

EBA FINAL draft Regulatory Technical Standards

[TO BE MERGED INTO ONE LEGAL TEXT WITH EBA-RTS-2013-01 AND EBA-RTS-2013-03 AS PER INDICATIONS THEREIN]

On Own Funds under Article 27(2) of Regulation (EU) No 575/2013 (Capital Requirements Regulation – CRR) – Part Two: mutuals, cooperatives, savings institutions or similar institutions



EBA FINAL draft Regulatory Technical Standards on Own Funds [Part Two] under Article 27(2) of Regulation (EU) No 575/2013 (Capital Requirements Regulation-CRR)

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1. Executive summary

The so-called Capital Requirements Regulation (henceforth 'CRR'), dated 26 June 2013¹ sets out, among others, prudential requirements for Own Funds, and contains, in a number of Articles, specific mandates for the European Banking Authority (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.

Main features of the RTS

These draft RTS on Article 27(2) of the CRR relate 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, savings institution or similar institution for the purposes of Part Two of the CRR (Own Funds).

The specific features of the European cooperative banking sector (to be understood as comprising mutuals, cooperative societies, savings institutions or similar institutions) are addressed through specific provisions in the CRR and subsequently also in draft technical standards for aspects of the sector related in particular to Own Funds requirements, 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.

This requires, in particular, 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 calculating own funds. This specification, together with the provisions included in the EBA Technical Standards on Own Funds Part One, allows the mitigation of the risk that any institution could operate under the specific status of a 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 particular, these features are the following:

- Institutions referred to in the draft RTS operate under specific dedicated rules under national company laws. The applicable national rules are listed in the draft RTS.
- In line with the mandate given to the EBA, the draft RTS focus on elements which are of relevance to own funds (features linked to capital, reserves etc), and which may lead competent authorities to recognise each type of undertaking as a mutual, cooperative society, savings institution or similar institution.

¹<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:176:0001:0337:EN:PDF>

Besides these draft RTS, the EBA also issued other draft RTS on own funds [EBA Final Draft RTS on Own Funds – Part One]. The present draft RTS constitute ‘Part Two’ of the draft RTS on own funds, and should be read in conjunction with that.

2. Background and rationale

Draft RTS on Own Funds – Part Two

The so-called Omnibus Directive² amended the directives that are collectively known as Capital Requirements Directive (CRD)³ in a number of ways, one of which was by establishing areas where the EBA is mandated to develop draft technical standards.

On 26 June 2013, revised CRD texts were published, aiming at applying the internationally agreed standards within the context of the Basel Committee for Banking Supervision (known as the ‘Basel III framework’) in the EU. These texts have recast the contents of the CRD into a revised CRD and a new Capital Requirements Regulation (CRR) – which are together colloquially referred to as the CRR/CRD IV.

The EBA has developed these draft RTS in accordance with the mandate contained in Article 27(2) of the CRR.

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 instruments⁴. The second set of guidelines, published in June 2010, specifies elements of Article 57(a) of the CRD⁵.

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 text on own funds translates 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 of the EBA are a direct result of the CRR text.

² 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).

³ 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.

⁴ <http://www.eba.europa.eu/regulation-and-policy/own-funds/guidelines-for-hybrid-capital-instruments>

⁵ <http://www.eba.europa.eu/regulation-and-policy/own-funds/guidelines-on-instruments-referred-to-in-article-57-a-of-the-crd>

These draft RTS constitute Part Two of the Own Funds RTS and relate to Article 27(2) of the CRR, whose provisions state that the EBA shall develop draft RTS to specify 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 purposes of Part Two of the CRR (Own Funds). The draft RTS complement the draft RTS on own funds Part One, in particular in terms of provisions related to mutuals, cooperative societies, savings institutions, or similar institutions.

Cooperatives are a predominant form of institution operating within the set of mutuals, cooperative societies, savings institutions, or similar institutions. According to Council Regulation (EC) No 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', as well as, most notably, 'the principle of the primacy of the individual which is reflected in the specific rules on membership, resignation and expulsion'. By virtue of these, '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, savings institutions and similar institutions.

The specific features of the European cooperative banking sector (to be understood as comprising mutuals, cooperative societies, savings institutions or similar institutions) are addressed through specific provisions in the CRR and subsequently also in draft technical standards for aspects of the sector related, in particular, to own funds requirements, developed by the EBA. Rules on own funds specific to the European cooperative banking sector need to be developed, as this sector's 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 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 recognised under applicable national law qualifies as a mutual, cooperative society, savings institution or similar institution for the purpose of calculating own funds. This specification, together with the provisions included in the EBA technical standards on own funds Part One, allows the mitigation of 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. The RTS shall apply to cooperatives, mutuals, savings institutions and similar institutions that will be created after the entry into force of the CRR as foreseen in Article 27(1) of the CRR.

3. EBA FINAL draft Regulatory Technical Standards on Own Funds under Article 27(2) of Regulation (EU) No 575/2013 (Capital Requirements Regulation – CRR)



EUROPEAN COMMISSION

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

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

of **XXX**

[...]

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

COMMISSION DELEGATED REGULATION (EU) No .../2013

of XX month 2013

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

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 institutions and amending Regulation (EU) No 648/2012⁶, and in particular Article 27(2) third subparagraph thereof, [*TO BE ADDED TO THE LEGAL BASES IN THE PREAMBLE OF THE LEGAL TEXT OF OWN FUNDS PART 1- EBA-RTS-2013-01, AFTER ARTICLE 29(6)*]

Whereas:

...[TO BE ADDED AFTER RECITAL 5 IN THE PREAMBLE OF THE LEGAL TEXT OF OWN FUNDS PART 1- EBA-RTS-2013-01]

(3) 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.

(4) 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.

(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 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

⁶ OJ L 176, 27.6.2013, p. 1.

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 Regulation (EU) No 575/2013, there should be no privileges assigned to only some of these types of instruments other than the ones foreseen in Recital 72 and Article 29(4) of Regulation (EU) No 575/2013.

(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) It is understood that all existing institutions already set up and recognized 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. If the future need arises to define in general which criteria have to be fulfilled to be recognized as a mutual, cooperative society, savings institution or similar institution, this Regulation does not constitute a predefinition for this case.

TITLE I

Subject matter and definitions

Article 1

Subject matter

This Regulation lays down uniform rules concerning:

.... [TO BE ADDED TO ART. 1 OF OWN FUNDS PART 1 LEGAL TEXT - EBA-RTS-2013-01, AFTER POINT a)]

b) 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, according to Article 27(2) of Regulation (EU) No 575/2013.

....

TITLE II

Elements of Own Funds

Chapter 1

Common Equity Tier 1 capital

Section 1

Common Equity Tier 1 items and instruments

.....

Article 3

Type of undertaking recognised under applicable national law as a cooperative society under Article 27(1)(a)(ii) of Regulation (EU) No 575/2013

Competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a cooperative society for the purpose of Part Two of Regulation (EU) No 575/2013, 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 '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 'spořitelni 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. *'Muu osuuskuntamuotoinen luottolaitos' or 'annat kreditinstitut i andelslagsform' under 'laki osuuspankeista ja muista osuuskuntamuotoisista luottolaitoksista' or 'lag om andelsbanker och andra kreditinstitut i andelslagsform'*

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- iii. *‘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;*
 - ii. *‘Banche di credito cooperativo’ referred to in Legislative Decree 1st September 1993, no. 385;*
 - 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 the United Kingdom: institutions registered as ‘cooperative societies’ under the Industrial and Provident Societies Act 1965 and under the Industrial and Provident Societies Act (Northern Ireland) 1969;*

- (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 29 of Regulation (EU) No 575/2013;
- (c) When the holders, which may be members or non members of the institution, of the Common Equity Tier 1 instruments referred to in paragraph (b) have the ability to resign, under the applicable national law, they may also have the right to put the capital instrument back to the institution, subject to the restrictions of the applicable national law, company statutes, of Regulation (EU) No 575/2013 and of this Regulation. This does not prevent the institution from issuing, under applicable national law, Common Equity Tier 1 instruments complying with Article 29 of Regulation (EU) No 575/2013 to members and non members that do not grant a right to put the capital instrument back to the institution.

Article 4

Type of undertaking recognised under applicable national law as a savings institution under Article 27(1)(a)(iii) of Regulation (EU) No 575/2013

Competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a savings institution for the purpose of Part Two of Regulation (EU) No 575/2013, 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)’*
‘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 29 of Regulation (EU) No 575/2013;
- (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 to a part of the profits and reserves, where allowed by the applicable national law, provided that this part is proportionate to their contribution to the capital and reserves or, where permitted by the applicable national law, in accordance with an alternative arrangement. The institution may issue Common Equity Tier 1 instruments that grant the holders, in the case of insolvency or liquidation of the institution, the right to reserves which do not need to be proportionate to the contribution to capital and reserves provided that the conditions of Article 29(4) and (5) of Regulation (EU) No 575/2013 are met.

Article 5

Type of undertaking recognised under applicable national law as a mutual under Article 27(1)(a)(i) of Regulation (EU) No 575/2013

Competent authorities may determine that a type of undertaking recognised under applicable national law qualifies as a mutual for the purpose of Part Two of Regulation (EU) No 575/2013, 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 insurance companies ('Forsikringsselskaber'), 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 registered as 'building societies' under the Building Societies Act 1989;*

- *in the United Kingdom: institutions registered as 'building societies' under the Building Societies Act 1986; institutions registered as a 'savings bank' under the Savings Bank (Scotland) Act 1819.*

(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 29 of Regulation (EU) No 575/2013;

(c) the total amount or a partial amount of the sum of capital and reserves is owned by members of the institution, who do not, in the ordinary course of business, benefit from direct distribution of 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, where allowed by the applicable national law.

Article 6

Type of undertaking recognised under applicable national law as a similar institution under Article 27(1)(a)(iv) of Regulation (EU) No 575/2013

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 Two of Regulation (EU) No 575/2013, 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 – PfbStG)';

- 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 29 of Regulation (EU) No 575/2013;

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

(i) When the holders, which may be members or non members of the institution, of the Common Equity Tier 1 instruments referred to in paragraph (b) have the ability to resign under the applicable national law, they may also have the right to put the capital instrument back to the institution, subject to the restrictions of the applicable national law, company statutes and of Regulation (EU) No 575/2013 and this Regulation. This does not prevent the institution from issuing, under applicable national law, Common Equity Tier 1 instruments complying with Article 29 of Regulation (EU) No 575/2013 to members and non-members that do not grant a right to put the capital instrument back to the institution;

(ii) 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 to a part of the profits and reserves, where allowed by the applicable national law, provided that this part is proportionate to their contribution to the capital and reserves or, where permitted by the applicable national law, in accordance with an alternative arrangement. The institution may issue Common Equity Tier 1 instruments that grant the holders, in the case of insolvency or liquidation of the institution, the right to reserves which do not need to be proportionate to the contribution to capital and reserves provided that the conditions of article 29(4) and (5) of Regulation (EU) No 575/2013 are met.

(iii) the total amount or a partial amount of the sum of capital and reserves is owned by members of the institution who do not, in the ordinary course of

business, benefit from direct distribution of the reserves, in particular through the payment of dividends.

....

4. Accompanying documents

4.1 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 27(2) 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, savings institution or 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, savings institutions and similar institutions exhibit a different business model from 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 those of 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) No 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

These RTS specify clear conditions according to which an institution qualifies as mutual, cooperative society, saving institution or similar institution. They ensure 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 these draft RTS, since they only clarify the scope of non-joint-stock companies by referring to applicable national laws of the Member States.

4.2 Feedback on the public consultation and on the opinion of the Banking Stakeholder Group (BSG)

The EBA publicly consulted on the draft proposal contained in this paper.

The consultation period lasted six weeks and ended on 21 December 2012. Nine responses were received, of which seven were published on the EBA website.

This section presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments, and the actions taken to address them where deemed necessary.

In many cases, several industry bodies made similar comments or the same body repeated its comments in the response to different questions. In such cases, the comments and the EBA analysis are included in the section of this paper where the EBA considers them most appropriate.

Changes to the draft RTS have been incorporated as a result of the responses received during the public consultation.

The Banking Stakeholder Group did not provide any comments on the draft RTS.

Summary of key issues and the EBA's response

Respondents generally supported the EBA's proposal to specify a suitable framework for institutions qualifying as cooperatives, mutuals, savings institutions or similar institutions.

Criteria used in the RTS

One respondent argued that it would be preferable to use criteria other than those focusing only on elements linked to capital and reserves when defining what qualifies as a cooperative, mutual etc. Another respondent suggested referring to the statute of the European Cooperative Society.

The EBA response:

The EBA mandate refers to the specifications of the conditions for the purposes of Part Two of the CRR, which relates to Own Funds. This is the reason why the draft RTS focus on criteria linked to own funds. The EBA considered making a reference to the statute of the European Cooperative Society when drafting the draft RTS for consultation but it has not been possible to find commonalities from this Regulation which would apply consistently for all cooperative institutions.

Link with the Level 1 text

A few respondents were concerned about the RTS being an additional layer of regulation and mentioned changes brought to the latest versions of the CRR, in terms of mandate and features of the

instruments issued by cooperatives, mutuals, savings institutions or similar institutions. Other respondents suggested leaving some provisions to be defined at national level under national applicable laws.

The EBA response:

The draft RTS intend 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.

Further, the draft RTS aim at ensuring a uniform application of some criteria for the purposes of Part Two of the CRR, which would not be the case if these criteria were left to the judgement of national competent authorities.

The EBA has finalised the draft RTS on the basis of the final CRR text as adopted by EU institutions. Appropriate amendments have been taken into account.

[Ability to issue capital instruments under Article 26 of the CRR \[Article 28 of the final CRR\]](#)

One respondent suggested stating simply in the draft RTS that mutuals, cooperatives etc. cannot use ordinary shares. Other respondents suggested clarifying that the ability to issue capital instruments referred to in Article 26 of the CRR [Article 28 of the final CRR] does not initially exclude an institution from being classified as a saving institution in the sense of this rule, nor does it put into question its nature as a 'savings institution'.

Further, one respondent added that saving institutions should be able to issue capital instruments under both Articles 26 and 27 of the CRR [Articles 28 and 29 of the final CRR].

The EBA response:

There is no reference to ordinary shares in Part Two of the CRR since a 'substance over form' approach, based on eligibility criteria, has been developed by EU legislators. The draft RTS refer to the Level 1 text provisions and cannot deviate from them. Institutions listed in the draft RTS shall not be able to issue instruments under both Articles 26 and 27 [Articles 28 and 29 of the final CRR] on a statutory basis.

[References to applicable national laws](#)

Respondents expressed concerns that the list of applicable national laws in the RTS was not comprehensive enough.

The EBA response:

The EBA has completed the list where deemed appropriate. In particular, the EBA did not deem it appropriate to include in the list institutions which issue capital instruments under Article 26 [Article 28 of the final CRR] of the CRR. Considering the text of the final CRR, such institutions recognised under applicable national law prior to 31 December 2012 as one of the categories listed in Article 25

[Article 27 of the final CRR] shall continue to be classified as such, provided that they continue to meet the criteria that determined such recognition. Further reference to this aspect has been provided in a new recital.

Non-redeemable instruments

According to respondents, cooperative institutions that issue CET1 instruments which are not redeemable (but perpetual) are not covered by the RTS, even though the possibility of issuing that type of instrument is explicitly foreseen in the CRR. Although recognising the existence of a Recital 4(c), respondents suggested amending Article 3(c) in order to clarify that those instruments could be issued by cooperative institutions.

The EBA response:

The EBA agreed to clarify this point further in the text of the RTS.

Link between holders and members

While holders of cooperative shares are generally members, there may be instances where this is not the case. For instance, an heir of a member is not automatically a member; holders can be members of members of the issuing institution (thus not members of the issuing institution itself). Respondents proposed to refer to holders of the capital instrument as opposed to members of a cooperative. Some respondents would also welcome a clarification that there is no restriction on the selling of CET1 capital instruments by mutuals to their members.

The EBA response:

The EBA agrees on these points and has amended the draft RTS accordingly.

Summary of responses and EBA's analysis

Topic to which comment relates	Summary of responses received	EBA analysis	Amendments to the proposals
Responses to questions in EBA/CP/2012/11			
References to articles of the CRR are made explicitly ('Article xx of the CRR'), whereas articles of the draft RTS are merely referred to as 'Article xx'. The articles referred to this feedback statement are references to articles of the CRR and of the draft RTS as presented in the original consultation paper of the EBA, to facilitate comparisons.			
1. General comments on the RTS			
Respondents welcomed the opportunity to comment on EBA/CP/2012/11 'Draft Regulatory Technical Standards on Own Funds under the draft Capital Requirements Regulation – Part Two' and generally supported the EBA's proposal to specify a suitable framework for institutions qualifying as cooperatives, mutuals, savings institutions and similar institutions for the purposes of Part Two of the CRR.			
EEA countries	According to one respondent, the institutions which belong to the EEA countries have signalled that the closed list of relevant types of institutions will make it impossible to implement the Regulation directly in EEA jurisdictions outside the EU. According to the same respondent, if the EEA countries are not already taken into account, an unnecessary and harmful uncertainty may arise until the closing of the negotiations connected to the terms of inclusion in the EEA agreement. As a result, the EEA countries would appreciate it if, for them, a more general reference to relevant laws regulating mutuals, cooperative societies, savings institutions and similar institutions was made.	In order to be applicable in the EEA/EFTA States, EU legislation has to be incorporated into the EEA Agreement in the manner and according to the process described therein (via decisions of joint EEA/EU organs). It is, therefore, beyond the EBA's powers to propose rules on EEA/EFTA states to be included into its draft RTS.	No change
Focus of the criteria	One respondent mentioned that provisions developed in paragraph (c) of each of Articles 3, 3a, 3b, and 3c focus too much on secondary characteristics which are then	The EBA mandate refers to the specification of the conditions for the purposes of Part Two of the CRR,	No change

	given undue weight as the defining feature of each category. According to this respondent, the RTS do not need to focus exclusively on elements linked to capital or reserves when defining what qualifies as a cooperative, mutual etc. Instead, the respondent suggests considering a wide-ranging criterion that would serve to include all <i>bona fide</i> cooperatives, mutuals and savings banks operating under the specific national laws, while excluding artificial structures.	which relates to Own Funds. This is the reason why the draft RTS focus on criteria linked to own funds.	
Reference to European Cooperative Society Statute	One respondent mentioned that, although no cooperative bank makes use of it for the time being, the statute of the European Cooperative Society should be also referred to in the RTS.	The EBA considered making this reference when drafting the draft RTS for consultation but it has not been possible to find commonalities from the Regulation on the Statute for a European Cooperative Society which would apply consistently for all cooperative institutions.	No change
Comments related to Level 1 issues/relationship between the RTS and the Level 1 text			
Avoidance of additional layer of regulation	Three respondents were concerned about the draft RTS becoming an additional layer of regulation. Respondents also expressed the view that the text of the standards should not go beyond the Level 1 text. For one respondent, the RTS should not impose conditions and restrictions for CET1 instruments of cooperative institutions that go beyond those included in the CRR. Otherwise, an unintended additional layer of regulation might be created or it might be misunderstood by some supervisors as such an additional layer. Another expressed concerns that a legal entity could be regarded as a cooperative in a Member State whereas the EBA could reject this classification.	The draft RTS do not go beyond the Level 1 text. The EBA is not aware of institutions which would have been regarded as cooperatives in a Member State whereas they would have been excluded on the basis of the provisions of the RTS. The draft RTS intends 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.	No change
Reference to ordinary shares	One respondent mentioned that the reference to 'capital instruments referred to in Article 27' becomes almost circular, since Article 27 of the CRR states that capital instruments issued by mutuals, cooperatives etc shall qualify as CET1 only if the conditions laid down in Articles 26 and 27 of the CRR are met. According to this	There is no reference to ordinary shares in Part Two of the CRR, since a 'substance over form' approach, based on eligibility criteria, has been developed by EU legislators. The draft RTS refers to the Level 1 text provisions.	No change

	respondent, it would be simpler and clearer, if such a condition is needed at all, for the RTS to state in each paragraph that the institution cannot issue ordinary shares.		
Changes in Level 1 mandates	<p>One respondent mentioned significant changes in the mandate on which the RTS are based, since the publication of the Commission proposal text. In the latest compromise texts, it appears that the mandate will be further narrowed drawn, so that the EBA is to specify 'the national laws of each Member State that govern the establishment and operation of mutuals, co-operative societies and savings institutions' – i.e. corresponding to paragraph (a) of each article, while the specification of further conditions – corresponding to (b) and (c) of each article – is limited to the determination of what qualifies as a 'similar institution'.</p> <p>Another respondent indicated that Recital 4c should be completed to refer to multiple of dividends and pointed out that Recital 53 of the CRR was added in the latest versions of the text.</p>	Agreed.	Recital amended accordingly
Level 1: Amendment to Article 25(1)(aa)(iv) CRR	<p>One respondent mentioned that it would expect the final text of CRR to include a reference to wholly owned subsidiaries of a mutual in Article 25(1)(aa)(iv).</p> <p>The respondent asked for a clarification from the EBA that it will not be relevant to apply any specifications in relation to the Article 25(1)(aa)(iv) of the CRR amendment in respect of either wholly owned subsidiaries of a mutual or indeed such subsidiaries' parent. If the EBA does consider it relevant for any specifications to be applied, the respondent asks to be consulted prior to the issue of any such specifications.</p>	The mandate given to the EBA does not cover Article 25(2)(aa)(iv) of the CRR [Article 27(1)(a)(v) of the final CRR].	No change
2. Comments on the articles			
Cooperative institutions			

<p>Article 3(c): recognition of non-redeemable instruments</p>	<p>Two respondents expressed concerns related to the wording of Article 3(c) and related Recital 4c.</p> <p>According to respondents, cooperative institutions that issue CET1 instruments which are not redeemable (but perpetual) are not covered by condition (c), even though this is explicitly foreseen in the CRR. Respondents, however, generally recognised that the EBA clarified during the hearing that it had no intention to limit the ability of institutions to issue non-redeemable CET1 instruments. Further, while they acknowledged Recital (4c) of the RTS, they suggested that Article 3(c) should be modified to cover the non-redeemable CET1 instruments as well.</p>	<p>Agreed to clarify this point further in the text of the RTS.</p>	<p>Draft RTS amended accordingly</p>
<p>Article 3(c): situations where holders are not members, heirs, resignations</p>	<p>Two respondents made the point that, while holders of cooperative shares are generally members, there may be instances where this is not the case: e.g. an heir of a member is not automatically a member; holders can be members of members of the issuing institution (thus not members of the issuing institution itself). In addition, there is not always a legal obligation to give up the capital instrument when the member resigns from membership. Moreover, the consequent implementation of the right to refuse redemption, as included in Article 27 of the CRR, will require in some jurisdictions that members be given opportunities to divest in other ways than by redemption. This may also lead to situations where the holder of the CET1 instruments is not a member.</p> <p>However, Article 3(c) seems to be based on the assumption that holders are always members.</p> <p>Respondents proposed to refer to holders of the capital instrument as opposed to members of a cooperative.</p>	<p>The EBA acknowledges that holders will not always be members and that the two concepts need to be separated in some cases (as underlined in the recitals of the draft RTS).</p>	<p>Draft RTS amended accordingly</p>

Savings institutions			
Article 3a(a)	<p>Five respondents expressed concerns that the list of legal frameworks in Article 3a(a) was not inclusive enough. Several institutions would not be included under the current draft. Respondents suggested alternative drafting formulations in order to include these institutions.</p> <p>One respondent noted that Northern Ireland was not covered by the RTS and thus a reference to the Industrial and Provident Societies Act (Northern Ireland) 1969 should be added.</p>	<p>The list of applicable national laws has been amended where appropriate, as in the case of the Northern Ireland.</p> <p>Further, the EBA did not deem it appropriate to include institutions which issue capital instruments under Article 26 of the CRR [Article 28 of the final CRR]. Considering the text of the final CRR, such institutions recognised under applicable national law prior to 31 December 2012 as one of the categories listed in Article 25 [Article 27 of the final CRR] shall continue to be classified as such, provided that they continue to meet the criteria that determined such recognition.</p>	List of applicable national laws amended where appropriate
Article 3a(b)	<p>Three respondents suggested clarifying that the ability to issue capital instruments referred to in Article 26 of the CRR does not initially exclude an institution from being classified as a 'Sparkasse' in the sense of this rule or does not put into question its nature as a 'Sparkasse'. The respondents suggested drafting changes.</p>	See above.	
Article 3a(c)	<p>Four respondents expressed concerns about Article 3a(c).</p> <p>The respondents suggested deleting or modifying the provisions of Article 3a(c).</p>		No change
	<p>One respondent argued that:</p> <ul style="list-style-type: none"> - The provision is useless: those provisions may be defining characteristics for savings institutions but those are also present in the 	<p>The draft RTS aims at ensuring a uniform application of some criteria for the purposes of Part Two of the CRR, which would not be the case if these criteria were left to the appreciation of national competent authorities. The EBA is aware of the variety of forms of savings</p>	

	<p>laws of the respective Member States. Since these laws are already mentioned in Article 3a lit. a) of the RTS there is no need for a repetition of these criteria in Article 3a lit. c).</p> <ul style="list-style-type: none"> - The provision is not applicable: Article 3a lit. c) RTS should be applicable for all the savings institutions laws mentioned in Article 3a lit. a) RTS. This objective cannot be met because, although Europe's savings institutions have fundamental features in common, in detail these characteristics are regulated very differently. 	<p>institutions but a lowest common denominator has to be spelled out.</p>	
	<p>One respondent argued that:</p> <ul style="list-style-type: none"> - On the one hand, savings banks are in principle, with regard to their Austrian legal status, legal entities without owners. They work on the basis of foundation capital and retained earnings in the form of open reserves. 		
	<ul style="list-style-type: none"> - On the other hand, savings banks are for some of them in the situation of issuing Core Tier 1 capital without voting rights granting the holders of such instruments a dividend payment at a pre-indicated level. The capital – in what concerns the principal but also the interest/dividend – is fully loss absorbent, meaning that the owner of the instrument has no right on the principal and the institution can stop interest/dividend payments any time. In the case of the insolvency of the institution, the holders of such an instrument have a proportionate claim on the proceeds of liquidation. 	<p>New eligibility criteria for CET1 instruments are provided by the CRR. CET1 instruments issued by institutions shall comply with these criteria (and appropriate grandfathering provisions will apply to instruments which do not meet the criteria when the CRR enters into force).</p>	
	<p>The respondent suggested clarifying the text in order to show that the capital structure described above is indeed in line with the provisions of Article 3a(c) and</p>		

	proposed a drafting change.		
Mutuals			
Article 3b (c)	<p>One respondent stated that:</p> <p>Condition (c) of Article (3b) does not appear to be fully clear with regard to the ability of a mutual to sell the instrument to its members. As the EBA representatives explained during a public hearing, the intention is not to limit the ability to sell such instruments. The draft RTS need to positively clarify that the mutual has the possibility of selling the CET1 instruments issued under Article 27 of the CRR to its members as well as to other persons. There should be no restrictions on whom the instruments can be sold to and the text should be clarified.</p>	The EBA confirms that there is no restriction on sell CET1 instruments issued by mutuals to its members.	Recitals of the RTS amended accordingly
	<p>Another respondent stated that:</p> <p>Turning to draft Article 3b on mutuals, the wording of paragraph (c) needs to be refined. In any mutual, the members do – in the ordinary course of business – benefit directly from the reserves, for the simple reason that the reserves provide a free source of own funds; the explicit cost of that capital is zero. This means that, other things being equal, a mutual bank or society will offer better savings and lending rates than it would be able to do if it were a joint stock bank and had to pay explicit dividends to shareholders. This is one of the key features and benefits of the mutual model. So, as a minimum, paragraph (c) must be further amended to state ‘These members do not, in the ordinary course of business, benefit from direct distribution of the reserves.’</p>	The EBA agrees with the proposed amendment.	Draft RTS amended accordingly