

# DECISIONS

## DECISION (EU) 2018/546 OF THE EUROPEAN CENTRAL BANK

of 15 March 2018

### on delegation of the power to adopt own funds decisions (ECB/2018/10)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

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

Having regard to 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 (<sup>(1)</sup>), and in particular Article 26(3) and Articles 28, 29, 77 and 78 thereof,

Having regard to Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (<sup>(2)</sup>), and in particular Article 4(1)(d) thereof,

Having regard to Decision (EU) 2017/933 of the European Central Bank of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40) (<sup>(3)</sup>), and in particular Article 4 thereof,

Whereas:

- (1) Pursuant to Article 4(1)(d) of Regulation (EU) No 1024/2013, the European Central Bank (ECB), as the competent authority for significant supervised entities, is responsible for evaluating whether issuances of Common Equity Tier 1 instruments meet the criteria set out in Regulation (EU) No 575/2013. Significant supervised entities may classify capital instruments as Common Equity Tier 1 instruments only with the prior permission of the ECB.
- (2) As required under the third subparagraph of Article 26(3) of Regulation (EU) No 575/2013, the European Banking Authority (EBA) established and regularly updates a public list of types of instruments that qualify in each Member State as Common Equity Tier 1 instruments. The inclusion of a type of instrument in the EBA list implies that it meets the eligibility criteria set out in Article 28 or, where applicable, Article 29 of Regulation (EU) No 575/2013. Considering the scrutiny of the types of instruments by the competent authorities and, after 28 June 2013, by the EBA, and the public nature and regular updates of the EBA list, it is appropriate to use that list in determining the scope of the delegation of decision-making powers pursuant to Article 26(3) of Regulation (EU) No 575/2013.
- (3) According to recital 75 of Regulation (EU) No 575/2013, that Regulation does not prevent competent authorities from maintaining prior permission processes regarding the contracts governing Additional Tier 1 and Tier 2 instruments. Accordingly, the laws of some Member States establish such processes for the classification of capital instruments as Additional Tier 1 or Tier 2 instruments. The ECB is the competent authority to grant such permission to significant supervised entities pursuant to Article 4(1)(d) of Regulation (EU) No 1024/2013.
- (4) The ECB is also responsible, pursuant to Article 4(1)(d) of Regulation (EU) No 1024/2013, for granting prior permission to significant supervised entities to reduce, redeem or repurchase Common Equity Tier 1 instruments issued by them in a manner that is permitted under national law and to effect the call, redemption, repayment or repurchase of Additional Tier 1 or Tier 2 instruments, prior to the date of their maturity.
- (5) When the ECB assesses requests from significant supervised entities for prior permission to reduce own funds, it applies Article 78 of Regulation (EU) No 575/2013 and Section 2 of Chapter IV of Commission Delegated Regulation (EU) No 241/2014 (<sup>(4)</sup>).

(<sup>1</sup>) OJ L 176, 27.6.2013, p. 1.

(<sup>2</sup>) OJ L 287, 29.10.2013, p. 63.

(<sup>3</sup>) OJ L 141, 1.6.2017, p. 14.

(<sup>4</sup>) Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions (OJ L 74, 14.3.2014, p. 8).

- (6) The ECB, as the competent authority, is required to adopt a substantial number of own funds decisions each year. To facilitate the decision-making process a delegation decision is necessary in relation to the adoption of such decisions. The Court of Justice of the European Union has recognised delegation of authority to be necessary to enable an institution required to adopt a considerable number of decisions to perform its duties. Similarly, it has recognised the need to ensure that decision-making bodies are able to function as a principle inherent to all institutional systems <sup>(1)</sup>.
- (7) Delegation of decision-making powers should be limited and proportionate, and the scope of the delegation should be clearly defined.
- (8) Decision (EU) 2017/933 (ECB/2016/40) specifies the procedure to be followed for adopting delegation decisions concerning supervision and the persons who may be delegated decision-making powers. That Decision does not affect the ECB's exercise of its supervisory tasks and is without prejudice to the Supervisory Board's competence to propose complete draft decisions to the Governing Council.
- (9) Where the criteria for the adoption of a delegated decision, as laid down in this Decision, are not met, decisions should be adopted in accordance with the non-objection procedure set out in Article 26(8) of Regulation (EU) No 1024/2013 and Article 13g of Decision ECB/2004/2 <sup>(2)</sup>. Furthermore, if the heads of work units have concerns regarding the fulfilment of assessment criteria for own funds decisions due to insufficient information being provided by the significant supervised entity or the complexity of the assessment, the non-objection procedure should also be used.
- (10) ECB supervisory decisions may be subject to administrative review pursuant to Article 24 of Regulation (EU) No 1024/2013 and as further specified in Decision ECB/2014/16 <sup>(3)</sup>. In the event of such administrative review, the Supervisory Board should take into account the opinion of the Administrative Board of Review and submit a new draft decision to the Governing Council for adoption under the non-objection procedure,

HAS ADOPTED THIS DECISION:

## Article 1

### **Definitions**

For the purposes of this Decision, the following definitions shall apply:

- (1) 'own funds decision' means a decision of the ECB on prior permission to classify an instrument as a Common Equity Tier 1, Additional Tier 1 or Tier 2 instrument and on own funds reductions;
- (2) 'own funds reduction' means any action referred to in Article 77 of Regulation (EU) No 575/2013;
- (3) 'reductions with replacement' means own funds reductions as referred to in Article 78(1)(a) of Regulation (EU) No 575/2013;
- (4) 'reductions without replacement' means own funds reductions as referred to in Article 78(1)(b) of Regulation (EU) No 575/2013;
- (5) 'EBA list' means a list established, maintained and published <sup>(4)</sup> by the EBA pursuant to the third subparagraph of Article 26(3) of Regulation (EU) No 575/2013, containing all the forms of capital instruments in each Member State that qualify as Common Equity Tier 1 instruments on the basis of information from each competent authority;
- (6) 'Common Equity Tier 1 instrument', 'Additional Tier 1 instrument' and 'Tier 2 instrument' mean a capital instrument which qualifies as Common Equity Tier 1 instrument, Additional Tier 1 instrument or Tier 2 instrument, respectively, under Regulation (EU) No 575/2013;
- (7) 'replacing instrument' means the capital instrument which replaces the capital instrument to be reduced, repurchased, called or redeemed within the meaning of Article 78(1)(a) of Regulation (EU) No 575/2013;

<sup>(1)</sup> AKZO Chemie v Commission, 5/85, ECLI:EU:C:1986:328, paragraph 37, and Carmine Salvatore Tralli v ECB, C-301/02 P, ECLI:EU:C:2005:306, paragraph 59.

<sup>(2)</sup> Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.3.2004, p. 33).

<sup>(3)</sup> Decision ECB/2014/16 of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (OJ L 175, 14.6.2014, p. 47).

<sup>(4)</sup> Published on the EBA's website at [www.eba.europa.eu](http://www.eba.europa.eu)

- (8) 'replaced instrument' means the capital instrument to be subject to an action referred to in Article 77 of Regulation (EU) No 575/2013 and replaced by a replacing instrument in a reduction with replacement pursuant to Article 78(1)(a) of Regulation (EU) No 575/2013;
- (9) 'Common Equity Tier 1 capital ratio', 'Tier 1 capital ratio' and 'total capital ratio' mean Common Equity Tier 1 capital ratio, Tier 1 capital ratio and total capital ratio, respectively, as referred to in Article 92(2) of Regulation (EU) No 575/2013;
- (10) 'SREP decision' means the decision adopted by the ECB on the basis of Article 16 of Regulation (EU) No 1024/2013 following the annual supervisory review and evaluation process within the meaning of Article 97 of Directive 2013/36/EU of the European Parliament and of the Council (<sup>1</sup>) and which establishes prudential requirements;
- (11) 'delegation decision' and 'delegated decision' have the same meaning as in point (2) and point (4) of Article 3 of Decision (EU) 2017/933 (ECB/2016/40), respectively;
- (12) 'heads of work units' means the heads of work units of the ECB to whom the power to adopt own funds decisions is delegated;
- (13) 'non-objection procedure' means the procedure set out in Article 26(8) of Regulation (EU) No 1024/2013 and further specified in Article 13g of Decision ECB/2004/2;
- (14) 'negative decision' means a decision that does not or does not fully grant the permission as requested by the significant supervised entity. A decision with ancillary provisions such as conditions or obligations shall be considered as a negative decision unless such ancillary provisions (a) ensure that the supervised entity fulfils the requirements of relevant Union law referred to in Articles 3(4), 4(3) and 5(6) and have been agreed in writing or (b) merely restate one or more of the existing requirements that the institution has to comply with pursuant to provisions referred to in Articles 3(4), 4(3) and 5(6) or require information on the fulfilment of one or more of such requirements;
- (15) 'significant supervised entity' means a significant supervised entity as defined in point (16) of Article 2 of Regulation (EU) No 468/2014 of the European Central Bank (ECB/2014/17) (<sup>2</sup>).

## Article 2

### **Delegation of own funds decisions**

1. In accordance with Article 4 of Decision (EU) 2017/933 (ECB/2016/40), the Governing Council hereby delegates the adoption of decisions on (a) prior permission for the classification of capital instruments as Common Equity Tier 1 instruments under Article 26(3) of Regulation (EU) No 575/2013; (b) prior permission for the classification of capital instruments as Additional Tier 1 or Tier 2 instruments, where required by national law; and (c) prior permission for own funds reductions under Article 77 of Regulation (EU) No 575/2013, to the heads of work units nominated by the Executive Board in accordance with Article 5 of that Decision.
2. The own funds decisions referred to in paragraph 1 shall be adopted by means of a delegated decision if the criteria for the adoption of delegated decisions, as set out in Articles 3, 4 and 5, are fulfilled.
3. Own funds decisions shall not be adopted by means of a delegated decision if insufficient information or the complexity of assessment require that they are adopted under the non-objection procedure.

## Article 3

### **Criteria for the adoption of delegated decisions on prior permission to classify instruments as Common Equity Tier 1 instruments**

1. Decisions on the classification of capital instruments as Common Equity Tier 1 instruments shall be taken by means of a delegated decision if the type of instruments in respect of which prior permission is sought has been included, at the time the application was received by the ECB, in the EBA list.
2. Negative decisions and decisions pursuant to Article 31 of Regulation (EU) No 575/2013 shall not be adopted by means of a delegated decision.

(<sup>1</sup>) 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 (OJ L 176, 27.6.2013, p. 338).

(<sup>2</sup>) Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

3. Where, pursuant to paragraphs 1 and 2, a decision on the classification of capital instruments as Common Equity Tier 1 instruments cannot be adopted by means of a delegated decision, it shall be adopted in accordance with the non-objection procedure.

4. The assessment on the classification of capital instruments as Common Equity Tier 1 instruments shall be carried out in accordance with Articles 27, 28 and 29 of Regulation (EU) No 575/2013 and Articles 4 to 11 of Delegated Regulation (EU) No 241/2014.

#### Article 4

##### **Criteria for the adoption of delegated decisions on prior permission to classify instruments as Additional Tier 1 or Tier 2 instruments**

1. Where prior permission is required under national law, decisions on prior permission to classify capital instruments as Additional Tier 1 or Tier 2 instruments shall be taken by means of a delegated decision.

2. Negative decisions shall not be adopted by means of a delegated decision and shall be adopted in accordance with the non-objection procedure.

3. The assessment on the classification of instruments as Additional Tier 1 or Tier 2 instruments shall be carried out in accordance with Articles 52 to 54 and 63 of Regulation (EU) No 575/2013 and Articles 8, 9 and 20 to 24a of Delegated Regulation (EU) No 241/2014.

#### Article 5

##### **Criteria for the adoption of delegated decisions on prior permission for own funds reductions**

1. Decisions on prior permission for own funds reductions shall be taken by means of a delegated decision where the conditions of either paragraph 2 or 3 are fulfilled.

2. For reductions with replacement, decisions shall be taken by means of a delegated decision if:

- (a) the replacing instrument is a Common Equity Tier 1 instrument with an aggregate nominal amount at least equal to the nominal amount of the replaced instrument; or
- (b) the replacing instrument is an Additional Tier 1 instrument with an aggregate nominal amount at least equal to the nominal amount of the replaced instrument, if the replaced instrument is an Additional Tier 1 instrument; or
- (c) the replacing instrument is an Additional Tier 1 or Tier 2 instrument with an aggregate nominal amount at least equal to the nominal amount of the replaced instrument, if the replaced instrument is a Tier 2 instrument.

3. For reductions without replacement, decisions shall be taken by means of a delegated decision if:

- (a) following the reduction, the own funds exceed and are estimated to continue exceeding, for at least three financial years after the date of the application, the sum of the requirements laid down in Article 92(1) of Regulation (EU) No 575/2013, the own funds required to be held in accordance with Article 16(2)(a) of Regulation (EU) No 1024/2013, the combined buffer requirement as defined in point (6) of Article 128 of Directive 2013/36/EU and the Pillar 2 capital guidance as set out in the last available SREP decision; and
- (b) the impact of the reduction on the Common Equity Tier 1 capital ratio, the Tier 1 capital ratio and the total capital ratio is below 100 basis points.

4. Negative decisions shall not be adopted by means of a delegated decision.

5. Where, pursuant to paragraphs 1 to 4, a decision on an own funds reduction cannot be adopted by means of a delegated decision, it shall be adopted in accordance with the non-objection procedure.

6. The assessment on an own funds reduction shall be carried out in accordance with Article 78 of Regulation (EU) No 575/2013 and Section 2 of Chapter IV of Delegated Regulation (EU) No 241/2014.

*Article 6***Transitional provision**

This Decision shall not apply in cases where the application was submitted to the ECB prior to the entry into force of this Decision.

*Article 7***Entry into force**

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Frankfurt am Main, 15 March 2018.

*The President of the ECB*

Mario DRAGHI

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