

Consultation Paper

Draft Regulatory Technical Standards

On Own Funds under the draft Capital Requirements Regulation- Part Two



Consultation Paper on Draft Regulatory Technical Standards on Own Funds under the draft Capital Requirements Regulation

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1. Responding to this Consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Please send your comments to the EBA by email to EBA-CP-2012-11@eba.europa.eu by 21/12/2012, indicating the reference 'EBA/CP/2012/11' on the subject field. Please note that comments submitted after the deadline, or sent to another e-mail address will not be processed.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please indicate clearly and prominently in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an e-mail message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.eba.europa.eu under the heading 'Legal Notice'.

2. Executive Summary

The CRR/CRD IV proposals¹ (the so-called Capital Requirements Regulation - henceforth 'CRR'- and the so-called Capital Requirements Directive – henceforth 'CRD') set out prudential requirements for Own Funds which are expected to be applicable as of 1 January 2013.

In a number of Articles the CRR contains specific mandates for the EBA to develop draft Regulatory or Implementing Technical Standards (henceforth 'RTS' and 'ITS') related to Own Funds. These standards will be part of the single rulebook enhancing regulatory harmonisation in Europe with the particular aim of strengthening the quality of capital.

Please note that the EBA has developed the present draft RTS based on the European Commission's legislative proposals for the CRR/CRD IV. It has also taken into account major changes subsequently proposed by the revised texts produced by the Council of the EU and the European Parliament, during the ordinary legislative procedure (co-decision process).

Following the end of the consultation period, and to the extent that the final text of the CRR changes before the adoption of the RTS, the EBA will adapt the draft RTS accordingly to reflect any developments.

Main features of the RTS

This consultation paper puts forward draft RTS related to Article 25(2)(a) of the CRR related to the conditions according to which competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a mutual, cooperative society or similar institution for the purposes of Part Two of the CRR (Own Funds).

Besides this consultation paper, the EBA also issued a consultation paper on certain (RTS) on own funds which was published on 4 April 2012² as 'Part one' of the consultation on Own Funds. The present consultation paper constitutes 'Part two' of the consultation. The legal text proposed herein should be read in conjunction with the text of that consultation paper. Further consultation papers on the remaining RTS on own funds in the CRR are expected to be published later in 2012 (depending also on the finalisation of the CRR/CRD IV text). It is envisaged that the legal texts proposed by all these consultation papers, will be ultimately merged together in one act, thereby contributing to a Single Rule Book in the area of own funds.

¹ Proposal for a Regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms, published on 20th July 2011.

² <http://www.eba.europa.eu/cebs/media/Publications/Consultation%20Papers/2012/CP02/EBA-BS-2012-059--CP-2012-02.pdf>

3. Background and rationale

Draft RTS on Own Funds - Part two

The so-called Omnibus Directive³ amended the directives that are collectively known as Capital Requirements Directive (CRD)⁴ in a number of ways, one of which was by establishing areas where the EBA is mandated to develop draft technical standards.

On July 20th 2011, the European Commission issued its legislative proposals on a revision of the CRD which aims to apply the Basel III framework in the EU. These proposals have recast the contents of the CRD into a revised CRD and a new CRR - which are colloquially referred to as the CRR/CRD IV proposals⁵. These are currently being debated by the EU legislators (Council and European Parliament) under the framework of the co-decision procedure.

In anticipation of the finalisation of the legislative texts for the CRR/CRD IV, the EBA has developed these draft RTS in accordance with the mandate contained in Article 25(2)(a) of the CRR.

The EBA will adapt the draft RTS according to the final version of the CRR/CRDIV text before submitting it to the European Commission for adoption.

The nature of RTS under EU law

The present draft RTS are produced in accordance with Article 10 of EBA regulation⁶. According to Article 10(4) of EBA regulation, RTS shall be adopted by means of a regulation or decision.

According to EU law, EU regulations are binding in their entirety and directly applicable in all Member States. This means that, on the date of their entry into force, they become part of the national law of the Member States and that their implementation into national law is not only unnecessary but also prohibited by EU law, except in so far as this is expressly required by them.

Shaping these rules in the form of a Regulation would ensure a level-playing field by preventing diverging national requirements and would ease the cross-border provision of services; currently, an

³ Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority).

⁴ 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 and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions.

⁵ Proposal for a Regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms, published on 20th July 2011.

⁶ Regulation (EU) N° 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision N° 716/2009/EC and repealing Commission Decision 2009/78/EC.

institution that wishes to take up operations in another Member State has to apply different sets of rules.

Background and regulatory approach followed in the draft RTS

The current applicable regulatory framework in terms of own funds is derived from the CRD, in particular Articles 56 to 67, as transposed by each Member State. The CRD was complemented by the publication of two sets of guidelines by the Committee of European Banking Supervisors (CEBS), the predecessor of the EBA. The first set of guidelines, published in December 2009, relates to hybrid capital instruments⁷. The second set of guidelines, published in June 2010, refers to elements of Article 57(a) of the CRD⁸.

In December 2010, the Basel Committee on Banking Supervision (BCBS) published its 'global regulatory framework for more resilient banks and banking systems' aiming at addressing the lessons from the financial crisis. The CRR proposals related to own funds translate these BCBS proposals into EU law. Both reforms raise the issues of both the quality and the quantity of the regulatory capital base. The draft RTS as put forward by the EBA for this consultation are a direct result of the CRR proposals which are expected to be applicable as of 1 January 2013.

This consultation paper constitutes Part two of the Own Funds consultation and puts forward draft RTS related to Article 25(2)(a) of the CRR whose provisions state that EBA shall develop draft RTS to specify the conditions according to which competent authorities may determine that a type of undertaking recognized under applicable national law qualifies as a mutual, cooperative society or similar institution for the purpose of part Two of the CRR (Own Funds). The proposed draft RTS complement the draft RTS on own funds published on 4 April 2012, in particular in terms of provisions related to mutuals, cooperative societies or similar institutions (see in particular Articles 4, 8, 18 and 32 of the consultation paper on the draft RTS on own funds).

All RTS related to own funds requirements are intended to be put forward as one integrated draft Regulation, as already announced in the EBA Consultation Paper on RTS for own Funds published on 4 April 2012. The rationale for this approach is to support the completion of the EU single rulebook for institutions in the area of own funds. It is therefore useful to group these regulations together in one legal act to facilitate a comprehensive view, improve understanding and provide compact access to them by legal or natural persons subject to the obligations laid down therein. With that in mind, the draft RTS text proposed in the present document are an addition to the draft RTS text proposed in the above-mentioned CP and need to be read in conjunction with it; more in particular with article 3 on the type of undertaking recognised under applicable national law as a mutual, cooperative institution or similar institution under Section 1- Common Equity Tier 1 items and instruments.

Cooperatives are a predominant form of institution operating within the set of mutuals, cooperative societies or similar institutions.

⁷ <http://www.eba.europa.eu/CMSPages/GetFile.aspx?nodeguid=97f3cd8f-855c-40de-a98b-b923e8eaa4ad>

⁸ http://www.eba.europa.eu/documents/Publications/Standards---Guidelines/2010/Guidelines_article57a/Guidelines_article57a.aspx

According to Council Regulation (EC) N° 1435/2003 on the statute for a European Cooperative Society, among other several features described, 'cooperatives are primarily groups of persons or legal entities with particular operating principles that are different from those of other economic agents. These include the principles of democratic features and control and the distribution of the net profit for the financial year on an equitable basis. These particular principles include notably the principle of the primacy of the individual which is reflected in the specific rules on membership, resignation and expulsion, where the 'one man one vote' rule is laid down and the right to vote is vested in the individual, with the implication that members cannot exercise any rights over the assets of the cooperative'.

In all cases, cooperative institutions operate under specific dedicated rules under national company laws, which is also the case for mutuals and similar institutions.

Savings institutions also represent a significant number of institutions in a few EU Member States. While not referred to explicitly in the Commission's proposal for the CRR, the EBA considers that it is highly likely that the category of savings institutions will be referred to in the final version of the CRR, along with cooperatives, mutuals and similar institutions. The draft RTS put forward in this consultation take this view into account and expand the scope of application to this category of institutions.

The specific features of the European cooperative banking sector (to be understood as comprising mutuals, cooperative societies, savings banks or similar institutions) are addressed through specific provisions in the draft CRR and draft technical standards for aspects of the sector related in particular to own funds requirements, as developed by the EBA. Rules on own funds need to be specified when applied to the European cooperative banking sector whose specificities have to be taken into account in an appropriate manner. As put forward in the EBA draft technical standards on own funds – part one, this requires, among others, a specification of: the characteristics of the instruments that could weaken the condition of an institution in periods of market stress; the limitations that the institution should be able to apply to the redemption of these instruments. Where, regarding instruments of mutuals, cooperative societies, savings banks or similar institutions, the refusal by an institution of the redemption of instruments is prohibited under applicable national law, it is appropriate that the provisions governing the instruments give the institution the ability to defer their redemption and limit the amount to be redeemed. It is also appropriate for competent authorities to have the power to limit the redemption of cooperative shares and for institutions to document any decision to limit the redemption.

In addition, this requires a specification of conditions according to which competent authorities may determine that a type of undertaking recognized under applicable national law qualifies as a mutual, cooperative society, savings institution or similar institution for the purpose of Own Funds. This is to mitigate the risk that any institution could operate under the specific status of mutual, cooperative society, savings institution or similar institution to which specific own funds requirements may apply, where the institution does not possess features which are common to the European cooperative banking sector institutions.

In line with the mandate given to the EBA, the draft RTS focus mainly on elements which are of relevance to own funds (features linked to capital, reserves, etc) which may lead competent authorities to recognise a type of undertaking as a mutual, cooperative society, savings institution or similar institution.

4. Draft regulatory technical standards on Own Funds under the draft Capital Requirements Regulation (draft CRR)

In between the text of the draft RTS/ITS/Guidelines/advice that follows, further explanations on specific aspects of the proposed text are occasionally provided, which either offer examples or provide the rationale behind a provision, or set out specific questions for the consultation process. Where this is the case, this explanatory text appears in a framed text box.

Contents



EUROPEAN COMMISSION

Brussels, **XXX**
[...] (2012) **XXX** draft

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

COMMISSION DELEGATED REGULATION (EU) No .../2012

of XX month 2012

**supplementing Regulation xx/XX/EU of the European Parliament and of the Council
[CRR number] with regard to regulatory technical standards for Own Funds**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation [xx/XX/EU] of the European Parliament and of the Council of [dd mmmm yyyy] on prudential requirements for credit institutions and investment institutions⁹ [the CRR], and in particular to Article 424(2) thereof,

Whereas:

....

(4a) This requires, in addition to the general requirements for own funds as added to or amended by specific requirements laid down in terms of own funds for these types of institutions, a specification of conditions according to which competent authorities may determine that a type of undertaking recognized under applicable national law qualifies as a mutual, cooperative society, [*savings institution*] or similar institution for the purpose of Own Funds. This is to mitigate the risk that any institution could operate under the specific status of mutual, cooperative society, [*savings institution*] or similar institution to which specific own funds requirements may apply, where the institution does not possess features which are common to the European cooperative banking sector institutions.

(4b) For an institution recognized under applicable national law as a mutual, cooperative society, [*savings institution*] or similar institution, it is appropriate in some cases to distinguish between the holders of the institution's Common Equity Tier 1 instruments and the members of such an institution since members generally need to hold capital instruments in order to be entitled to a right to dividends, as well as to a right to a part of the profits and reserves.

(4c) In general, a common feature of a cooperative institution is the ability of members to resign and therefore to require the redemption of the Common Equity Tier 1 capital instruments they hold. That does not prevent a cooperative society to issue qualifying Common Equity Tier 1 capital instruments for which there is no possibility for the holders to put the instruments back to the institution, provided that these instruments meet the provisions of Article 27 of the CRR. Where an institution issues different types of instruments under Article 27, there should be no privileges between the different types of instruments other than the ones foreseen in Article 27(4) of the CRR.

....

TITLE II

⁹ OJ.....

Elements of Own Funds

Chapter 1

Common Equity Tier 1 capital

Section 1

Common Equity Tier 1 items and instruments

Explanatory text for consultation purposes

The specific features of the European cooperative banking sector (to be understood as comprising mutuals, cooperative societies, savings banks or similar institutions) are addressed through specific provisions in the draft CRR and draft technical standards for aspects of the sector related in particular to own funds requirements, as developed by the EBA.

In line with the mandate given to the EBA, the draft RTS focus mainly on elements which are of relevance to own funds (features linked to capital, reserves, etc) which may lead competent authorities to recognise a type of undertaking as a mutual, cooperative society, savings institution or similar institution.

Questions for consultation:

Q01: Are the provisions on the conditions according to which competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a mutual, cooperative society, savings institution or similar institution for the purpose of Own Funds sufficiently clear?

Q02: Are there issues which need to be elaborated further?

Q03: Are there any additional conditions which shall be added, any additional commonalities of the European cooperative banking sector (to be understood as comprising mutuals, cooperative societies, savings banks or similar institutions) which shall be referred to?

Article 3

Type of undertaking recognised under applicable national law as a cooperative society under

Article 25(1)(a) of the CRR

(Legal basis: Article 25(2)(a) of the CRR)

Competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a cooperative society for the purpose of Part II of Regulation xx/XX/EU [CRR], where all of the following conditions are met:

(a) the institution's legal status falls under one of the following categories:

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- in Austria: institutions registered as ‘eingetragene Genossenschaft (e.Gen.)’ or ‘registrierte Genossenschaft’ under the ‘Gesetz über Erwerbs- und Wirtschaftsgenossenschaften (GenG)’;
 - in Belgium: institutions registered as ‘Société Coopérative/Cooperative Vennostchap’ and approved in application of the Royal Decree of 8 January 1962 fixing the conditions of approval of the national groupings of cooperative societies and cooperative societies;
 - in Cyprus: institutions registered as ‘Συνεργατικό Πιστωτικό Ίδρυμα ή ΣΠΠ’ established by virtue of the Cooperative Societies Laws of 1985;
 - in Czech Republic: institutions authorised as ‘spořitelní a úvěrní družstvo’ under ‘zákon upravující činnost spořitelních a úvěrních družstev’;
 - in Denmark: institutions registered as ‘andelskasser’ or ‘sammenslutninger af andelskasser’ under the Danish Financial Business Act;
 - in Finland: institutions registered as
 - i. ‘Osuuspankki’ or ‘andelsbank’ under ‘laki osuuspankeista ja muista osuuskuntamuotoisista luottolaitoksista’ or ‘lag om andelsbanker och andra kreditinstitut i andelslagsform’
 - ii. ‘Keskusyhteisö’ or ‘centralinstitutet’ under ‘laki talletuspankkien yhteenliittymästä’ or ‘lag om en sammanslutning av inlåningsbanker’;
 - in France: institutions registered as ‘sociétés coopératives’ under the ‘Loi n°47-1775 du 10 septembre 1947 portant statut de la coopération’ and authorised as ‘banques mutualistes ou coopératives’ under the ‘Code monétaire et financier, partie législative, Livre V, titre Ier, chapitre II’ ;
 - in Germany: institutions registered as ‘eingetragene Genossenschaft (eG)’ under the ‘Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften (Genossenschaftsgesetz –GenG)’;
 - in Greece: institutions registered as ‘Πιστωτικοί Συνεταιρισμοί’ under the Cooperative Law 1667/1986 that operate as credit institutions and may be labeled as ‘Συνεταιριστική Τράπεζα’ according to the Banking Law 3601/2007;
 - in Hungary: institutions registered as ‘Szövetkezeti hitelintézet’ under Act CXII of 1996 on Credit Institutions and Financial Enterprises;
 - in Italy: institutions registered as
 - i. ‘Banche popolari’ referred to in Legislative Decree 1st September 1993, no. 385;
 - iii. ii. ‘Banche di credito cooperativo’ referred to in Legislative Decree 1st September 1993, no. 385;
 - iv. iii. ‘Banche di garanzia collettiva dei fidi’ referred to in art. 13 of Decree Law 30 September 2003, no. 269, converted into Law 24th November 2003, no. 326;
 - in Luxembourg: institutions registered as ‘Sociétés coopératives’ as defined in Section VI of the law of 10 August 1915 on commercial companies;

- in Netherlands: institutions registered as 'Coöperaties' or 'onderlinge waarborgmaatschappijen' under 'Title 3 of Book 2 Rechtspersonen of the Burgerlijk wetboek';
- in Poland: institutions registered as 'bank spółdzielczy' under the provisions of 'Prawo bankowe';
- in Portugal: institutions registered as 'Caixa de Crédito Agrícola Mútuo' or as 'Caixa Central de Crédito Agrícola Mútuo' under the 'Regime Jurídico do Crédito Agrícola Mútuo e das Cooperativas de Crédito Agrícola' approved by Decreto-Lei n.º 24/91, de 11 de Janeiro;
- in Romania: institutions registered as 'Organizații cooperatiste de credit' under the provisions of Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, approved with amendments and supplements by Law no.227/2007;
- in Spain: Institutions registered as 'Cooperativas de Crédito' under the 'Ley 13/1989, de 26 de mayo, de Cooperativas de Crédito';
- in Sweden: institutions registered as 'Medlemsbank' under 'Lag (1995:1570) om medlemsbanker' or as 'Kreditmarknadsförening' under 'Lag (2004:297) om bank- och finansieringsrörelse';
- in United Kingdom: institutions registered as 'cooperative societies' under the Industrial and Provident Societies Act 1965;

- (b) with respect to Common Equity Tier 1 capital, the institution is able to issue, according to the national applicable law or company statutes, at the level of the legal entity, only capital instruments referred to in Article 27 of Regulation xx/XX/EU [CRR];
- (c) the holders of the Common Equity Tier 1 instruments referred to in paragraph (b) have the ability to resign under the applicable national law and therefore may have a right to put the capital instrument back to the institution, subject to the restrictions of the applicable national law and of Regulation xx/XX/EU [CRR] and this Regulation [this refers to the text contained in EBA/CP/2012/02 of April 4 on technical standards on own funds- part one].

Article 3a

*Type of undertaking recognised under applicable national law as a savings institution under Article 25(1)(a) of the CRR
(Legal basis: Article 25(2)(a) of the CRR)*

Competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a savings institution for the purpose of Part II of Regulation xx/XX/EU [CRR], where all of the following conditions are met:

(a) the institution's legal status falls under one of the following categories:

- in Austria: institutions registered as 'Sparkasse' under para. 1 (1) of the 'Bundesgesetz über die Ordnung des Sparkassenwesens (Sparkassengesetz – SpG)';
- in Denmark: institutions registered as 'Sparekasser' under the Danish Financial Business Act;
- in Finland: institutions registered as 'Säästöpankki' or 'Sparbank' under 'Säästöpankkilaki' or 'Sparbankslag';
- in Germany: institutions registered as 'Sparkasse' under
 - i. 'Sparkassengesetz für Baden-Württemberg (SpG)'
 - ii. 'Gesetz über die öffentlichen Sparkassen (Sparkassengesetz – SpkG) in Bayern'
 - iii. 'Gesetz über die Berliner Sparkasse und die Umwandlung der Landesbank Berlin – Girozentrale – in eine Aktiengesellschaft (Berliner Sparkassengesetz – SpkG)'
 - iv. 'Brandenburgisches Sparkassengesetz (BbgSpkG)'
 - v. 'Sparkassengesetz für öffentlich-rechtliche Sparkassen im Lande Bremen (Bremisches Sparkassengesetz)'
 - vi. 'Hessisches Sparkassengesetz'
 - vii. 'Sparkassengesetz des Landes Mecklenburg-Vorpommern (SpkG)'
 - viii. 'Niedersächsisches Sparkassengesetz (NSpG)'
 - ix. 'Sparkassengesetz Nordrhein-Westfalen (Sparkassengesetz – SpkG)'
 - x. 'Sparkassengesetz (SpkG) für Rheinland-Pfalz'
 - xi. 'Saarländisches Sparkassengesetz (SSpG)'
 - xii. 'Gesetz über die öffentlich-rechtlichen Kreditinstitute im Freistaat Sachsen und die Sachsen-Finanzgruppe'
 - xiii. 'Sparkassengesetz des Landes Sachsen-Anhalt (SpkG-LSA)'
 - xiv. 'Sparkassengesetz für das Land Schleswig-Holstein (Sparkassengesetz – SpkG)'
 - xv. 'Thüringer Sparkassengesetz (ThürSpkG)';
- in Spain: institutions registered as 'Cajas de Ahorros' under 'Real Decreto-Ley 2532/1929, de 21 de noviembre, sobre Régimen del Ahorro Popular';
- in Sweden: institutions registered as 'Sparbank' under 'Sparbankslag (1987:619)';

(b) with respect to Common Equity Tier 1 capital, the institution is able to issue, according to national applicable law or company statutes, at the level of the legal entity, only capital instruments referred to in Article 27 of Regulation xx/XX/EU [CRR];

(c) the sum of capital, reserves and interim or year-end profits, is not allowed, according to national applicable law, to be distributed to holders of Common Equity Tier 1 instruments. Such condition is deemed to be fulfilled even where the institution issues Common Equity Tier 1 instruments that grant the holders, on a

going concern basis, a right on a part of the profits and reserves, unless prevented by the applicable national law. This part shall be proportionate to their contribution to the capital and reserves or, where permitted by the law of the Member State in which the institution has its registered office, in accordance with an alternative arrangement.

Article 3b

Type of undertaking recognised under applicable national law as a mutual under Article 25(1)(a) of the CRR

(Legal basis: Article 25(2)(a) of the CRR)

Competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a mutual for the purpose of Part II of Regulation xx/XX/EU [CRR], where all of the following conditions are met:

(a) the institution's legal status falls under one of the following categories:

- *in Denmark: Associations ('Foreninger') or funds ('Fonde') which originate from the conversion of mortgage credit institutions ('Realkreditinstitutter'), savings banks ('Sparekasser'), cooperative savings banks ('Andelskasser') and affiliations of cooperative savings banks ('Sammenslutninger af andelskasser') into limited companies as defined under the Danish financial Business Act;*

- *in Ireland: institutions as 'building societies' under the Building Societies Act 1989;*

- *in Portugal: institutions registered as 'caixas económicas' under the legal framework approved by Decreto-Lei nº 136/79, de 18 de Maio;*

- *in United Kingdom: institutions registered as 'building societies' under the Building Societies Act 1986;*

(b) with respect to Common Equity Tier 1 capital, the institution is only allowed to issue, according to the national applicable law or company statutes, at the level of the legal entity, capital instruments referred to in Article 27 of Regulation xx/XX/EU [CRR];

(c) the total amount or a partial amount of the sum of capital and reserves is owned by members of the institution. These members do not, in the ordinary course of business, benefit directly from the reserves, in particular through the payment of dividends. Such conditions are deemed to be fulfilled even where the institution issues Common Equity Tier 1 instruments that grant a right on the profits and reserves, unless prevented by the applicable national law.

Article 3c

*Type of undertaking recognised under applicable national law as a similar institution under
Article 25(1)(a) of the CRR
(Legal basis: Article 25(2)(a) of the CRR)*

Competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a similar institution to cooperatives, mutuals and savings institutions for the purpose of Part II of Regulation xx/XX/EU [CRR], where all of the following conditions are met:

(a) the institution's legal status falls under one of the following categories:

- in Austria: the 'Pfandbriefstelle der österreichischen Landes-Hypothekenbanken' under the 'Bundesgesetz über die Pfandbriefstelle der österreichischen Landes-Hypothekenbanken (Pfandbriefstelle-Gesetz – PfBrStG)';

- in Finland: institutions registered as 'Hypoteekkiyhdistys' or 'Hypoteksförening' under 'Laki hypoteekkiyhdistyksistä' or 'Lag om hypoteksföreningar';

(b) with respect to Common Equity Tier 1 capital, the institution is only able to issue, under statutory terms, at the level of the legal entity, capital instruments referred to in Article 27 of Regulation xx/XX/EU [CRR];

(c) one or more of the following criteria are met:

- i. the holders of the Common Equity Tier 1 instruments referred to in paragraph (b) have the ability to resign under the applicable national law and therefore may have a right to put the capital instrument back to the institution, subject to the restrictions of the applicable national law and the provisions of Regulation xx/XX/EU [CRR] and this Regulation [this refers to the text contained in EBA/CP/2012/02 of April 4 on technical standards on own funds- part one];
- ii. the sum of capital, reserves and interim or year-end profits, is not allowed, according to applicable national law, to be distributed to holders of Common Equity Tier 1 instruments. Such condition is deemed to be fulfilled even where the institution issues Common Equity Tier 1 instruments that grant the holders, on a going concern basis, a right on a part of the profits and reserves, unless prevented by the applicable national law. This part shall be proportionate to their contribution to the capital and reserves or, where permitted by the law of the Member State in which the institution has its registered office, in accordance with an alternative arrangement;

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- iii. the total amount or a partial amount of the sum of capital and reserves is owned by members of the institution but there is no possibility for these members to benefit directly from the reserves, in particular through the payment of dividends.

5. Accompanying documents

5.1 Draft Cost- Benefit Analysis / Impact Assessment

Introduction

As per Article 15(1) second subparagraph of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council), any draft technical standards developed by the EBA will have to be accompanied by a separate note on Impact Assessment (IA) which analyses the ‘potential related costs and benefits’ (unless such analyses are disproportionate in relation to the scope and impact of the draft technical standard concerned or in relation to the particular urgency of the matter).

Article 25(2)(a) of the CRR requires the EBA to develop draft Regulatory Technical Standards (RTS) relating to the conditions according to which competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a mutual, cooperative society or a similar institution.

Problem definition

Issues addressed by the European Commission (EC) regarding capital requirement for mutuals, cooperative societies and similar institutions.

The CRR imposes stricter eligibility criteria to instruments that can qualify as regulatory capital for institutions, in particular for high quality Tier 1 capital (Common Equity Tier 1 capital). Although often competing in the same marketplace, non-joint stock companies such as mutuals, cooperative societies and similar institutions exhibit a different business model to joint-stock companies. Non joint-stock companies across Europe generally raise capital in a variety of different ways and hold forms of capital that are different from joint-stock companies. Because of this, criteria for capital instruments issued by non-joint stock companies have been adapted in the CRR to take into account their specific constitutions and legal structures.

Issues addressed by the RTS

Council Regulation (EC) N° 1435/2003 provides a general definition of a European Cooperative Society. Because this definition is not specific to the financial sector, and because the European cooperative banking sector includes many different type of institutions, the EBA has been mandated to clarify further, in particular regarding own fund requirements, under which conditions an institution can be recognised as a mutual, cooperative society, saving institution or similar institution.

Policy proposal and Impact

This RTS specifies clear conditions according to which an institution qualifies as mutual, cooperative society, saving institution or similar institution. It ensures that these firms operate in a regulatory regime that is adapted to the specificities of their business model and their capital instruments.

No additional incremental impact is likely to materialise from this draft RTS since it only clarifies the scope of non joint stock companies by referring to applicable national laws of the Member States.

5.2 Overview of questions for Consultation

Q01: Are the provisions on the conditions according to which competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a mutual, cooperative society, savings institution or similar institution for the purpose of Own Funds sufficiently clear?

Q02: Are there issues which need to be elaborated further?

Q03: Are there any additional conditions which shall be added, any additional commonalities of the European cooperative banking sector (to be understood as comprising mutuals, cooperative societies, savings banks or similar institutions) which shall be referred to?