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**Consultative Document "Draft Regulatory Technical Standards on Own Funds under the draft Capital Requirements Regulation- Part Two"**

Ladies, Gentlemen,

The European Association of Co-operative Banks (EACB) welcomes the opportunity to comment on the EBA's Consultative Document on "Draft Regulatory Technical Standards on Own Funds under the draft Capital Requirements Regulation- Part Two". We appreciated the invitation to the hearing on November 26<sup>th</sup>, day which gave us the opportunity to raise our concerns and establish a constructive dialogue on these relevant aspects.

Please find our remarks on the following pages.

We will remain at your disposal,

Yours sincerely,

Hervé Guider  
General Manager

Volker Heegemann  
Head of Legal Department



## **EACB REMARKS**

The European Association of Co-operative Banks (EACB) acknowledges the importance of a framework for qualifying institutions as cooperative, mutual, savings institution and similar institution and appreciates EBA's work in this respect. EACB also acknowledges the importance of avoiding the improper use of Articles 25-27. Therefore, the EACB welcomes the RTS for own funds as drafted by EBA. With regard to elaborating a suitable framework we believe that there are a few issues that need to be taken into account and/or further clarified in the draft RTS for own funds part two.

### **Reference to European Co-operative Society Statute**

There is no harmonisation of co-operative law in the EU. Therefore, referring to relevant national legislation is indeed the right method for accounting for the different rules governing the co-operatives in Europe. Although no co-operative bank makes use of it for the time being, the statute of the European Cooperative Society should be also referred to in the RTS.

### **Avoidance of Additional Layer of Regulation**

We agree that the improper use of Articles 25-27 should be avoided. Our conclusion from the public hearing is that it is EBA's intention to include as many cooperative features that can be a common denominator as possible in order to be transparent. Nevertheless, the text of the standards should not result in an instrument being regarded as a co-operative equity instrument in a Member State and fulfilling the conditions for CET-1 instruments of cooperatives under the CRR, while not being accepted as such by EBA. Therefore, in our view the RTS should not impose conditions and restrictions for CET-1 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. Therefore, the text of the RTS needs to be as close as possible to the wording in Articles 25-27 of the CRR and should take into account any amendments to the CRR text.

### **No Additional Layer of Regulation for Amendment to Article 25(1)(aa)(iv) CRR**

We expect that the final text of CRR will include a reference to wholly owned subsidiaries of a mutual in Article 25(1)(aa)(iv). This amendment is designed to take into account a very specific structure that came about as a result of a mandatory requirement of UK banking legislation. Furthermore, in other countries (e.g. Denmark) the national legislation also led to similar structures. We note that the reference in Recital 4(a) to the specification of conditions according to which competent authorities may determine that a type of undertaking recognised under



applicable national laws qualifies as a mutual, co-operative society, [savings institution] or similar institution does not include the category of wholly owned subsidiaries of a mutual, as proposed by the amendment to the CRR text in Article 25(1)(aa)(iv). It is our view that this is the correct approach, since the EBA mandate included in Article 25(2)(a), relating to specifying such conditions, does not include wholly owned subsidiaries of a mutual. If the EBA were to specify such conditions this could result in an additional layer of regulation which would not be necessary. The proposed wording of the Article 25(1)(aa)(iv) amendment is particularly restricted to subsidiaries which are 100% owned by a mutual. This provides clarity and safeguards against misuse of Article 25-27 without the need for any additional regulatory specification.

We would like a clarification from the EBA that it will not be relevant to apply any specifications in relation to the Article 25(1)(aa)(iv) amendment in respect of either wholly owned subsidiaries of a mutual or indeed to such subsidiaries' parent. If the EBA does consider it relevant for any specifications to be applied, The EACB asks to be consulted prior to the issue of any such specifications.

### **Treatment of Redeemable and Non-redeemable CET-1 Instruments**

We perceive the wording of Article 3 condition (c), dealing with the redemption possibility, as not very clear and inconsistent with the CRR. Cooperative institutions that issue CET-1 instruments which are not redeemable (but perpetual) are not covered by condition c), even though it is explicitly foreseen in the CRR. We appreciate that the EBA clarified during the hearing that its intention is not to limit the ability of institution to issue non-redeemable CET-1 instruments which, in the opinion on EBA, considered even as "better" instruments. This is recognized already in recital (4c) of the RTS but, Article 3 (c) should be modified to cover the non-redeemable CET-1 instruments as well.

### **Holders of a Capital Instrument vs. Members**

Article 3 (c) seems to be based on the assumption that holders of CET-1 instruments of cooperative institutions are always members. However, in certain jurisdictions there are some cases where a holder of capital instrument is not a member: a 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 are given opportunities to divest in other ways than by redemption. This may also lead to situations where the holder of the CET-1 instruments is not a member. Thus, we propose to refer to holders of the capital instrument as opposed to members of a cooperative.



## Appropriate Reflection of Multiple Dividends as a Specificity of Co-operative Instruments

The last sentence of recital (4c) – “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” – should be re-drafted after the adoption of the final text of the CRR, without using the word *privilege*, which is undefined and could lead to uncertainty as it could be understood as an additional restriction. The new drafting should reflect all the specificities of co-operative CET-1 instruments that are recognized under the final text of the CRR. In particular we expect that the final text will allow multiple dividends, which needs also to be reflected in the final draft RTS<sup>1</sup>.

## Ability to Sell the Capital Instrument of a Mutual to Members

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 public hearing, the intention is not to limit the ability to sell such instruments. The draft RTS needs to positively clarify that the mutual has the possibility to sell the CET1 instruments issued under Article 27 **also** to its members. There should be no restrictions on whom the instruments can be sold to and the text should be clarified.

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<sup>1</sup> In the May Council compromise text, recital 53 already foresees such possibility to allow cooperatives to pay “on shares with differentiated or no voting rights, distributions that are a multiple of those paid on shares which have relatively higher levels of voting rights”