

<b>Question ID</b>	2020_5146
<b>Status</b>	Final Q&A
<b>Legal act</b>	Regulation (EU) No 575/2013 as amended by Regulation (EU) 2019/876 (CRR2)
<b>Topic</b>	Own funds
<b>Article</b>	52, 63, 72b
<b>Paragraph</b>	52(1), 63, 72b(2)
<b>Subparagraph</b>	52(1)(r), 63(p), 72b(2)(f)
<b>COM Delegated or Implementing Acts/RTS/ITS/GLs/Recommendations</b>	Not applicable
<b>Article/Paragraph</b>	Not applicable
<b>Date of submission</b>	02/03/2020
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<b>Disclose name of institution / entity</b>	No
<b>Type of submitter</b>	Competent authority
<b>Subject matter</b>	Absence of waiver of set-off
<b>Question</b>	<p>Do AT 1 and Tier 2 instruments issued before 27 June 2019 continue to qualify as eligible AT 1 / Tier 2 capital despite the fact that it does not contain an explicit clause on waiver set-off rights in its terms and conditions, provided it meets all other eligibility criteria?</p> <p>Equally, does a liability issued before 27 June 2019 continue to qualify as eligible liabilities instrument despite the fact that it does not contain an explicit clause on waiver of set-off rights in its terms and conditions, provided it meets all other eligibility criteria of Article 72b CRR2?</p>
<b>Background on the question</b>	<p>Several institutions having old disco style issuances that they previously considered as being fully eligible as AT 1 / Tier 2, have recently changed this qualification to being eligible AT 1 / Tier 2 only until June 2025 under the grandfathering provisions of CRR2 (Article 494b(1)/(2) CRR). The rationale behind this re-classification is that the bonds do not contain contractual clauses for a waiver of set-off rights.</p>
<b>EBA answer</b>	Article 52(1)(r) and Article 63(p) of Regulation (EU) No. 575/2013 as

amended by Regulation (EU) 2019/876 (CRR2) require that 'the instruments are not subject to set-off or netting arrangements that would undermine their capacity to absorb losses'. Regarding eligible liabilities instruments, the same requirement is specified in Article 72b(2)(f) CRR2 stating that 'the liabilities are not subject to set-off or netting arrangement that would undermine their capacity to absorb losses in resolution.'

In addition, Article 494b(1) CRR2 specifies that 'by way of derogation from Articles 51 and 52, instruments issued prior to 27 June 2019 shall qualify as Additional Tier 1 instruments at the latest until 28 June 2025, where they meet the conditions set out in Articles 51 and 52, except for the conditions referred to in points (p), (q) and (r) of Article 52(1)'. Article 494b(2) CRR2 further specifies that 'by way of derogation from Articles 62 and 63, instruments issued prior to 27 June 2019 shall qualify as Tier 2 instruments at the latest until 28 June 2025, where they meet the conditions set out in Articles 62 and 63, except for the conditions referred to in points (n), (o) and (p) of Article 63'. Article 494b(3) CRR2 specifies that: 'by way of derogation from point (a) of Article 72a(1), liabilities issued prior to 27 June 2019 shall qualify as eligible liabilities items where they meet the conditions set out in Article 72b, except for the conditions referred to in point (b)(ii) and points (f) to (m) of Article 72b(2)'.

Recital 26 of the CRR2, after recalling this requirement for own funds instruments and eligible liabilities, states that 'this should not mean that the contractual provisions governing the liabilities should contain a clause explicitly stating that the instrument is not subject to set-off or netting rights.'

On the basis of Recital 26 CRR2, there is no requirement for instruments' contractual terms to contain explicit wording precluding set-off or netting rights for holders.

Consequently, the absence of a clause to this end does not - by itself - lead to the instruments having to be grandfathered and ultimately disqualified as AT 1 / Tier 2 capital or eligible liabilities. The instrument concerned remains eligible, provided that it meets all eligibility criteria set out in Article 52, Article 63 or Article 72b CRR2, including the effective absence of set-off or netting arrangements that would undermine their capacity to absorb losses in resolution, as applicable.

**Link**

[https://eba.europa.eu/single-rule-book-qa/qna/view/publicId/2020\\_5146](https://eba.europa.eu/single-rule-book-qa/qna/view/publicId/2020_5146)