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Bart P.M. Joosen

*Simplifying the Going Concern Stacking Orders of EU Banking Capital Rules:
A Review of the June 2026 Report of the European Banking Authority*

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Abstract

In the discourse surrounding the ‘simplification’ of capital requirements for EU banks, reference is often made to the assumption that the EU has deviated from the path delineated by the Basel Committee on Banking Supervision in the Basel III standards framework. The European Union, for example, has been accused of ‘gold-plating’ Basel III, and reversing this would enable a return to the original concepts in a proposed method for simplifying the capital requirements framework. This contribution analyses whether the recommendations currently under consideration – as follows, amongst others, by the EBA’s report of June 2026 – effectively constitute a conceptual ‘reset’ of EU capital requirements back to the Basel Committee’s original standards. The present study hypothesises that there is a possibility that the current recommendations may amplify the friction with the original concepts set out in the Basel III standards. This does not imply that simplification – without relinquishing the absolute level of capital requirements – cannot be achieved via an alternative approach. This contribution explores a number of alternative ideas and makes further recommendations for corrections that should be made to have an impact on capital adequacy and proper use of buffers for the loss absorbing function which prevents the need to seek recourse to the minimum capital as required to be held by banks.

Keywords: Capital requirements; Basel III; Pillar 2 capital; Combined Buffer Requirements; MREL/TLAC; Stacking Orders; Point-of-non-viability; CET1 capital; AT1 Contingent Convertible Capital; Tier 2 capital; Maximum Distributable Amounts; EBA; ECB; Basel Committee on Banking Supervision; Financial Stability Board

JEL classification: K22, G28

SIMPLIFYING THE GOING CONCERN STACKING ORDERS OF EU BANKING CAPITAL RULES

A REVIEW OF THE JUNE 2026 REPORT OF THE EUROPEAN BANKING AUTHORITY

BART P.M. JOOSEN, LL.M., PhD (†)

1 September 2026

Abstract:

In the discourse surrounding the ‘simplification’ of capital requirements for EU banks, reference is often made to the assumption that the EU has deviated from the path delineated by the Basel Committee on Banking Supervision in the Basel III standards framework. The European Union, for example, has been accused of ‘gold-plating’ Basel III, and reversing this would enable a return to the original concepts in a proposed method for simplifying the capital requirements framework. This contribution analyses whether the recommendations currently under consideration – as follows, amongst others, by the EBA’s report of June 2026 – effectively constitute a conceptual ‘reset’ of EU capital requirements back to the Basel Committee’s original standards. The present study hypothesises that there is a possibility that the current recommendations may amplify the friction with the original concepts set out in the Basel III standards. This does not imply that simplification – without relinquishing the absolute level of capital requirements – cannot be achieved via an alternative approach. This contribution explores a number of alternative ideas and makes further recommendations for corrections that should be made to have an impact on capital adequacy and proper use of buffers for the loss absorbing function which prevents the need to seek recourse to the minimum capital as required to be held by banks.

***Key expressions:** Capital requirements; Basel III; Pillar 2 capital; Combined Buffer Requirements; MREL/TLAC; Stacking Orders; Point-of-non-viability; CET1 capital; AT1 Contingent Convertible Capital; Tier 2 capital; Maximum Distributable Amounts; EBA; ECB; Basel Committee on Banking Supervision; Financial Stability Board*

(†) Bart P.M. Joosen is a former full professor who has held the positions of chair of prudential supervision and financial law at the University of Amsterdam, Vrije Universiteit and Leiden University in the Netherlands. He is a Fellow of the Academic Board of the European Banking Institute (EBI), Frankfurt, Germany. From 2023-2026 he has been involved in the SSM Foundation training programme for ECB officers in his capacity as part-time professor at the Florence School of Banking and Finance, EUI, Florence, Italy. He is currently employed in private practice as a specialist consultant.

1. Introduction

In June 2026, the European Banking Authority (EBA) published a report on the subject of simplifying the stacking orders of the EU Prudential and Resolution Framework¹ ('EBA June 2026 Report'). Despite the EBA emphasising that alterations to the prevailing system of capital requirements for European banks and the regulations on Minimum Required own funds and Eligible Liabilities ('MREL') should not result in an overall diminution of current levels, the EBA does propose a self-assessment of the evolution of the rules on capital adequacy and resolvability within the EU into a highly intricate system where simplification is a possibility.

The EBA June 2026 Report has the potential to initiate an ill-advised debate about the background and essence of capital adequacy for EU banks. Given the current tendency to confuse simplification with deregulation², the report could result in a misguided move in the wrong direction, thereby posing a risk to the financial stability of the EU financial sector. It is challenging for external observers to reconcile the rationale of the proposals now on the table with the EBA's recent conclusions in the stacking order report published by the EBA in 2024³. In that report EBA asserted the efficacy of the regulations governing the order of banking capital stacking, the adequacy of the system that had evolved within the EU in addressing risks to financial stability, and the absence of necessity for a comprehensive system review. Now, just two years later, there has been a change of views notwithstanding the fact that the EBA is doing its utmost to emphasise that it does not wish to make any recommendations that would undermine the resilience of the banking sector or that supervisory action should be put on hold.

The present contribution conducts a thorough examination of the background to the EBA June 2026 Report, its relationship to the EU's competitiveness agenda, and some of the solutions proposed by the EBA to reduce complexity. On the one hand, we advocate caution regarding the reduction of complexity that has grown since the Global Financial Crisis of 2007/2008 ('GFC') in respect of bank capital adequacy rules if the amendments or the current prudential rules would result into frictions with the original concepts of the standard setters; on the other hand, it highlights alternatives for reducing complexity, although these alternatives are more politically charged than the EBA was able to advocate.

This study focuses on the risk-based and non-risk-based going concern prudential requirements. The EBA's proposals for simplifying the stacking order rules in the resolution regime require a detailed and in-depth further study, for which there was no scope in this contribution. We shall, however, briefly outline the 'gone concern' rules in the following paragraph, in order to provide a comprehensive overview of the context in which this issue arises.

2. "Stacking orders" of the EU Prudential and Resolution framework and their relationship with going concern and gone concern capital

The concept of 'stacking order' in the context of EU banking law emerged in the aftermath of the 2008 financial crisis, which led to a significant expansion of regulatory measures. The expression delineates

¹ EBA *Report on Simplifying the Stacking Orders of the EU Prudential and Resolution Framework*, EBA/REP/2026/12, 16 June 2026.

² See for a warning that such confusion should not take place: Joint letter of the Spanish, German, Italian and French supervisory authorities to the newly appointed Commissioner Albuquerque dated 5 February 2025, accessible at www.bundesbank.de/resource. In similar vein European Banking Institute, *Report on Simplification of EU Financial Law*, ed. Christos Gortsos et al, January 2026, accessible at www.ebi-europa.eu, where it is stated on p. 14: "At the same time, it explicitly rejects any interpretation of simplification as merely deregulation or as weakening of the core objectives of financial regulation, proceeding instead from the premise that simplification is a necessary condition for preserving the effectiveness, credibility and long-term sustainability of the existing regulatory framework."

³ EBA, *Stacking Orders and Capital Buffers Reflections on Management Buffer Practices in the EU* – 15 July 2024, doi:10.2853/212383. ('EBA July 2024 Report').

the sequential hierarchy in which banking institutions are required to accumulate diverse capital requirements, leverage limits, and loss-absorbing and recapitalisation resolution financing (MREL, as well as Total Loss Absorbing Capacity, ‘TLAC’). Like many terms used in banking law, the concept has its roots in mathematical research.⁴

As microprudential rules regulated in the Capital Requirements Regulation⁵ (‘CRR’), macroprudential buffers regulated in the Capital Requirements Directive⁶ (‘CRD4’) and resolution mandates included in the Bank Recovery and Resolution Directive⁷ (‘BRRD’) and for certain banks in the Single Resolution Mechanism Regulation⁸ (‘SRMR’) were superimposed on one another by various authorities, the rules form independent parallel ‘stacks’. EBA and other supervisory bodies have adopted the use of the methodology known as ‘stacking order’. The stacking order is used in the EU to analytically reconcile the various capital requirements and resolution buffers and to understand the interaction between these different requirements and, when breached, trigger maximum distributable amount (‘MDA’) measures.⁹

In the well-known diagrammatic overviews published by the EBA¹⁰, the European Central Bank (‘ECB’)¹¹ and, following the lead of those authorities, the Single Resolution Board (‘SRB’)¹², it is shown that the various capital requirements are stacked in layers, in which a certain hierarchy can be assumed, with the ‘lowest layer’ representing the absolute minimum requirements and the highest layer comprising the less ‘rigid requirements’, for example consisting of the Pillar 2 Guidance (‘PR2’) capital and the so-called ‘management buffers’.

MDA and M-MDA¹³ rules are displayed in such diagrammatic overviews, by drawing a line at the top of the ‘mandatory part’ of the capital and MREL stacks, and any buffers or financing held above that line, is considered to be the ‘guidance’ part of the prudential requirements, loss absorbency and recapitalisation requirements. The approaches followed in the EU triggered debate as to the ‘releasability of capital’ in accordance with the intended purpose of certain buffers. This issue will be further explained below.

These somewhat abstractly formulated principles of the stacking order may give the reader a somewhat unclear picture. For this reason, the point can be further clarified by referring to the diagrammatic overviews available on this subject. We have opted for the recent overview provided by the EBA in the

⁴ Alan Turing, *Proposals for Development in the Mathematics Division of an Automatic Computing Engine*, 1945.

⁵ 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, *OJEU* 2013, L 176.

⁶ Directive 2013/36/EU, of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, *OJEU* 2013, L 176.

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

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

⁹ See for the MDA prudential regime: Title VII (*Prudential Supervision*), Chapter 4 (*Capital Buffers*), Section III (*Capital Conservation Measures*) CRD4. See for the MREL-MDA ‘M-MDA’ regime: Article 16a BRRD.

¹⁰ See for the first time (as far as we could research), *EBA Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP)*, EBA/GL/2014/12 of 19 December 2014 point 363 on page 129. In the 2014 Guidelines there is a basic diagram displayed that evolved in later publications to much more complex overviews of the different stacks, integrating the various prudential and resolution requirements. See for a commonly used diagrammatic overview: Figure 1 in the 2024 EBA Stacking Orders Report on p. 9 where the diagram is subdivided in ‘going concern’ and ‘gone concern’ requirements.

¹¹ See *f.i.* in a very first publication: ECB, *Frequently asked questions on the 2016 EU-wide stress test*, www.bankingsupervision.europa.eu.

¹² See for one of the first places the SRB published a ‘stacking order’ diagram displaying the MREL Target: SRB, *MREL: Approach taken in 2016 and next steps*, www.srb.europa.eu.

¹³ *Ibid.* n [10].

EBA July 2024 Report, which sets out both parallel stacking orders – the going concern and gone concern orders – and which also includes the non-risk-weighted (leverage ratio, ‘LR’) column, not yet discussed above.¹⁴ The various elements of this overview will be discussed in later parts of this contribution.

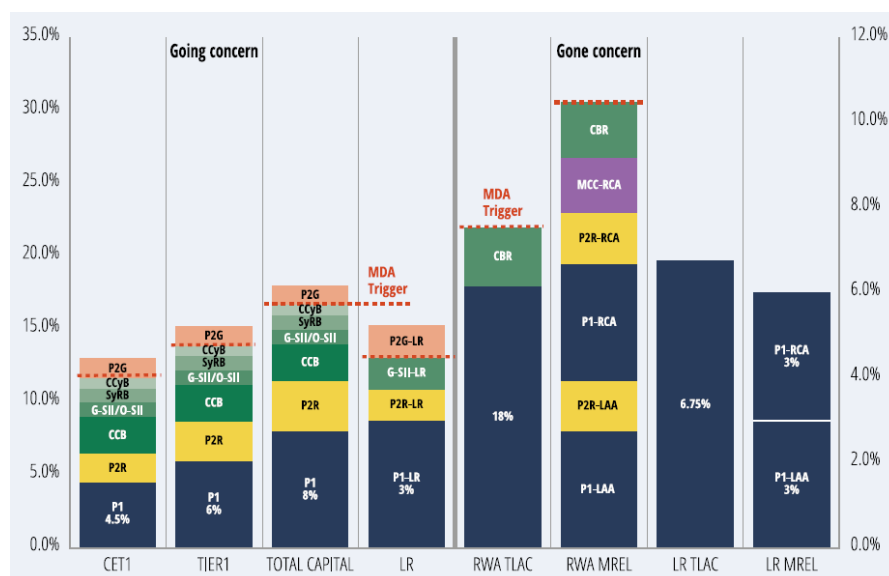


Diagram displayed is Figure 1: EU capital requirements framework from the EBA July 2024 Report.¹⁵

In connection herewith, the function of banks’ capital must be explored. In the original Basel III texts of 2010¹⁶, it was prominently stated that both Common Equity Tier 1¹⁷ (‘CET1’) and Additional Tier 1¹⁸ (‘AT1’) capital components must fulfil a function in a ‘going concern’ scenario; in other words, the bank in question has not yet reached the so-called ‘Point of Non-Viability’ (‘PONV’). CET1 and AT1 together form the Tier 1 layer of a bank’s capital, and the Total Capital is further supplemented by so-called ‘Tier 2 capital instruments’¹⁹. These Tier 2 capital instruments are then intended to fulfil a function in a ‘gone concern’ situation. At least, this was the original thinking of the Basel Committee on Banking Supervision (‘BCBS’).²⁰

The stacking order methodology as this evolved in the EU, resulted into a somewhat blurred view as to the function of bank capital. This is related to the fact that the stacking order, as described hereabove in fact defines the Tier 1 and Tier 2 capital components as belonging to the ‘lowest’ stack of the hierarchy

¹⁴ It is imperative to acknowledge, however, that even in this ‘official diagram’, certain issues are determined by the choices made by its authors. For instance, the text makes no distinction between the MDA and M-MDA rules, whereby decisions regarding M-MDA are taken by the competent resolution authority, whilst the MDA issue rests with the competent (prudential) supervisor. Furthermore, this diagram adopts a distinctive approach to other diagrams in circulation, in that the various capital components – CET1, AT1 and Tier 2 – are arranged in a repetitive manner, one below the other, within the same column. Firstly, in order to fulfil the minimum capital requirements stipulated in Article 92 of the CRR, and subsequently, with regard to the P2R (which may equally be constructed using CET1, AT1 and Tier 2, as follows from Article 104a(4) of CRD4), and finally, the Combined Buffer Requirements, which must be fulfilled in their entirety using CET1 capital (see Arts. 129, 130(1), 131(4) and (5) and 133(3) CRD4).
¹⁵ In the narrative surrounding this Figure 1, EBA explains that it wishes to display the stacking orders for a Globally Systemically Important Institution (‘G-SII’) and that for simplicity reasons it has refrained from displaying the subordinated MREL requirements and the Total Liabilities and Own Funds (‘TLOF’) requirement. See: EBA July 2024 Report, pp. 8 and 9.

¹⁶ Basel Committee on Banking Supervision Basel III: *A global regulatory framework for more resilient banks and banking systems*, December 2010 (rev June 2011), accessible at www.bis.org (‘2010 Basel III’).

¹⁷ In the EU the qualitative requirements for CET1 being regulated in Arts. 26-50 CRR.

¹⁸ In the EU the qualitative requirements for AT1 capital instruments being regulated in Arts. 51-61 CRR.

¹⁹ In the EU the qualitative requirements for Tier 2 capital instruments being regulated in Arts. 62-71 CRR.

²⁰ See 2010 Basel III, points 32, 49 (with a classification of Tier 1 Capital as going concern and Tier 2 capital as gone concern), point 53(criterion 8 for the classification as common shares for regulatory capital purposes, point 58 on Tier 2 gone concern classification. See furthermore: BCBS, *Proposal to ensure the loss absorbing capacity of regulatory capital at the point of non-viability*, August 2010, and BCBS, Press Release, *Final elements of the reforms to raise the quality of regulatory capital issued by the Basel Committee*, 13 January 2011 both accessible at: www.bis.org.

shaped by the stacking order, therefore, as it were, the assumption is, a bank breaching the requirements could lose its authorisation. However, the original concept of (particularly) Tier 2 capital components as developed by the BCBS suggested that the bank would have lost its authorisation as it surpassed the PONV, whereupon the Tier 2 capital would be used for loss absorbency during a liquidation scenario (therefore the bank was gone concern).

Another confusing element of the discussion concerns the inclusion of both Tier 1 and Tier 2 capital components in the overall MREL volume to primarily serve the loss absorbing function during resolution (then Tier 1 and Tier 2 are fully used in a gone concern context). Assuming that losses need not to be fully absorbed by the existing Tier 1 and Tier 2 capital components, such remaining volume of Tier 1 and Tier could serve to fill in the recapitalisation effort in resolution, where the aim is to bring the bank concerned in a fully going concern situation. Both functions are often displayed in the diagrammatic overviews of the stacking order in the context of setting MREL targets.

The fundamental question that needs to be addressed is the definition of wisdom itself. It can be concluded that the EU has moved away from the BCBS's original concepts of bank capital by bringing the BCBS's original thinking on the function of bank capital to the fore. This shift is evidenced by the evolution of capital requirements and the resolution framework – as expressed, almost metaphorically, in the 'stacking order'.

However, it is evident that within the EU, there exists a call to revert to a stricter adherence to these original principles, particularly concerning the functions of the so-called macroprudential buffers and the context of Pillar 2 capital. In my opinion, the matter at hand is one of a binary nature, and the tenets of the international Basel standards must be entirely assimilated into the discourse surrounding the review of the stacking order, as initiated by the EBA in the June 2026 Report.

3. Background of the EBA June 2026 Report

Despite its recent emergence, the process that culminated in the formulation of the EBA June 2026 Report can be characterised as intricate, given the multifarious perspectives and the assorted factors that converged to give rise to it. It is my opinion that the initial public authority catalyst for the present discourse on the sustainability of the EU's prudential and resolution regulations was the 2024 Draghi Report²¹. The following observation can be found therein:

*“Furthermore, the EU has a wide array of prudential regulations derived from the international standards set by the Basel committees. Prudential regulation is crucial in safeguarding financial stability. However, the EU has been accused of ‘gold-plating’ the Basel framework, leading to an overly restrictive and cautious regulatory environment for banks. At the same time, the US has been delaying implementation of the new Basel framework [...]”*²²

This was preceded by a major industry-led study, commissioned by the European Banking Federation, which resulted in the 2023 Oliver Wyman Report.²³ One of the key findings of this report, can be quoted as follows:

²¹ M. Draghi, Report to the European Commission, *The future of European competitiveness, Part B | In-depth analysis and recommendations*, September 2024 accessible at: www.commission.europa.eu/topics/competitiveness/draghi-report ('Draghi Report').

²² Draghi Report, p. 288.

²³ Oliver Wyman, *The EU Banking Regulatory Framework and its Impact on Banks and the Economy. Reference study*, January 2023 ('Oliver Wyman 2023') accessible at: www.oliverwyman.com/our-expertise/insights/2023. The Draghi Report 2023 uses this study as one of its supporting references in the recommendations made in this field, see the comments on p. 317: “Quantifications of the aggregate regulatory burden in the EU, especially compared to other blocks, are hindered by differing or piecemeal approaches”.

“The EU’s approach to determine capital requirements is more complex, gives regulators wider discretion and might be perceived as being less transparent. The resulting uncertainty is one of the reasons that EU banks tend, on average, to hold surplus capital. Additionally, on average and considering that samples are not directly comparable given differences in business models and market structure, EU banks face higher capital requirements than US peers: 10.6% versus 9.9% for Common Equity Tier 1. In addition, future requirements related to the full implementation of Basel III and climate-related capital surcharges are expected to penalise EU to a larger extent than US banks.”²⁴

Prompted by the recommendations in the Letta Report of April 2024²⁵, the European Commission (‘Commission’) published the Communication on the Savings and Investment Union in the spring of 2025²⁶, in which it set out its intention to produce a comprehensive study on the competitiveness of the EU banking sector in the course of 2026. The Commission noted in March 2025:

“The single rulebook for EU banks reflects internationally agreed standards, which are essential for global financial stability and to avoid a global regulatory race to the bottom. The most recent changes to the EU banking rules integrate the last elements of the Basel III standards and apply in the EU as of 1 January 2025. The EU implementation of these standards reflects a balanced compromise that keeps all of EU banks resilient, while responding to the specificities of the EU’s framework. At the same time, the Commission must be vigilant to avoid penalising EU banks that are internationally active on global financial markets, as well as preserving their competitiveness in European markets vis-à-vis third country banks. [...] The Commission will publish in 2026 a report assessing the overall situation of the banking system in the Single Market, including the evaluation of the banking sector’s competitiveness.”²⁷

Concurrently, the EU supervisory authorities are also exerting their influence, and a growing debate has emerged on the subject of simplification, with prominent authorities at the very least challenging the assumption that the current framework governing prudential and resolution requirements in the EU does not require further evaluation.²⁸ In summary, there is a growing recognition of the necessity to revisit this area. The High-Level Task Force on Simplification (‘ECB HLTF’) of the ECB presented its initial findings on this matter in the autumn of 2025, using unambiguous language as regards the subject matter of prudential and resolution requirements in the EU, and the stacking order.²⁹

Meanwhile, the EBA has drawn up a comprehensive work programme as part of the simplification agenda. The work programme, comprising 21 recommendations, was published on 1 October 2025.³⁰ Recommendation 9 concerns the subject of this contribution and can be quoted as follows:

“In the short term, the EBA will consider how to streamline the capital, buffer and MDA requirements, as well as the multitude of own funds, leverage and TLAC/MREL requirements.”

²⁴ Oliver Wyman 2023, p. v.

²⁵ Letta Report *Much More Than a Market* (April 2024), accessible at: www.european-research-area.ec.europa.eu.

²⁶ Communication from the Commission, *Savings and Investments Union; A Strategy to Foster Citizens’ Wealth and Economic Competitiveness in the EU*, COM(2025) 124 Final, 19 March 2025, (‘EC SIU 2025’).

²⁷ EC SIU 2025, pp. 16-17

²⁸ See: François Velleray de Galhau, *Towards a realistic simplification: untying some of the knots in European banking regulations*, speech at the ACPR Conference on 26 November 2024; BAFIN and the Deutsche Bundesbank, *High-level response to the European Commission’s targeted consultation document “Targeted Consultation on the Competitiveness of the EU Banking Sector”*, 17 April 2026, (‘BAFIN-Bundesbank April 2026’) and Francesco Cannata and Lucia Serafi, *A pragmatic approach to simplification: the case of banking regulation in the EU*, Banca d’Italia Occasional Paper, No. 955, July 2025, (‘Cannata-Serafini 2025’). Cannata-Serafini 2025 have produced an impressive study on how simplification might be implemented.

²⁹ ECB, *Simplification of the European prudential regulatory, supervisory and reporting framework*, December 2025, accessible at www.ecb.europa.eu/press/pubbydate/2025, (‘ECB December 2025 Report’).

³⁰ EBA proposals for a more efficient regulatory and supervisory framework in the EU, EBA/REP/2025/26 1 October 2025, accessible at www.eba.europa.eu, (‘EBA October 2025 Report’).

The Commission initiated on 11 February 2026 the Targeted Consultation on the Competitiveness of the EU Banking Sector, conducted between February and April 2026.³¹ More than 200 stakeholders responded to the consultation. One of the main findings relevant for the study that is undertaken in this contribution can be quoted as follows:

*“The effectiveness of the EU’s regulatory framework was widely recognised in enhancing financial stability, but its growing complexity and insufficient proportionality drew sharp criticism. Banks and business associations argued that layered requirements have created a web of overlapping obligations that are difficult to navigate, costly to comply with, and some are often redundant.”*³²

On 17 July 2026 the Commission published its Communication on Competitiveness of the EU Banking Sector.³³ Focussing on the subject matter of the stacking order, the Commission outlines its line of thinking in respect of the various prudential and resolution requirements in an extensive set of policy objectives. The Commission argues:

*“Complexity is further compounded by parallel or sometimes overlapping rules on microprudential, macroprudential, and resolution aspects. This is because parts of the banking framework have been reformed in several stages and often in isolation. Furthermore, co-legislators have, over time, largely transposed or preserved national specificities in EU legislation. The overlaps with the various requirements that banks must meet at the same time can give rise to duplications and limit buffer usability (the capital stack issue). Moreover, the interaction of the rules across the three separate but inter-related prudential fields is often sub-optimal.”*³⁴

Focusing purely on the policy intentions of the Commission related to the ‘stacking order’ issue, the following points may be quoted (leaving aside the related other policy objectives and procedural recommendations and changes to competences):

“— Propose measures to enhance the functioning of Pillar 2 guidance to ensure its targeted application.

— Propose to remove Pillar 2 capital requirements related to the leverage ratio.

— Propose to revise the MREL framework, bringing it closer to international standards by eliminating unnecessary discrepancies with the TLAC standard and by introducing a simpler, more automatic and predictable calibration. The revised framework will preserve the resilience of the resolution framework, retain incentives for resolvability, and ensure that requirements are proportionate, in particular for smaller banks.

*— Propose to revise the macroprudential framework to ensure a simpler toolbox and greater convergence and consistency in the application of macroprudential tools across the EU. More specifically, the number of buffers (countercyclical buffer, systemic risk buffer) should be reduced and their design and calibration improved. The framework for other systemically important institutions (O-SII) should be harmonised by addressing shortcomings in the O-SII identification and buffer calibration.”*³⁵

³¹ The Consultation documents and Consultation Reports are accessible at: www.finance.ec.europa.eu/regulation-and-supervision/consultations.

³² *Targeted Consultation on the Competitiveness of the EU Banking Sector*, Summary Report, Executive Summary, p. 4.

³³ Communication from the Commission, *Competitiveness of the Banking Sector and the Single Market in Banking*, COM(2026) 615 Final of 17 July 2026, accessible at: www.finance.ec.europa.eu/publications/commission-outlines-measures-strengthen-europes-banking-sector-and-support-growth, (‘July 2026 Communication’).

³⁴ Commission, July 2026 Communication, p. 8.

³⁵ Commission, July 2026 Communication, quoted policy objectives extracted from paragraph 3.3 *Simplifying the regulatory framework*, pp. 16-19.

This comprehensive overview of the background to the EBA June 2026 Report explores the likely changes that will take place in relation to stacking orders, and more specifically the changes that are likely to occur in the relationship between Pillar 1 and Pillar 2, combined (macroprudential) buffers, and the MREL and TLAC simplification. We would first like to address the EBA's findings in the EBA July 2024 Report, before moving on to a discussion of the first two of the three topics mentioned above. The proposals regarding the MREL and TLAC simplification are to be considered in a further in-depth study and will not be discussed at length in this contribution. We will however also add a few issues that have received less attention in the work of EBA and the Commission carried out to date, but which, in our view, also merit further consideration in the context of the revision of the prudential rules framework.

4. Reflection on management buffer practices in the EBA July 2024 Report

4.1 Management buffers and releasability of capital

As mentioned in the introduction, the EBA published the EBA July 2024 Report two years ago, and we need to examine the differences between the findings of that comprehensive EBA study and the EBA June 2026 Report. In any case, it can be noted from the outset that in 2024 the EBA did not make any proposals for adjustments to capital buffers or resolution financing; in other words, the EBA proceeded on the basis of the *fait accompli* of the rules and supervisory practices as they had evolved, and the fundamental structure of the stacking orders. The report is also subtitled 'Reflections on Management Buffer Practices'. This highlights the main theme of the EBA's study. The EBA's July 2024 report is presented more as an academic study than a Level 3 legislative instrument. Consequently, it would be wrong to draw overly far-reaching conclusions about the positions the EBA may or may not have taken regarding capital requirements, resolution, MREL targets and stacking orders.

In this regard, we have already explained that, in relation to the build-up of the various layers of capital buffers and resolution funding, a stacking takes place according to a hierarchy, on the assumption that the moment at which the various buffers are required to fulfil their function is, as it were, linked to a build-up process.

Minimum capital buffers intended to meet the Pillar 1 minimum capital requirements of Article 92 CRR are therefore placed at the very bottom of the stacking order, followed by P2R capital whose legal basis is to be found in Article 104(1)(a) CRD4, the combined buffers as regulated in Articles 128 to 140 CRD4 ('Combined Buffers'), and then the capital components of the Pillar 2 Guidance capital ('P2G') which has found its legal ground in Article 104b CRD4 introduced at the occasion of CRD5³⁶ in 2019 implementing the Banking Package 2016³⁷, leaving room for an additional layer of management buffers. The line is typically drawn between the first 'mandatory' layers of the stacking order and the 'voluntary' P2G and management buffers with regard to the MDA threshold. Similarly, the 'gone concern' scenario in the resolution stacking order is constructed to determine the MREL Target.

This issue is closely related to the question of the releasability of bank capital, and moreover, the freedom of banks to make distributions on share capital and interest payments on AT1 instruments, as well as variable remuneration payments to management and staff. The fundamental principles of the

³⁶ Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, *OJEU* 2019 L 150, ('CRD5').

³⁷ See: Commission, *EU Banking Reform: Strong banks to support growth and restore confidence*, 23 November 2016 accessible at: ec.europa.eu/commission/presscorner/detail/en/ip_16_3731 with links to the CRD5, CRR2, BRRD2 and SRMR2 legislative proposals.

stacking order, in conjunction with the MDA, are designed to evaluate the capacity of a banking institution to meet its capital requirements. The underlying assumption underpinning this evaluation is that, in the event of non-compliance, any release of capital or subsequent allocation, distribution of capital, or utilisation of released profits is restricted.

The assumption is that any positive results must be set aside under a profit retention principle, but also that the bank's costs relating to interest payments on AT1 instruments and variable remuneration are capped. The former, by its very nature, has an immediate effect on strengthening the bank's capital position; the latter will only have that effect at a later stage because, in accordance with the accrual basis of accounting and assuming the close of the bank's financial year, the deferred interest payments and variable remuneration will, by their very nature, be recognised as extraordinary income in the following financial year.

In this context, the MDA concepts assume significance. The intricacy inherent in these concepts stems from their foundation on a sliding scale of distributability, which allows for the deferral or imposition of restrictions on distributions in proportion to the extent of obligations fulfilled. At the same time, the releasability of capital comes into play at times when a bank, as a going concern, needs scope to absorb existing or expected losses. This loss absorption should, preferably, first be drawn from one of the Combined Buffers components, namely the Capital Conservation Buffer as set out in Article 129 of CRD4 ('CCB'). Recently, the EU policy makers have introduced a scheme to enable releasability of the Countercyclical Capital Buffer as set out in Article 130 of CRD4 ('CCyB'). At least as regards the release of CCB in a going-concern situation, this was the original concept of the BCBS. As regards the CCyB this is not in line with the standards of 2010 Basel III.

If that happens, the Combined Buffers layer (which includes the CCB and the CCyB) will, as it were, become narrower, and the entire stacking order will shrink. Under the EU system, this will in any case result in the demarcation line for the MDA shifting 'downwards', but by its very nature, the EU system also has implications for the payability of dividends, AT1 interest and variable remuneration; the releasability of CCB and CCyB is therefore conditional and results in a freeze on distributions to shareholders, certain bondholders and personnel in respect of variable remuneration until all requirements are met once again.³⁸ The release of CCB and CCyB therefore comes at a cost to the bank, namely the suspension of regular distribution processes relating to results. See the provisions of Article 141 of CRD4 in this regard. In paragraph 7 we will elaborate on the subject matter of releasability, highlighting the impact of the proposed changes to the rules on some of the Combined Buffers as is now proposed by EBA in the EBA June 2026 Report.

4.2 *The binding nature of P2G guidance capital*

However, the issue of the release of profits for the purpose of distributions to shareholders, etc., also plays a role in the framework for PG2 and the Management Buffers, which is, by its very nature, the main theme of the EBA July 2024 Report. We are therefore discussing a different issue that arises in the zone above the MDA threshold; there is no breach of the mandatory capital requirements, Pillar 1, P2R and Combined Buffers requirements are all fully met; however, in addition to this, the question arises as to whether, assuming the bank is sufficiently profitable, P2G and/or Management Buffers should be treated in the same way as in the event of a breach as referred to in Article 141 of CRD4 of the combined

³⁸ See for an elaborate analysis of this topic written in the aftermath of the COVID 19 Pandemic that put the question of releasability of capital buffers prominently on the table: Bart P.M. Joosen, *Releasability Combined Buffer Requirements After the Covid-19 Pandemic*, Chapter 11 in *Financial Stability amidst the Pandemic Crisis: On Top of the Wave*, ed. Christos Gortsos and Wolf-Georg Ringe, European Banking Institute (2021). An electronic copy of this volume is available at papers.ssrn.com.

buffer requirements, which would require a bank to retain profits. A deferral or reduction of interest payments in respect of AT1 instruments or variable remuneration is therefore, in law, not applicable.

The ‘guidance element’ of the P2G component of the stacking order is, by its very nature, non-binding. It is the guidance provided by the competent authority which, in view of the results of the regular EU-wide stress tests, recommends that the bank in question take into account the anticipated future increase in capital requirements should the potential risks identified actually materialise. This therefore involves the complex interplay between the predictability of future risks and the implications this may have for the bank’s future capital requirements. Naturally, should the risks materialise, the non-binding nature of P2G becomes binding.³⁹ However, the current P2G regime as it is being regulated in Article 104b CRD4 goes beyond this principle, in our opinion.

The regime set out in Article 104b of CRD4, as enshrined in law in 2019 as part of CRD5, is one example where the EU has clearly gone much further than is required by the 2010 Basel III standards. The provision effectively amounts to an obligation: the competent supervisory authorities may require banks to maintain P2G, making it clear that this P2G is in addition to the other existing requirements. The crux of the matter, however, lies in the somewhat striking mechanism resulting from the combination of Article 104b CRD4 and the provision of Article 104a(1)(e) CRD4, which stipulates the following:

“(1) Competent authorities shall impose the additional own funds requirement referred to in point (a) of Article 104(1) (i.e. P2R, add. author) where, on the basis of the reviews carried out in accordance with Articles 97 and 101, they determine that any of the following situations apply to an individual institution:

(e) the institution repeatedly fails to establish or maintain an adequate level of additional own funds to cover the guidance communicated in accordance with Article 104b(3).”

This makes it difficult to assume that P2G is a completely non-binding arrangement for banks, because if a bank repeatedly fails to hold P2G capital but, for example, proceeds to pay dividends from the headroom provided above the MDA threshold, there is nevertheless an obligation to hold P2R capital in line with the original guidance, therefore ‘pushing’ the P2G down into the mandatory layer of the stacking orders. Effectively, the headroom above the MDA threshold disappears, and is being moved to requirements section of the stacking orders.

³⁹ The various institutions involved in defining what P2G actually entails are at odds with one another when it comes to finding the right wording. Here is a quote from the EBA July 2024 Report, point 7 on page 6: “Pillar 2 Guidance (P2G) sits on top of the buffer requirements. P2G is guidance which, if not met, leads to an expected notification and capital plan. In addition, in the EU, there is guidance or expectations that institutions hold additional own funds and/or eligible liabilities above certain reference points in the regulatory stacks, for instance above buffer requirements.” From a legal perspective, this passage suggests that, as regards EBA P2G, the provisions are much more restrictive than would be implied by the notion that P2G is not classified as a mandatory capital buffer. For completeness’ sake it must be noted that EBA used more careful language in this respect in the EBA SREP Guidelines (revised in 2018), see the paragraph on p. 13 where it is said: “As part of the assessment of capital adequacy, competent authorities should also determine whether applicable own funds requirements can be met in stressed conditions. Where the quantitative outcomes of relevant stress tests suggest that an institution may not be able to meet the applicable own funds requirements in stressed conditions, or is excessively sensitive to the assumed scenarios, competent authorities should take appropriate supervisory measures to ensure that the institution is adequately capitalised. These include communicating expectations to institutions to have own funds over and above their overall capital requirements and which are not subject to the restrictions on distributions provided for in Article 141 of Directive 2013/36/EU – ‘Pillar 2 capital guidance’ (P2G). In particular, these guidelines outline how competent authorities should establish and set Pillar 2 capital guidance based on supervisory stress test results (see Section 7.7). As P2G is positioned above the combined buffer requirement, a failure to meet P2G does not trigger automatic restrictions on distributions provided for in Article 141 of Directive 2013/36/EU.” The ECB (‘Pillar 2 Guidance’ to be accessed at www.bankingsupervision.europa.eu/activities/srep/html/p2g) is clearer in this respect, see the following quote: “The Pillar 2 guidance is a bank-specific recommendation that indicates the level of capital the ECB expects banks to maintain in addition to their binding capital requirements to ensure they can absorb potential losses resulting from adverse scenarios. The Pillar 2 guidance is set as part of the Supervisory Review and Evaluation Process. Unlike the Pillar 2 requirement, it is not legally binding. It also does not encompass the risk of excessive leverage, which is covered by the leverage ratio Pillar 2 guidance.”

As we shall discuss in the following section, the entire current framework for Pillar 2 capital represents a significant departure from the Basel Committee's original thinking at the time of the launch of the Three-Pillar framework for banking supervision in 2006 at the occasion of the launch of the Basel II standards.⁴⁰

4.3 Evaluation of the findings in the EBA July 2024 Report

We should now turn to the observations of the EBA in the EBA July 2024 Report as to the management buffer practices. A 'management buffer' is the part of the actual capital held by a bank truly exceeding the required levels of capital. It is the actual capital of the bank, minus Pillar 1, P2R, Combined Buffers and P2G. Typically, excess capital would be eligible for recognition as CET1 capital, as the buffer concerned is often resulting from the profits of the bank not being utilised to supplement the required capital buffers. Excess capital is also the resulting sum after the distribution of interest on AT1 instruments, and (most customarily) the distribution of variable remuneration. Consequently, excess capital is being allocated to the prerogative sphere of the bank's shareholders.

It is considered to be belonging to the 'management buffer', as in ordinary circumstances, it is the management that shall exercise discretion as to whether or not the excess capital will be retained (and therefore becomes part of the CET1 capital) or distributed to the shareholders as dividend or used to finance the redemption of shares of the company. Typically, the rules of Articles 77 *et seq* CRR on conditions and authorisation processes to be followed before redeeming regulatory capital instruments do not apply to the headroom amount of the management buffer.

EBA has investigated the practices of banks in respect of management buffers, a.o. by organising a survey amongst 53 EU banks. The EBA July 2024 Report considers that management buffers are not subject to robust policy making by banks, and that in many cases a concrete policy in this respect is even absent. Absent clear policies in this respect, EBA observed that many banks targetted the highest level in the capital stack order, being the 'risk based' P2G CET1⁴¹ volume as the point of reference for the exercise of discretion. EBA considered the policies adopted by the larger (globally systemic important institutions, 'G-SII') and observed that G-SII's tended to define clear targets for management buffers, being on average 2.4% above the P2G and in addition on average 1.7% additional headroom. EBA observed the following:

*"The determination of management buffers is influenced by a broad set of factors, both internal and external. Internal considerations include the ability to manage unexpected risks and to develop strategic and business opportunities. External considerations include expectations from supervisors and regulators (e.g. no breach of regulatory requirements or expected changes in regulatory requirements) or from other stakeholders (e.g. rating agencies or peer pressure)."*⁴²

In fact, this is a rather disheartening conclusion, as it shows that, in practice, there are very differing views on the function of bank capital, in all its forms and across all levels of the stacking order. After all, if a bank believes that management buffers serve to cover unexpected risks, this appears to overlook the core function of Pillar 1 capital, namely that it is intended to cover unexpected losses, whilst expected losses should be recognised in the bank's profit and loss account. The observation that a

⁴⁰ BCBS, International Convergence of Capital Measurement and Capital Standards; A Revised Framework, Comprehensive Version, June 2006, accessible at www.bis.org ('Basel II').

⁴¹ 'Risk based' refers to the principles developed with respect to the stacking orders, being a 'risk based' stacking order co-exists with the non-risk based (leverage ratio) stacking order. The reference to CET1 volume in the P2G buffer refers to the fact that any excess capital, as is being explained above, typically would fit into qualifying CET1 capital instruments in accordance with the requirements set out in Arts. 26 *et seq.* CRR.

⁴² EBA July 2024 Report, point 14 on p. 7.

management buffer is intended to meet the supervisory authorities' expectations that there will be no regulatory capital breach is, in our view, also a rather striking point. After all, if the engagement between the bank and the supervisor in the Supervisory Review and Evaluation Process⁴³ ('SREP') fails to provide sufficient assurance that the supervisor (following the determination of the level of P2R and other measures) can confirm full compliance with the capital requirements, it seems to us that there is considerable tension regarding how the supervisory mechanism functions in practice.

4.4 *Usability of management buffers and P2G*

The report concludes with a number of observations on the usability of the management buffer. Most banks do not consider the Combined Buffers suitable for use in organising (temporary) loss absorption. This is a well-known bottleneck, which, in my view, is linked to the functioning of the MDA mechanism as explained above. Some banks take the view that excess capital attributable to the P2G volume can be used (without restriction) to exercise management discretion (and thus the choice of whether or not to buy back shares or make dividend payments). Other banks view P2G as a strict requirement, meaning that the 'usable' portion consists of the excess capital above the P2G threshold.

This demonstrates that, in practice, despite clearly communicated policy by the supervisory authorities regarding the operation of the stacking orders, there is no uniform approach or policymaking amongst the banks. After all, the EBA, ECB and SRB have issued clear guidance on how the various buffers should be filled, with a clearly defined threshold (the MDA line) regarding the available scope for banks and the portion which, in principle, is not considered usable.⁴⁴ These differing interpretations are, in my view, understandable, given the widely divergent views on this matter between the supervisory community and the banking sector. One may refer to the heated debate in the aftermath of the COVID-19 pandemic, which even led to further recommendations from the ECB to provide guidance on the widely divergent approaches that had emerged in practice, building on earlier recommendations made in 2015⁴⁵.

The 2015 recommendations have, understandably, been setting out the subject matter of complying (and ability to comply in the future) with the transitional scheme of requirements to result into the 'fully loaded' capital requirements after the full implementation of requirements of the CRR⁴⁶. As to the ECB recommendations of 2020, the ECB has imposed far-reaching restrictions on the autonomy of the banking sector in this regard. In my view, the heated debate arose in connection with the 'releasability' discussion we touched upon earlier, where the utilisation of one or more of the Combined Buffers immediately led to a blanket freeze on the ability to make dividend payments in view of the MDA mechanisms. The tension between the supervisory authorities and the banking sector could not have been brought into the public eye more strikingly than it was following the publication of the 'COVID-19 recommendations'.⁴⁷

⁴³ Conducted in accordance with the rules set forth in Arts. 97 *et seq* CRD4.

⁴⁴ See: EBA July 2024 Report, point 15 on p. 7.

⁴⁵ Recommendation ECB/2015/2 of the European Central Bank of 28 January 2015 on dividend distribution policies (OJEU 2015 C 51) and Recommendation ECB/2015/49 of the European Central Bank of 17 December 2015 on dividend distribution policies (OJEU 2015 C 438).

⁴⁶ 'Fully loaded' or 'fully phased in' refers to the transitional provisions included in the CRR of 2013, where new capital requirements for banks (such as the meeting of the CCB) were phased in four to five years after the entry into force. For instance, the CCB rate is 2.5% CET1 of the Total Risk Exposure Amount ('TREA'), and 2.5% CET1 is then 'fully loaded'. In the first-year 2026 banks were subject to a lower requirement in respect of the CCB, being 6.125%, and an incremental growth path of four years was defined in the CRR transitional provisions until the fully phased in level of 2.5%.

⁴⁷ The ECB recommendations of July and December 2020 were following up on the Recommendation of the European Systemic Risk Board of 27 May 2020 on restriction of distributions during the COVID-19 pandemic (ESRB/2020/7) OJEU 2020 C 212. The ECB recommendations are as follows: Recommendation ECB/2020/19 of the European Central Bank of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/1, OJEU 2020 C 102I;

As will be discussed below, it is perhaps in the area of aligning the release of Combined Buffers with the P2G framework and management buffers that the greatest gains can be made in terms of efficiency, but also in dispelling the perception that the prudential regime in the EU has evolved into an unnecessarily complex set of rules characterised by conflicts and overlaps.

5. Preserving the role of P2R but abolishing P2G?

5.1 *The Purpose of P2R supplementing Pillar 1 capital*

It is evident that no bank within the European Union – whether a significant bank subject to direct supervision by the European Central Bank (ECB), a less significant bank subject to supervision by the relevant competent authority in the euro area, or banks supervised by the competent authorities in non-euro area countries – can escape the application of the P2R capital requirement. The ‘R’ clearly indicates that the relevant rules are binding, although, if implemented correctly by the competent authorities, P2R is determined on an institution-specific basis based on the outcomes of the SREP, leading to an (annual) decision by the authorities to set the level of P2R applicable to the institution in question.

Apart from the significant institutions (‘SI’) under the direct supervision of the ECB, little is known about the range of P2R mark-ups applied by the other authorities. For banks supervised by the ECB, the range⁴⁸ is between 1.50% and 4.5% for currently applicable P2R in 2026 and on average for all the SIs is 2.31%.^{49 50} However, data from rating agencies do provide some insight for other jurisdictions, revealing that Scandinavian banks are subject to (significantly) higher P2R capital add-ons (ranging from 2.19 per cent to 3.14 per cent⁵¹). For UK banks subject to supervision by the Prudential Regulation Authority (‘PRA’), these P2R capital add-ons are also at the higher end of the scale, ranging from 2.60% to 4.80%.⁵²

P2R requirements are therefore now a reality across the entire EU, and as we have seen in the UK, the requirement applies to the entire banking sector. The history of how this requirement came about in the EU is complex, and little academic research is known on the subject. It is not unreasonable to suggest that in the early years following the introduction of the Three-Pillar system in the EU, coinciding with the first CRD of 2006⁵³, the concept of ‘Pillar 2’ capital was still structured in accordance with the thinking of the BCBS during the development of the Basel II standards.

This philosophy essentially means that, within the Three-Pillar system, banks are subject to minimum capital requirements under Pillar 1, whereby capitalisation takes place against the risks to be weighted in the various areas; broadly speaking, these are credit risk, market risk and operational risk. Depending on the business model pursued by the bank in question, the absolute levels of the capital requirements will vary; for example, because a bank may not have a relevant trading portfolio and will therefore need to apply a very minimal weighting to market risk. The premise of Basel II was that, in the Pillar 2

Recommendation ECB/2020/35 of the European Central Bank of 27 July 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/19, OJ EU 2020 C 251; Recommendation ECB/2020/62 of the European Central Bank of 15 December 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/35, OJEU 2020 C 437; Recommendation of the European Central Bank of 23 July 2021 repealing Recommendation ECB/2020/62 (ECB/2021/31) 2021/C 303/01 OJEU 2021 C 303.

⁴⁸ The range and the average includes in the upper percentage an outlier percentage for a specific individual case, the best ‘highest percentage’ for a representative bank is 2.85%.

⁴⁹ See: ECB www.bankingsupervision.europa.eu/activities/srep/pillar-2-requirement last consulted on 21 August 2026.

⁵⁰ The ECB itself publishes an ‘weighted’ average of 2.1% in total capital and around 1.2% in TREA in CET1 capital. See: ECB, *Aggregated results of the 2025 SREP*, www.bankingsupervision.europa.eu/activities/srep/2025.

⁵¹ This excludes the P2R of DNB Bank AS set at 1.7%, a Norwegian bank that is highly capitalised with CET1.

⁵² Scope Ratings, Financial Institutions Research, 13 November 2025 European Bank Capital Quarterly, accessible at www.scooperatings.com.

⁵³ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), PbEU, L 177 (‘CRD1’).

process, the individual bank would carry out a periodic assessment of the adequacy of the capital held under Pillar 1, in light of the bank's actual risks as they manifested themselves in the preceding reference year.

This assessment takes place as part of the Internal Capital Adequacy Assessment Process ('ICAAP'). The ICAAP results are submitted to the competent supervisory authority, which then carries out a periodic assessment as part of the SREP. The SREP results in the supervisory authority's own assessment of whether, and if so to what extent, the ICAAP resulted in an adequate assessment of capital adequacy. If not, a dialogue was to be initiated between the bank and the supervisory authority, with the ultimate outcome – as envisaged in the original Basel II framework – being that management would be prompted to revise the ICAAP and draw up a capital plan to achieve higher capitalisation. If the bank's management was unwilling to cooperate, then, as a last resort, the supervisor could proceed to impose an additional capital requirement.^{54,55}

5.2 *Evolution of the P2R regime in the EU*

The original text concerning the imposition of measures in the form of obliging (credit) institutions to hold "own funds in addition to" the Pillar 1 requirement by the supervisory authority as contained in Article 136 CRD1⁵⁶ was transposed in similar wording in the provision of Article 104 CRD4 of 2013, where the imposing of the requirement to "hold own funds in excess of the requirements set out in Chapter 4 of this Title and in [CRR] relating to element of risks and risks not covered by Article 1 of [CRR]" was clearly phrased as one of the supervisory powers framed in relation to the supervisory measures to 'resolve problems', for instance non-compliance with the rules of CRR or CRD4. The reference in the original text of Article 124 CRD4 to "Chapter 4 CRD4" is a reference to the Combined Buffer requirements. Originally, the additional capital imposed on an individual bank as a specific (P2R) measure was therefore a layer above the Combined Buffer requirements, instead of sitting under the Combined Buffer requirements as is currently framed in the principles of the 'risk based' stacking order.

In the early days after the capital requirements of CRR and CRD4 became applicable, the increased requirements following the transposition of 2010 Basel III (particularly related to the new Combined Buffer requirements) were subject to a number of transitory provisions phasing the requirements in a period of three to four years. For that reason, banks were faced with the clear prospect that capital requirements would rise in significant increments. At the time, to cut a long story short, the powers relating to the supplementary 'Pillar 2 capital' were utilised by the supervisory authorities to support capital planning in this area; in other words, to provide banks with an incentive to ensure that excessively large dividend payments or share buy-back programmes, funded out of profits, did not lead to insufficient profit retention and additions to the CET1 capital base, and therefore a predictable breach of obligations. See also, in this regard, the ECB's 2015 recommendations mentioned at the end of

⁵⁴ The philosophy of the original Basel II standards can best be demonstrated by quoting two paragraphs from the Basel II standards, which display the original line of thinking in our view: "759. Supervisors should consider a range of options if they become concerned that a bank is not meeting the requirements embodied in the supervisory principles outlined above. These actions may include intensifying the monitoring of the bank, restricting the payment of dividends, requiring the bank to prepare and implement a satisfactory capital adequacy restoration plan, and requiring the bank to raise additional capital immediately. Supervisors should have the discretion to use the tools best suited to the circumstances of the bank and its operating environment. 760. The permanent solution to banks' difficulties is not always increased capital. However, some of the required measures (such as improving systems and controls) may take a period of time to implement. Therefore, increased capital might be used as an interim measure while permanent measures to improve the bank's position are being put in place. Once these permanent measures have been put in place and have been seen by supervisors to be effective, the interim increase in capital requirements can be removed.", see: Basel II, p. 212.

⁵⁵ See for the initial regulation of this process in the EU: Arts. 123 (ICAAP) and 124 (SREP) and Annex XI (Technical criteria on Review and Evaluation by the Competent Authorities) CRD1 and for the 'capital add on powers', Article 136 CRD1.

⁵⁶ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), *OJEU* L 177.

paragraph 4.⁵⁷ At the time, the additional capital requirement as based on Article 104 CRD4 was imposed without exception by mandating that CET1 capital be used for this purpose, since the Combined Buffers – which are in addition to the minimum capital requirements but that can be met in part through AT1 and Tier 2 capital – must be fully covered by CET1 capital.

At that time, the way in which the SREP was to be organised was still in its infancy. It was only following the development of the EBA's first guidelines in 2014⁵⁸ and the parallel work carried out by the ECB in its capacity as supervisor within the Single Supervisory Mechanism, that the temporary nature of the additional Pillar 2 capital add-ons – linked to the necessary capital planning for the full phased-in Combined Buffers – evolved into a permanent system of annually adjusted requirements for additional capital relating to risks not covered by Pillar 1 (such as interest rate risks) and, in addition to institution-specific risks. In essence, the additional capital based on the provisions of Article 104 of CRD4 acquired the status of a permanent requirement in the course of 2016–2017.

In the revised SREP Guidelines of the EBA of 2018 this shifting point concerning Pillar 2 capital as a permanent requirement is described as follows in an additional paragraph added in 2018 to the text of the Guidelines of 2014:

*“Since an institution may face risks that are not covered or not fully covered by the minimum own funds requirements in accordance with the Regulation (EU) 575/2013 or the capital buffers specified in Directive 2013/36/EU, through assessment of the adequacy of the institution's own funds, competent authorities should determine the quantity and composition of additional own funds required to cover such risks ('Pillar 2 capital requirements'). Such requirements should be set in a legally binding way and institutions should be expected to meet them at all times.”*⁵⁹

At that time, the supervisory authorities still strongly preferred that this additional requirement be met entirely with CET1 capital, which was regarded within the sector as disproportionately onerous. In response, the legislator introduced the new CRD5 regime of 2019, which has already been discussed in connection with the P2G topic. Following the entry into force of CRD5, the rule is that at least 75 per cent of P2R capital must be met by CET1 and AT1 (and therefore Tier 1) capital, with the remaining 25 per cent able to be met by Tier 2 capital.⁶⁰

This evolution from a special supervisory measure for isolated cases – designed to temporarily bridge an impending capital shortfall – to a permanent requirement as described above was ultimately enshrined in the current legislation in 2019 with the adoption of Article 104a CRD4, in the form of a codification, as it were. The scheme is still based on the supervisory authority's discretionary assessment of individual cases, but the statutory framework assumes that P2R will be imposed in all cases, and this new provision sets out the criteria to be applied when imposing this capital requirement. We would like to reject the notion that this framework should be regarded as an example of 'gold plating' of 2010 Basel III. The EU system finds broad support in the BCBS standards.⁶¹

⁵⁷ *Ibid.* n [47].

⁵⁸ *Ibid.* n [10].

⁵⁹ Paragraph *The common SREP framework*, page 11 of EBA *Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing*, EBA/GL/2014/13 Consolidated version of 19 July 2018.

⁶⁰ Article 104a(4) CRD4.

⁶¹ See the language contained in paragraph 9 of Basel II (which has not been replaced in 2010 Basel III): “It should be stressed that the revised Framework is designed to establish minimum levels of capital for internationally active banks. As under the 1988 Accord, national authorities will be free to adopt arrangements that set higher levels of minimum capital. Moreover, they are free to put in place supplementary measures of capital adequacy for the banking organisations they charter. National authorities may use a supplementary capital measure as a way to address, for example, the potential uncertainties in the accuracy of the measure of risk exposures inherent in any capital rule or to constrain the extent to which an organisation may fund itself with debt. Where a

What does need to be analysed, however, is the consequence of developing P2R as a quasi-statutory capital requirement, given the principles of the stacking order. In this regard, we have explained that, in the original wording of Article 104 of CRD4, supplementary Pillar 2 capital requirements were still regarded as subordinate to the requirements of the Combined Buffers. The reversal of the order in the stacking order resulting from these developments is therefore understandable.

5.3 *Recommendations of EBA in the EBA June 2026 Report*

In paragraph 3.1.2 of the EBA June 2026 Report an elaborate analysis is made of the role P2R is playing within the EU prudential framework. EBA pays attention to further developments in the EU and provides some insights of the study it has conducted in 2025 in connection with supervisory convergence in the context of Pillar 2.⁶²

The EBA's guidance provides important insight into EU practice regarding the application of P2R. The EBA emphasises that P2R add-ons are institution-specific and must not lose that character. However, the EBA draws attention to the fact that, in supervisory practice, there may be a lack of consistency regarding the reasons for setting P2R amounts; to date, there has been no clear, comprehensive 'risk catalogue' that provides institutions and the market with insight into the rationale behind the application of P2R add-ons. The amended SREP Guidelines, published in June 2026⁶³, address this point in detail. On two specific points, the EBA provides insight into possible alternative applications of P2R: in one case, this may lead to the discontinuation of the imposition of P2R; in another, it advocates a different approach that could result in the postponement of the imposition of P2R in specific cases.

The EBA notes, first of all, that in approximately 47 per cent of the cases examined in the 2025 study, P2R relates to risks that are already covered by Pillar 2 rules (credit risk, market risk and operational risk), but where the Pillar 1 rules lack sufficient risk sensitivity, or where (it may be assumed) the individual institutions have underestimated the relevant risk, as revealed by the SREP assessment of the ICAAP. Approximately 20 per cent relates to governance and business model risk, and approximately 30 per cent (including interest rate risk in the banking book and concentration risks) relates to other risks.

A key reason for imposing P2R has always been to provide a backstop against potential risks arising from inadequate internal models (the 'model risk'). With the introduction of the output floor as set out in the new provision of Article 92 of the CRR, the EBA suggests that there may be grounds for phasing out the P2R for this particular risk, on the grounds that an adequate response in terms of capital adequacy is already in place through the imposition of the (potentially) stricter capital requirements resulting from the output floor. In this regard, the EBA suggests that the focus could perhaps be shifted by removing the ground 'deficiencies in regulatory models' from the CRD, and by shifting the practice of applying P2R to a situation where the validation of (internal) models by the supervisor and the application of other rules for making corrections⁶⁴ can be brought within the scope of P2R.

jurisdiction employs a supplementary capital measure (such as a leverage ratio or a large exposure limit) in conjunction with the measure set forth in this Framework, in some instances the capital required under the supplementary measure may be more binding. More generally, under the second pillar, supervisors should expect banks to operate above minimum regulatory capital levels." See furthermore the evaluation of the manner of application of the Three Pillar framework by all jurisdictions that have adopted the Basel II standards, BCBS, *Overview of Pillar 2 supervisory review practices and approaches*, June 2019, to be accessed at www.bis.org.

⁶² The publication of the study is forthcoming as noted by EBA in June 2026, see footnote 21 on page 16.

⁶³ EBA *Guidelines (revised) on common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing under Directive 2013/36/EU*, EBA/GL/2026/6 of 26 June 2026.

⁶⁴ These include Article 458(2)(d)(iv) of the CRR measures, LGD floors under Article 164 CRR, and real estate risk-weight adjustments under Article 124(9) CRR. Particularly with regard to the application of Article 458(2)(d)(iv) of the CRR (which occurs in only three Member States), there is a growing consensus that the significant impact of its application on the level of

Contrary to the views of the BCBS as set out in 2006⁶⁵, the EBA proposes a more conservative approach to applying P2R in cases where, as a result of the SREP assessment, recommendations are made regarding improvements to qualitative risk management measures. The EBA's approach can be summarised as applying P2R as a last resort if, after the matter has been raised during the dialogue in the Pillar 2 process and no adequate response has been received, a bank still proceeds to impose P2R. In this regard, the BCBS regards the immediate and temporary imposition of additional capital as an important incentive for the bank to implement the necessary improvements. The EBA therefore deviates from the Basel standards, with a positive impact for banks in terms of capital requirements.

5.4 *The impact of the EBA analysis for P2R in the stacking order*

With the somewhat subtle realignment of the objectives of the P2R regime, and the call for greater transparency regarding practices within the EU concerning the application of the rules set out in Article 104a of CRD4, the EBA strongly advocates retaining the current powers of the competent authorities, and lays even stronger foundations for the regime. The P2R stack will remain at the bottom of the stacking order, and one can wholeheartedly agree with these observations and recommendations. The P2R rules in the EU are fully in line with the principles of the BCBS, and in one minor respect, the conservatism of Basel II is even toned down to the benefit of the banking sector.

What is missing from the analysis, however, is a consideration of the intrinsic quality of the various components of the P2R tier in the stacking order – a point which, incidentally, is also relevant to the Pillar 1 tier of the stacking order. Since the introduction of the rules under Article 104a(4) of CRD4 concerning the composition of the tiers comprising the various capital components, there is a need to carry out a more detailed analysis of the intrinsic value of the relevant components, particularly in relation to one of those components: the AT1 capital instruments. We shall address this point in the paragraph 6.

5.5 *Abolishment of P2G*

With the introduction in 2019 of the rules set out in Article 104b of CRD4 concerning 'guidance capital', a broadly defined framework has been established, which effectively means that P2G may relate to both the risk-based capital requirements of Article 92 of the CRR, supplemented by those of P2R under Article 104a of CRD4, as well as the large exposure limits set out in Part Four of the CRR and the leverage ratio (LR) set out in Part Seven (Article 429 et seq. of the CRR). European authorities and institutions (and the Commission, as evidenced by the policy objectives cited above from the July 2026 Communication) have embraced the view that it would support simplification of the prudential rules and the organisation of the stacking orders to amend the guidance on capital rules by completely removing the reference to the possibility of imposing P2G for the LR.⁶⁶

We go a step further. In our view, it would be better to reconsider the entire framework of Article 104b of CRD4 and put an end to the whole set of P2G rules, which are poorly understood in practice. The

TREA leads to a distortion of capital requirements across the EU for the banks concerned. For this reason, the EBA (in the section 'Aligning P1 risk exposure amounts calculation with macroprudential objectives' on p. 14 *et seq.* of the EBA June 2026 Report) advocates the abolition of the relevant provision. One cannot but wholeheartedly agree with the EBA's observation. The decision by some Member States to take the rules set out in Article 458 CRR from the shelf has undermined the legislator's original objectives of creating a Single Rule Book in the EU for banking supervision and prudential rules. The application of the procedure set out in Article 458 of the CRR effectively undermined the concept that there should be a uniform legislative framework within the EU, and it is doubtful whether the Member States that proceeded to apply the special procedure under Article 458 of the CRR fully realised the far-reaching consequences associated with this step.

⁶⁵ *Ibid.* n [53].

⁶⁶ ECB December 2025 Report, *ibid.* n [29], pp. 4 and 5 and EBA June 2026 Report, *ibid.* n. [2], Paragraph 3.4 *Leverage Ratio*, on pp. 25 *et seq.*

EBA's June 2026 Report also presents a somewhat hesitant argument on this point regarding whether or not to retain P2G for risk-based capital requirements. See section 3.2, 'Reaffirming the role of P2G' of the EBA June 2026 Report for further details.⁶⁷

A complete abolition of the P2G regime would, in any case, lead to a significant simplification and would bring the EU prudential framework more into line with the Basel II standards. As mentioned earlier, the P2G capital rules do, however, entail a deviation from those Basel II standards. In essence, the proposal amounts to placing a greater burden on the management of banks to ensure sufficient headroom to keep future adverse scenarios – insofar as they are relevant to the bank – manageable, provided that capital is an adequate means of addressing those future challenges, and the relevant risks have not been capitalised through Pillar 1, Combined Buffers and/or P2R requirements. In particular, where the release mechanism for Combined Buffers functions effectively, a solution is readily apparent, thereby still achieving capital conservation.

Supervisors always have the option, as soon as the risks become apparent and the bank in question has not organised adequate provisioning against them, to apply at least the P2R power under Article 104a of CRD4; furthermore, one should bear the new improved early intervention measure regime in mind as possible further response by the supervisory authorities, including the requirements on frequent updating of the recovery planning.⁶⁸ In extreme situations, the 'Failing or Likely to Fail' ('FOLF') assessment⁶⁹ is the final step. These powerful deterrents should provide banks with sufficient incentives to ensure that headroom is created in the management buffer in a timely and adequate manner, without the need for imposing guidance.

6. The defective calibration of contingent convertible capital triggers

6.1 Background

One of the issues which, in our view, is lacking in the current debate on stacking orders concerns the assessment of a part of the qualitative characteristics of the capital used to fill the various layers in the orders. As is apparent from the foregoing, the bottom Pillar 1 capital tier and the subsequent P2R tier may, up to the limits set out in Article 92(1)(b) of the CRR and Article 104a(4) of the CRD respectively, be 'filled' with AT1 capital, the so-called contingent convertible capital instruments. When it comes to assessing how the rules function in practice, there has already been considerable debate.

Although the EU has implemented the Basel III standards in a manner consistent with the rules set out in Articles 52 *et seq.* CRR, which govern the requirements for AT1 instruments, consistent with the Basel III standards, there is nevertheless an ongoing debate regarding the practical functioning of these rules.⁷⁰ This debate has also flared up following the measures taken in connection with the rescue of Credit Suisse, whereby subordinated bonds similar to AT1 instruments were written off on a going-concern basis under a specific emergency provision by the Swiss authorities, after which the shares of

⁶⁷ EBA June 2026 Report *ibid.*, n 2 on p. 19 *et seq.*

⁶⁸ As a result of the adoption of the CMDI package in the spring of 2026, the provisions of Article 5 *et seq.* (Recovery Planning) have been rephrased and Arts. 27 and 28 BRRD (Early Intervention Measures) replaced to ensure effectiveness of the precautionary measures regime to prevent resolution and accommodate the timely recovery of the bank concerned. See the new provisions introduced with Directive (EU) 2026/806, *OJEU*, L. 2026/806 ('BRRD3').

⁶⁹ Pursuant to the application of the resolution rules, based on Art. 32(1)(a) BRRD.

⁷⁰ See for a comprehensive review: Bundesbank, Monthly Report, March 2028, pp. 54-64, where the following conclusion may be quoted (p. 63): "The actual design of CoCo bonds gives rise to doubts about their effectiveness for banks as a loss absorbing instrument on a going- concern basis. It is particularly the low CET1 thresholds seen in practice, below which a conversion or write- down is triggered, which could temper the effectiveness of this instrument. Regulatory capital requirements could be undershot even before the occurrence of the trigger events enshrined in the CoCo bond contracts. This would require authorities to intervene in banks' business operations even prior to the contractual conversion or write- down of CoCos." This report is accessible at: www.bundesbank.de.

the Credit Suisse Group were transferred to UBS in return for consideration.⁷¹ In other words, the Swiss authorities altered the order of priority of the consequences attached to regulatory capital instruments. The Swiss court rejected this approach.⁷² However, even prior to the Credit Suisse case, there was controversy within the EU, relating in particular, on the one hand, to the application of the MDA regime, which had implications for interest payments, and, on the other hand, to the exercise of the issuer's discretionary powers regarding the extension of the maturity of the issued AT1 instruments. Neither of these aspects is discussed in detail here.

Here, we focus on the effectiveness of the conversion mechanism, which essentially means that, should certain (statutory) triggers be met, there must be an automatic full or partial conversion of the AT1 debt instruments into CET1 capital. Where the bank in question has no means of proceeding with conversion (for example, a bank organised as a cooperative without share capital), upon the triggering of a condition, a write-down takes place of the principal and any accrued but not yet paid interest on the AT1 capital instruments. The intention and rationale behind this is that the conversion (or write-down) results in an increase in the outstanding CET1 capital, bringing it back within the statutory limits.

6.2 *The failure of the automatic trigger mechanism*

The trigger mechanism for AT1 instruments is set out in Article 54(1)(a)(i) and (ii) of the CRR as follows:

“(a) a trigger event occurs when the Common Equity Tier 1 capital ratio of the institution referred to in point (a) of Article 92(1) falls below either of the following:

(i) 5,125 %;

(ii) a level higher than 5,125 %, where determined by the institution and specified in the provisions governing the instrument;”

The EU trigger mechanism is therefore an automatic mechanism designed to result in the conversion of the principal amount of AT1 (and any accrued but not yet paid interest), at least where the CET1 ratio falls below 5.125 per cent, with reference to the ratio set out in Article 92(1)(a) of the CRR. The reference to the provision in Article 92 of the CRR implies that this must therefore relate to a fall below the ratio in respect of Pillar 1 capital. As discussed earlier, CET1 capital will consist of requirements from the various stacks, namely Pillar 1, P2R and Combined Buffers. This is also linked to the requirement that CET1 capital held to meet Pillar 1 requirements may not be used again to meet P2R or Combined Buffer requirements. The CET1 capital amounts are divided by the total TREA volume of the bank in question, resulting in the CET1 ratio as reported.

At present, banks in the EU have significantly higher average CET1 ratios than the trigger figure set out in Article 54 of the CRR.⁷³ However, this ratio is the sum of the various stacks in the stacking order. What, in the BCBS's original thinking, was intended to lead to a correction mechanism by mandating an (automatic or supervisory) trigger for the conversion mechanism has, in the EU, found a different

⁷¹ The European authorities have been quick to point out that such a reversal of the creditor hierarchy has no basis in European legislation; see the joint statement by the ECB, the SRB and the EBA: *ECB Banking Supervision, SRB and EBA statement on the announcement made on 19 March 2023 by the Swiss authorities*, 20 March 2023, accessible via: www.bankingsupervision.europa.eu/press/pr/date/2023.

⁷² Judgement of the Federal Administrative Court of Switzerland of 1 October 2025, B-2334/2023, accessible via www.bvger.weblaw.ch.

⁷³ See ECB, *Aggregated results of the 2025 SREP*, where the ECB reports that for the banks under its supervision the overall capital requirements and guidance is 15.6% of the TREA, whereas the average CET1 ratio in the first quarter of 2026 is 15.99. The average Tier 1 ratio in the first quarter of 2026 is 17.51% and the total capital ratio (CET1, AT1 and Tier 2) is 20.11%. Dec: www.bankingsupervision.europa.eu/activities/srep and www.bankingsupervision.europa.eu/framework/statistics.

solution in nature, whereby the MDA mechanism is linked to the maintenance of the Combined Buffers (in the form of CET1 capital), requires the bank to ensure, through profit retention, that CET1 capital is brought up to the required level.

Both from the perspective of the actual situation in the banking sector and from the perspective of the corrective mechanism chosen by the EU in the form of MDA triggers which, as explained above, far exceed the baseline percentages set out in Article 54 of the CRR, it can be concluded that the provisions governing the conversion mechanism for AT1 have, in fact, become a hollow phrase. The bottom line is that, unless banks voluntarily chose to include a significantly higher trigger mechanism in the terms and conditions of the AT1 capital instruments they issued (which, as far as we have been able to ascertain, is rare⁷⁴), the entire operation of the AT1 capital instrument is illusory.

The BCBS made a thorough analysis of the efficacy of the Basel III standards concerning AT1 instruments and concludes that examples of the loss-absorbing capacity of these instruments are scarce. Where write-off of the instruments occurred (i.e. in the EU Banco Popular and other jurisdictions outside the EU related to the failure of the bank to meet the Combined Buffer requirements) these mechanisms were not related to the loss-absorbing function going concern in accordance with the main objectives of the instruments, rather the write off scenario's happened in *gone concern* situations.⁷⁵ In some jurisdictions, this has even led to rules designed to phase out the entire AT1 regime.⁷⁶ In the EU, next to the above cited comments from Deutsche Bundesbank, in the December 2025 Simplification Report, the ECB laid out proposals to improve the going-concern loss-absorbing capacity.⁷⁷ There is also a substantial scholarly debate on the subject matter.⁷⁸

6.3 *Proposals to make the CRR AT1 rules more effective*

There are several approaches that could be taken to resolve the issues surrounding the AT1 capital instrument. Firstly, one might consider abolishing the AT1 instrument entirely and phasing out existing issues of these instruments. Secondly, one might consider replacing the fixed-income instrument, as is common in the EU, with an equity instrument modelled on preference shares, as permitted in the United

⁷⁴ Although no exact data are available, it has been noted that some issuers chose a 7% trigger instead of the 5.125% trigger.

⁷⁵ See: BCBS, *Evaluation of the impact and efficacy of the Basel III reforms*, December 2022, paragraph 6.3 Assessment of the efficiency of AT1 instruments, points 124-135.

⁷⁶ In Australia it has been decided to remove Additional Tier 1 capital from the prudential framework. See: Australian Prudential Regulation Authority publication of 4 December 2025, *Finalising the removal of Additional Tier 1 capital*, accessible via www.apra.gov.au/news-and-publications/finalising-removal-additional-tier-1-capital. In line with this Bundesbank President Joachim Nagel made in the speech of 12 September 2025 for the 13th regulatory conference of Bundesbank recommendations to consider the removal of the AT1 capital instrument from the prudential regime. He argued: "In the case of additional tier 1 capital, in particular, there have been doubts for years as to whether it can actually absorb losses as intended in a going concern scenario. And the international experience of the past few years also shows that, in crises, additional tier 1 capital often only absorbs losses when the bank is already on the verge of failure. If banks were to consistently rely on common equity tier 1 capital instead, banks' loss-absorbing capacity on a going concern basis would be significantly strengthened. This is because common equity tier 1 capital covers losses without constraints and is not subject to repayment or conversion. In addition, this would make the capital regime much clearer and less complex.," accessible at www.bundesbank.de/en/press/speeches/banking-regulation-as-complex-as-necessary-as-simple-as-possible and www.bis.org/review/r250916a. See furthermore on this: Scope Ratings, Financial Institutions Research, 13 November 2025 European Bank Capital Quarterly, accessible at www.scooperatings.com.

⁷⁷ ECB December 2025 Report, paragraph *Minimum requirements composed of the highest possible quality of capital, ensuring sufficient loss-absorbing capacity*, p. 5. ING Think economic and financial analysis issued its analysis of these proposals on 4 February 2026, *AT1: Adapt or abolish?* authored by Suvi Platerink Kosonen, Head of Corporate Credit Research, arguing that the ECB proposals are not clearly making a choice between the 'dramatic' abolishing of the AT1 instruments or the adaptation of the rules to make the instruments more effective. We concur with these observations and read between the lines in the ECB recommendations set out in the ECB December 2025 Report no preference for the full replacement of AT1 instruments with CET1 capital instruments.

⁷⁸ There is a substantial scholarly debate on the subject matter. See: Eduardo D. Martino and Tom Vos, *Cocos in Europe: What is wrong – and how to fix it*, Amsterdam Law School Legal Studies Research Paper, No 2024-18, also published as working paper 2024 no. 169 in the EBI Working Paper Series, accessible via ssrn.com/abstract=4810761 and the sources cited therein.

States.⁷⁹ Thirdly, one could work towards resolving the issue of the flawed trigger mechanism. Let us examine these three options briefly.⁸⁰

Following Australia's example⁸¹, the *first option* of complete phasing out of the AT1 capital instrument – if we are to speak about simplification – would have enormous consequences for the structure of prudential rules. The impact in terms of simplification is not only to be found in the dismantling of a large body of legal provisions but also leads to a significant simplification of the capital stack. The assumption is that, by phasing out AT1 instruments, an equivalent volume of bank funding will be converted into CET1 capital. This solution was also put forward by Bundesbank President Joachim Nagel in his well-known speech of September 2025.⁸²

This solution would also put an end to the heated debates regarding the treatment of creditors within the creditor hierarchy; after all, financiers would henceforth provide CET1 capital, which is undisputedly available for loss absorption (both 'going concern' and 'gone concern'). The Banco Popular case has shown that the controversy surrounding AT1 instruments – even when clear statutory powers are exercised in resolution to write off the instruments under 'gone concern' scenarios – leads to an avalanche of legal proceedings. The legal uncertainty that this created (and which, by its very nature, still persists) stands in the way of the effective implementation of resolution measures; it carries the risk that the competent authorities will be forced to reconsider their strategies or to exercise greater restraint when exercising their (otherwise entirely clear) powers.

With an estimated volume of EUR 180 billion of currently outstanding AT1 instruments issued by (particularly the larger) EU banks⁸³, a retroactive measure to abolish the possibility to comprise AT1 instruments in the capital stacks does not seem to be a viable option. If this far-reaching option were to be adopted, it would amount to a phase-out over an extended period; this is the approach also being taken in Australia, where the phase-out will take place over a period of six years up to 2032.⁸⁴

The second option – introducing the possibility, instead of issuing fixed-rate debt instruments that qualify as AT1 capital, of allowing banks to issue non-cumulative preference shares that incorporate certain trigger mechanisms regarding the payment of preference dividends – would be consistent with the Basel III framework as regards the qualitative requirements for AT1 instruments.⁸⁵ It is an option that has been applied in the United States and which has interesting features, for the following reasons.

⁷⁹ See: Federal Regulations; Chapter II—Federal Reserve System; Subchapter A—Board of Governors of the Federal Reserve System — Title 12—Banks and Banking; 12 CFR Part 217 - Subpart C - Definition of Capital; 12 CFR § 217.20 - Capital components and eligibility criteria for regulatory capital instruments. The legal text is accessible via LII Legal Information Institute, Cornell Law School, www.law.cornell.edu/cfr/text/12/217.20. Typically, the relevant eligibility requirements are very much resembling the criteria as set out in Arts. 54 CRR, with the major difference is that the instruments concerned are clearly positioned as 'equity instruments' than as fixed income instruments. This is without prejudice to the absence of a complex 'conversion' mechanism related to the relevant capital instruments. The AT1 instruments are (simply) positioned to be less subordinated than CET1 instruments, but more subordinated than Tier 2 instruments in the creditors hierarchy.

⁸⁰ It should be noted that EBA considered this subject matter as well in the EBA June 2026 report, by exploring the various options, including the option to completely abolish the permissible use of AT1 instruments. The end conclusion of EBA is that there is no straightforward solution available for the observed constraints on the use of AT1 instruments by EU institutions and EBA refrains from proposing any changes in this respect. EBA considers: "All in all, the EBA observes that there are no straightforward solutions to changing the role of AT1 instruments considering the potential for high and skewed impacts that could distort well established EU AT1 markets. Regarding the design of AT1 instruments, it may be considered further how to facilitate their use, subject to any international development, with initial reflections pointing to various trade-offs." See point 82 EBA June 2026 Report.

⁸¹ *Ibid.*, n [76].

⁸² *Ibid.*, n [76].

⁸³ See the analysis of ING Think economic and financial analysis referred to in n [72] which extracted the numbers from the EBA Risk Assessment Report - June 2025, accessible via www.eba.europa.eu/publications-and-media/publications/risk-assessment-report-june-2025.

⁸⁴ *Ibid.*, n [76].

⁸⁵ See the criteria set out in paragraphs 54 *et seq.* of 2010 Basel III (p. 15 and further), which are drafted in a neutral way, permitting both fixed income instruments and equity type instruments to align with the AT1 eligibility.

Assuming, in a theoretical scenario, that EU banks were to issue such AT1 instruments, it is highly likely that, under the applicable company law of most member states of the EU ('Member States'), such a capital instrument would be treated in the same way as CET1 instruments in terms of the creditor hierarchy. The result is that, in any event, there would be less debate regarding the consequences in the event of a need to write off the principal in the event the PONV has been reached. It also leads to greater clarity regarding the entirely subordinated position of the financiers in both going-concern and gone-concern scenarios.

A trigger mechanism leading to the suspension or even complete forfeiture of the right to receive dividend payments will also have a significant impact on banks' ability, on a going-concern basis (and assuming sufficient profitability), to adopt a profit retention policy, and to add the relevant profits to the bank's reserves within the framework of regulatory capital requirements.

As far as we have been able to ascertain, this option has not yet been discussed in detail in the EU policy recommendations on this subject, nor in the academic literature. It would be worthwhile to take a broader look at the pros and cons of this alternative in this regard.

Finally, the *third option* – adjusting the trigger mechanism – appears to enjoy the most support amongst European authorities, in the market and in the scholarly debate. The policy debate has not yet provided much clarity on the precise details of the changes to the trigger. Martino and Vos⁸⁶ have produced an impressive analysis of the various perspectives on this issue, devoting considerable attention to the question of early warning indicators signalling the need for intervention, which would cause the triggers of AT1 instruments to become effective. Their solution – to establish a 'smart trigger mechanism', which amounts to a mix of accounting triggers (i.e. the current regime under Article 54 of the CRR) and discretionary triggers whereby the competent authority would have powers of intervention – is a tempting concept that merits further study. Whilst not wishing to detract from the valuable analyses they have provided, we must, however, recognise that the mixed-trigger regime does lead to further complexity regarding the stacking order and is therefore at odds with the aim of simplification. It is this realisation which, in my view, is also insufficiently acknowledged in the recommendations of (among others) the ECB, which also appears to have expressed a preference for this solution.

A further aspect which, in our view, has not been adequately addressed is the implications of the MDA regime under Article 141 of CRD4, whereby the suspension of coupon payments in connection with capital conservation measures also plays a significant role in the functioning of the AT1 instrument. That said, a way forward should be to focus in particular on the possibilities of using AT1 instruments for dividend withholding strategies, which provides a tangible going-concern solution. Furthermore, we should not tamper with the principle that, upon reaching a 'failing or likely to fail' ('FOLF') situation, pursuant to the application of the rules in Articles 59 *et seq.* BRRD, the resolution authorities have an unquestionable power to write off AT1 instruments in full in order to address the loss absorption necessary to pre-empt the resolution tools. Perhaps the necessity, all things considered, of maintaining a 'going concern' conversion mechanism could be critically re-examined. This observation therefore leans towards a preference for a solution along the lines set out in Option 2, by introducing in the EU the possibility of issuing non-cumulative preference shares eligible to qualify as AT1 instrument. This would level the playing field with other jurisdictions recognising this type of capital instrument as AT1 regulatory capital as well.

⁸⁶ *Ibid.* n [77].

7. Combined Buffers

7.1 Introduction

Since the GFC, banks' regulatory capital levels have more than doubled on a global scale, and not just in the EU. This sharp increase is (thusfar) not so much attributable to an increase in capital requirements (in other words, an absolute rise in TREA⁸⁷ levels – to use a European term – proportional to the rise in capital levels), but rather to the introduction of the Basel III standards for the additional capital buffers that banks are now required to hold.⁸⁸ The effect, in percentage terms, of a fully activated set of buffers under the Basel III rules – assuming we are dealing with a globally systemically important bank⁸⁹ (and assuming it is a Bucket 4 bank) – is approximately 7.5 per cent, comprising the sum of the systemically important institution buffer of 2.5 per cent, the capital conservation buffer ('CCB') of 2.5 per cent and a (fully loaded) countercyclical capital buffer ('CCyB') of 2.5 per cent. This must then be set against the 'standard' risk-based capital requirements of the Pillar 1 framework, which amount to at least 8 per cent of the TREA.

On top of this – and this, too, is a global phenomenon – Pillar 2 capital must be added. As mentioned above, this averages 2.31 per cent in the Eurozone; in Scandinavia, the Pillar 2 surcharge can rise to 3.14 per cent; and in the United Kingdom, it can even reach 4.8 per cent. We have been unable to find reliable figures for the United States, but it is clear that in that jurisdiction, too, the Pillar 2 framework leads to additional capital requirements.

When it comes to buffers for systemically important banks, a distinction is also made between globally systemically important banks (referred to in European jargon as 'Globally Systemically Important Institutions', or 'GSII's') and domestic or regionally systemically important banks (referred to in European jargon as 'Other Systemically Important Institutions', or 'O-SII's'). Additional capital requirements also apply to O-SII's⁹⁰, although these do not stem from the core standards of Basel III (which, incidentally, is also not the case for G-SII buffers), and the EU rules for O-SII's therefore align with what has been agreed at a global level.

⁸⁷ 'TREA' is the EU jargon for the total risk exposure amount which comprises the risk weighted assets ('RWA') following the measurement of the credit risk, and the exposure amounts in relation to market risk and operational risk which rather assume the establishment of an amount of loss estimated using the different methods. For market risk and operational risk, it is therefore less correct to speak about 'risk weighted assets' as the outcome of the loss estimation. The TREA is being calculated following the rules of Article 92(3) up to (6) CRR, which have been recently and fundamentally changed to introduce the framework of the output floor. These amendments occurred at the occasion of adoption of Regulation (EU) 2024/1623 of 31 May 2024, *OJEU* 2024/1623 ('CRR3').

⁸⁸ Of course, in this discussion we do not overlook the fact that, as a result of the regulatory changes introduced to implement the 2017 Basel III Reform standards (BSBS, *Basel III: Finalising post-crisis reforms*, December 2017 accessible via www.bis.org) – as occurred in the EU with the introduction of the 2011 Banking Package (including the rules CRR3), there has indeed been an increase in capital requirements, at least for those banks that use internal models to calculate their RWAs or risk positions, as a result of the output floor rules set out in Article 92(3) to (6) of the CRR. See the EBA's comprehensive studies in this area, including the most recent study, *Basel III Monitoring Exercise Results Based on Data as of 31 December 2023* of 7 October 2024 (EBA/REP/2024/22). We would, however, like to emphasise that these consequences of increased capital requirements are, by their very nature, likely to have global implications and do not exclusively impact EU banks (albeit with varying stages of implementation).

⁸⁹ On the basis of the indicator-based measurement approach for assessing the systemic importance of global systemically important banks (G-SIBs) developed by the BCBS as commissioned by the Financial Stability Board in 2009 and where the current methodology framework is laid out in *SCO, Scope and Definitions, SCO40 Globally systemically important banks*, accessible via www.bis.org/basel_framework/chapter/SCO/40, G-SIBs are subdivided in five buckets, where additional capital levels for a Bucket 1 bank is 1% and for a Bucket 5 bank 3.5%. There are no Bucket 5 banks identified in the world, there is in 2025 one Bucket 4 bank with an additional capital requirement of 2.5% (a US bank), there are no EU banks in Bucket 3, two Bucket 2 banks are established in the EU, the other EU banks being identified as G-SIB are Bucket 1 banks with an additional capital requirement of 1%. See the 2025 List of Global Systemically Important Banks (G-SIBs) published by the Financial Stability Board in November 2025, accessible via www.fsb.org.

⁹⁰ The current methodology framework is laid out in *SCO, Scope and Definitions, SCO50 Domestic systemically important banks*, accessible via www.bis.org/basel_framework/chapter/SCO/50.

There is one additional buffer in the EU that is not based on BCBS or Financial Stability Board ('FSB') standards, being the Systemic Risk Buffer ('SRB') as set out in Article 133 of CRD4. The SRB buffer was intended as an additional measure that could be applied to mitigate systemic risks on a sectoral basis, and the assumption was that, should authorities decide to apply it, it would apply to the entire local banking sector or to a sub-sector (for example, banks engaged in real estate financing). The legal mandate in Article 133 CRD4 stipulates that this buffer shall not exceed 3 per cent of TREA⁹¹, unless Member State authorities follow a specific (rigorous) procedure whereby this buffer may be increased to 5 per cent. The procedure in question requires, amongst other things, obtaining an opinion from the European Systemic Risk Board ('ESRB') and a decision by the Commission to apply a buffer level exceeding 3 per cent.

The CCB, CCyB, G-SII and O-SII are all based on globally agreed standards and applied on a global scale. The SRB is a specific EU buffer, not based on globally agreed standards. All these additional buffers together to be referred to as the 'Combined Buffers'.

In this paragraph, we devote considerable attention to the subject of Combined Buffers, as it is in this area that academic studies and the views of policymakers and EU institutions appear to offer the greatest scope for simplifying the regulatory framework and adjusting the capital stacking order to introduce changes. For this reason, the subject deserves the detailed attention we shall give it in this paragraph.

7.2 *Microprudential and Macprudential buffers*

In the aftermath of the GFC, it became evident that conventional prudential supervisory measures, which were centred on the evaluation of individual institutions' soundness and resilience (referred to as the 'microprudential perspective'), did not adequately consider the interconnectedness of banks. This oversight led to the recognition that financial institutions, due to their connectedness, possessed the capacity to initiate cascading effects that could compromise the stability of the financial system as a whole. The inherent vulnerability of financial institutions is such that the failure of a bank can affect the condition of one or more healthy, well-capitalised banks and this potentially can precipitate a systemic crisis within the banking sector. Furthermore, it has been established (in addition, it should be noted, to the lessons learned from the GFC) that macroeconomic developments have the capacity, by their very nature, to affect the entire financial sector, or a sub-sector thereof, depending on their relevance to the business models of the banking institutions concerned (*both of these distinct aspects* are referred to as the 'macroprudential perspective').⁹²

This is not to say that there was a lack of theoretical development in this area prior to 2007/2008. On the contrary, for example, during the drafting of the Basel II standards in 2004, leading academics argued that the microprudential framework should be supplemented with rules that would go beyond the core function of capital requirements, in particular to help banks anticipate macroeconomic cyclical developments (in line with 'leaning against the wind' macro-economic theories).⁹³ Although these

⁹¹ At the occasion of amendment of CRD4 by Directive 2024/1619 of 31 May 2024 (*OJEU* 2024/1619, ('CRD6')), the calculation method for the SRB has been supplemented with the potential of imposition of additional requirements for a sub-set of exposures in addition to the full TREA, see the amended language in Art.133(1) CRD4.

⁹² Significant groundwork has been carried out in this area by prominent academics, with particular reference here to Claudio Borio, *The Financial Turmoil of 2007-? A preliminary assessment and some policy considerations*, BIS Working Papers, No 251, March 2008 (one should particularly look at the publication date of this paper, considerably before the collapse of Lehmann Brothers in September 2008, *comment author*); Markus Brunnermeier, Andrew Crockett, Charles Goodhart, Martin Hellwig, Avinash D. Persaud and Hyun Shin, *The Fundamental Principles of Financial Regulation*, Geneva Report on the World Economy 11, ICMB International Centre for Monetary and Banking Studies, 6 January 2009, published on 2 July 2009 and available at cepr.org/publications/books-and-reports and the important study of Viral V. Archaya, *A Theory of Systemic Risk and Design of Prudential Bank Regulation*, Journal of Financial Stability, September 2009, Volume 5, Issue 3.

⁹³ Here we particularly refer to: Claudio Borio, Craig Furfine and Philip Lowe, *Procyclicality of the financial system and financial stability: issues and policy options* and reports from central banks, a.o. Eddie Yue, *Marrying the micro- and macro-prudential*

proposals did not result in specific standards within the Basel II accord, the relevant theoretical framework provided a useful basis for the BCBS in defining the rules governing the Combined Buffers introduced under Basel III.

Based solely on these theoretical foundations, and our interpretation of them, we have drawn up a classification of the various EU Combined Buffers in the two segments in accordance with their characteristics, as set out in the following overview:

Microprudential	Macroprudential
Capital Conservation Buffer (CCB)	Countercyclical Capital Buffer (CCyB)
G-SII buffer	Systemic Risk Buffer (SRB)
O-SII buffer	

It is necessary to consider the original intentions of the standard-setters (the BCBS with regard to the CCB and the CCyB and, through the work of the FSB, with regard to the G-SII and O-SII), as well as those of the EU legislator with regard to the SRB, in relation to the rationale, functions and characteristics of these Combined Buffers. The objective of this analysis is to develop an assessment framework for the further consideration of the various proposals put forward in the literature and by policymakers regarding the future of the various EU Combined Buffers. This is partly in the light of the simplification recommendations, as set out, among others in the EBA June 2026 Report.

7.3 Rationale, function and characteristics of the CCB

The CCB is intended to stimulate banks to hold capital above the minimum requirements of Pillar 1 outside periods of stress. The CCB is, as the expression clearly points out, a buffer to be built up through the retention of profits, thus ‘conserving’ the capital of the bank and avoiding distributions of profits to shareholders and other entitled beneficiaries. The CCB requirements are designed to oblige the bank’s management, until the buffer has been built up to the targeted statutory level of 2.5 per cent, to give priority to the CCB reserve when making decisions on dividend payments. The CCB is intended to ‘save in good times to prepare for the bad times’. The BCBS observed in Basel III the following purpose of the CCB:

“The framework reduces the discretion of banks which have depleted their capital buffers to further reduce them through generous distributions of earnings. In doing so, the framework will strengthen their ability to withstand adverse environments. Implementation of the framework through internationally agreed capital conservation rules will help increase sector resilience both going into a downturn, and provide the mechanism for rebuilding capital during the early stages of economic recovery. Retaining a greater proportion of earnings during a downturn will help ensure that capital remains available to support the ongoing business operations of banks through the period of stress. In this way the framework should help reduce procyclicality.”⁹⁴

Banks are then restricted to make distributions until the required level is reached. However, banks are able to conduct normal business operations when they experience losses when “the capital levels fall

dimensions of financial stability - the Hong Kong experience; and Andrew G Haldane, Glenn Hoggarth and Victoria Saporta, *Assessing financial system stability, efficiency and structure at the Bank of England*; some Chapters in: *Marrying the macro- and microprudential dimensions of financial stability*, BIS Working Papers No 1, accessible at www.bis.org. Furthermore: Claudio Borio, *Towards a macroprudential framework for financial supervision and regulation?* BIS Working Papers, No 128, February 2003 accessible via www.bis.org and Charles A.E. Goodhart, Pojanart Sunirand, and Dimitrios P. Tsomocos, *A risk assessment model for banks*, *Annals of Finance* 1, 197–224 (2005).
2010 Basel III, para. 128 on p. 56.

into the conservation range”. In other words, the CCB is intended to absorb losses in order to avoid that Pillar 1 capital is required to be used for loss absorption. The BCBS furthermore notes:

“The distribution constraints imposed on banks when their capital levels fall into the range increase as the banks’ capital levels approach the minimum requirements. By design, the constraints imposed on banks with capital levels at the top of the range would be minimal. This reflects an expectation that banks’ capital levels will from time to time fall into this range. The Basel Committee does not wish to impose constraints for entering the range that would be so restrictive as to result in the range being viewed as establishing a new minimum capital requirement.”⁹⁵

As demonstrated above, the original design of the BCBS standards stipulates that the CCB functions as a ‘dynamic’ buffer, employed on a going-concern basis to absorb losses. In instances where such measures are deemed necessary, this may result in restrictions being imposed on the payment of dividends until the required level of the buffer has been restored. It is evident that the CCB structured in accordance with the Basel III standards, serves as a microprudential buffer.

The CCB shall be fully maintained by means of CET1 capital in accordance with Article 129(1) CRD4. In accordance with the provision of Article 128, second paragraph CRD4, CET1 capital held to meet the Pillar 1 requirements of Article 92 CRR, the P2R (additional capital) requirements of Article 104a CRD4 or the guidance capital of Article 104b(3) CRD4 shall not be used to meet the ‘combined buffer requirements’ as defined in point (6) of Article 128 CRD4.

7.4 Rationale, function and characteristics of the CCyB

In the original 2010 Basel III standards, the CCyB buffer requirements were explicitly positioned as a macroprudential measure, under which banks are required to take account of the consequences of a (macro-)economic downturn following a period of (excessive) credit growth. The underlying assumption is that credit growth has a reinforcing effect on the scale of losses once an economic downturn sets in. Owing to the relationship between credit growth and subsequent losses, banks are required to hold additional capital buffers for this purpose. The BCBS explained its function as follows:

“The countercyclical buffer aims to ensure that banking sector capital requirements take account of the macro-financial environment in which banks operate. It will be deployed by national jurisdictions when excess aggregate credit growth is judged to be associated with a build-up of system-wide risk, to ensure the banking system has a buffer of capital to protect it against future potential losses. This focus on excess aggregate credit growth means that jurisdictions are likely to need to deploy the buffer only infrequently. The buffer for internationally active banks will be a weighted average of the buffers deployed across all the jurisdictions to which they have credit exposures. This means that they are likely to find themselves subject to a small buffer on a more frequent basis, as credit cycles are not always highly correlated across jurisdictions.”

Just like the CCB, the CCyB is dynamic rather than static; the buffer fluctuates in line with macroeconomic cycles. Setting the level of the buffer (though always capped at 2.5 per cent of the relative TREA components for which estimates of the macroeconomic impact are made, but therefore, in theory, 2.5 per cent of the total volume of RWAs for credit risk) is based on assessments by the competent authorities of the extent of credit growth and other indicators pointing to the build-up of a system-wide risk.

Banks subject to these requirements must identify the jurisdictions in which they hold the relevant exposures for which CCyB measures have been implemented, and must determine a weighted average

⁹⁵ 2010 Basel III, para. 130 on p. 56.

for all relevant jurisdictions where the CCyB applies. The CCyB is an extension of the CCB, and the same rules therefore apply to this buffer with regard to restrictions on profit distributions and variable remuneration.⁹⁶

However, these rules do assume that it must be possible to draw down the buffer capital to help absorb losses incurred on the relevant loan portfolios before the bank is required to draw down its Pillar 1 capital for that purpose. To that extent, there must be a conditional release of the buffer amounts, but it is also targeted at the relevant loan portfolios to which the additional buffer requirements apply. The 2010 Basel III standards provide little guidance on whether a CCyB buffer can also be used to absorb losses incurred in other parts of the loan portfolio that have not been earmarked for the purposes of determining the CCyB rate. The CCyB is a macroprudential measure.

The CCyB shall be fully maintained by means of CET1 capital in accordance with Article 130(1) CRD4. In accordance with the provision of Article 128, second paragraph CRD4, CET1 capital held to meet the Pillar 1 requirements of Article 92 CRR, the P2R (additional capital) requirements of Article 104a CRD4 or the guidance capital of Article 104b(3) CRD4 shall not be used to meet the ‘combined buffer requirements’ as defined in point (6) of Article 128 CRD4.

7.5 *Rationale, function and characteristics of the G-SII and O-SII buffers*

G-SII and O-SII buffers are, by their very nature, microprudential measures and are tailored to the individual institutions subject to the assessment framework. The buffers for systemically important banks are intended to impose additional loss-absorbing capacity on the institutions concerned. The measures are designed to address the heightened risk posed by systemically important banks. The BCBS explains this as follows:

“The negative externalities associated with institutions that are perceived as not being allowed to fail due to their size, interconnectedness, complexity, lack of substitutability or global scope are well recognised. In maximising their private benefits, individual financial institutions may rationally choose outcomes that, on a system-wide level, are suboptimal because they do not take into account these externalities. Moreover, the moral hazard costs associated with implicit guarantees derived from the perceived expectation of government support may amplify risk-taking, reduce market discipline and create competitive distortions, and further increase the probability of distress in the future. As a result, the costs associated with moral hazard add to any direct costs of support that may be borne by taxpayers.”⁹⁷

In addition to the need to impose additional capital requirements in the context of loss absorption, there is also a second rationale behind the buffers, namely, to provide an incentive to prevent the bank from growing in size or becoming more complex.⁹⁸ These incentives are distributed through the so-called ‘bucket system’, whereby banks may be placed in a higher or lower bucket depending on their growth (and thus size), and on the development of other scores relating to their interconnectedness, cross-border

⁹⁶ 2010 Basel III, para 138 on p. 57.

⁹⁷ BCBS, *SCO40 Globally systemically important banks*, para. 40.1 *ibid.* n [83].

⁹⁸ BCBS notes the following: “The number of G-SIBs, and their bucket allocations, will evolve over time as banks change their behaviour in response to the incentives of the G-SIB framework as well as other aspects of Basel III and country-specific regulations. Moreover, if a bank’s score increases such that it exceeds the top threshold of the fourth bucket, new buckets will be added to accommodate the bank. New buckets will be equal in size in terms of scores to each of the existing buckets, and will have incremental higher loss absorbency requirements, as set out in [...] and [...], to provide incentives for banks to avoid becoming more systemically important”, *SCO40 Globally systemically important banks*, para. 40.22 *ibid.* n [83].

activity, substitutability and complexity. The higher the ranking, the stricter the capital requirements, with ‘bucket rates’ ranging from 1 per cent for the lowest to 3.0 per cent for the highest.⁹⁹

The classification of G-SIIs into the various buckets and the associated ‘buffer rates’ is fully aligned within the EU with the methodology used by the BCBS¹⁰⁰, and the annual assessment of global systemically important banks carried out by the FSB is published in November of each year.¹⁰¹

As regards O-SIIs, their classification and the methodology are based on the EBA’s 2014 Guidelines.¹⁰² However, these guidelines do not provide detailed rules on the classification into ‘buckets’ or a sliding scale for the O-SII buffer rates. The competent authorities therefore have considerable discretion in this regard.

Over the years, it has become apparent that, as regards the absolute rates for the G-SII buffers, there is a certain, albeit modest, degree of fluctuation. There have been downward shifts in the bucket ranking, with the top-ranked institution, JP Morgan, consistently remaining subject to the highest rate. Upward shifts have mainly affected the Chinese banks. No such dynamics are observable for the O-SIIs; at least, the setting of rates appears to be much more subject to a discretionary assessment by the relevant competent authorities. There have also been shifts within the EU, but these were more closely linked to a reclassification of capital requirements based on the various Combined Buffers.

The G-SII and the O-SII buffers shall be fully maintained by means of CET1 capital in accordance with Article 131(4) and (5) CRD4. In accordance with the provision of Article 128, second paragraph CRD4, CET1 capital held to meet the Pillar 1 requirements of Article 92 CRR, the P2R (additional capital) requirements of Article 104a CRD4 or the guidance capital of Article 104b(3) CRD4 shall not be used to meet the ‘combined buffer requirements’ as defined in point (6) of Article 128 CRD4.

7.6 *Rationale, function and characteristics of the SRB*

The SRB buffer is a major exception to the international framework for Combined Buffers as described in the preceding paragraphs. It is an EU-specific measure that was introduced when the implementing legislation for Basel III was adopted in 2013. The precise background to this buffer (which was put forward by a number of Member States during the political negotiations on the CRR and CRD4) is perhaps best described by quoting the relevant recital in the CRD4 text of 2013:

*“Member States should be able to require certain institutions to hold, in addition to a capital conservation buffer and a countercyclical capital buffer, a systemic risk buffer in order to prevent and mitigate long-term non-cyclical systemic or macroprudential risks not covered by Regulation (EU) No 575/2013, where there is a risk of disruption in the financial system with the potential to have serious negative consequences for the financial system and the real economy in a specific Member State. The systemic risk buffer rate should apply to all institutions, or to one or more subsets of those institutions, where the institutions exhibit similar risk profiles in their business activities.”*¹⁰³

⁹⁹ See n [83] for more detail on this topic, including a brief assessment of the position of EU banks in the Bucket ranking. The implication of this is that only two EU G-SIIs have been placed in the second lowest Bucket 2, with the remaining EU G-SIIs in the lowest Bucket.

¹⁰⁰ Article 133(2) CRD4 contains an identical display of the criteria set out in the BCBS assessment methodology.

¹⁰¹ *Ibid.* n [83].

¹⁰² The core criteria are contained in Article 133(3) CRD4 and more or less based on the BCBS methodology for domestic systemically important banks (*ibid.* n [84]). See furthermore: the EBA Guidelines *On the criteria to determine the conditions of application of Article 131(3) of Directive 2013/36/EU (CRD) in relation to the assessment of other systemically important institutions (O-SIIs)* EBA/GL/2014/10 of 16 December 2014.

¹⁰³ Recital (85) to Directive 2013/36/EU (CRD4). See for one of the few authors giving some background to the introduction of this buffer: Tobias H. Tröger, *Capital Buffers for Systemically Important Banks and the Systemic Risk Buffer*, Chapter 14 in *Capital and Liquidity Requirements for European Banks*, ed. Bart P.M. Joosen, Marco Lamandini and Tobias H. Tröger, Oxford University

In the legislator's view, the SRB is, by its very nature, a complement to the CCB and CCyB, whereby the reference to 'long-term non-cyclical' appears to refer to the counterpart of the inherently 'cyclical' CCyB buffer. The legislator appears to be assuming here that the SRB is not designed to 'lean against the headwinds' of short-term cyclical developments in the real economy. The reference to "macroprudential risks not covered by [CRR]" is somewhat more difficult to interpret, as the CRR, by its very nature, has no macroprudential dimensions, only microprudential ones.

The use of the term 'long term' implies that the legislator regards the SRB buffer, by definition, as a non-dynamic buffer, but that this buffer would be of a much more permanent nature, which also says something about its releasability or its use for loss absorption. Nor is it clearly defined to what extent the buffer is intended to strengthen the company's loss-absorbing capacity. The impact of the materialisation of the risks set out in the recital – namely, consequences for financial stability and the real economy – is self-evident, and there is little to analyse in terms of the necessity or the intended effect of the SRB buffer as such.

It should, however, be emphasised that the SRB buffer must be imposed on the entire banking sector in the jurisdiction concerned, or on a sub-sector comprising institutions with a comparable business model. In the latter case, this could include, for example, all banks within the jurisdiction that are involved in real estate finance. This means that the sector-wide application disregards the classification of banks according to their size or other considerations aimed at an individualised capital requirement, as is the case for banks subject to the G-SII or O-SII buffers. This is the reason we qualified this SRB buffer as belonging to the macro-prudential buffers category.

The SRB shall be fully maintained by means of CET1 capital in accordance with Article 133(1) CRD4. In accordance with the provision of Article 128, second paragraph CRD4, CET1 capital held to meet the Pillar 1 requirements of Article 92 CRR, the P2R (additional capital) requirements of Article 104a CRD4 or the guidance capital of Article 104b(3) CRD4 shall not be used to meet the 'combined buffer requirements' as defined in point (6) of Article 128 CRD4.

7.7 *Scattered application of the Combined Buffer rules*

Following a concise overview of the theoretical frameworks underpinning the various Combined Buffers, the subsequent discussion will focus on the practical application of these legal frameworks within the EU. In this regard, it is important to acknowledge the diverse influences that shape the EU's approach to the implementation of the rules on combined buffers. This leads to a wide variation in the application of these rules across Member States, including instances where significant banking institutions are subject to direct supervision by the ECB.¹⁰⁴ This is linked to the fact that policy regarding the application of the Combined Buffers has remained the prerogative of the national authorities designated for this purpose under the mandate provisions of CRD4. In most cases, these are the competent authorities of the Member States; in a few cases, a separate authority has been designated to take decisions on the application of one or more buffers and to set the buffer rates.

Consequently, when it comes to the application of the Combined Buffers, there is no uniform pattern, nor is there consistent application of the rules. The patchwork that has thus emerged – particularly with regard to the CCyB, the SRB and the application of the buffer rates for the O-SII buffer – is, in our

Press (2022), paragraph 14.4.1 (Historical Development). His analysis boils down to the observation that the SRB regime was included in CRD4 to allow Member States to introduce capital requirements above the Basel III requirements, in line with the Admati-Hellwig doctrine, discussed in Anat R. Admati and Martin Hellwig, *The Bankers' New Clothes*, Princeton University Press, (2013).

¹⁰⁴ See in this connection Article 5(1) Regulation (EU) No 1024/2013, *OJEU* 2013, L. 287 ('SSM Regulation').

view, one of the reasons why the prudential rules are perceived as ‘complex’. By their very nature, these different methods of application and the varying levels of the various buffers do not undermine the theoretical stacking order model; however, there is a degree of complexity within the layer of the stacking order represented by the Combined Buffers.¹⁰⁵

It is acknowledged that it is not feasible to deliver a comprehensive overview. However, the following observations can be made with regard to the application of the rules in the EU, albeit in a somewhat fragmented manner:

- The O-SII buffer rates based on Article 131(3) CRD4 are set in a variety of ways across the EU. There are documented instances where these rates reach the maximum limit of 3 per cent (Article 131(5) CRD4) for smaller banks, in contrast to banks established in other Member States that are subject to a significantly lower O-SII buffer rate.¹⁰⁶
- During the course of the COVID 19 pandemic, it became apparent that the application of the CCyB buffer based on Article 130 CRD4 had varied considerably, both in terms of buffer rates and the activation of the CCyB. The observations of the European institutions (in particular ECB and the ESRB) noted that there was less scope for banks in Member States where the CCyB had not been activated, or where a lower rate applied, to release the buffer to absorb expected losses. This resulted into recommendations to shift practices towards a ‘positive neutral’ CCyB.¹⁰⁷
- A wide variation in practice regarding the SRB buffers based on Article 133 CRD4 can be observed across the different Member States. In a number of Member States, this buffer was applied across (sub-)sectors in accordance with the principles of the legislative framework. In other Member States, however, the SRB was applied to a single bank in that Member State (in order to compensate for the G-SII buffer rate for the relevant global systemically important bank, which was deemed insufficient).¹⁰⁸
- It is evident that a uniform approach has been adopted in relation to the CCB based on Article 129 CRD4 and G-SII buffers based on Article 131(1) CRD4. This is primarily due to the absence of any allowance for variation in these contexts. The CCB buffer rate is set at a consistent 2.5 per cent of TREA, and all EU banks are subject to the same stipulated requirement. The uniform approach as to the G-SII is due to the fact that such matters are regulated at a supranational level, with the buffer rates being established within the methodology administered by the FSB and the BCBS.

¹⁰⁵ See: Christos V. Gortsos, *The Response of the European Central Bank to the Current Pandemic Crisis: Monetary Policy and Prudential Banking Supervision Decisions*, European Company and Financial Law Review, 2020, pp. 231-256 and for an attempt to establish an overview of all the different ways of application of a number of the Combined Buffers, Bart P.M. Joosen, *Balancing macro- and microprudential powers in the SSM during the COVID-19 crisis*, Chapter 10 in *Pandemic Crisis and Financial Stability*, Ed. Christos V. Gortsos and Wolf-Georg Ringe, European Banking Institute, (2020) accessible via www.ebi-europa.eu.

¹⁰⁶ See: ESRB overview of O-SII setting in the EU: www.esrb.europa.eu/national_policy/systemically/html/index.en.html.

¹⁰⁷ See among other publications in this field: Markus Behn, Ana Pereira, Mara Pirovano and Alessandra Testa, *A positive neutral rate for the countercyclical capital buffer – state of play in the banking union*, ECB Macroprudential Bulletin 21, April 2023, accessible via www.ecb.europa.eu/press/financial-stability-publications and Piergiorgio Alessandri, Pierluigi Bologna and Maddalena Galardo, *Financial crises, macroprudential policy and the reliability of credit-to-GDP gaps*, Working Paper Series, No 114, February 2021 and ECB and ESRB, *Using the countercyclical capital buffer to build resilience early in the cycle Joint ECB/ESRB report on the use of the positive neutral CCyB in the EEA*, January 2025, both publications accessible via www.esrb.europa.eu. Through these channels both the ECB and the ESRB promoted the setting of a “positive neutral rate” for the CCyB, meaning that the rate would always be a positive number (therefore not to be set at 0%) and that the adoption of a policy to set the rate should be based on ‘neutral’ considerations, therefore not related to actual building up of systemic risk due to credit growth in the Member State. See: ESRB overview of CCyB setting in the EU: www.esrb.europa.eu/national_policy/ccb/html/index.en.html, where most of the Member States yielded to the recommended approach and started to set positive neutral CCyB rates in their jurisdictions in a turn around of existing practices before the launch of this newly recommended approach. These positive neutral rates range from 1% to 2.25%.

¹⁰⁸ See: ESRB overview of SRB setting in the EU: www.esrb.europa.eu/national_policy/systemic/html/index.en.html.

The issue of releasability of the CCyB spurred a further discussion as to the need to establish a more balanced and uniform practice throughout the EU. This discussion was particularly informed in the EU by research undertaken by the ESRB and the ECB. These developments resulted into a broad adoption of policies by the competent authorities in Member States of the so-called ‘positive neutral rate’ for the CCyB, also by jurisdictions that previously were not activating the CCyB buffer for exposures in their jurisdictions.¹⁰⁹

7.8 Various proposals to better alignment

As mentioned a few times previously, in the recent debate on the simplification of prudential requirements, a series of proposals have been put forward, both from the academic community and from EU institutions and authorities, which have reached its provisional end point in the EBA’s proposals in the EBA June 2026 Report. It is now up to the legislator to act, and in its July 2026 Communication, the Commission announced that it would put forward concrete proposals in this area. In this paragraph, we examine the proposals from the ECB’s December 2025 Report. Finally, we will examine the specific proposals set out in the EBA’s June 2026 Report. We will also draw comparisons between them, as we shall see that views on how simplification should be achieved vary from one proposal to another.

In the ECB December 2025 Report there are concrete proposals in respect of the potential merger of elements in the Combined Buffers. In recommendation #1 the Governing Counsel endorses the view of the ECB HLTF to merge the CCB with (the highest of the) G-SII or O-SII buffers to constitute a non-releasable buffer, and to create a releasable merged buffer consisting of the combination of the CCyB and the SRB¹¹⁰. PG2 capital would be kept separate in this proposal to be held on top of the releasable buffers.¹¹¹ If the ECB proposals are interpreted correctly, this would result in a reshaping of the capital stack as displayed in the following diagram prepared by the author:

Stack type	Capital components to be used	Basis of calculation
P2G	CET1	Guidance % set by competent authority x TREA
Releasable	CET1 Article 130 CRD4 + CET1 Article 133 CRD4	CCyB Rate and SRB Rate %
Non-releasable	CET1 Article 129 CRD 4 + CET1 Article 131(4) or (5) CRD4	SII Rate % and 2.5% CCB Rate over TREA
P2R	Article 104a(4) CRD4 <25% Tier 2	$TREA = \max\{U - TREA; x * S - TREA\}$ ¹¹²
	Article 104a(4) CRD4 >75% CET1 + AT1	
Pillar 1	Article 92(c) 8% CET1 + AT1 + Tier 2	$TREA = \max\{U - TREA; x * S - TREA\}$.
	Article 92(1)(b) 6% CET1 and AT1	
	Article 92(1)(a) CRR 4.5% CET1	

The grey highlighted row marked out with the red dotted lines concerns the part of the Combined Buffers where the MDA rules of Articles 141 *et seq.* CRD4 would apply, the assumption is that for the non-releasable buffers, a breach of the requirements would have the consequences of a bank no longer meeting the capital requirements, with the impact in respect of a ‘Failing or Likely to Fail’ (‘FOLF’) determination. The proposals in the ECB December 2025 Report boil down the microprudential buffers (CCB + G-SII and O-SII buffers) to become the non-releasable buffers, and therefore in its nature obtain the same status in the capital stack as Pillar 1 and P2R requirements. The releasable buffers are characterised as being the macro-prudential buffers and will be the sole buffers to be subject to the possibility to use them for loss absorption.

¹⁰⁹ See n [107] for further discussion of this point.

¹¹⁰ This proposal is consistent with the initial thoughts laid out in the September 2025 speech of Bundesbank President Joachim Nagel, *ibid.* n [73]. These viewpoints are then furthermore laid out in the BAFIN-Bundesbank April 2026, *ibid.* n [28], p. 4 introducing the concept of ‘non-releasable but usable buffer’ for the to be merged CCB and G-SII or O-SII buffers.

¹¹¹ ECB December 2025 Report, p. 4.

¹¹² This formula expresses the ‘output floor’ calculations of TREA, as introduced with CRR3 and set out in Art. 92(3) CRR.

We must point out that these recommendations from the ECB's December 2025 Report do indeed propose a significant departure from the original Basel II concepts, under which, as explained above, the CCB and CCyB buffers were specifically classified as 'releasable' buffers. By now removing the CCB buffer's 'releasable' status, a deviation in its nature will occur. Furthermore, the 'releasable' nature of the SRB buffer is at odds with the original intentions of the legislator, who, as explained above, envisaged a buffer that would need to be maintained more or less on a permanent basis.

The EBA has opted for a completely different approach, involving an analysis of the combination of CCB, PR2 and, possibly, P2G or certain elements thereof into a new tier in the stacking order, such that either a clear distinction would be made between 'minimum requirements' that closely align with the Pillar 1 minimums, or a tier would be positioned between the (other) Combined Buffer requirements and the Pillar 1 minimum requirements, where there would be less scope to apply the rules on releasability.

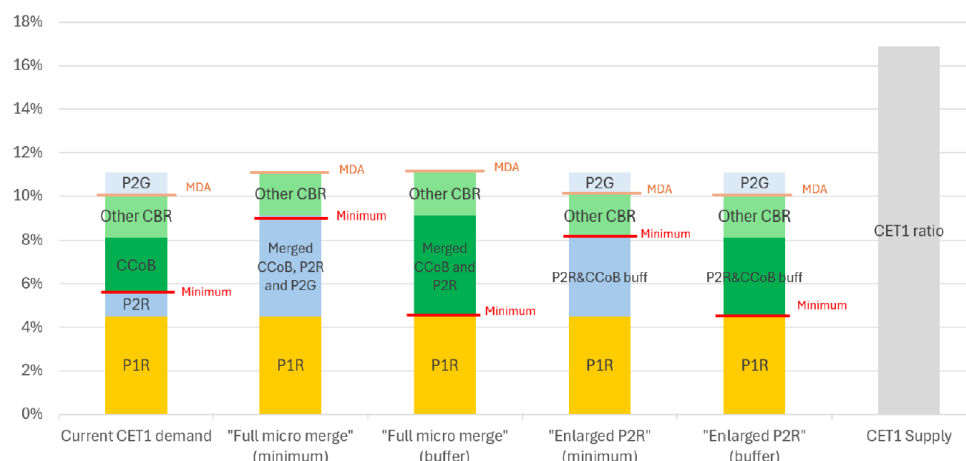
The EBA's analysis is complex and ultimately concludes that it would be better not to make any changes (other than the aforementioned adjustment to the rules regarding the Guidance requirements for LR capital). We nevertheless wish to open this analysis up for discussion, as we consider it a missed opportunity that the EBA has thrown in the towel in this regard. For this reason, it is necessary to briefly address here the various scenarios analysed by the EBA. We will then present some concluding observations, in which the various points are unravelled.

The four alternatives are briefly discussed here, and we then present the diagram from the EBA June 2026 Report:

Alternative stacking proposal	Essential features
Full micro merge (minimum)	This alternative assumes the complete merging of the P2R, CCB and P2G into a minimum tier, so that, in the stacking order, this tier aligns fully, as it were, with the Pillar 1 requirement (P1R). Above this minimum layer, a somewhat more flexible layer is then established comprising the other Combined Buffer Requirements, consisting of the macroprudential CCyB and SRM, and the microprudential G-SII or O-SII.
Full micro merge (buffer)	This alternative involves the same components but subsequently makes the layer part of the freer space, whereby, by its very nature, all components – P2R, P2G and all the various buffers – are placed in a stack that is fully subject to the MDA rules; by its very nature, the EBA thereby defines the entire stack in the order as 'releasable' or 'usable'.
Enlarged P2R (minimum)	This is a variant of the Full micro merge, with the difference that a different approach is taken for the P2G, which (as is currently the case) is placed above the MDA threshold.
Enlarged P2R (buffer)	This is yet another variation on the Enlarged P2R alternative, in which, once again, P2G is placed entirely above the stacking order, but a layer is then defined consisting of P2R and the CCB, which is positioned in a somewhat more flexible (releasable) zone.

EBA displays the various alternatives in a diagrammatic display of the actual averages of application of the requirements as follows:

Figure 11. Average CET1 stack in EU currently and impact of merged approaches



This overview is not particularly easy to read, as it is unclear to what extent the ‘CET1 Supply’ shown across the entire right-hand side of the column represents the average of actual CET1 capital for all EU banks. However, the reader should bear in mind that, in this overview, the EBA has focused exclusively on the CET1 components in the stacking order, omitting AT1 and Tier 2 capital components. As indicated in paragraph 5.5 above, we believe it would be better for the EU to reconsider the entire P2G scheme, as this would not only lead to a significant degree of simplification but also ensure greater alignment with the Basel II standards. Furthermore, this would mean that the task of capitalising the bank to account for any adverse outcomes of (external) stress tests would fall back on the ultimate responsibility of the management itself. Merging P2G and management buffers into a single, comprehensive management-discretionary layer would, in our view, do much better justice to the necessary division of responsibilities. It should also lead to the abolition of the anomalous provisions of Article 104a(1)(e) CRD4 whereby P2G becomes ‘mandatory’ if management has systematically refrained from establishing a P2G buffer – a somewhat bizarre provision, as we explained in section 5.5, which has found its way into our legislation.

In any case, it follows from this that we do not consider the proposed ‘full micro merge’ – whether as a minimum or as a buffer – to be a recommendable way of addressing the complexity. However, we do regard the *enlarged P2R (minimum) scenario* as an alternative; we would have preferred the EBA to have taken this further and recommended to the legislator that they proceed with it. Essentially, this involves a consistent integration of P2R with P1R, so that the key function of P2R – namely, addressing capital adequacy for risks not covered by P1R – is formalised. This clarifies that P2R effectively has the same status as P1R, as it is, after all, an extension of the minimum capital requirements. The inclusion of the CCB in the P2R ‘enlarged minimum stack’ has the disadvantage of deviating from the Basel III standards regarding full releasability, but it has the advantage of effectively providing a pure correction to the approach chosen in Basel III, which was designed to avoid recommending any adjustment to the ‘BIS Ratio’ of 8 per cent, whilst at the same time implementing a material extension of that BIS Ratio through a TREA-based buffer of 2.5 per cent. In our view, the BCBS might just as well have chosen to propose raising the CET1 ratio from 4.5% to 7% instead of introducing the CCB. The ‘enlarged P2R (minimum) scenario’ is also consistent with the ECB proposals contained in the ECB December 2025 Report.

7.9 Final observations

The path towards simplifying the Combined Buffer issue will involve a complex discussion aimed at striking the right balance between maintaining absolute capital levels whilst, at the same time, ensuring that Combined Buffers fulfil their actual function, which can be summarised as follows: the release of these buffers must adequately absorb any losses that may arise before the mandatory capital reserves are drawn upon. One of the solutions to promote this releasability and ensure that banks actually make use of it is to revise the MDA regime, for example by introducing a ‘proportional’ application of the MDA trigger – for instance that a decrease between 100 and 50 per cent of the CCyB does not lead to the automatic suspension of dividend payments or other consequences arising from Article 141 of CRD4.¹¹³

We do, however, consider it a missed opportunity that the EBA has not translated its ideas regarding the reorganisation of the Combined Buffers into a concrete proposal. In this regard, as explained above, we have specifically identified the Enlarged P2R (Minimum) alternative as a robust solution for organising capital stacks.

8. Concluding Remarks

Recent developments have demonstrated the resilience of EU banks in the face of macroeconomic exogenous shocks (notably the pandemic of 2020 and the energy crisis that ensued from the commencement of the Ukraine war) and financial market endogenous shocks (for example, the banking crisis in the US in March 2023 and the collapse of Credit Suisse). The EU should not relinquish its status as a provider of robust capital requirements¹¹⁴, thereby ensuring that the EU can continue to serve as a genuine safe harbour for the stability of the global financial sector, whatever developments may occur in other jurisdictions.¹¹⁵

The reader should not construe this as an endorsement of the view, which is currently being voiced with increasing frequency, that the EU has ‘gold-plated’ the Basel III rules; on the contrary, in this contribution we have sought to demonstrate that, in many respects, the EU initially faithfully transposed the Basel III standards into applicable rules for EU banks, and that, all things considered, the EU regime has not resulted in requirements that are significantly more onerous than the rules in other jurisdictions. However, it should be noted that the EU has deviated from the original rationale as set out in Basel III at a certain point. In many cases, this did not result in a tightening of the requirements as would have been expected under Basel III, but rather in an alternative application of prudential standards from that for which they were originally intended.

Nevertheless, it must be noted that there are instances of deviation from the original Basel III standards. The present study has focused on the P2G framework, which is one of the most striking examples of where the EU goes a fair way beyond what Basel III requires. The issue of releasability has been

¹¹³ See Joosen *ibid.* n [38] for reference of work of the author in which this proposal for amendment of Article 141 CRD4 has been laid out in an elaborate way.

¹¹⁴ This view is broadly shared by all relevant policymakers and authorities; see the joint opinion of the French, Spanish, German, and Italian supervisory authorities cited in n [2], the view of the ECB’s HLTf cited in n [29], as well as the widely held views in the EBA’s June 2026 Report. In the academic literature: among others, Canetta and Serafi, *ibid.*, n [28], and the EBI’s Simplification Report, *ibid.* n [2].

¹¹⁵ The trend toward deregulation in other jurisdictions is also facing strong critics. For de UK see f.i. Jonathan Watson, *Financial déjà vue*, 22 May 2023 and Alice Johnson, *UK deregulation is risk to financial stability and ‘really concerning’*, International Bar Association, 16 May 2025, accessible via www.ibanet.org. Nick Kotucha, *The UK government’s risky rollback of financial regulation threatens long-term growth*, 17 November 2025, The Conversation, accessible at www.theconversation.com and *Back to the Future: Labour and the Politics of Financial Deregulation*, The Political Quarterly, Vol. 97, No. 1, January/March 2026. For the United States, see the recent article by Jeremy C. Kress and Graham S. Steele, “Extra Legal Bank Capital Regulation,” (2026), University of Chicago Law Review Online (forthcoming), accessible via www.ssrn-7313941.pdf.

highlighted as well. Moreover, we discussed the purpose of the SRB, one of the Combined Buffers. It can be concluded that none of the amendments to the prudential rules recommended in scholarly work or by the EU policy makers or EU institutions, with the exception of the P2G Leverage, are intended to ‘reset’ EU legislative frameworks to the original Basel III rules.

In other words, as regards the simplification of the stacking order for the risk-based tiers, no far-reaching changes are proposed. There is no revision of the absolute levels; the proposals merely involve the reordering of a few stacks. We saw in paragraph 7 that this reorganisation may be open to question. As regards the stacking order column relating to the non-risk-based (leverage) requirements, there is, however, a proposal to remove one tier from it, namely the guidance tier of the leverage ratio requirements.

The question is whether there is sufficient momentum to consider yet another fundamental review of the prudential rules governing EU banks, without this being based on in-depth academic research into how the current system functions. After all, the world and the financial markets are currently highly unstable. Would a new process of revising the existing rules not contribute too much to uncertainty, ambiguity and a source of debates based on spurious arguments, when it might be wiser to maintain the current system for the time being and set aside time for an evidence-based programme of change?

Such a programme of change needs not be completed in the short term; rather, the EU legislator and the European supervisory authorities should allow ample time for this. Ideally, this programme of regulatory adjustments would be based on extensive consultation with international standard-setters such as the FSB and the BCBS, in order to ensure that any systemic adjustments are also based on the broadest possible consensus within the regulatory community, rather than on a series of unilateral measures taken by the EU.

This contribution has put forward a number of suggestions regarding the research approach to be adopted; in particular, these suggestions are based on the assumption that it would be better to base the EU bank capital adequacy system on the original dogmatic principles as developed by the international standard-setters, for example with regard to the function of Pillar 2 capital, the function of contingent convertible capital as truly loss-absorbing capital going concern, the function of the Combined Buffers and in connection therewith the function of capital releasability at times when a bank is in need to absorb losses on a going concern basis.

It is evident that none of the suggestions made for further consideration affect the fundamental concept of risk-based capital stacking order up to the level of the MDA threshold. However, it should be noted that the MDA mechanism itself may be subject to adjustment. Furthermore, it is particularly within the scope above the MDA threshold that it would be worthwhile to consider taking a more significant step towards revising the rules.



Address

European Banking Institute e.V.

TechQuartier (POLLUX)

Platz der Einheit 2

60327 Frankfurt am Main

Germany

For further information please visit our website www.ebi-europa.eu or contact us at info@ebi-europa.eu

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