

Question ID	2019_5009
Status	Final Q&A
Legal act	Directive 2014/59/EU (BRRD)
Topic	MREL
Article	45f
Paragraph	3, 4
Subparagraph	-
COM Delegated or Implementing Acts/RTS/ITS/GLs/Recommendations	Not applicable
Article/Paragraph	Not applicable
Date of submission	20/11/2019
Published as Final Q&A	12/03/2021
Disclose name of institution / entity	No
Type of submitter	Resolution authority
Subject matter	Minimum requirement for own funds and eligible liabilities (MREL) - Waivers
Question	<p>Are the conditions of Article 45f(4) (or (3), depending on the case) exhaustive?</p> <p>In other terms, when assessing a request to waive an individual MREL requirement under Article 45f(4) (or (3) depending on the case) of BRRD, is the resolution authority required to assess only the conditions set out in the relevant paragraph (s), or is it allowed to require, in its policies and procedures, the fulfilment of other additional conditions?</p>
Background on the question	<p>The drafting of paragraphs 3 and 4 of article 45f could potentially be seen as unclear on whether it lists exhaustive conditions: the introductory part does not include the phrase “at least” but does not include a phrase such as “all of the following conditions” either. There therefore remains a potential room for addition of new conditions by individual authorities, with the resulting risk of diverging practices being established and hampering the smooth functioning of the Banking Union.</p>
EBA answer	<p>Paragraphs 3 and 4 of Article 45f of Directive 2014/59/EU, as amended by Directive (EU) 2019/879 (BRRD), state that the resolution authority “may</p>

waive” the application of that Article to a subsidiary that is not a resolution entity where the conditions provided therein are met.

The use of the word “may” indicates that this is a discretionary power. Resolution authorities are thus free to waive or not to waive the application of the MREL requirement to a subsidiary that is not a resolution entity (internal MREL), within the framework of the exercise of the recognised discretion. This means that, when deciding whether to grant the waivers provided for in paragraphs 3 and 4 of Article 45f BRRD, and provided that the conditions mentioned therein are met, the resolution authority can assess additional conditions.

However, resolution authorities must exercise the freedom to grant or not to grant the waivers in a way that is consistent with the objectives pursued by those waivers and that does not deprive them of their practical effect. In this respect, it is important to note recital (20) of Directive (EU) 2019/879, which indicates that the MREL that applies to institutions or entities that are not resolution entities “should allow resolution authorities to resolve a resolution group without placing certain of its subsidiaries under resolution, thus avoiding potentially disruptive effects on the market”.

With regards to the parallel provisions in the Regulation (EU) No 806/2014, as amended by Regulation (EU) 2019/877 (SRMR), it should be noted that the conditions of points (d) to (f) of both paragraphs (3) and (4) of Article 45f BRRD were purposefully not mirrored in Article 12h SRMR by the co-legislators. This difference must be duly taken into account by the Single Resolution Board (SRB) and the national resolution authorities when applying the SRMR provisions. This is particularly relevant for the SRB, in light of the principles established in cases C-9/56 and C-10/56 (*Meroni v High Authority* [1957/1958] ECR 133). Apart from these constraints, the above considerations still apply.

Disclaimer:

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

Link

https://www.eba.europa.eu/single-rule-book-qa/qna/view/publicId/2019_5009

