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PUBLIC GUIDANCE on the review of the qualification of capital instruments as Additional Tier 1 and Tier 2 instruments

I. LEGAL BACKGROUND

According to Article 4(1)(d) of Council Regulation (EU) No 1024/2013¹ (SSM Regulation), the ECB is required to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose prudential requirements on credit institutions in the area of own funds requirements.

Regulation (EU) No 575/2013 of the European Parliament and of the Council² (CRR), and in particular Articles 52 and 63, sets out the conditions to be met by capital instruments to qualify as Additional Tier 1 (AT1) and Tier 2 (T2) instruments respectively. Other articles of the CRR³, and the relevant provisions of Commission Delegated Regulation (EU) No 241/2014⁴ (RTS on Own Funds), provide further details on these conditions⁵.

II. SCOPE AND APPLICATION

This guidance lays down the procedure followed by the ECB in reviewing the qualification of capital instruments as AT1 and T2 instruments. It specifies the information that should be provided by significant supervised entities (entities), as defined in Article 2(16) of Regulation (EU) No 468/2014 of the European

¹ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

² Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

³ In particular see Articles 53 and 54 of the CRR for AT1 instruments and Article 64 of the CRR for Tier 2 instruments. This is not an exhaustive list, other articles may also apply or be relevant.

⁴ Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions (OJ L 74, 14.3.2014, p. 8).

⁵ In particular see Articles 8, 9, 20, 21, 22, 23, 24 of the RTS on Own Funds. This is not an exhaustive list, other articles may also apply or be relevant.

Central Bank (ECB/2014/17)⁶ (SSM Framework Regulation), that compute the capital instruments towards their AT1 or T2 capital on an individual, sub-consolidated and/or consolidated basis.

The ECB recommends that entities follow this Guidance with respect to capital instruments issued after its date of publication. However, Section III.2 of the Guidance applies to all capital instruments irrespective of their date of issuance. Entities are responsible for ensuring that their capital instruments comply with all the relevant provisions of the CRR and the RTS on Own Funds, irrespective of the ex post review carried out by the ECB.

This guidance is without prejudice to any requirements in respect of the recognition of AT1 or T2 instruments under applicable national law. If national law requires pre-approval, the ECB is competent to grant such pre-approval to the entities.

This guidance will be updated from time to time to reflect any relevant developments.

III. REVIEW OF THE CAPITAL INSTRUMENTS

III.1 Information to be provided by the entity

As soon as a capital instrument is computed towards an entity's AT1 or T2 capital on an individual, sub-consolidated or consolidated basis, the Chief Executive Officer (CEO) or a person duly authorised by the entity's management body to sign on its behalf should send a signed letter as an attachment in an e-mail to the coordinator of the relevant Joint Supervisory Team (JST). The email should be sent via the official JST mailbox and the following centralised mailbox: ownfunds_notifications@ecb.europa.eu. This letter should:

- 1) Specify the reason(s) for the issuance of the capital instrument and how it fits the entity's capital planning (on an individual, sub-consolidated and/or consolidated level). In particular, it should include a description of the impact on own funds (Common Equity Tier 1 (CET1), T1 and total capital) and on the leverage ratio (for AT1 instruments) at all levels of application in accordance with Part One, Title II CRR over a three-year period based on capital planning projections and reflecting 5(iii) below.
- 2) Provide a description of the main features of the capital instrument in the format described in Annex I. The letter should also indicate where the capital instrument in question is similar to other instruments issued by the same entity.

⁶ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

- 3) Include a self-assessment, performed by the entity, of the capital instruments against the requirements set out in the relevant provisions of the CRR and the RTS on Own Funds, taking into consideration the relevant European Banking Authority (EBA) Q&As and the EBA Report on the monitoring of AT1 issuances in the format described in Annex II.
- 4) Confirm that the information provided is accurate and complete, that the capital instrument meets the criteria to qualify as an AT1 or T2 instrument and that there are no undisclosed side agreements that could affect its eligibility (e.g. enhancement in the seniority of the claim etc.).
- 5) Be accompanied by the following supporting documentation:
 - i) A copy of the final agreement governing the capital instrument.
 - ii) For capital instruments with new or complex features, a properly reasoned legal opinion issued by an appropriately qualified external independent third party confirming that the capital instrument meets the conditions for qualification as the relevant type of own funds instrument.
 - iii) For capital instruments qualifying as AT1 capital, a quantification of the minimum amount of CET1 capital that would be generated if the principal amount of AT1 instruments were fully written down or converted into CET1 instruments (Article 54(3) CRR) after deduction of any foreseeable tax liability or tax payment resulting from the conversion or write-down, or any other foreseeable tax liability or tax payment due and related to the instruments at the moment of conversion or write-down. The entity should assess and justify the amount of any foreseeable tax liabilities or tax payments, taking into account the local tax treatment applicable at the time of assessment and the structure of the group.

The ECB may request any other information considered relevant for the purposes of an ex post assessment that may be carried out at any time.

Entities should immediately bring to the ECB's attention any subsequent changes to the agreement governing the capital instrument or any other changes that could affect the eligibility of the capital instrument.

Where a capital instrument contributes to any combination of individual, sub-consolidated and/or consolidated own funds, the letter referred to in the first paragraph should be sent by the highest consolidating entity. The letter should be signed by the CEO or a person duly authorised by the entity's management body to sign on behalf of that (sub)consolidating entity.

III.2 ECB Assessment

The ECB may at any time carry out an **ex post assessment** of AT1 and T2 instruments.

If the review concludes that a capital instrument is not eligible or is no longer eligible in accordance with Article 55 or 65 of the CRR, the capital instrument and the related part of the share premium account immediately cease to qualify as AT1 or T2 capital. It follows that the entity concerned should cease to compute this capital instrument and the related part of the share premium account towards their AT1 or T2 capital and correct the relevant reporting in accordance with Commission Implementing Regulation (EU) No 680/2014⁷ (ITS on Supervisory Reporting).⁸

IV. INFORMAL EXCHANGE OF VIEWS BEFORE ISSUANCE

Without prejudice to the ex post assessment, an informal dialogue on the specific features of a capital instrument is encouraged between an entity's representatives and the relevant JST before issuance, in particular when the instrument to be issued has new or complex features.

This informal dialogue does not represent an approval (either explicit or implicit) of any instruments, or confirmation of their eligibility as an AT1 or T2 instrument. Entities are responsible for ensuring that their capital instruments comply with all the relevant provisions of the CRR and the RTS on Own Funds.

[*signed*]

Danièle NOUY

⁷ Commission Implementing Regulation (EU) No 680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) No 575/2013 of the European Parliament and of the Council (OJ L 191, 28.6.2014, p. 1).

⁸ This is without prejudice to those instances where amendments/changes to the provisions of an instrument are undertaken to restore eligibility.

ANNEX I

MAIN FEATURES OF THE INSTRUMENT⁹

For each of the following items, the entity should provide the relevant information which should be based on the applicable provisions contained in the agreement governing the capital instrument or any other relevant document.¹⁰

Features	Relevant information
(1) Issuer	
(2) Unique identifier (e.g. CUSIP, ISIN or Bloomberg identifier for private placement)	
(3) Format offering (e.g. Reg S, Sec Rule 144a)	
(4) Governing law(s) of instrument	
(5) Listing(s)	
(6) Issuer rating (if any) at time of issuance. To indicate notches below	

⁹ The information in this Annex is useful for the purposes of completing Annex II of [Commission Implementing Regulation \(EU\) No 1423/2013 of 20 December 2013 laying down implementing technical standards with regard to disclosure of own funds requirements for institutions according to Regulation \(EU\) No 575/2013 of the European Parliament and of the Council](#).

¹⁰ This is a common template that should be completed in respect of both AT1 and T2 instruments. Some of the features may not be applicable according to the type of instrument.

the issuer's senior unsecured rating	
(7) Currency	
(8) Size of issuance	
(9) Par/nominal value of instrument	
(10) Minimum denomination and increment (if any)	
(11) Date of issuance	
(12) Settlement date	
<i>Regulatory Treatment</i>	
(13) Instrument type (AT1 or T2)	
(14) Eligible at solo/sub-consolidated/consolidated level or any combination of these. The relevant entities/sub-groups/groups should be indicated.	
(15) Amount recognised in regulatory capital at all levels of application in accordance with Part One, Title II CRR, identifying any amounts relating to share premium accounts	
(16) Accounting classification (equity/liability/compound instrument). If	

compound instrument, distinguish between equity and liability component.	
(17) Applicable tax treatment (tax deductible or not and whether any dividend/coupon withholding tax). Tax treatment of embedded derivatives (if any)	
(18) Perpetual or dated	
(19) For dated instruments, original maturity date	
(20) Call option (if any) to indicate if a call option to be exercised at the discretion of the issuer and subject to regulatory approval is included	
(21) Specify first call date and subsequent call dates (if any) for the issuer call option	
(22) Additional issuer redemption options (if any) – describe any issuer call/redemption/repurchase/repayment options other than the issuer call option described above e.g. regulatory call, tax call, repurchases or market making	
<i>Coupons</i>	
(23) Coupon rate mechanism (fixed, fixed reset, floating or other)	

(24) Initial coupon rate, initial coupon spread and any related reset index	
(25) Confirm non-existence of step-up or other incentive to redeem. Where applicable, as in the case of Article 20(2)(c) of the RTS on Own Funds, provide calculations to confirm such non-existence	
(26) For AT1 instruments, confirm non-existence of a dividend/coupon stopper, pusher or alternative coupon settlement mechanism (ACSM) (see Article 53 of the CRR for AT1 instruments)	
(27) For AT1 instruments, confirm whether coupons are fully discretionary	
(28) For AT1 instruments, confirm whether coupon cancellation is non-cumulative	
(29) For AT1 instruments, confirm coupon payments subject to available distribution items (reference to definition of distributable items in Article 4(128) of the CRR)	
(30) For AT1 instruments, provide any further details on the calculation of distributable amounts (institution or country specific, such as treatment of share premium account)	
<i>Conversion</i>	

(31) Convertible (yes/no)	
(32) If convertible, specify conversion trigger(s) (individual/sub-consolidated/ consolidated) and whether fully loaded or transitional CRR rules apply	
(33) If convertible, rate or range of conversion prices (see Article 54(1)(c) of the CRR for AT1 instruments)	
(34) If convertible, specify if mandatory or optional conversion and in the case of optional conversion, specify who holds the conversion option (e.g. the issuer or investor)	
(35) If convertible, specify instrument type convertible into	
(36) If convertible, specify issuer of instrument it converts into	
(37) If convertible, specify whether there are any provisions relating to pre-emption rights for existing shareholders	
(38) Specify provisions relating to the computation of the conversion amount where instruments with different triggers have been issued	
<i>Write-down feature</i>	

(39) Write-down feature (yes/no)	
(40) If write-down, write-down trigger(s) (individual/sub-consolidated/consolidated) and whether fully loaded or transitional rules of CRR apply	
(41) If write-down, permanent or temporary	
(42) If temporary write-down, description of write-up mechanism (Article 21(2)(e) of the RTS on Own Funds)	
(43) Specify provisions relating to the computation of the write-down amount where instruments with different triggers have been issued	
<i>Subordination and BRRD¹¹/TLAC¹² related provisions</i>	
(44) Position in subordination hierarchy in liquidation (describe key subordination provisions, including specification of instrument type immediately senior to instrument)	
(45) Confirm absence of seniority enhancement clauses (e.g. no set-off clauses or seniority enhancing guarantees)	

¹¹ [Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations \(EU\) No 1093/2010 and \(EU\) No 648/2012, of the European Parliament and of the Council \(OJ L 173, 12.6.2014, p. 190\).](#)

¹² [Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution – Total Loss-absorbing Capacity \(TLAC\) Term Sheet, 9 November 2015.](#)

(46) Point of non-viability (PONV) recognition in the terms and conditions or risk factors (see Recital 81 of the BRRD)	
(47) For instruments governed by third country (non-EEA) law, is there any contractual recognition of bail-in powers? If not, can write-down and conversion powers be applied pursuant to the law of the third country or has a binding agreement been concluded with that third country? (see Article 55 of the BRRD)	
(48) For Tier 2 instruments, describe any clauses to allow or expressly prevent the possibility of issuing TLAC/MREL eligible subordinated bail-in instruments ranking ahead of Tier 2 in liquidation	
(49) Any other BRRD/TLAC related provisions	
<i>Other</i>	
(50) Details of any features of the capital instrument which are new, unusual or different from capital instruments of a similar nature previously issued by the entity or which are widely available in the market and an assessment of why these are not considered to impact the eligibility of the instrument in question. To cross-refer to the relevant part of the legal opinion	
<i>Investor Base</i>	
(51) Whether the capital instrument is issued in private placement,	

publicly to external investors or intra-group	
(52) If external, an indication of the investor composition at issuance broken down by investor type (e.g. hedge funds, banks, asset managers, other) and geography	
(53) If externally held, where possible, identify the current main holders of the instrument	
(54) If intra-group, identify the investor and describe how the purchase of the capital instrument will be funded	

ANNEX II

SELF-ASSESSMENT TO BE PERFORMED BY THE ENTITY ON THE ELIGIBILITY CONDITIONS

Entities must review and assess each capital instrument against the requirements for own funds set out in the relevant provisions of the CRR and the RTS on Own Funds, taking into consideration the relevant EBA Q&As and the EBA Report on the monitoring of AT1 issuances. The entity must provide all the relevant information to confirm that the conditions have been met. It must also copy or refer to the applicable provisions contained in the agreement governing the capital instrument and any other relevant documents, and refer to the applicable EBA Q&As that have been taken into consideration. The standard templates to be used for this self-assessment are set out below.

(i) AT1 INSTRUMENTS

Article 52(1) CRR requirements			
Sub-article	Reference to the relevant provisions in the agreement governing the capital instrument or any other relevant document	Where relevant, reference to EBA Q&As and paragraphs of the EBA Report on the monitoring of AT1 issuances taken into consideration	Self-assessment
(a)			

(b)			
(c) in conjunction with Articles 8 and 9 of the RTS on Own Funds			
(d)			
(e)			
(f)			
(g) in conjunction with Article 20 of the RTS on Own Funds			
(h)			
(i) in conjunction with Articles 77 and 78 of the CRR			
(j)			
(k)			
(l) in conjunction with Article 53 of			

the CRR			
(m)			
(n) in conjunction with Article 54 of the CRR and Articles 21 and 22 of the RTS on Own Funds (see separate table below)			
(o) in conjunction with Article 53 of the CRR and Article 23 of the RTS on Own Funds			
(p) in conjunction with Article 24 of the RTS on Own Funds			

Article 54 of the CRR			
Sub-article	Reference to the relevant provisions in the agreement governing the capital instrument or any other relevant document	Where relevant, reference to EBA Q&As and paragraphs of the EBA Report on the monitoring of AT1 issuances taken into consideration	Self-assessment

(1)(a)(i) & (ii)			
(1)(b)			
(1)(c)(i) & (ii)			
(1)(d)(i),(ii) & (iii) in conjunction with Article 21 of the RTS on Own Funds			
(2)			
(3)			
(4)(a) & (b) in conjunction with Article 21 of the RTS on Own Funds			
(5)(a), (b) & (c) in conjunction with Article 22 of the RTS on Own Funds			
(6)			
(7)			

(ii) TIER 2 INSTRUMENTS

Article 63 CRR			
Sub-article	Reference to the relevant provisions in the agreement governing the capital instrument or any other relevant document	Where relevant, reference to EBA Q&As taken into consideration	Self-assessment
(a)			
(b)			
(c) in conjunction with Articles 8 and 9 of the RTS on Own Funds			
(d)			
(e)			

(f)			
(g)			
(h) in conjunction with Article 20 of the RTS on Own Funds			
(i)			
(j)			
(k)			
(l)			
(m)			
(n) in conjunction with Article 24 of the RTS on Own Funds			