the EU for Global Systemically Important Institutions (GSIIs), review MREL to increase alignment with TLAC and address certain practical challenges such as achieving subordination and the application of article 55 BRRD. Our overarching perspective when addressing the proposals is to:

1) ensure that an effective MREL framework is introduced in which there can be confidence in the credibility and feasibility of resolution strategies;
2) facilitate the establishment of a deep and liquid market in MREL in the European Union to enable banks to achieve the necessary requirements for loss absorbing capacity and enhance market discipline while maintaining financial stability; and
3) to ensure a consistent and transparent framework to establish a level playing field across the EU and internationally.

We hope that the co-legislators and supervisory and resolution authorities share these objectives. In this context, we set out below the key priority issues which we believe should be addressed as the proposals are discussed by the co-legislators:

[1] AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society. AFME is listed on the EU Transparency Register, registration number 65110063986-76.

[2] See Financial Stability Board, TLAC Principles and Term Sheet available at http://www.fsb.org/wp-content/uploads/TLAC-Principles-and-Term-Sheet-for-publication-final.pdf

1. **Creditor hierarchy**: we welcome the proposal to amend the creditor hierarchy of banks to create a new class of senior non-preferred debt. This proposal is of the utmost importance and quick agreement is essential to enable banks to continue to increase their loss absorbing resources, improve their resolvability and, for GSIIs, to achieve their TLAC requirements by 1 January 2019. Quick agreement and transposition is essential to enable banks to issue the new class of debt and to support an effective market throughout the EU by providing harmonisation and clarity to the market. Any delay may impact banks' ability to meet these requirements in a timely and cost-effective manner. The proposed cut-off date should not prevent Member States from proceeding with an 'anticipated transposition' of the directive in order to allow their banks to begin issuing the new class of debt as soon as possible, with a commitment to make any necessary adjustments once the final text is approved. This will ensure a level playing field across the European Union, and not restrict Member States from benefiting from an early transposition of the proposals where they wish to do so.

2. **Transitional arrangements and changes to eligibility criteria are required**: we regard it as essential that the EU legislators introduce as a matter of priority transitional arrangements ensuring the continued eligibility of issuances made prior to the new eligibility criteria under articles 72b (MREL), 52 (Additional Tier 1) and 63 (Tier 2) CRR coming into force, and communicate this clearly to the public and the markets. This is necessary to provide clarity for banks on their current shortfall and enable them to continue issuance over the next months without uncertainty as to whether further issuances will ultimately be eligible.

   Absent grandfathering, TLAC and MREL shortfalls would be significantly increased and there will be uncertainty over the ultimate eligibility criteria which would hamper the market for issuances over the next year and banks' ability to meet the minimum requirements by 1 January 2019. This is an issue which would be amplified should the proposed interaction between MREL and the combined buffer apply as per the proposals. This approach would be consistent with the US final TLAC rule which provides for similar grandfathering for debt issued before the rule was finalised in December 2016.

   There are some key provisions in the MREL eligibility criteria which go above and beyond the eligibility criteria in the TLAC Standard, notably the restriction on acceleration rights and requirements for contractual write-down or conversion which in our view merit a revision of the Commission's proposals.

3. **Internal MREL under article 92b CRR requires increased flexibility to take account of ongoing developments; the calibration and eligibility criteria should be amended:** It is essential that the calibration and location of loss absorbing capacity within a group supports the group resolution strategy. We support the introduction of the concepts of resolution entity and resolution group in the legislation to increase alignment with the resolution strategy and the TLAC Standard.

   The proposed internal MREL requirement under article 92b CRR is inadequate and requires a number of important changes including to its scope, calibration and eligibility criteria to increase consistency with the TLAC Standard and to accommodate ongoing work to develop appropriate internal TLAC arrangements. The calibration should be amended to allow resolution authorities to set requirements within the 75 – 90% range agreed in the TLAC Standard and scope and the eligibility criteria require a number of changes to achieve the necessary consistency with the agreed principles under the TLAC

Standard. At the same time, the level 1 text should be less prescriptive in light of the ongoing work at the international level.

4. **Internal MREL under the BRRD requires increased flexibility and recognition of the resolution framework within the EU:** we welcome the introduction of the concept of internal MREL within the BRRD. However, the proposal requires significant changes to take account of the EU and Banking Union resolution framework and to provide greater flexibility in light of the ongoing work at the international level. This work includes the arrangements for determining material sub-groups, calibration and eligibility of internal TLAC, and as the work being taken forward is of a highly technical nature and part of the resolution planning process in Crisis Management Groups and resolution colleges, we strongly encourage the level 1 text to be less prescriptive and to provide the EBA with a mandate to evaluate and set out the most appropriate criteria for the application of internal MREL including its scope, calibration and eligibility criteria.

   The provisions around internal MREL including scope, calibration and eligibility criteria require further consideration and increased flexibility. The calibration of internal MREL between institutions within the European Union should be set within a range that is significantly lower than the TLAC Standard to reflect the group resolution planning process, close cooperation and information sharing within resolution colleges, the automatic recognition of resolution actions and the single supervisor and resolution authority within the Banking Union. Internal MREL should be eligible if it is provided in a manner that supports the bank's resolution strategy and the passing of losses to the resolution entity.

   Greater flexibility should also be provided in relation to the scope of the requirements. The starting point should be that internal MREL should only be required at material sub-groups and should not be necessary where the resolution entity and the relevant subsidiary are both within the scope of a single resolution authority. Therefore, the legislation should at least not prevent resolution authorities from waiving internal requirements within the EU, in particular within the Banking Union, where they consider this to be appropriate.

5. **Pillar 2 external MREL**: we broadly support the Commission proposal as providing greater alignment with TLAC, subject to clarification of a number of issues. Where firm specific additional requirements (Pillar 2) are set, this should be subject to a clear set of criteria to justify the rationale and to ensure consistency and transparency of application.

6. **Article 55 BRRD:** we welcome the acknowledgment of the need to amend article 55. We believe that the best way to address the practical difficulties while not impeding resolvability is to limit the scope of article 55 to liabilities eligible for MREL and any additional liabilities identified by the resolution authority where required for the resolvability of the group. This approach would provide a clear and consistent scope of liabilities, creating clarity for the market and ensuring a consistent approach across the single market while maintaining the oversight of resolution authorities and ensuring that resolvability is not impeded.
   However, if the waiver approach is preferred, a number of issues need to be resolved to ensure that it works. These include moving 55(2)(a) to a separate provision and permitting resolution authorities, provided that resolvability is not materially impeded, to waive the requirement for debt instruments that are unsecured liabilities and liabilities that rank pari passu with eligible liabilities. Otherwise the waiver would not address the acknowledged problems with the existing provision. As set out below,

we also propose an amendment to the waiver to acknowledge the need to consider the proportionality of the requirement as against the loss absorbing capacity of the relevant liabilities.

7. **New moratoria:** we do not believe that it is necessary or appropriate to introduce new moratoria powers, especially prior to resolution and for a period as long as five working days. The broad scope of this provision would run directly contrary to the stated objectives of ensuring the continuity of critical functions. In particular, we are concerned about the impact that this would have on the ability of banks to recover in stressed situations and the market impact. For example, customers and counterparties may be incentivised to act at an earlier stage making recovery more challenging. The possibility of a moratorium could therefore threaten the success of resolution and increase financial instability.

8. **Stacking order:** We agree that Common Equity Tier 1 (CET1) should not be double-counted between the combined capital buffer and MREL. The TLAC Standard provides that the combined buffer requirement must be met in addition to the TLAC RWA Minimum, but not to the TLAC leverage exposure minimum. This approach should also be reflected in the European legislation and we believe that the combined buffers should not "sit on top" of the Pillar 1 and Pillar 2 MREL requirements when calibrated in accordance with the leverage ratio exposure measure. This approach would also be consistent with the purpose of the leverage element of MREL as a backstop, as acknowledged by the EBA in its report on MREL.

9. **MDA and consequences of breach:** A breach of MREL should be taken seriously by the authorities. However, the response of the supervisory and resolution authorities should be tailored to address the cause of the breach in the circumstances. It would be inappropriate for Maximum Distributable Amount (MDA) restrictions to be automatically imposed by virtue of a bank using its combined buffer solely as a result of CET1 being used to meet a temporary MREL shortfall. This could occur, for example, due to a temporary debt refinancing issue rather than the bank facing any immediate solvency issues and would result in a substantially higher threshold at which MDA could apply, and – as importantly – generate considerable potentially destabilising uncertainty as to the threshold at which MDA will apply.

   We believe that MDA restrictions should not be automatically triggered by a breach of the combined buffer which occurs only due to insufficient MREL. This approach of disconnecting MDA from MREL, which has been adopted by the Bank of England, is preferable to a grace period because it would still allow the regulator to require the necessary actions to be undertaken by banks whilst avoiding the triggering of the rigid MDA restrictions designed and calibrated for the 'going concern' solvency framework. Furthermore, the market would likely react immediately regardless of the grace period.

10. **Clarity on application in the context of global groups:** Greater clarity is required as to the process and application of requirements in relation to global groups, in particular for (i) groups headquartered in the EU which have resolution entities outside the EU under a multiple point of entry (MPE) resolution strategy; and (ii) groups headquartered outside the EU with subsidiaries in the EU under a single point of entry (SPE) resolution strategy. It is necessary to introduce the concepts of third country resolution entity and third country resolution group.

11. **A number of important technical issues need to be resolved and clarified.** We have set out a number of technical issues and our proposed solutions in the annex.

We expand upon these and other issues below.

1. Creditor Hierarchy

We welcome the acknowledgment of the challenges for many European banks to achieve subordination of MREL and support the proposal to require all Member States to establish a new class of non-preferred debt in the statutory creditor hierarchy which is explicitly loss-absorbing. This proposal is of the utmost importance and quick agreement is essential to enable banks to continue to increase their loss absorbing resources, improve their resolvability and, for GSIIs, to achieve their TLAC requirements by 1 January 2019. The introduction of the new senior non-preferred class could also be important for other banks where required to achieve their MREL.

Accordingly, the proposal represents an important step in improving the resolvability of banks in the EU, increasing the credibility and feasibility of their resolution plans and further strengthening the protection against taxpayer bail-outs. This helps to ensure clarity and harmonisation across the single market. Quick agreement and transposition is essential to enable banks to issue the new class of debt and to support an effective market throughout the EU by providing harmonisation and clarity to the market. Any delay may impact banks' ability to meet these requirements in a timely and cost-effective manner.

It is important to note that there is not yet a well-developed market for explicitly loss-absorbing bank debt in Europe[3] and it is important for the legislation to support the development of a deep and liquid market in these instruments. Agreement on a common creditor hierarchy as soon as possible is therefore required to facilitate this and to ensure that existing markets are not disrupted. A delay and lack of clarity for banks and investors could create significant market capacity concerns due to significant issuance in a compressed period of time.

It is necessary to ensure that there is clarity as to the interaction between the new class and existing classes, in particular that where there is an existing "senior non-preferred" class in a Member State's creditor hierarchy that claims arising from debt issued under the new class rank equally with claims arising from such existing senior non-preferred liabilities.

With regard to the proposed cut-off date of 31 December 2016, we understand it as a measure designed to avoid any retroactive impact and to encourage rapid adoption of the new directive. We recommend the introduction of an amendment in order to provide the possibility for Member States to proceed with an 'anticipated transposition'. of the directive in order to allow their banks to begin issuing the new class of debt as soon as possible. Such early transposition should be made with the commitment of making any necessary adjustments once the final text is approved. This will ensure a level playing field across the European Union, and not restrict Member States from benefiting from an early transposition of the proposals where they wish to do so. Otherwise, many banks will find themselves in a position of a 'legal vacuum' between 31 December 2016 and the date of transposition of the directive, during which either issuance may be legally impossible, or will require complex legal 'work-arounds'.

On a technical drafting point, it is also necessary to amend the condition that the maturity "spans one year" to replace this with "is greater than one year" to enable liabilities to meet the minimum maturity eligibility criteria.

[3] The EBA confirmed that "besides a few established capital markets, most domestic markets for MREL instruments are relatively small" (EBA Final Report on MREL, 14 December 2016, at p.27.

2. External Pillar 1 MREL under Article 92a of the CRR

Calibration: We support the proposed calibration for the external common minimum (Pillar 1) requirement for GSIIs in line with the TLAC Standard.

However, there are a number of issues relating to the eligibility criteria which need to be resolved in order to ensure that there is an active market for MREL in Europe and to ensure that banks can meet the minimum requirements in the tight timescale.

Transitional arrangements required: The proposals make significant changes to the eligibility criteria for eligible liabilities and also introduce new criteria for Additional Tier 1 and Tier 2 capital instruments[4]. It is essential that transitional arrangements are provided to grandfather issuances prior to the new legislation coming into force. A significant volume of liabilities has been issued over the past 12-18 months, with a view to meet the ambitious 1 January 2019 target. These existing liabilities do not comply with the proposed new criteria in their entirety (e.g. restrictions on acceleration, contractual recognition requirements and set-off arrangements) and absent transitional provisions MREL shortfalls would increase very significantly.

It is also essential that banks have clarity that planned issuances prior to the finalisation of the legislation will be eligible in order for them to proceed with issuances over the next year. The importance of a transitional period has been acknowledged by the EBA[5] and a number of European resolution authorities. The US has provided for grandfathering of liabilities issued prior to its Final Rule and the EU should also adopt this approach and signal clearly that there will be grandfathering for liabilities issued prior to entry into application of the new requirements.

In light of the short time frame to meet the minimum requirements by 1 January 2019 it is critical that banks have clarity on their shortfall and are able to proceed with issuances to increase their loss absorbing capacity prior to finalisation of the legislation. Early clarity on grandfathering is therefore necessary to support this objective.

Eligibility criteria: It is important to note however, that transitional provisions would not resolve a number of important concerns with the proposals where we strongly believe changes are required. These include:

a) **Restrictions on acceleration rights:** the proposed restriction on acceleration rights[6] goes beyond the TLAC Standard and could unnecessarily hamper the market for debt which is eligible to satisfy MREL requirements, making it more difficult and more expensive for banks to issue such debt. Standard acceleration rights such as upon non-payment of principal and interest should be permitted. This is necessary to introduce a clear distinction between regulatory capital and eligible liabilities. Specifically, senior debt investors invest in securities with lower coupons than capital securities due to their relative position in the creditor hierarchy. However senior debt issued by banks offer no covenants to protect senior investors' rights. As a result, investors take comfort from the fact that they can accelerate payment under normal circumstances in the event that a bank withholds payment. If this acceleration right is withdrawn then the senior investors will be left with the same acceleration

[4] Articles 52(o), (p) and 63(o), (n) CRR

[5] See EBA Final Report on MREL, 14 December 2016, at p.22

[6] Article 72b(2)(m) CRR

right as that enjoyed by investors in capital securities and it unclear whether they will accept lower coupons for similar risks.

This is important for both external and internal MREL as in addition to the impact on the market, the proposal also increases the risk that debt instruments would be viewed as equity rather than debt for taxation purposes. This could impact the tax deductibility of interest payments and have a material impact on the cost of issuing both external and internal MREL. Should the co-legislators determine that acceleration rights should be restricted, we would strongly urge them to consider a rule which allows acceleration for non-payment subject to a 30-day cure period, in line with the approach taken in the final US TLAC rules.

It is worth noting that powers under the BRRD allow the resolution authority to essentially over-ride the terms of existing liabilities if an entity enters resolution. The law therefore gives the resolving authority the power to over-ride the acceleration provisions noted above. The presence of such safeguards is also accepted by the FSB, as explicitly addressed in the FSB Key Attributes[7] which explicitly recognises that should contractual acceleration or early termination rights be exercisable, the resolution authority should have the power to stay temporarily such rights where they arise by reason only of entry into resolution or in connection with the exercise of any resolution powers.

b) **Contractual recognition of bail-in**: the requirement to include contractual provisions for the recognition of bail-in[8] should be deleted or at the very least limited to liabilities governed by the law of a third country and aligned with the requirements of article 55 BRRD. There should be no such requirement for liabilities governed by EU law as this would be inconsistent with the statutory bail-in power already in place under the BRRD and could create confusion in the market and legal uncertainty as to whether the bail-in would be implemented under statute or contract. It would also create a substantial burden on firms to comply with no corresponding benefit.

It is important to note that the contractual requirement contrasts with the specified features included in the CRR2 for Additional Tier 1 and Tier 2 capital instruments, whereby statutory as well as contractual bail-in is envisaged, which would result in inconsistent provisions amongst the various instruments.

c) **Subordination requirements**: As drafted the proposals require instruments to be structurally subordinated as well as either contractually or statutorily. This appears to be contrary to the legislative intention and the TLAC Standard. It should be clarified that all three routes to subordination should be equally permissible and respected. The requirement under article 72b(2)(e) should be moved to a new 72b(2)(d)(iii) to correct this.

With the introduction of the concepts of resolution entity and resolution group, it is important that the legislation is neutral with regard to different methods of achieving subordination and it should be possible to make use of the 3.5% RWAs exemption from subordination for groups utilising structural subordination as well as those utilising contractual or statutory subordination to ensure a level playing field.

[7] See section 4 of FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions

[8] Article 72b(2)(o) CRR

d) **Scope of application:** with respect to the application of requirements, we welcome MREL to be applied on the basis of resolution groups and resolution entities rather than on a solo or consolidated basis, as aligned with bank's resolution strategies. It is however important to understand where a EU GSII group contains more than one resolution entity and a comparison is made with a hypothetical group consolidated requirement, what further adjustments/actions are anticipated under Article 12.

3. Internal Pillar 1 MREL under article 92b CRR

We do not support the proposed article 92b CRR. Instead, we would be supportive of the introduction of internal MREL requirements for GSIIs headquartered outside the EU in line with the TLAC Standard. The objective of internal TLAC, as stated in the TLAC Standard, is for home and host authorities to be provided with confidence in the resolution strategy for the group. This objective should be codified in the legislation as the overriding objective. The work on internal intra-group requirements, both at the FSB and within European resolution authorities remains a work in progress.

While significant progress has been made on the objectives and guiding principles, these are yet to be finalised and the detailed structures to put in place effective intra-group mechanisms to support resolution strategies require further work in Crisis Management Groups and resolution colleges. It is therefore crucial that the legislative proposals providing for internal MREL requirements accommodate the ongoing work and provide sufficient flexibility, within a harmonised framework, to allow resolution authorities to put in place effective arrangements to support global resolution plans and cater for different bank structures, business models and risk profiles. In order to achieve this objective, it is necessary to construct a cohesive framework for the setting of internal MREL across the CRR/BRRD and in doing so we consider that the following aspects of the proposal need further consideration:

a) **Calibration**: the proposed requirement for 90% of external Pillar 1 MREL requirements at each material subsidiary should be amended to provide flexibility for resolution authorities to agree an appropriate calibration of internal MREL in the 75-90% range set in the TLAC Standard. The proposals should also incorporate the process of calibration being determined in consultation with the home authority of the resolution entity as part of the resolution strategy agreed in the Crisis Management Group or resolution college. In case that the sum of the internal MREL requirements of the different material subsidiaries exceed the external MREL requirement of the GSII resolution entity, the legislation should require home and host authorities to agree on measures to reduce the internal MREL requirements to avoid an over-calibration at the level of the top entity. This would bring the EU proposal into line with the TLAC Standard and provide resolution authorities with the ability to implement what is agreed in Crisis Management Groups. This is particularly important given the risk that the sum of internal MREL requirements exceeds the minimum external MREL requirement due to intra-group exposures or other consolidation effects.

b) **Scope (1):** The proposal applies to material subsidiaries of non-EU GSIIs that are not resolution entities. This scope should be amended to clarify that article 92b does not apply to subsidiaries of non-EU GSIIs where they are subsidiaries of a resolution entity in the EU. For example, third country headquartered GSIIs subject to a Multiple Point of Entry (MPE) strategy may have a resolution entity in the EU and subsidiaries of such entity should not be required to issue internal MREL to a parent undertaking in a third country, but rather should be allowed to issue internal MREL to the resolution entity in the EU under the BRRD internal MREL provisions.

c) **Scope (2):** the definition of "material subsidiary" should be replaced with the concept of material sub-group in line with the TLAC Standard and the draft guidelines on internal TLAC. Non-bank entities should only be included to the extent necessary as set out in the draft guidelines on internal TLAC. The interaction of this requirement with the requirement to establish intermediate holding companies in article 21b CRD also needs to be considered.

d) **Eligibility criteria (1)**: the requirement for Additional Tier 1, Tier 2 and eligible liabilities to be held by "the parent undertaking" of the institution in a third country"[9] is unclear. Instruments should be eligible to meet Internal MREL if they are ultimately held (directly or indirectly) by the resolution entity and if the approach to issuing those instruments supports the resolution strategy and the passing of losses to the resolution entity. It is critical that the EU legislation provides banks with the flexibility to issue instruments to meet internal MREL in a way that allows them to efficiently fund their operations. The CRR should provide for AT1, Tier 2 and eligible liabilities to be eligible to meet internal MREL if they are issued directly to the resolution entity, indirectly through the ownership chain to the resolution entity and indirectly to the resolution entity through wholly owned affiliates. It is also unclear how the requirement to issue internal MREL to a parent undertaking outside the EU could be implemented by banks which are owned by an EU-based intermediate holding company (IHC), and how this aligns with the proposal to require certain third country headquartered banks to establish an IHC, as it appears that subsidiaries could not issue internal MREL to an EU-based IHC.

e) **Eligibility criteria (2):** several of the eligibility criteria in article 72b are inappropriate for internal MREL. Article 72b(2)(b) and (c) (restrictions on issuance within a resolution group) and the requirements in article 72b(3)-(5) should not apply to internal MREL. This might require separate eligibility criteria for "internal MREL" to be defined (under a separate article).

   As discussed above in section 2 sub-paragraph (a), the restriction on acceleration rights[10] should be removed and should not apply to internal MREL due to the risk of recharacterization as equity for tax purposes which would impact the tax deductibility of interest payments on internal MREL and, in certain circumstances, the treatment of repayments of principal. This could negatively affect financial results and have a material impact on the cost of compliance, resulting in a material impact on the cost of issuing internal MREL. Standard acceleration rights, such as upon non-payment of principal and interest, should be permitted for internal MREL. These acceleration rights do not present a risk to the effectiveness of internal MREL passing losses from an operating entity to a resolution entity and do not present a risk to recapitalisation. Should an entity reach the point that it has triggered an acceleration clause due to non-payment, it is highly likely that it would be in distress and that its parent would need to recapitalise the entity in order the preserve the franchise value and to execute the resolution strategy.

   The requirement for contractual recognition of bail-in under article 72b(2)(o) is also inappropriate for internal MREL for the same reasons as external MREL discussed above.

[9] Article 92b CRR

[10] Article 72b(2)(l) CRR

Should the co-legislators determine that acceleration rights should be restricted, we would strongly urge them to consider a rule which allows acceleration for non-payment subject to a 30-day cure period, in line with the approach taken in the final US TLAC rules.

f) **Eligibility criteria (3):** It should be clarified that internal MREL will only be written down or converted with the consent of the home resolution authority for the resolution entity, but that the host retains the power to subject internal MREL to its own resolution bail-in should the consent not be forthcoming. This is in line with the TLAC Standard (para.19) and is important to foster cross-border cooperation and reflect agreements made in Crisis Management Groups. This process is considered further in the FSB draft guidance on internal TLAC and should be accommodated in the EU.

g) **Eligibility criteria (4):** Greater flexibility should be provided for alternatives to pre-positioned internal MREL such as the use of guarantees and capital contribution arrangements where the host authority is happy with these arrangements.

4. External firm-specific MREL under the BRRD

We broadly welcome the proposed amendments to the MREL framework under the BRRD including the introduction of the concepts of resolution entity and resolution group and the changes that have been made to align MREL more closely with TLAC, while maintaining flexibility to tailor MREL to the resolution strategy for the group. We set out below a number of comments on these aspects of the proposals.

Calibration of Pillar 2 external MREL

We support the increased focus on aligning MREL with the resolution strategy for the group and the introduction of the concepts of resolution entity and resolution group in the BRRD. It is important to distinguish external MREL requirements from internal MREL.

We support the proposed calibration of external Pillar 2 MREL based on the concepts of loss absorption and recapitalisation amounts developed from the existing MREL RTS. We welcome the clarification that the starting-point for this assessment should not exceed the sum of the Pillar 1 and Pillar 2 capital requirements currently applicable (loss absorption) and those applicable to the entity in resolution (recapitalisation).

However, it is essential that MREL is determined in the context of the group resolution strategy and that resolution authorities have flexibility to set a lower recapitalisation amount taking into account the resolution strategy including the likelihood that some capital remains at the point of resolution and that that the resolved group is likely to be smaller at the point of resolution and following restructuring. Accordingly, not all Pillar 2 risks will be relevant at the point of resolution.

We support the emphasis on resolvability and that additional requirements for GSIIs beyond the Pillar 1 minimum and any additional requirements for all banks should only be required to the extent necessary to fulfil the conditions set out in article 45c. The scope of article 45d should however, be expanded to also include material subsidiaries of third country GSIIs (entities that are within the scope of article 92b CRR) to reflect that these entities might also be subject to a Pillar 1 minimum requirement. We also suggest that when calibrating MREL, resolution authorities should have regard to ensuring a level playing field with other key jurisdictions and avoid setting MREL requirements at a higher level than those for comparable banks in these jurisdictions.

Pillar 2 external MREL eligibility criteria

We support the proposed alignment of the eligibility criteria for external Pillar 2 MREL with the CRR, subject to the additional flexibility in relation to subordination and the eligibility of certain structured notes. However, the issues discussed above in relation to the eligibility criteria for external Pillar 1 MREL and the need for transitional arrangements also apply to Pillar 2 MREL.

Clear criteria should be established for the determination by the resolution authority as to whether subordination of Pillar 2 MREL should be required to ensure a consistent approach across the EU. We suggest that this could be achieved through EBA Regulatory Technical Standards to supplement article 45b(3). It should also be clarified that subordination should only be required to the extent necessary to support a credible resolution strategy and achieve the resolution objectives. We believe that the Pillar 1 MREL requirement should be sufficient to achieve this for GSIIs and in any case, in order to avoid any level playing field issues with institutions outside the EU, this subordination requirement should not lead to situations where institutions are required to have higher levels of subordinated MREL compared to requirements for comparable institutions in third countries.

5. Internal MREL under the BRRD

We support the acknowledgement of the need to address external MREL and internal MREL separately under the BRRD to provide greater clarity to resolution authorities, banks and investors. As discussed above in relation to the CRR internal Pillar 1 MREL requirements, account needs to be taken of the FSB work on internal TLAC and the fact that the work on internal intra-group requirements, both at the FSB and within European resolution authorities remains a work in progress.

It is therefore crucial that the legislative proposals accommodate the ongoing work and provide sufficient flexibility for resolution authorities to put in place effective internal MREL arrangements to support resolution plans and avoid excessive requirements which could increase overall external MREL requirements. Currently we are concerned that the proposals do not achieve this and consider that the following changes are required:

a) **Objective:** the objective of internal MREL should be expressly set out in the BRRD, namely to support cross-border cooperation where necessary to support the preferred resolution strategy for the group. The role of internal MREL is to provide a mechanism for the transfer of losses and recapitalisation needs of subsidiaries up to a resolution entity under the chosen resolution strategy, and without those subsidiaries entering into resolution. It can also serve to provide greater comfort to host authorities of material subsidiaries that the resolution strategy will be followed if necessary. The objectives are therefore distinct from external MREL and we believe that these should be set out clearly in the legislation.

b) **Scope:** it should not be necessary for internal MREL to be held at every subsidiary in a group. The starting point should be that internal MREL should not be necessary where the resolution entity and the relevant subsidiary are within the scope of a single resolution authority. This is acknowledged in the TLAC Standard, which requires internal TLAC only at material sub-groups in different jurisdictions from the resolution entity. In its final report on MREL, the EBA highlighted that “MREL decisions are to be taken jointly within resolution colleges in full consistency with the resolution strategy and are subject, in case of disagreement, to EBA binding mediation. Therefore it does not appear that the various national authorities within the EU should be considered as foreign jurisdictions under the [TLAC Standard]."[11]

The proposed limited scope of waivers of internal MREL to between entities located in the same Member State is too restrictive. Waivers should be available between institutions within the European Union and at a minimum within the Banking Union in light of the automatic recognition of resolution actions, the joint process for resolution planning, cooperation and information sharing within resolution colleges and the single supervisor and resolution authority within the Banking Union. Waivers should apply automatically within a Member State where the criteria in article 45g(5) are met, and for entities within the scope of a cooperative mutual solidarity system that protects the solvency and liquidity of the affiliated institutions.

c) **Calibration**: greater flexibility is required in relation to the determination of internal MREL requirements. Currently there is no scaling of internal MREL under the BRRD, in contrast to the scaling (albeit overly restrictive) for material subsidiaries of third country GSIIs. It is important that the BRRD framework includes appropriate scaling of internal MREL. The scaling range between institutions in the EU should be significantly lower than the 75-90% internal TLAC requirement to reflect the group resolution planning process, close cooperation and information sharing within resolution colleges, the automatic recognition of resolution actions and the single supervisor and resolution authority within the Banking Union.

The current calibration of internal MREL appears to provide for higher requirements between institutions within the EU than for subsidiaries of third country resolution entities and does not give recognition to the single market and Banking Union under the BRRD and SRMR framework, including:

i. the joint resolution planning and decision-making process through resolution colleges[12];

ii. the legal obligations on home authorities to give due consideration to (i) "the interests of each individual Member State where a subsidiary is established, in particular the impact of any decision or action or inaction on the financial stability, fiscal resources, resolution fund, deposit guarantee scheme or investor compensation scheme of those Member States"[13] and (ii) the objectives of balancing the interests of particular Member States, including avoiding unfair burden allocation across Member States[14];

iii. The legal obligation on resolution authorities when taking resolution actions, to take into account and follow the jointly agreed group resolution plans unless they consider that the resolution objectives will be achieved more effectively by other means; and[15]

iv. the single supervisory authority and resolution authority in the Banking Union.

These factors should materially reduce the need for internal MREL within the EU and Banking Union and this should be clearly reflected in the criteria for determining internal MREL requirements. The current approach which appears to assume fully distributed internal MREL could reduce flexibility to use resources where they are needed in the group, potentially increasing fragmentation and reducing

[11] See page 136.

[12] Article 13 BRRD
[13] Article 87(f) BRRD
[14] Article 87(h) BRRD
[15] Article 87(j) BRRD

resilience. As stated in the draft FSB guidance on internal TLAC, "there must be sufficient flexibility to use loss-absorbing capacity within a GSII where needed" and to ensure that resources are distributed within the group according to the resolution strategy.

Setting internal MREL at 100% of the calibration as if a subsidiary is a resolution entity at every institution in the group is also highly likely to increase overall external MREL requirements due to consolidation effects. This should be addressed in the factors to be considered when calibrating internal MREL within resolution colleges that the sum of the internal requirements should not increase the external requirement at the resolution entity and this principle should be set out in the legislation.

d) **Process:** These decisions should be taken by the resolution college taking account of the group resolution strategy. Internal MREL requirements should be set by host authorities in consultation with the home authority to support the resolution strategy for the resolution group, taking into account the implications for the resolution group.

e) **Guarantees:** AFME welcomes the ability to use guarantees to meet internal MREL requirements. This should provide groups with a degree of additional flexibility to manage their funding while providing additional comfort to host authorities and providing a mechanism to upstream losses. As highlighted by the EBA, "prepositioning constrains banks in centrally managing liquidity and financial resources at the group level, including in dealing with asymmetric shocks"[16]. Greater flexibility as to the types of instruments should also be accommodated where agreed between authorities. For example capital contribution, uncollateralised guarantees or other arrangements may achieve the objectives.

f) **Eligibility criteria (1)**: the requirement that liabilities are issued to the resolution entity (art 45g(3)(a)(i)) does not provide sufficient flexibility to provide for different structures for down-streaming internal MREL under consideration by resolution authorities. Flexibility should be provided to accommodate direct issuance to resolution entities and down-streaming through the group whether through the direct ownership chain or through wholly owned affiliates.

g) **Eligibility criteria (2)**: It should be clarified that internal MREL will only be written down or converted with the consent of the home resolution authority for the resolution entity, but that the host retains the power to subject internal MREL to its own resolution bail-in should the consent not be forthcoming. This is consistent with the TLAC Standard.

h) **Application to third country groups:** the application of the internal MREL requirements to EU subsidiaries of third country groups and the process for determining such requirements should be clarified. A definition of third country resolution entity should be introduced to assist with this.[17]

In light of the ongoing work at the international level regarding arrangements for determining material sub-groups, calibration and eligibility of internal TLAC, it is important that adequate flexibility is provided within the level one text to permit future work on creating an appropriate framework for the setting of internal Pillar 2 MREL within the EU. As the work being taken forward is of a highly technical nature, we strongly encourage a mandate for the EBA to evaluate and set out the most appropriate criteria for the application of internal MREL including its calibration and eligibility criteria.

6. MREL Guidance

[16] See EBA Final Report on MREL, 14 December 2016, at p.137.
[17] See also section 7 below.

It is unclear what risks MREL guidance is intended to address beyond those already covered by MREL requirements under article 45c and why a further guidance buffer is required. The firm specific (Pillar 2) MREL requirement is designed to ensure that banks are resolvable and we do not believe that an additional guidance or buffer is necessary or appropriate.

Market confidence concerns should be addressed by recapitalisation to replicate existing Pillar 1 and Pillar 2 capital requirements. This approach to the recapitalisation amount, reflected in article 45c, already provides conservatism in terms of losses exhausting all capital and the need for the bank post-resolution to have the same Pillar 2 requirement. We therefore regard it as unnecessary and as potentially creating a new "buffer" of guidance which only serves to increase requirements (as in practice it will have to be met) and reduce clarity and transparency of overall requirements. Firms will likely run a management buffer on top of MREL requirements to ensure that they do not breach them, but there should not be any presumption of any buffers to be held by firms upfront. In any event, further recapitalisation beyond the necessary requirements could give rise to concerns regarding ensuring that creditors are not worse off than in liquidation.

As discussed below, concerns regarding the consequences of breach should be addressed directly by de-linking MDA from a breach of the combined capital buffers solely due to an MREL shortfall.

7. MREL in the context of global groups

As discussed above, we support the alignment of MREL requirements with the preferred resolution strategy for the group and the introduction of the concepts of resolution entity and resolution group in the European framework**.** This should support resolvability and cross-border effectiveness of resolution. However, greater clarity is required as to the process and application of requirements in relation to global groups, in particular for (i) groups headquartered in the EU which have resolution entities outside the EU under a multiple point of entry (MPE) resolution strategy; and (ii) groups headquartered outside the EU with subsidiaries in the EU under a single point of entry (SPE) resolution strategy.

EU headquartered MPE groups: We support the Commission's apparent intention to clarify that MREL is to be set on a sub-consolidated basis for MPE groups through the application of MREL to resolution entities. However, it is crucial to clarify the proposed wording by introducing the definitions of third country resolution entity and third country resolution group because the current wording may have unintended consequences.

Third country headquartered SPE groups: The definition of resolution entity as "an entity in respect of the resolution plan provides for resolution action" is specified too broadly and would capture subsidiaries of GSIIs subject to a single point of entry resolution strategy. In particular, in the case of non-EU GSIIs the article 12(1) BRRD appears to require resolution plans to be drawn up at the level of the EU subsidiary or sub-group. The BRRD further specifies that "the resolution plan shall provide for the resolution actions which the resolution authority may take", thus by definition the resolution plan will provide for resolution actions in respect of these entities, thereby bringing these subsidiaries into the definition of resolution entities, even where they are part of a group for which the preferred resolution strategy is a single point of entry (SPE) approach.

As a consequence, these entities would fall within the requirements of article 92a rather than 92b. While article 89(2) as amended contemplates a group with no resolution entity in the EU, this should be clarified. It is also unclear how the provisions should apply to a standalone single subsidiary of a third country group where that subsidiary is not a resolution entity. The definition of resolution entity should therefore be clarified, consistently with the amended article 89(2) to ensure that subsidiaries of SPE firms are not subject to external MREL requirements and that it is clear how internal MREL should be applied.

Our proposed definitions: In line with the above concerns, we propose the inclusion of the following definitions and amendments to provide clarity on these issues, as follows;

(a) Add “or third country resolution entities” in BRRD2 art. 1, 83(b) after “that are not resolution entities”;

(b) Add a new 83(c): “third country resolution entity” means an entity established in a third country identified in accordance with the applicable law as an entity in respect of which measures equivalent to resolution action are planned to be taken;

(c) Add a new 83 (d): “third country resolution group” means a third country resolution entity and its subsidiaries that are not themselves resolution entities; and,

(a) Amend article 45 (f) (2) of the proposed BRRD amendment: “The requirement referred to in Article 45(1) of a resolution entity at the consolidated resolution group level shall be determined in accordance with Article 45h, on the basis of the requirements laid down in Articles 45c to 45e and of whether the third-country ~~subsidiaries~~ resolution entities of the group are to be resolved separately according to the resolution plan”.

8. Article 55

We welcome the acknowledgment of the practical challenges with the implementation of the existing scope of article 55 BRRD and the need to address these. AFME has highlighted these issues on numerous occasions[18] and also assisted banks with implementation through developing model clauses.[19] It is essential to address these issues in order to provide a workable solution while not threatening resolvability. It also remains important to encourage the development of statutory recognition in other jurisdictions.

Practical problems with the existing scope

AFME’s members have undertaken a thorough analysis of the contracts which are within the scope of article 55 and identified the following categories as presenting particular challenges:

a) contracts where there is no realistic possibility of inserting the relevant provisions – and in some cases, it is not clear what these would achieve. Examples include trade finance and membership of financial markets infrastructure which are discussed further below; and

b) contracts where there is resistance from the local regulatory authorities to any change in the terms, for example uninsured corporate deposits of a branch of a bank outside the EEA, which are governed by local law.

Some examples of the types of agreement which cause the greatest difficulties include:

[18] For example, http://www.afme.eu/globalassets/downloads/consultation-responses/afme-paper-highlighting-concerns-with-the-scope-of-contractual-recognition-of-bail-in-under-article-55-brrd.pdf;

[19] http://www.afme.eu/globalassets/downloads/industry-guidelines-standard-forms-and-documents/afme-model-clauses-for-contractual-recognition-of-bail-in.pdf

a) Trade finance, which since 1933, has been governed not by national laws but by protocols developed by the International Chamber of Commerce. Trade finance provides a vital form of financing for the real economy and is important to support growth. As highlighted by the UK Treasury: "*The use of international standard documentation and rules, the practice of having no express choice of governing law of contracts, the legal nature of certain finance liabilities and the inability to impose unilateral changes to a contract because of the dominant bargaining position of non-customers makes it practically impossible for banks to add contractual bail-in terms to some types of trade finance liabilities. This may affect the ability of EU banks to offer trade finance to clients, or the attractiveness of that trade finance to investors, and therefore reduce the number of transactions. The impact on SMEs is likely to be disproportionate as they are less likely to be in a position to access trade finance solutions from non-EU banks or other market participants. Compliance with the contractual documentation will also require banks to renegotiate tens of thousands of contracts with little corresponding financial stability benefit ... it is therefore questionable whether bailing [trade finance liabilities] in would contribute to the recapitalisation of the bank. Attempting to bail-in trade finance liabilities is therefore unlikely to have a significant positive impact on recapitalising a firm and would damage the provision of trade finance. A requirement to include contractual clauses of the type required by Article 55 could lead to a fall in the number of trade finance transactions that can be undertaken by EU banks, as it is not possible to add contractual bail-in terms to certain trade finance liabilities.*"[20]

b) Agreements with financial markets infrastructure outside the EU, including central counterparties ("CCPs"): it is not possible for banks to unilaterally amend the membership rules for CCPs outside the EU. It is also likely that bail-in of such liabilities would be counterproductive and inconsistent with the goal of maintaining access to financial markets infrastructure and the resolution objective to continue critical economic functions.[21] Again, as highlighted by the UK Treasury, "*EU banks are required (by Article 55) to seek to amend their contracts with non-EU CCPs to include a clause acknowledging that the contract may be subject to bail-in. As it is very likely that liabilities to a non-EU CCP would be subject to a discretionary exclusion by the resolution authority, this has limited benefit and comes with considerable costs to the European bank. It may also cause non-EU CCPs to examine more closely the risks that they are exposed to in the case of bank failure and reassess their appetite for accepting European banks as clearing members*."[22] The Bank of England has also stated that as a consequence of Article 55 "*There is a risk that access of European firms to clearing, payment and settlement systems in third countries - and thus to the markets they serve - would be restricted.*"[23]

c) Contracts and other arrangements that give rise to a contingent liability eg letters of credit, guarantees, commitments to lend, undertakings and indemnities. This potentially extends to a very broad range of

[20] See HM Treasury response to the European Commission Call for evidence on the EU regulatory framework for financial services, February 2016, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496887/PU1903_HMT_response_to_EU_consultation.pdf at p.4.1

[21] See FSB Consultative Document, Guidance on Continuity of Access to Financial Market Infrastructures (FMIs) for a Firm in Resolution, http://www.fsb.org/wp-content/uploads/Continuity-of-Access-to-FMIs-Consultation-Document-FINAL.pdf

[22] Above, at p.60.

[23] See Bank of England response to the European Commission Call for evidence on the EU regulatory framework for financial services, February 2016, available at: http://www.bankofengland.co.uk/financialstability/Documents/regframework/detailedanswers010216.pdf at p.12.

agreements. In practice, contingent liabilities are unlikely to be bailed in because of their contingent nature and their uncertain value.

d) Operational and administrative liabilities that cannot be readily negotiated such as contracts for supply of goods and services entered into on a counterparty's standard terms, contracts governed by standard terms under local law (eg purchases of land, leases, utilities etc) or with foreign public authorities, and underlying documentation in respect of debt securities traded on the secondary market.

e) Challenges also arise in relation to liabilities that are documented through SWIFT messages, are agreed verbally (such as spot currency payment vs delivery obligations) or arise under market conventions which would be difficult to amend.

Banks are unable to unilaterally impose contractual terms in relation to many of these categories of liabilities. Including contractual recognition provisions in contracts governing secured liabilities, liabilities which are likely to be excluded from bail-in under discretionary exclusions and operating liabilities also sends a confused message to counterparties and could cause undue concern as to the risk of bail-in, particularly in jurisdictions where bail-in is a foreign concept. It is important to note that other jurisdictions outside the EU do not require contractual clauses for this broad range of liabilities, potentially leaving European banks at a significant competitive disadvantage. Moreover, the scope of article 55 includes liabilities that are very unlikely to be bailed-in in practice and do not contribute significantly to the loss absorbing capacity of the bank. There is therefore a lack of proportionality between the operational challenges of implementing the clause for certain types of liabilities and the benefits in terms of loss absorbency and resolvability, which are the objectives of article 55.

Proposed solution

We believe that the best way to address the practical difficulties while not impeding resolvability is to limit the scope of article 55 to liabilities eligible for MREL and any additional liabilities identified by the resolution authority where required for the resolvability of the group.

This approach would provide a clear and consistent scope of liabilities, creating clarity for the market and ensuring a consistent approach across the single market while maintaining the oversight of resolution authorities and ensuring that resolvability is not impeded. It would also be consistent with the FSB Principles for Cross-border Effectiveness of Resolution Actions.[24]

However, if it is decided not to limit the scope of article 55 as we propose, it is necessary to make the following changes to the proposed waiver in order to provide a workable solution which achieves its objectives:

1) Article 55(2)(a) should be a standalone exception where the law of the third country provides for the necessary recognition. This should not be a cumulative condition with article 55(2)(b) and (c). The current cumulative requirement to meet the conditions (a), (b) and (c) leads to a more restrictive approach than the current BRRD, contrary to the stated legislative intention.

2) We support the proposed basis of the waiver to be where it is "legally, contractually or economically impracticable" to meet the requirement. We strongly support the statement in recital 18 that

[24] http://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf

"*resolution authorities should therefore be able to waiver the application of the requirement to include those contractual terms where those contractual terms would entail disproportionate costs for institutions and the resulting liabilities would not provide significant loss absorbing and recapitalisation capacity in resolution*". This should be expressly reflected in the text of article 55 by amending article 55(2)(b) as follows:

"(b) that it is legally, contractually or economically impracticable, <u>or results in disproportionate costs relative to the liabilities' loss absorbing capacity in resolution</u>, for an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to include such a contractual term in certain liabilities"

This would ensure that resolution authorities are able to apply the waiver in a proportionate manner.

3) We support the condition that the waiver does not impede the resolvability of the institution. However, we do not believe that it is necessary or appropriate to restrict resolution authorities from applying the waiver to either:

   - **debt instruments that are unsecured liabilities**: the scope of the definition of debt instruments is very broad and this restriction in applying the waiver would be overly restrictive. The scope of the definition does not only apply to bonds, but also includes instruments acknowledging a debt. For example, the definition of debt instruments may also include bills of exchange and promissory notes, which are often used in trade finance. Additionally, where firms operate through cross-border branches and rely on attracting local currency through various forms of unsecured funding transactions, in certain jurisdictions, the inclusion of contractual recognition clauses has been as impracticable as for other types of contracts. If debt instruments are excluded, and thus the necessary waivers cannot be granted, in order for the firm to be compliant with the requirements under the BRRD the branch would have to end parts or all of its local business in certain jurisdictions as local funding can no longer be relied upon; and
   - **liabilities that rank alongside eligible liabilities**: this is overly restrictive and would prevent the application of a waiver to any senior liabilities where a bank has any eligible liabilities that are not fully subordinated. The proposed MREL framework provides that not all eligible liabilities are required to be subordinated, for example, GSIIs making use of the 3.5% RWAs exception to subordination under article 72b(3) CRR and other banks including small banks where subordination of MREL is not required by resolution authorities. This restriction severely restricts the utility of the proposed waiver and will not achieve the objective of a proportionate approach. Instead the waiver should be possible for liabilities which are <u>**pari passu with or**</u> senior to MREL provided that the other conditions are met, including not impeding the resolvability of the institution, but liabilities which are subject to a waiver should not be eligible as MREL.

It is therefore necessary to address these issues in order for the waiver to be capable of achieving its objective. The condition in article 55(2)(c) that the resolution authority determines that the waiver does not impede resolvability provides a sufficient safeguard to ensure that any waiver that is applied does not impede the objective of resolvability.

Finally, in light of the proposed amendments to the eligibility criteria for Additional Tier 1 and Tier 2 capital to require contractual recognition of the write down and conversion powers under article 59 BRRD[25], these instruments should be excluded from article 55 to avoid overlapping requirements under the CRR and the BRRD.

9. Stacking order and consequences of breach

Stacking order

We agree that CET1 should not be double-counted between the combined capital buffer and MREL. The TLAC Standard provides that the combined buffer requirement must be met in addition to the TLAC RWA Minimum, but not the TLAC leverage exposure minimum. This approach should be reflected in the European legislation and we believe that the combined buffer should not "sit on top" of the Pillar 1 and Pillar 2 MREL requirements when calibrated in accordance with the leverage ratio exposure measure. This approach would also be consistent with the purpose of the leverage element of MREL as a backstop, as acknowledged by the EBA in its report on MREL.

As a consequence, we believe that it is necessary to amend article 141a(1)(d) CRD to refer to the Pillar 1 and Pillar 2 MREL requirement calibrated through the risk-based methodology only. This would also be consistent with the capital framework, as article 141a(1) of CRD5 does not refer to the leverage ratio referred to in article 92(1)(d) CRR2.

Consequences of breach and interaction with Maximum Distributable Amount ("MDA")

A breach of MREL should be taken seriously by the authorities. However, the response of the supervisory and resolution authorities should be tailored to address the cause of the breach in the circumstances. It would be inappropriate for MDA restrictions to be automatically imposed by virtue of a bank breaching its combined buffer solely as a result of CET1 being used to meet a temporary MREL shortfall. This could occur, for example, due to a temporary debt refinancing issue rather than the bank facing any immediate solvency issues and would result in a substantially higher threshold at which MDA could apply.

The case of a bank meeting capital requirements but failing to meet MREL requirements can arise for either systemic or idiosyncratic reasons:

a) *Systemic*: The market for eligible liabilities is globally closed or extremely difficult (temporary lack of appetite for this type of paper), making it impossible for a bank/banks to roll over MREL eligible liabilities that fall below 12 months' residual maturity.

   This can arise for reasons unconnected to the health of the bank in question, for example it could occur after a bail-in took place in another bank and investors are reassessing their exposure to this type of paper. A similar situation arose during Q1 2016 on the basis of market misinterpretation of supervisors' public pronouncements. MDA restrictions on a bank with no capital shortfall could be destabilizing and reduce confidence further. Indeed, the mere possibility of widespread MDA restrictions due to the consequences of the weakness in the eligible liabilities market could generate and accelerate a systemic crisis.

[25] Articles 52(o), (p) and 63(o), (n) CRR

b) *Idiosyncratic*: A particular bank has difficulty issuing eligible liabilities: in this case, the bank is clearly perceived as being in difficulty and some action needs to be taken. However, it would be counterproductive to publicly introduce MDA restrictions on dividend and interest distribution for a bank that apparently needs to issue more loss-absorbing liabilities.

We believe that rather than the proposed grace period, the CRD should be amended to provide that MDA restrictions should not be automatically triggered by a breach of the combined buffer which occurs only due to insufficient CET1 to meet the combined buffer and MREL. This approach of disconnecting MDA from MREL, which has been adopted by the Bank of England, is preferable to a grace period because it allows the regulators to intervene as deemed appropriate and, on the other hand, the market would still react regardless of the grace period.

Where a breach of MREL occurs alongside a breach of capital requirements, the existing capital framework provides sufficient powers to address this. However, where a breach of MREL does not involve a breach of capital requirements, rather than automatically triggering MDA restrictions, the authorities should assess the cause of the breach and agree, as necessary, a plan with the institution to remedy the breach as a barrier to resolvability. Such a plan should provide an appropriate timeframe in which the institution should restore its MREL position, taking into account the cause of the breach, market conditions and the availability of broader bail-in-able liabilities. We support the introduction of clearer powers for resolution authorities to take this action rather than relying on automatic MDA restrictions which were not designed with a breach of MREL in mind.

Nevertheless, if a grace period approach is retained, we suggest that it should be for at least 12 months and it should be clear that the authorities may extend the grace period where the conditions continue to apply and they believe that it is appropriate to do so. The minimum 12 month remaining maturity requirement for MREL instruments should provide the authorities with, in effect, a "maturity buffer" during which the MREL position can be restored. Where a breach of MREL is due to a bank's inability to roll-over MREL instruments that fall below the 12-month remaining maturity requirement, it should be acknowledged that this would not equate to a reduction in loss-absorbing capacity, as those instruments would still be present and able to absorb losses should they be required to. The requirement for the breach to be due to the inability to replace eligible liabilities in article 141a(2)(b) adds unnecessary complexity and should also be removed.

We strongly support the EBA's recommendation that resolution authorities and competent authorities should closely cooperate and coordinate in this process.

10. Moratorium tools

We do not believe that it is necessary or appropriate to introduce new moratoria powers, especially prior to resolution. The proposed moratoria would run directly contrary to the stated objectives of ensuring the continuity of critical functions. We view the existing moratoria under the BRRD as sufficient to enable the authorities to conduct an effective resolution and extending this would increase the level of systemic risk within European financial markets.

We are concerned about the impact that the proposed new powers would have on the ability of banks to recover in stressed situations and the market impact. For example, customers and counterparties would be incentivised to run at an earlier stage making recovery more challenging and potentially increasing the likelihood of failure in a stressed situation. The possibility of a stay could increase concern in markets and increase contagion both through market reaction and also due to the impact that a stay would have on counterparties, which include other financial institutions which may be reliant on the income to meet their own obligations.

The broad scope of the moratoria includes a number of critical economic functions of banks which are intended to be maintained prior to and throughout resolution, including uninsured deposits and other critical economic functions. Applying a stay to such liabilities would be directly contrary to the resolution objectives of ensuring that critical economic functions are uninterrupted. As such the moratorium tool (either pre-resolution or in resolution) could undermine the resolution objectives, make communication to creditors and the market more difficult, threaten the success of the resolution and create financial instability.

The possibility of a stay could therefore threaten the success of resolution and increase contagion and financial instability.

We are also very concerned about the potential reaction that counterparties would have to the new moratoria. The impact of this power needs to be fully assessed, including the likely impact on pricing and market reactions in a stressed situation.

The existence of the tool, even if not exercised, could itself create uncertainty in the market and incentivise counterparties, including uninsured depositors (but also potentially insured depositors who are unwilling to rely on deposit insurance) to run at an earlier stage than they would otherwise. The trigger for early intervention is vague and therefore markets could react at the first sign or rumour of difficulties. This could be counterproductive and make recovery actions less likely to succeed. As drafted, it appears that the moratoria could apply successively such that a counterparty could be subject to a stay for 15 business days which is a long period in what could be a volatile and stressed market.

The legal implications for legal opinions and any requirement for contractual recognition of the moratoria also require very careful consideration. The proposed moratoria go beyond the global standard under the FSB Key Attributes of Effective Resolution Regimes, which provide for a limited stay on termination rights in certain circumstances (see Key Attribute 4.3 and I-Annex 5) which were broadly implemented under the BRRD. This could have an adverse impact on European banks which would be subject to additional uncertain powers prior to resolution which do not apply globally.

Additionally, some jurisdictions have introduced requirements for firms to amend certain contracts to give contractual recognition of resolution stays. If these requirements were expanded to address the proposed new moratoria this would create a significant burden on firms including the need to amend again contracts which have already been amended to recognise existing stays. Such an exercise would be burdensome and could create significant confusion in the market.

We do not believe that these issues have been sufficiently considered or the impact assessed. We therefore oppose the proposed introduction of additional moratoria.

11. Treatment of MREL holdings

We support the proposed approach to the deduction of TLAC holdings from Pillar 1 MREL which takes due account of the application of the MREL framework to all institutions. It should be clarified whether deductions are intended only to be applied to resolution entities of GSIIs.

We believe that a change to the proposal should be made by deleting article 72(j) to permit trading book holdings which cease to meet the conditions set out in article 72j CRR to be included in the exceptions set out in articles 72h and 72i. There does not appear to be a good rationale for this restriction given such restrictions do not currently apply for holdings of regulatory capital instruments and, furthermore, this restriction may make the use of such exemption unusable in practice.

Additionally, we believe that additional clarity is needed as to how the deductions are to be made, namely:

a) what in practice is meant by 'gross long position';

b) how the 30-day holding is intended to work due to rolling trading book positions;

c) whether holdings in own instruments could benefit from the threshold under 72j;

d) how the corresponding deduction approach is to operate in practice given the deduction articles for own funds were not amended; and

e) consistency of netting rules for calculation of own funds and MREL liabilities.

In order for banks to be able to assess the level of holdings of other GSIIs' Pillar 1 MREL, they require clarity as to whether instruments they may be holding are eligible liabilities. The timing of the introduction of the deduction should therefore be linked with the timing of relevant disclosure requirements.

12. Redemption restrictions

We do not believe that it is necessary or proportionate for regulatory approval to be sought for every redemption of MREL-eligible instruments where the institution retains sufficient eligible liabilities to meet its requirements. We support the EBA's recommendation that a redemption approval regime should be introduced for eligible liabilities but should be limited to require approval where the proposed redemption would lead to a breach of its MREL requirement.[26] This approach is also consistent with the TLAC Standard. The proposed extension of the capital regime for supervisory permission to eligible liabilities in article 78 CRR should be amended to limit the requirement for permission to these circumstances.

As recommended by the EBA, this more limited supervisory permission requirement could be supported by providing resolution authorities with the express power to monitor the maturity profile of eligible liabilities and to request institutions to modify the maturity profile of its eligible liabilities where this constitutes an impediment to the resolvability of the institution.

This approach would provide banks with greater flexibility to manage their issuances and facilitate the ability of banks to be market-makers in their own eligible instruments, which is important to support a liquid market. It would also be more manageable for the authorities given the volumes involved, while ensuring that resolution authorities maintain oversight of the maturity profile of eligible liabilities.

13. Disclosure requirements

Appropriate disclosure is necessary to support the market for MREL issuance. We encourage the European authorities to apply the international disclosure standards once finalised by the BCBS to avoid divergence

[26] Recommendation 5, EBA Report on the Implementation and Design of the MREL Framework, 14 December 2016.

between the EU and other jurisdictions. It is essential that a well-defined disclosure framework is in place well before the application of the deduction treatment for cross-holdings to enable firms to identify and assess the quantum of relevant instruments that they hold. Disclosure requirements should not apply to entities for which MREL has been waived.

We recommend that the disclosure requirements in the CRR should be aligned with the supervisory reporting and public disclosure requirements as described in article 45i BRRD to ensure consistency. In addition, we are concerned that public disclosure is required for each individual issuance of an eligible liability. This would be overly burdensome and instead we recommend, where appropriate, that public disclosure is made on an aggregated basis.

The reporting volume will be a concern to users as well as issuers. The volume of disclosure required will be substantially greater than for regulatory capital instruments. It would be very useful to introduce a materiality threshold (or include only benchmark issuances). Transactions below a threshold could be aggregated. Private Placements (for subordinated and senior debt) should be aggregated, to manage down the volume of disclosures and to provide reasonable confidentiality, both as to the firm's financing strategy and for lenders. The principles of aggregation need to be discussed, but reasonable aggregation should allow other lenders to see the general position of private placements in the stack. Private-placement lenders are presumably in a position to negotiate comprehensive disclosure of their exposures as part of the placement process and so would not need to rely on public disclosures to ascertain their own exposures to bail-in.

Finally, we are supportive of disclosure on a semi-annual basis as required per article 433a(3) CRR. It should be noted that regardless of the prescribed disclosure frequency, the bank will have the opportunity to update its website whenever it issues or repays a capital or MREL instrument or whenever there is redemption, conversion, write-down or other material change in the nature of an existing instrument.

The EBA together with European institutions and authorities should work with the BCBS and the industry to determine how to coordinate disclosures regarding the creditor hierarchy, regulatory capital stack and the quantum of eligible MREL.

14. Interaction with the large exposures framework

We welcome the acknowledgment of the need to address internal MREL in the large exposures framework. As discussed above, there should be flexibility for internal MREL to be issued to entities other than the resolution entity. Accordingly, the exemption from large exposures provided in Article 400(1)(l) CRR should not only be provided for resolution entities but at every institution as internal MREL could be held at other entities in the group. It should therefore be clarified that any exposures resulting from internal MREL are exempt from large exposure limits.

Annex: Technical Issues

1. Introduction

This annex identifies a number of technical issues arising from the Commission's proposed amendments to the CRR, CRD, BRRD and SRMR as they relate to MREL and other resolution issues. We hope that these issues are addressed during the legislative process to ensure that there is a workable legislative framework in the European Union. Our members' analysis of the proposals is still ongoing and the below should be viewed as a non-exhaustive list of issues which we will update as our work progresses.

2. CRR2: Pillar 1 MREL

Article	Issue	Comments/proposed solution
New 4(1)(134): Definition of material subsidiary	The definition of material subsidiary thresholds for consolidated RWAs, total operating income and leverage exposure relate to the "original parent undertaking" of the subsidiary. This is not defined but should refer to the GSIB group as per the TLAC term sheet.	Align the definition with the TLAC term sheet to refer to 5% of the consolidated RWAs, total operating income and total leverage exposure measure of the global GSIB group.
New 12, 92a(3) CRR, 45d(3), 45h(1) BRRD: consolidation for MPE GSIBs	It is unclear what options are available to the resolution authority in the stated circumstances by the ability to "act in accordance with article 45d(3) or 45h(1) BRRD" and how these should be applied. The second paragraph of article 12 would also appear to duplicate 92a(3).	The options available to the resolution authority in these circumstances should be clarified in the legislation, or perhaps via an RTS.
New 52 (p), (q) CRR: AT1 contractual recognition	Outstanding issuances of Additional Tier 1 do not meet the new criteria set out in letter (p) and (q) .	Apply the new requirements to new issuances only and grandfather instruments issued up until date of entry into force.
New 63 (n), (o): Tier 2 contractual recognition	Outstanding issuances of T2 do not meet the new criteria set out in letter (n) and (o).	Apply the new requirements to new issuances only and grandfather instruments issued up until date of entry into force.
New 63(d)	The revised drafting of article 63(d) requiring Tier 2 to be subordinated to any claim from eligible liabilities instruments does not work because when Tier 2 ceases to qualify as Tier 2 due to its remaining maturity it will become eligible liabilities. The same issue applies to the existing art	Revert to the existing language.

Article	Issue	Comments/proposed solution
	52(1)(d) of the CRR, which requires AT1 instruments to rank below Tier 2 instruments. Ranking should not be by reference to regulatory treatment which is not constant throughout the life of the instrument.	
New 72b(2)(b)(ii)	The criteria set under article 72b(2)(b)(ii) are unclear. How does this relate to the concept of "participation" under the CRR more generally?	The criteria under art. 72b(2)(b)(ii) should be clarified.
New 72b(2)(d), (e): subordination requirement	As drafted, this appears to require all eligible liabilities to be either (i) contractually or (ii) statutorily subordinated; and also structurally subordinated.	Sub-paragraph 72b(2)(e) should be moved to a new 72(b)(2)(d)(iii). As well as for pillar 1 MREL, this is also important for pillar 2 MREL as art. 45b(1) cross-refers to the eligibility with the exception of 72b(2)(d).
New 72b(2)(d)(ii): subordination requirement	A technical change is required to recognise that the law governing a liability is not necessarily the applicable insolvency law. MREL can be issued under foreign law. In this event, the law governing the liabilities is distinct from the insolvency law determining the subordination. Given that "bail-in clauses" are required (see art. 72b(2)(o) CRR) the recognition of MREL issued under foreign law must be possible.	Amend Article 72b(2)(d)(ii) as follows: (ii) the **applicable** law ~~governing the liabilities~~ specifies that in the event of normal insolvency proceedings as defined in point 47 of Article 2(1) of Directive 2014/59/EU, the claim on the principal amount of the instruments ranks below claims arising from any of the excluded liabilities referred to in Article 72a(2);
72b(2)(g)	Some liabilities that would qualify as eligible liabilities instruments include set off arrangements.	Introduce transitional provisions providing for grandfathering of issuances prior to the regulation coming into force.
New 72b(2)(m): acceleration restrictions	This restriction on acceleration provisions outside insolvency goes beyond the TLAC standard and would prevent standard clauses that the market would expect to see eg acceleration upon non-payment in debt instruments. This could adversely affect the market, making issuances more challenging and more expensive. It would also create an unlevel playing field for European issuers	Review the restrictions on acceleration to enable standard debt acceleration rights to be included.

Article	Issue	Comments/proposed solution
	vis-á-vis other jurisdictions (eg US) which do not include this restriction.	
New 72b(2)(o): contractual recognition	It is unclear whether this is (i) a requirement for contractual recognition of the statutory bail-in power or (ii) a requirement for contractual bail-in power in all eligible liabilities. In either case, this is inappropriate and unnecessary in the context of the existing statutory bail-in framework. In addition, for contracts governed by third country law, enforceability risk is dealt with by article 55 BRRD. This new requirement could create uncertainty and increase shortfalls due to existing issuances not containing these clauses.	The requirement should be deleted or limited to liabilities governed by third country law and aligned with article 55 BRRD.
New 72b(3)-(5)	These provisions appear to apply to subsidiaries of non-EU GSIIs as well as resolution entities.	It should be clarified that these provisions do not apply to subsidiaries of non-EU GSIIs.
General remark on eligible liabilities for fulfilment of G-SII Requirement for own funds and eligible liabilities under Article 92 a	The proposal does not clarify that to qualify as eligible liabilities for purposes of Article 92a (or in FSB terms: "external TLAC"), eligible liabilities instruments have to be issued by the resolution entity. (Art. 72b (2) (a) only states that eligible liabilities instruments have to be issued by an "institution"; the CRR 2 recitals do also not contain a clear statement in this regard – as opposed to e.g. the explanatory text of the SRMR on the comparable situation for non-G-SII-MREL that reads as follows (p.9): "(....) *Articles 12g and 12h deal with the level of application of the MREL. As regards institutions that qualify as resolution entities, the MREL applies to them at the consolidated resolution group level only. This means that resolution entities will be obliged to issue eligible (debt) instruments to external third party creditors that would be bailed-in should the resolution entity (i.e. resolution group) enter resolution. As regards other*	Include clarification

Article	Issue	Comments/proposed solution
	entities of the group, the proposal introduces the concept of an 'internal' MREL in line with a similar concept brought forward by the TLAC standard. (....)")	
New 92b: internal MREL eligibility	Consideration should be given to whether the eligibility criteria for external MREL are all appropriate and/or necessary for internal MREL. For example, new art. 72b(2)(b) restricts eligible liabilities from being issued to an entity in the same resolution group. This restriction would prevent a material subsidiary from meeting its requirements under art. 92b with eligible liabilities issued to its parent in the same resolution group which would be inconsistent with internal TLAC principles. As discussed above, art. 72b(3)-(5) should also be inapplicable to internal MREL.	Additional clarity on the eligibility criteria for internal MREL should be provided, in line with the TLAC term sheet. In particular art. 72b(2)(b) and art. 72b(3)-5) should not apply to internal MREL.
New 92b: internal MREL eligibility	The proposal does not take sufficient account of the process for the trigger of internal TLAC as set out in the TLAC term sheet and expanded upon in the draft FSB guidance on internal TLAC. Whilst this work is still work in progress at an international level, it is important that the European framework remains consistent with the overarching term sheet principles and the Level 1 text is flexible enough so as not to prevent future alignment with agreed international principles.	The regulation should incorporate and account for the process to trigger internal TLAC set out in the TLAC standard. This article should be deleted or fundamentally changed so as to ensure the principles for setting internal TLAC under the FSB term sheet are incorporated across the CRR/BRRD. A provision could be introduced in the CRR/BRRD to allow for further elaboration of those principles using a Level 2 measure.
New Article 400 (l)	The exemption for internal holdings of instruments and eligible own funds (internal MREL) does not clearly provide for exemptions at entities that are not resolution entities. This would be required to incorporate the FSB draft guidance permitting flexibility in the structure of such intragroup exposures (e.g. daisy chaining).	This should be clarified/modified if necessary to reflect the fact that exemptions should apply at all entities holdings where internal MREL is not directly issued to the resolution entity.

3. BRRD2

Article	Issue	Proposed solution
BRRD2 art.1, 83 (b); CRR2 art.2; CRDV art.1; SRMR2 art. 1	The Commission's intention in the amendments to the BRRD, CRR, CRDIV and SRMR is to make clear that MREL is to be set on a sub-consolidated basis for MPE groups. But it is crucial to clarify the proposed wording by introducing the definitions of third country resolution entity and third country resolution group because the current wording may have unintended consequences.	Add "or third country resolution entities" in BRRD2 art. 1, 83(b) after "that are not resolution entities". Add a new 83(c): "third country resolution entity" means an entity established in a third country identified in accordance with the applicable law as an entity in respect of which measures equivalent to resolution action are planned to be taken" Add a new 83 (d): "third country resolution group" means a third country resolution entity and its subsidiaries that are not themselves resolution entities." Article 45 f) 2) of BRRD Text of the amendment The requirement referred to in Article 45(1) of a resolution entity at the consolidated resolution group level shall be determined in accordance with Article 45h, on the basis of the requirements laid down in Articles 45c to 45e and of whether the third-country ~~**subsidiaries**~~ **resolution entities** of the group are to be resolved separately according to the resolution plan.
New 2(1)(83a)	The definition of resolution group does not accommodate the structure of certain cooperative groups where affiliates within the resolution group are not subsidiaries of the central body resolution entity.	The definition should accommodate such structures for example by including a reference to credit institutions permanently affiliated to the central body when the resolution entity is the central body of a cooperative bank.
New 44(2)(f)	There is a reference to "third country central CCPs". It is unclear what this refers to.	Replace the phrase with "third country central counterparties recognised by ESMA in accordance with Article 25 of Regulation (EU) No. 648/2012".
BRRD, Article 1(23)	Interaction between the RWA-denominated combined buffer and LRE-denominated	It should be made clear that there are two separate external MREL requirements for

Article	Issue	Proposed solution
(replacing Article 45 with new Articles 45 to 45l); CRR Article 1(40) inserting new Article 92a; CRD Article 1(32) inserting new Article 141a	MREL requirements requires technical adjustments. The BRRD, CRR and CRD package as drafted would require the RWA-denominated combined buffer to be stacked on top of leverage-denominated MREL requirements. We believe this to be a technical error that requires some careful technical amendments to the drafting in particular of CRD Article 141a and BRRD Article 45 and Articles 45c to Article 45g.	resolution entities, denominated by RWA and LRE respectively (eg in the same way it is clear that there are two separate MREL requirements in CRR Article 92a). CRD Article 141a could then be amended to specify no double-counting between the combined buffer and the <u>RWA-based</u> MREL requirements for <u>resolution entities</u> <u>only</u>.
New 45c(7)	New Article 45c(7)(e) should be a separate sub-paragraph; it is currently drafted to form part of the provision governing the calculation of the size of the reduction of the MREL requirement attributable to contributions from the Deposit Guarantee Scheme. The reference to 'Directive 2014/59/EU' should be changed to 'this Directive'.	Move article 45c(7)(e) to a new subparagraph of 45c(7).
New 45c(8), new 45l(1)(a)	There are references to the requirement for own funds and "permissible" liabilities. It is unclear what permissible liabilities refers to.	We assume that "permissible" should be replaced with "eligible".
New 45b	There is no provision directly reproducing or applying the provisions of new article 72c CRR which introduces a minimum residual maturity of one year.	For clarity, Article 45b should include equivalent provisions for new article 72c CRR.
New 45f(1)	This article provides that "all resolution entities shall comply with the requirements laid down in Article 45c to 45e". However, article 45d only applies to GSIIs.	Amend article 45f as follows: "1. Resolution entities shall comply with the requirements laid down in Articles 45c to 45e, <u>**as applicable**</u> …"
New 45g(2)(a): internal MREL	The current wording does not contemplate the situation where a third country group does not have any resolution entities in the EU (in contrast with article 89(2)). Third country resolution entities would not	The application to groups headquartered in third countries should be clarified. Remove this requirement or amend it to provide for third country resolution entities meeting

Article	Issue	Proposed solution
	comply with the consolidated requirement in article 45f(1).	their loss absorbing capacity requirements under applicable law.
New 55(2): contractual recognition of bail-in	The proposed condition that the liabilities can be subject to write down and conversion pursuant to the law of the third country or a binding agreement with a third country should be a standalone exception as it is in the current article 55. It should therefore not be necessary for all of conditions (a) to (c) to be met.	Article 55(2)(a) should be a separate exception eg by moving it to a separate paragraph, leaving only (b) and (c) as conditions for the waiver.
New 55(2): contractual recognition of bail-in	The requirement for liabilities to be senior to liabilities "which count towards the minimum requirement for own funds and permissible liabilities" is inappropriate and unclear. This would appear to prevent the waiver being applied to any liabilities which rank *pari passu* with eligible liabilities. Where an institution is not required to hold all or part of its MREL in subordinated instruments, this condition would not allow the waiver to be used for any senior liabilities. The condition therefore severely restricts the scope of the waiver, particularly impacting banks which do not have all their MREL subordinated. The condition is also unnecessary due to the condition that the waiver does not impede resolvability.	The requirement should be removed.
New 55(2): contractual recognition of bail-in	The requirement that liabilities not be debt instruments which are unsecured liabilities would be overly restrictive given the very broad definition that applies. Instruments within this definition include those that secure funding in local currencies for EU branches in third countries, bills of exchange, and promissory notes (which are often used in trade finance).	Remove this restriction such that the waiver can be applied to debt instruments that are unsecured liabilities, where it does not impede the delivery of an effective resolution.

Where relevant the same changes should be made to the SRMR proposal.

4. Creditor hierarchy

Article	Issue	Proposed solution
1(2)(a)	The condition that the initial contractual maturity "spans one year" could be interpreted as being equal to one year.	Replace "spans one year" with "spans one year or more". It would also be preferable to use the language "original contractual maturity" rather than "initial" for consistency with the other proposals.
1(3)	The reference to "ordinary unsecured" claims should be clarified and should refer to "non-preferred" claims or simply claims arising from debt instruments referred to in paragraph 2.	Delete the reference to "ordinary unsecured".
1(3)	This should form paragraph 3 of the amendments to Article 108 BRRD.	Amend article 1(2) to include what is now article 1(3) and renumber article 1(4) accordingly.
1(4)	The relationship between new non-preferred senior class and existing insolvency regimes should be clarified.	
1(4)	There is no clear justification for the cut off date of 31 December 2016 in order to apply national insolvency regimes.	We understand that this limitation should be removed or aligned to the date of entry into force of this amendment (initially thought as of July 2017). Alternatively, Member States should be entitled to decide on a transitional regime for the outstanding amount. This leaves Member States (many countries do not have a law that allows the computability of all the outstanding senior debt stock as of 31 December 2016.) more time to amend their insolvency laws as per the amended BRRD before its entry into force so that banks may start to issue MREL compliant debt.
2(2)	It should be clarified that Member States may apply the provisions earlier than the transposition date.	Add such clarification in article 2.

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