

THE CHAIRPERSON

Mr Richard East
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5 January 2024

Subject: BNP Paribas – Legacy Tier 2 instrument

Dear Mr East,

I refer to the letter sent to the EBA on 11 September 2023 in which you expressed several concerns on behalf of an ad hoc committee of noteholders relating to the classification as Tier 2 of a legacy perpetual instrument issued by Banque Nationale de Paris Paribas (BNPP) and raised some specific questions relating to its eligibility as Tier 2 capital in perpetuity. Concerns were raised in particular with specific reference to the tax call, the multi-layered Tier 2 structure and the potential related infection risk.

One of the tasks of the EBA is to ensure consistent, efficient, and effective application of the acts referred to in Article 1(2) of the EBA founding Regulation, which includes the application of the criteria on the quality of own funds and eligible liabilities instruments laid down in the capital requirements Regulation (EU) No 575/2013 ('CRR'). More specifically, the EBA is also entrusted by the CRR, amongst others, with the task of monitoring the quality of such instruments across the Union.

The EBA has carefully assessed the concerns raised and performed a detailed assessment of the terms and conditions of the instrument, which was not limited to the issues raised in your letter. The EBA has advised that the instrument cannot count as fully eligible Tier 2 instrument of BNPP. Instead, it should have been grandfathered under the grandfathering provisions set out in Article 484 et seq. CRR providing a beneficial treatment that came to an end on 31 December 2021, without any possibility to benefit from a second grandfathering under CRR2.

The reason for the grandfathering relies on the presence of an obligation for the issuer to redeem the notes in case it is not permitted by law to pay the additional amount related to a tax gross-up clause. This raises concerns regarding compliance with Articles 63(i) and (k) CRR which require the early repayment options to be exercisable at the sole discretion of the issuer and the provisions governing the instrument not indicating that the instrument will be called, redeemed, repaid or repurchased early other than in case of the insolvency or liquidation.



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The instrument cannot qualify as eligible liabilities instrument either, since the condition mentioned in the previous paragraph raises similar concerns regarding compliance with Article 72b(2)(k) CRR which requires the provisions not to indicate that the instrument will be called, redeemed, repaid or repurchased early other than in case of insolvency or liquidation. In addition, the combination of a tax gross-up clause and the call option for tax reasons would result in a redefinition of the maturity of the instrument as the earliest possible date on which the issuer can exercise the option (Articles 72b(2)(i) and 72c(3) CRR). Since there is no limitation in time for the exercise of the call, the requirement of a residual maturity of at least one year under Article 72c(1) CRR could not be verified.

Finally, the EBA considered additional elements in the overall assessment of the quality and complexity of the instrument, concerning the existence of a multiple-layered structure for Tier 2 instruments and failure to follow some best practices previously identified by the EBA.

For all the above reasons, the instrument should have been considered as ineligible under CRR1 and should have been grandfathered under CRR1. Therefore, the instrument should have been subsequently subject to the EBA Opinion on legacy instruments¹ and the options contained therein for phasing out legacy instruments. In this regard, it is recalled that the option to keep the instrument in the balance sheet as a non-regulatory instrument should be treated as a last resort option, i.e. if the redemption of the instrument or the amendments of the terms and conditions are not possible, and considering the transposition of Article 48(7) Directive 2014/59/EU (BRRD).

This assessment has been shared earlier with the European Central Bank (SSM) and Autorité de Contrôle Prudentiel et de Résolution (ACPR) for their consideration and to take the necessary steps, in particular with regard to the above referred EBA Opinion on Legacy instruments.

The EBA intends to publish this letter on its website.

Yours sincerely,

[signed]

José Manuel Campa

¹ [EBA-Op-2020-17 Opinion on legacy instruments.pdf \(europa.eu\)](#)