Chapter

Preamble

THE EUROPEAN COMMISSION,

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, and in particular third subparagraph of Article 26(4); third subparagraph of Article 27(2); third subparagraph of Article 28(5); third subparagraph of Article 29(6); third subparagraph of Article 32(2); third subparagraph of Article 36(2); third subparagraph of Article 41(2); third subparagraph of Article 52(2); third subparagraph of Article 76(4); third subparagraph of Article 78(5); third subparagraph of Article 79(2); third subparagraph of Article 83(2); third subparagraph of Article 481(6); third subparagraph of Article 487(3) thereof,

01/01/2021

Whereas:

(1) The provisions in this Regulation are closely linked, since they refer to elements of own funds requirements of institutions and to deductions from those same elements of own funds for the application of Regulation (EU) No 575/2013. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, it is desirable to include all of the regulatory technical standards on own funds required by Regulation (EU) No 575/2013, in a single Regulation.

(2) In order to bring more convergence across the Union in the way foreseeable dividends have to be deducted from interim or year-end profits, it is necessary to introduce a hierarchy of ways to evaluate the deduction, by first having a decision on distributions from the relevant body, then the dividend policy, and thirdly an historical payout ratio.

(3) 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 recognised under applicable national law qualifies as a mutual, cooperative society, savings institution or similar institution for the purpose of own funds is necessary in order 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 Union cooperative banking sector institutions.

(4) For an institution recognised 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 that 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.

(5) In general, the common feature of a cooperative, savings institution, mutual or similar institution is to carry on business for the benefit of the customers and members of the institution, and as a service to the public. The primary objective is not to generate and pay a financial return to external providers of capital, like shareholders of joint stock companies. For this reason, capital instruments used by these institutions are different from capital instruments issued by joint stock companies that generally grant the holders a full access to reserves and profits in going concern and liquidation and are transferable to a third party.

(6) With regard to cooperative institutions, a common feature is in general 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 from issuing 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 29 of Regulation (EU) No 575/2013. Where an institution issues different types of instruments under Article 29 of that Regulation, there should be no privileges assigned to only some of these types of instruments other than the ones foreseen in Article 29(4) of that Regulation.

(7) Savings institutions are generally structured like a foundation where there is no owner of the capital, meaning nobody who participates in the capital and may benefit from the profits of the institution. One of the key feature of mutuals is that, in general, members do not contribute to the capital of the institution and do not, in the ordinary course of the business, benefit from direct distribution of the reserves. This should not prevent these institutions, in order to develop their business, from issuing Common Equity Tier 1 instruments to investors or members who may participate in the capital and benefit to some extent from the reserves in going concern situations and in liquidation.

(8) All existing institutions already set up and recognised as mutuals, cooperative societies, savings institutions or similar institutions under applicable national law before 31 December 2012 continue to be classified as such for the purpose of Part Two of Regulation (EU) No 575/2013 without regard to their legal form as long as they continue to meet the criteria that determined such recognition as one of those entities under applicable national law.

(9) When defining situations which would qualify as indirect funding for all types of capital instruments it is more practical and comprehensive to do so by specifying the characteristics of the opposite concept, direct funding.

(10) In order to apply own funds rules to mutuals, cooperative societies, savings institutions and similar institutions, the specificities of such institutions have to be taken into account in an appropriate manner. Rules should be put in place to ensure, among others, that such institutions are able to limit the redemption of their capital instruments, where appropriate. Therefore, where the refusal of the redemption of instruments is prohibited under applicable national law for these types of institutions, it is essential that the provi-

sions governing the instruments give the institution the ability to defer their redemption and limit the amount to be redeemed. Further, given the importance of the ability to limit or defer redemption, competent authorities should have the power to limit the redemption of cooperative shares and institutions should document any decision to limit the redemption.

(11) There is a need to define and align the treatment of the concept of gain on sale associated with a future margin income in the context of securitisation, with international practices as those defined by the Basel Committee on Banking Supervision and to ensure that no revocable gain on sale is included among the own funds of an institution, given the lack of its permanence.

(12) In order to avoid regulatory arbitrage and ensure a harmonised application of the capital requirements rules in the Union, it is important to ensure that there is a uniform approach concerning the deduction from own funds of certain items like losses for the current financial year, deferred tax assets that rely on future profitability, and defined benefit pension fund assets.

(13) In order to ensure consistency across the Union in the way incentives to redeem are assessed, it is necessary to provide a description of cases where an expectation is created that the instrument is likely to be redeemed. There is also a need to design rules leading to timely activation of loss absorbency mechanisms for hybrid instruments so as to consequently increase the loss absorbency of these instruments in the future. Further, given that instruments issued by special purpose entities give less certainty in prudential terms than directly issued instruments, the use of special purpose entities for indirect issuance of own funds has to be restricted and strictly framed.

(14) It is necessary to balance the need between ensuring prudentially appropriate calculations of exposures of institutions to indirect holdings arising from index holdings, with the need to ensure that does not become overly burdensome for them.

(15) A detailed and comprehensive process is deemed necessary for competent authorities to grant a supervisory permission for reducing own funds. Redemptions, reductions and repurchases of own funds instruments should not be announced to holders before the institution has obtained the prior approval of the relevant competent authority. Institutions should provide a detailed list of elements in order for the competent authority to be provided with all relevant information before deciding on granting its approval.

(16) Temporary waivers for deduction from own funds items are provided in order to accommodate and allow the application of financial assistance operation plans, where applicable. Therefore the duration of such waivers should not exceed the duration of financial assistance operation plans.

(17) In order for special purposes entities to qualify for inclusion under the Additional Tier 1 and Tier 2 own funds items, the assets of the special purpose entities not invested in own funds instruments issued by institutions should remain minimal and insignificant. In order to achieve this, that amount of assets should be capped by a limit expressed in relation to the average total assets of the special purpose entity.

(18) Transitional provisions aim at allowing a smooth passage to the new regulatory framework, therefore it is important, when applying the transitional provisions for filters and deductions, that this transitional treatment set out in Regulation (EU) No 575/2013

is applied consistently, but in a manner that takes into account the original starting point created by the national rules transposing the previous Union regulatory regime, represented by Directives 2006/48/EC and 2006/49/EC of the European Parliament and of the Council.

(19) Excess Common Equity Tier 1 or Additional Tier 1 instruments grandfathered according to the transitional provisions of Regulation (EU) No 575/2013 are, on the basis of these provisions, allowed to be included within the limits for grandfathered instruments for lower tiers of capital. That nevertheless cannot alter the limits for grandfathered instruments for lower tiers, therefore any inclusion in the grandfathering limits of the lower tier should only be possible if there is sufficient allowance in that lower tier. Finally, as those are excess instruments of the higher tier, it should be possible for those instruments to be later reclassified in a higher tier of capital.

(20) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority to the Commission.

(21) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council,

(22) The European Banking Authority should carry out a review of the application of this Regulation, and especially of the rules for laying down the procedures for authorisations for redemption of Common Equity Tier 1 instruments of mutuals, cooperative societies, savings institutions or similar institutions, and propose amendments where appropriate.

(23) The European Banking Authority consulted the European Insurance and Occupational Pensions Authority on the treatment of capital instruments of third country insurance and reinsurance undertakings and on the treatment of capital instruments of undertakings excluded from the scope of Directive 2009/138/EC of the European Parliament and of the Council for the purposes of Article 36(3) of Regulation (EU) No 575/2013.

HAS ADOPTED THIS REGULATION: